20-0664

United States Court of Appeals for the Second Circuit

JIM HAVENS, individually and on behalf of ROC Love Will End Abortion, an unincorporated association,

Plaintiff-Appellant,

v.

LETITIA A. JAMES, Attorney General of the State of New York, in her official capacity as Attorney General of the State of New York, CITY OF ROCHESTER, NEW YORK,

Defendants-Appellees.

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

BRIEF FOR APPELLEE LETITIA A. JAMES

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PRELIMINARY STATEMENT

This case presents the question whether plaintiff-appellant Jim Havens, an anti-abortion protestor, has stated a claim for a declaration that he and his unincorporated association are not bound by an injunction entered in 2005, to which he was not a party, prohibiting certain activity within a 15-foot buffer zone around the doorways of Planned Parenthood Rochester. The U.S. District Court for the Western District of New York (Larimer, J), dismissed the complaint for failure to state a claim, and denied as moot Havens's motion for a preliminary injunction.

This Court should affirm. The complaint's own allegations make clear that, although Havens is not a party to the injunction, he has engaged in a course of conduct taken "in active concert or participation" with those who are parties to it. Thus, he and his association are bound by the injunction for such conduct under Rule 65(d)(2) of the Federal Rules of Civil Procedure. For the same reason, the court properly denied Havens's motion for a preliminary injunction. And it did not abuse its discretion in dismissing the complaint with prejudice, as Havens never requested leave to replead.

QUESTIONS PRESENTED

1. Does the complaint fail to state a claim for a declaration that Havens is not bound by an injunction, when the complaint's own allegations show that Havens has been engaged in a course of conduct of aiding and abetting violations of the injunction by anti-abortion protestors named in that injunction and that Havens is also legally identified with such protestors?

2. Did the district court providently exercise its discretion in denying Havens's motion for a preliminary injunction?

3. Did the district court providently exercise its discretion in dismissing the complaint with prejudice?

STATEMENT OF THE CASE

A. Anti-Abortion Protests in the Western District

For decades, the Western District of New York has been "the site of ongoing anti-abortion protests." *People ex rel. Spitzer v. Operation Rescue Nat'l*, 273 F.3d 184, 191 (2d Cir. 2001). These protests have prompted litigation to protect access to reproductive health facilities in the Western District—including the one at issue in this case, the Planned Parenthood on University Avenue in Rochester, New York. *Id.* at 191, 210. In 1992, U.S. District Judge Richard J. Acara entered an injunction that, among other things, restrained protestors named in the injunction from entering a 15-foot buffer zone around these facilities' entrances and exits. *Id.* at 191 (citing *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F. Supp. 1417 (W.D.N.Y. 1992)). The injunction also included a "sidewalk-counselors" exception. *Id.* This allowed up to two protesters to enter the buffer zone and approach pedestrians entering or leaving a facility for the purpose of "sidewalk counseling consisting of conversation of a non-threatening nature." *Id.*

The buffer zone was upheld on appeal by the Supreme Court. *Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357, 380 (1997). It found that the buffer zone was "necessary" to ensure that people who wish to enter or exit the facilities could do so. *Id.* As the Court explained, protestors—including "sidewalk counselors"—had "followed and crowded people right up to the doorways of the clinics (and sometimes beyond)," thereby obstructing access to the facilities. *Id.*

B. The Injunction at Issue

After the 1992 injunction was entered, anti-abortion protests in the Western District continued "on a regular basis." *Operation Rescue Nat'l*, 273 F.3d at 191. In late 1998, these activities "promised to take a serious turn" when activists began planning "Operation Save America," a large-scale protest in Rochester and Buffalo. *Id.* The State of New York, by its Attorney General, and health care providers filed suit under the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248, and state law to safeguard access to Planned Parenthood Rochester and other facilities. *Id.* This suit shared "many of the same parties, issues, and fact patterns" as *Schenck*. *Id.* at 191 n.1.

The case was assigned to Judge Arcara who, in 2000, entered a preliminary injunction. *Id.* at 192. As relevant here, the injunction established a 15-foot buffer zone but, unlike the 1992 injunction, omitted an exception allowing for sidewalk counseling. *Id.* It named as defendants dozens of anti-abortion protestors and organizations, including (i) Mary Melfi (now known as Mary Jost), (ii) Rescue Rochester, (iii) Michael McBride, and (iv) Robert Pokalsky. *See id.* at 184, 191.

Melfi (now Jost) appealed, asserting that the preliminary injunction infringed her free-speech rights. *Id.* at 191. This Court upheld the 15-foot buffer zone, reasoning that the record established that protestors had sought to block access to the facilities at issue in a variety of ways. *Id.* at 194. They had "interfered with pedestrians as they approach" the facilities, "standing in front of them as the pedestrians tried to enter the [facilities]." *Id.* Further, "[w]hen allowed close to facility entrances, the protestors ha[d] sometimes blocked clinic doors by standing directly in front of them and trying to communicate with those entering or leaving." *Id.* As to Melfi in particular, the Court noted that the record was "replete with consistently egregious conduct" by her, including "confront[ing] patients at close range" outside Planned Parenthood Rochester. *Id.* at 195

The Court also rejected Melfi's challenge to Judge Arcara's decision to ban her and any other protestor from "from acting as a 'sidewalk counselor' within the buffer zones." *Id.* at 210. It noted that the 1992 injunction's sidewalk-counselor exception had "proven to disrupt clinic access and complicate enforcement of the injunction." *Id.* at 211. The "nonporous no-protest zone" created by the 2000 injunction—which "excludes all protestors from the area immediately around entrances and driveways"—provided "clarity" that "will help police violations of the District Court's order." *Id.*

In 2005, Judge Arcara converted his preliminary injunction into a permanent one (the "Injunction"). By its terms, the Injunction binds (i) the named defendants, (ii) their "officers, directors, agents, and representatives," and (iii) "all other persons whomsoever known or unknown, acting in defendants' behalf of in concert with defendants" and "receiving actual or constructive notice of [the Injunction]." (JA18, 20.)

This case focuses on two of its provisions. The first creates the buffer zone: it bars "demonstrating, congregating, standing, sitting, or lying on, or posting or carrying signs, or being within fifteen feet of either edge of any doorway, walkway or driveway entrance" of any of the protected facilities, including Planned Parenthood Rochester. (JA21.)

The second provision forbids assisting others to do what the named defendants cannot do directly. It bars "inducing, directing, aiding or abetting in any manner, others to take any of the actions" prohibited by the Injunction, including being present within the buffer zone. (JA22-23.)

A yellow line is painted on the sidewalk outside Planned Parenthood Rochester to demarcate the buffer zone's border. (JA9.)

C. Havens's Anti-Abortion Activities and Coordinated Efforts with Parties Named in the Injunction

The following allegations come from the complaint itself. (JA5-17.) Plaintiff-appellant Jim Havens is an anti-abortion protestor. In 2017, he began demonstrating on the sidewalk outside Planned Parenthood Rochester. He soon solicited others to join him in his "pro-life sidewalk activities." (JA7.) In October 2017, he formed an unincorporated association of these individuals called "ROC Sidewalk Advocates for Life." (JA5, 7.) Havens and his association's members have regularly demonstrated at Planned Parenthood Rochester. (JA9.)

As part of their protest activities, Havens and his association's members have engaged in sidewalk counseling. This entails trying to start a "non-violent" conversation with "abortion-minded women" as they approach Planned Parenthood Rochester. (JA7, 9.) The conversation's goal is to stop these women from having an abortion. Further, Havens has obtained training materials from "a national sidewalk counseling support group" and led trainings on how to engage in sidewalk counseling outside Planned Parenthood Rochester. (JA9, 13.)

While sidewalk counseling, Havens and his association's members entered the Injunction's 15-foot buffer zone. (JA9-10.) This was no accident. The buffer zone, according to Havens, is "very burdensome" and prevents "effective[]" sidewalk counseling. If he and his association's members respect the buffer zone, they are "unable, because of the buffer zone," to start or continue "an intimate conversation in close proximity with a woman who is willing to talk to them" as she approaches the facility. (JA11.)

In the latter part of 2017, as more protestors joined Havens's sidewalk activities, Planned Parenthood Rochester's security guards told him and "anyone who was with him" to observe the Injunction's buffer zone. Havens requested and received from the guards a copy of the Injunction. He read it but claimed that it did not apply "to him and to others with him who were not named as defendants in it." (JA10.)

Havens and his association's members continued to engage in sidewalk counseling without respecting the buffer zone. As a result, the security guards at Planned Parenthood Rochester called the police multiple times in 2017 and 2018 to report that Havens and the protestors with him were within the buffer zone. (JA10.)

Throughout this time, Havens coordinated his activities with several anti-abortion protestors and organizations who were named as defendants in the Injunction. Mary Jost (named in the Injunction as Mary Melfi) and Rescue Rochester aided Havens's trainings on how to engage in sidewalk counseling. Havens's trainings were held at an organization run by Jost, Focus Pregnancy Help Center, which is nearby Planned Parenthood Rochester. (JA9, 12-13.)[1] Rescue Rochester, as well as Havens, promoted these trainings on Facebook. (JA12.)

Jost and Rescue Rochester also promoted the sidewalk activities of Havens and his association, Sidewalk Advocates for Life, outside Planned Parenthood Rochester. Rescue Rochester sent mailings that urged its members to join Havens and his association's regular demonstrations, which included sidewalk counseling. Jost's organization likewise advertised a "Jim Havens and Sidewalk Advocates for Life protest" on its website. (JA12.)

Further, Rescue Rochester's leader, Michael Warren, and two individuals named in the Injunction, Michael McBride and Robert Pokalsky, engaged in sidewalk counseling alongside Havens and as part

[1] The Focus Pregnancy Help Center's website identifies Jost as the founder. (JA94; *see* https://focusphc.com/ (last accessed June 10, 2020).) *See 23-34 94th St. Grocery Corp. v. New York City Bd. of Health*, 685 F.3d 174, 183 (2d Cir. 2012) (taking judicial notice of website).

of his association. (JA11, 13-14.) Havens has told them that they are bound by the Injunction. (JA11, 14.)

In June 2018, the Rochester Police Department informed Havens that he and his association's members must observe the buffer zone. (JA10.) Only then did they start doing so. (JA11.) Havens retained counsel who, in August 2018, sent a letter to defendant-appellee City of Rochester asserting that the Injunction did not apply to him or his association's members. (JA11.)

In September 2018, the City responded. It stated that it and the New York Attorney General's Office had "reviewed evidence demonstrating that [Havens and his association, Sidewalk Advocates for Life] are in fact acting in concert with several of the defendants" named in the Injunction. Thus, they were "expected to abide by" the Injunction and "respect the 15-foot buffer zone" surrounding Planned Parenthood Rochester's entrances and exits. (JA11-12.)

The Attorney General's Office sent a follow-up letter a week later indicating that it had "reviewed evidence demonstrating that [Havens and his association] have coordinated their activities" with Jost and Rescue Rochester, both of whom the Injunction named as defendants.

(JA12.) Around this time, a news reporter identified for Havens "the specific evidence [that] the OAG possessed" regarding his concerted action. (JA13; *see also* JA55.) The evidence included (i) a Facebook post by Rescue Rochester promoting a sidewalk-counseling training conducted by Havens and his association at Jost's organization; (ii) a Facebook post by Havens promoting his training; (iii) a mailing by Rescue Rochester urging its members to join Havens and his association at their monthly protests outside Planned Parenthood Rochester; and (iv) a screenshot of the website of Jost's organization that promoted a protest by Havens and his association at the facility. (JA12.)

In 2019, Havens changed the name of his unincorporated association to ROC Love Will End Abortion. (JA7.) Havens alleges that he is "unaware" whether Jost, Rescue Rochester, McBride, or Pokalsky have violated the Injunction. (JA13-14.)

D. This Action and the Decision Below

Rather than seeking clarification on the Injunction's scope from the district judge who issued it, in July 2019, Havens commenced this declaratory-judgment action, individually and on behalf of his association, against defendants-appellees City of Rochester and Letitia

A. James in her official capacity as New York's Attorney General. Havens avers that the Injunction does not bind him, and that consequently defendants' request that he respect the buffer zone infringes his First Amendment rights. He seeks a declaration that the Injunction does not bind him, his association, or his association's members who are not parties to the Injunction. (JA15-16.)

Havens moved for a preliminary injunction to restrain defendants from enforcing the Injunction against him, his association, and its members. (A26-28.) Defendants each opposed this motion and moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6). (JA65, 77, 79.) After oral argument (JA129), the district court (Larimer, J.) granted the motions to dismiss, denied the preliminary injunction motion, and dismissed the complaint with prejudice (JA197-221).

In its thorough 25-page opinion, the district court held that Havens failed to state a claim. As the court explained, it was clear from the face of the complaint that Havens, although not a party to the Injunction, was automatically bound by it through operation of Federal Rule of Civil Procedure 65(d)(2). This was because, as established by the allegations of the complaint, Havens had "actual notice" of the Injunction and engaged in a course of conduct taken "in active concert or participation" with several parties to it—Jost (formerly Melfi), Rescue Rochester, Pokalsky, and McBride. (JA221.) Fed. R. Civ. P. 65(d)(2)(C).

The court observed that the complaint demonstrated that Havens and his association "benefitted from the aid and resources given to them by [these named defendants]." According to the complaint, they had (i) hosted Havens's trainings on sidewalk counseling, (ii) solicited others to join Havens's sidewalk counseling activities outside Planned Parenthood Rochester, and (iii) publicized his trainings and activities. (JA217.) This aid, in turn, enabled Havens to do what the named defendants could not do directly—enter the buffer zone while sidewalk counseling. (JA218.) The court further noted that Rescue Rochester (through its leader), McBride, and Pokalsky "benefitted from [Havens's] legal counsel" when he advised them not to enter the buffer zone. In exchange, they supported Havens's activities by sidewalk counseling as part of his association. (JA215, 217.) Given these coordinated efforts, the court concluded, "[a]ny suggestion that [Havens and his association] acted 'independent' from the [four named defendants]" is "not only disingenuous, but is also belied by [Havens's] own allegations." (JA217-18.)

The court also denied as moot Havens's preliminary injunction motion. It further held that even if not moot, the motion was "meritless." (JA219.) It observed that the "face of the complaint clearly demonstrates the great lengths to which [Havens] and enjoined parties went to coordinate their efforts to violate the Arcara Injunction." (JA220.) This appeal followed. (JA223.)

STANDARD OF REVIEW

This Court reviews de novo a district court order granting a motion to dismiss under Rule 12(b)(6). *Washington v. Barr*, 925 F.3d 109, 113 (2d Cir. 2019). To survive a motion to dismiss, a complaint must contain factual allegations that, accepted as true, are sufficient "to state a claim to relief that is plausible on its face." *Carlin v. Davidson Fink LLP*, 852 F.3d 207, 212 (2d Cir. 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (internal quotation marks omitted). This Court need not accept as true "allegations that are wholly conclusory" or "'a legal conclusion couched as a factual allegation.'" *Krys v. Pigott*, 749 F.3d 117, 128 (2d Cir. 2014) (quoting *Iqbal*, 556 U.S. at 678).

This Court reviews a district court order denying a preliminary injunction for abuse of discretion. *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015).

SUMMARY OF ARGUMENT

Havens has failed to plausibly allege that he is not bound by the Injunction under Rule 65(d)(2). The complaint itself makes clear that Havens had "actual notice" of the Injunction when, in 2017, he received a copy of it. Fed. R. Civ. 65(d)(2). The complaint also makes clear that Havens has engaged in a course of conduct taken "in active concert or participation" with multiple parties named in the Injunction. Fed. R. Civ. 65(d)(2)(C). This is true for either of two reasons.

First, Havens has aided and abetted parties to the Injunction to violate its terms. The Injunction forbids these parties from aiding others to enter the buffer zone. But they did just that when they supported Havens's trainings on sidewalk counseling and his sidewalk counseling itself. As alleged in the complaint, sidewalk counseling—by design—entails entering the buffer zone. And Havens enabled these violations when he repeatedly engaged in sidewalk counseling without respecting the buffer zone and trained others to do the same. Second, the shared goals of Havens and the enjoined parties and the substantial interconnection among their activities—which are clear from the face of the complaint—render Havens legally identifiable with these parties and thus "in active concert or participation" with them.

Having pleaded himself out of court, Havens asserts that the district court should not have accepted as true the factual content of certain allegations. But he induced any purported error, and his about-face on appeal cannot salvage his claim. Moreover, his assertion that Rule 65(d)(2) binds nonparties, like himself, to an injunction only if they knowingly violate its terms is wrong as a matter of law. If, upon receiving notice of the Injunction, Havens had a bona fide, concrete question about its scope, he could have requested clarification from the district judge who issued it. But he did not do so.

The district court also properly denied as moot Havens's motion for preliminary injunction. Even if not moot, as the district court found, the motion should be denied because it is meritless. The evidence submitted in opposition to the motion further confirms Havens's concerted action with the parties to the Injunction. Moreover, considerations of comity militate against entering a preliminary injunction that would limit enforcement of a coordinate court's order (here, the Injunction). Judge Arcara, who issued the Injunction, and not the district judge below, should adjudge the propriety of any contempt proceedings involving Havens, his association, or its unidentified members.

Lastly, the district court did not abuse its discretion when it dismissed Havens's insufficiently pleaded claim with prejudice given that Havens never moved to replead.

ARGUMENT

POINT I

HAVENS FAILS TO STATE A CLAIM BECAUSE HIS ALLEGATIONS SHOW THAT HE IS BOUND BY THE INJUNCTION UNDER RULE 65

Under Rule 65(d), an injunction binds the following persons who receive "actual notice of the [injunction] by personal service or otherwise": the "(A) parties; (B) the parties' officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with" such persons. Fed. R. Civ. P. 65(d)(2). Consequently, every injunction "automatically forbids others—who are not directly enjoined but who are 'in active concert or participation' with an enjoined party—from assisting in a violation of the injunction." *NML Capital, Ltd., v.*

Republic of Argentina, 727 F.3d 230, 243 (2d Cir. 2013). This rule "gives force to injunctions" by "prevent[ing] parties from violating them by proxy." *Eli Lilly & Co. v. Gottstein*, 617 F.3d 186, 195 (2d Cir. 2010).

Nonparties who receive actual notice of an injunction are "in active concert or participation" with an enjoined party if they either (i) aid and abet that party to engage in forbidden conduct or (ii) are "legally identified" with that party. *People ex rel. Vacco v. Operation Rescue Nat'l*, 80 F.3d 64, 70 (2d Cir. 1996) (quoting *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 833 (2d Cir. 1930)). Both conditions are met here.

A. Havens Received Actual Notice of the Injunction When He Was Given a Copy of It

The complaint makes clear that Havens received "actual notice" of the Injunction. It alleges that in the "the latter part of 2017," Havens requested and received a copy of the Injunction from Planned Parenthood Rochester's security guards; he then read it. (JA10.) This suffices to show that he was actually notified of the Injunction. *See Vacco*, 80 F.3d at 68, 70 (nonparty anti-abortion protestors had actual notice of order after it was "read aloud to them" at protest); *Roe v. Operation Rescue*, 919 F.2d 857, 872 (3d Cir. 1990) (similar).

Havens argues (Br. at 26-27) that he did not receive "actual notice" because, although he received and read the Injunction, he purportedly did not know that it applied to him. But Havens has waived this argument by failing to raise it below. *See In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008). In fact, in opposing the Attorney General's motion to dismiss, Havens did not dispute her assertion that his allegations show that he had "actual notice" of the Injunction. (*Compare* ECF No. 7-1, at 3, 9, *with* ECF No. 11.)[2]

Even if considered, his argument is baseless. It is unsupported by this Court's precedent, *see Vacco*, 80 F.3d at 70, and irreconcilable with the text of Rule 65. "Actual notice" means notice that is "given directly to, or received personally by," the person to be notified. Black's Law Dictionary 1164 (9th ed. 2009); *see* 58 Am. Jur. 2d *Notice* § 4 (2d ed., 2018) ("actual notice" is that "which is directly and personally given to the one to be notified"). The Supreme Court has likewise equated "actual notice" with "receipt of notice." *Dusenbery v. United States*, 534 U.S. 161, 169 n.5 (2002). The cases Havens cites are not to the contrary. *See In re Baldwin-*

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[2] Parenthetical references to "ECF No._" are to the district court ECF docket entries. All page citations are to the ECF page numbering.

United Corp., 770 F.2d 328, 340 (2d Cir. 1985) (nonparties had "actual notice" of injunction upon being "served with [it]"). Havens's direct receipt of the Injunction thus constitutes actual notice under Rule 65(d).

B. Havens Is "In Active Concert or Participation" with Parties Named in the Injunction

1. Havens Aided and Abetted the Named Parties' Violations of the Injunction

As the district court correctly held, the complaint demonstrates that Havens acted "in active concert or participation" with multiple parties to the Injunction by aiding and abetting their violations of it. (JA211.) A nonparty, like Havens, aids and abets an enjoined party when, with notice of the injunction, he or she "help[s] to bring about" an "act of a party" that the injunction forbids. *Alemite*, 42 F.2d at 833. A nonparty need not to intend to cause the party's violation: the "inquiry into the fact of aiding and abetting is 'directed to the actuality of concert or participation, without regard to the motives that prompt the concert or participation.'" *Eli Lilly & Co.*, 617 F.3d at 193 (quoting *New York State Nat'l Org. for Women v. Terry*, 961 F.2d 390, 397 (2d Cir. 1992), *vacated on other grounds sub nom.*, *Pearson v. Planned Parenthood Margaret Sanger Clinic (Manhattan)*, 507 U.S. 901 (1993)). Thus, as this Court has observed in the context of anti-abortion activities, the fact that the actions of nonparty protestors "were independently motivated' by their 'political, social and moral positions on the subject of abortion" does not provide "an escape hatch from Rule 65(d)." *New York State Nat'l Org. for Women*, 961 F.2d at 397 (alterations omitted).

i. The Complaint Alleges That the Named Parties Violated the Injunction

The Injunction bars those named as defendants from both entering the buffer zone and "inducing, directing, aiding or abetting in any manner[] others" to do so. (JA21-22.) This latter provision embodies the commonsense principle that a party may not skirt an injunction "by leaving the physical performance of the forbidden conduct to others." *Roe*, 919 F.2d at 871 (anti-abortion protestor named in injunction violated injunction by leading protest at which nonparties engaged in conduct forbidden by the injunction); *see United States v. Schine*, 260 F.2d 552, 556 (2d Cir. 1958) (condemning use of nonparties to undertake that which parties are prohibited from doing directly).

Numerous allegations of the complaint establish that the named defendants violated the Injunction by aiding Havens and others to do what they could not do directly—engage in sidewalk counseling within the buffer zone. First, Jost (who is named in the Injunction as Mary Melfi) hosted trainings led by Havens on how to engage in sidewalk counseling. This activity—by design—entails entering the buffer zone. (JA9, 13.) According to Havens, a person engaged in sidewalk counseling must be free to enter the buffer zone; otherwise that person is "unable, because of the buffer zone," to initiate or continue "intimate conversation in close proximity" with patients as they approach Planned Parenthood Rochester. (JA11.) Indeed, because counseling targets "abortion-minded women," a counselor may be unable to distinguish such a woman from a mere passerby until she is about to enter, or already within, the buffer zone. (JA11 (describing the buffer zone as "very burdensome").)

Second, in addition to hosting Havens's sidewalk-counseling trainings, Jost promoted Havens's sidewalk counseling itself. Jost's organization publicized on its website a protest by Havens and his association, Sidewalk Counselors for Life, outside Planned Parenthood Rochester. (JA12.) And, as part of their protest activities, Havens and his association's members would engage in sidewalk counseling without respecting the buffer zone. (JA9-10.)

Third, Rescue Rochester, an anti-abortion organization named in the Injunction, supported Havens's trainings at Jost's organization, as well as his counseling activities outside the clinic. It published a Facebook post "promoting training by [Havens] and [his association,] Sidewalk Advocates" at Jost's organization. (JA12.) It also sent a mailing to its members urging them to join Havens and his association's regular sidewalk demonstrations—demonstrations at which Havens and his association's members would enter the buffer zone. (JA10-12.)

It is thus clear on the face of the complaint that Jost and Rescue Rochester violated the Injunction. As the district court noted, their aid and promotion of Havens's sidewalk-counseling trainings and sidewalk counseling itself constituted "at least *a* manner" of "inducing, directing, aiding or abetting" Havens and others to do what they could not—engage in sidewalk counseling within the buffer zone. (JA218; *see* JA22.)

Contrary to Havens's argument (Br. at 29-31), it does not matter whether Jost or Rescue Rochester knew or intended to breach the Injunction by aiding Havens's anti-abortion activities. "[T]he fact that the prohibited act was done inadvertently or in good faith . . . does not preclude a citation for civil contempt." *Vuitton et Fils S. A. v. Carousel*

Handbags, 592 F.2d 126, 129 n.2 (2d Cir. 1979). This is because civil contempt is "remedial in nature." *New York State Nat. Org. for Women v. Terry*, 159 F.3d 86, 93 (2d Cir. 1998). It is not meant to punish but rather "to force the contemnor to conform his conduct to the court's order." *Id.*

In any event, Jost and Rescue Rochester knew full well the connection between sidewalk counseling and entering the buffer zone. Jost previously challenged the Injunction's ban on her and the other named defendants "from acting as a 'sidewalk counselor' within the buffer zone." *Operation Rescue Nat'l*, 273 F.3d at 210. Yet this Court rejected her claim given that protestors had engaged in disruptive conduct under the guise of sidewalk counseling. *Id.* at 211.

ii. The Complaint Alleges Conduct by Havens That Assisted the Violations by the Named Parties

Numerous allegations of the complaint also demonstrate that by "assisting in" these violations, Havens is bound by the Injunction through operation of Rule 65(d)(2). *NML Capital, Ltd.*, 727 F.3d at 243. Havens led the trainings—hosted by Jost and promoted by Rescue Rochester—at which he taught protestors to engage in sidewalk counseling. At these trainings, Havens did not tell others to respect the buffer zone. He believed that the buffer zone prevents "effective[]" sidewalk counseling and only governs those "named as defendants in [the Injunction]." (JA10-11.)

Havens also led the demonstrations—promoted by Jost and Rescue Rochester—at which he and the protestors with him repeatedly entered the buffer zone while sidewalk counseling. (JA10-11.) After receiving the Injunction, he and his association's members, in 2017 and 2018, continuously entered the buffer zone, thereby prompting numerous calls to the police. (JA9-10.)

The facts alleged in the complaint also establish that Havens has acted in concert with other parties named in the Injunction. The complaint alleges that two anti-abortion protestors named as defendants in the Injunction, McBride and Pokalsky, as well as Rescue Rochester's leader, Michael Warren, engaged in sidewalk counseling alongside Havens and as part of his association. Havens, in turn, advised them not to enter the buffer zone. (JA11, 13-14.) Thus, as the district court held, by participating in Havens's association, McBride, Pokalsky, and Rescue Rochester materially supported its sidewalk activities—which included sidewalk counseling without regard for the buffer zone—and, in exchange, Havens helped them avoid conspicuous violations of the Injunction that would garner the attention of the clinic's security guards. (JA217.)

Havens argues that the district court erred when it inferred that McBride and Pokalsky engaged in sidewalk counseling as part of Havens's association. (Br. at 19-20) But this is the only reasonable inference that the complaint permits. The complaint identifies (i) which named defendants engaged in sidewalk counseling (McBride and Pokalsky) and (ii) which named defendant did not do so as part of his association (Jost). (JA11, 13-14.) It follows, as the district court recognized, that McBride and Pokalsky engaged in sidewalk counseling as members of Havens's association. (JA215 ("[U]nlike the allegations related to Jost, [the complaint does] not affirmatively allege that McBride's and Pokalsky's sidewalk counseling" is done "independent of" Havens's association).) Their participation in Havens's association is further evidenced by the fact that the declaratory relief sought in the complaint excludes members of Havens's association who are "named defendants in the 2005 injunction order." (JA16.)

The district court also aptly noted that McBride's and Pokalsky's membership in Havens's association is unsurprising. (JA215.) In the context of anti-abortion organizations, this Court has noted that "similarly constituted groups of individuals move fluidly between multiple unincorporated associations that share the same basic leadership and goals." *Vacco*, 80 F.3d at 71. Here, activists like McBride and Pokalsky have moved among anti-abortion organizations, including two iterations of Havens's unincorporated association. That Havens changed the name of this entity from "ROC Sidewalk Advocates for Life" to "ROC Love Will End Abortion" further reflects the fluid nature of these organizations. (JA7.) *Cf. Washington Metro. Area Transit Comm'n v. Reliable Limousine Serv., LLC*, 776 F.3d 1, 9 (D.C. Cir. 2015) ("Rule 65 requires . . . pull[ing] back the curtain to expose the reality.").

Lastly, Havens's argues (Br. at 31) that the district court erred by failing to accept as true his allegation that he has not acted "in concert or participation" with any named defendant. (*See* JA15.) But this averment is precisely the kind of "legal conclusion couched as a factual allegation" that cannot sustain a claim under Rule 12(b)(6). *Krys*, 749 F.3d at 128 (internal quotation marks omitted). Because Havens's actual allegations of fact show that he and several defendants named in the Injunction assisted each other to violate its terms, he has failed to plausibly allege that the Injunction does not bind him for such conduct under Rule 65(d).

2. Havens Is Legally Identified with the Named Parties

The complaint fails to state a claim for a separate reason. Its allegations show that Havens is "in active concert or participation" with Jost, Rescue Rochester, and the other named defendants because he is "legally identified" with them. *Vacco*, 80 F.3d at 70. Although the district court did not reach this issue, it was argued below by the Attorney General. (ECF No. 7-1, at 5-8.). It thus provides an alternative ground for affirmance. *See Dettelis v. Sharbaugh*, 919 F.3d 161, 163 (2d Cir. 2019).

A nonparty is legally identified with a party to an injunction where there is "substantial continuity of identity" between the two, *Vacco*, 80 F.3d at 70, or where the nonparty is otherwise "substantially intertwined" with that party, *John Wiley & Sons, Inc. v. Book Dog Books, LLC*, 327 F. Supp. 3d 606, 638 (S.D.N.Y. 2018) (internal quotation marks omitted) (collecting cases).

This theory has often been invoked to bind a nonparty organization where it is a "successor of an enjoined organization" or where there are other forms of substantial overlap among the organizations. *See Vacco*, 80 F.3d at 70. Yet this theory has also been applied outside the context of nonparty entities or their agents. *See, e.g.*, *Quinter v. Volkswagen of Am.*, 676 F.2d 969, 972 (3d Cir. 1982) (expert witness and consultant was "legally identified" with enjoined party); *Blackard v. Memphis Area Medical Center for Women, Inc.*, 262 F.3d 568, 576 (6th Cir. 2001) (Tennessee's Administrative Director of Courts was "identified in interest" with the state's juvenile court judges). Ultimately, whether a nonparty is legally identified with a party is a practical inquiry that turns on the case's "facts and circumstances." *Vacco*, 80 F.3d at 70.

It is clear on the face of the complaint that Havens is legally identified with the named defendants given their shared goal and closely intertwined operations. As detailed at *supra* 21-28, Havens and the named defendants have materially assisted each other's anti-abortion activities in general and sidewalk counseling in particular. Jost has provided a physical space for Havens to conduct his trainings on how to engage in sidewalk counseling. *See John Wiley & Sons, Inc.*, 327 F. Supp.

3d at 638 (shared resources provide indicia of "active concert or participation"). She and Rescue Rochester recruited others to join Havens's counseling activities outside Planned Parenthood Rochester—activities undertaken without regard for the buffer zone. Moreover, two other named defendants, McBride and Pokalsky, engaged in sidewalk counseling alongside Havens and as part of his association.

These coordinated efforts flow from a singular goal: to stop women from obtaining services at Planned Parenthood Rochester. As the district court observed, Havens and the named defendants are "well aware" that Havens's goal "is no different than those explicitly named in the Arcara Injunction" and that he seeks to achieve "this goal through similar, if not the same, means as those original defendants." (JA217.)

Most telling, the specific right Havens seeks to assert—the right to engage in sidewalk counseling without respecting the buffer zone—was already exhaustively litigated by Jost. *Cf. Patsy's Italian Rest., Inc. v. Banas*, 658 F.3d 254, 275 (2d Cir. 2011) (binding nonparty under Rule 65 where party was "perfectly able to represent the [nonparty's'] interests"). Like Havens asserts on this appeal, Jost argued that she had a seemingly boundless right to engage in sidewalk counseling, including within the buffer zone. *See Operation Rescue Nat'l*, 273 F.3d at 210. This Court disagreed. *Id.* As it explained, allowing her and other protestors to engage in sidewalk counseling within the buffer zone was both "constitutionally unnecessary" and "logistically unsupportable." *Id.*

The interconnected, overlapping interests and coordinated activities of Havens and several defendants named in the Injunction—which is clear on the face of the complaint—render Havens legally identified with them and, in turn, bound by the Injunction. *See Vacco*, 80 F.3d at 70.

C. Havens's Counterarguments Lack Merit

Havens raises two main counterarguments. Neither saves his claim.

1. Havens Cannot Fault the District Court for Accepting As True Allegations That He Urged the Court to Accept As True

Havens first argues (Br. at 14-19) that the district court erred by accepting as true certain allegations contained in paragraph 43 of his complaint. This paragraph alleges that, in September 2018, the Office of the Attorney General ("OAG") identified for a news reporter "the specific evidence [that] the OAG possessed" regarding Havens's concerted action.

(JA12.) This evidence consisted of internet posts and mailings by Jost and Rescue Rochester, as well as Havens himself, that promoted his sidewalk-counseling training at Jost's organization and his regular demonstrations at Planned Parenthood Rochester. (JA12.) According to Havens, on the motion to dismiss, the district court could accept as true that the OAG had identified this evidence, but it should not have accepted as true that this evidence was "accurate." (Br. at 15-16.)

But Havens urged the district court to accept the accuracy of this evidence and thus "cannot complain" of any error that he induced. *Kelso Enterprises Ltd. v. A.P. Moller-Maersk*, 375 F. App'x 48, 51 (2d Cir. 2010) (summary order); *see Dir. Gen. of India Supply Mission v. S.S. Maru*, 459 F.2d 1370, 1377 (2d Cir. 1972) ("[W]hatever error is alleged now was induced by appellant's position below and hence it cannot complain."). Havens repeatedly referred the district court to paragraph 43. Nowhere did he suggest that the activities detailed in that paragraph did not occur or that the OAG's evidence of those activities was, or may be, inaccurate.

Rather, as he made clear in the district court, he included these activities in the complaint to show that they did not satisfy Rule 65(d)(2). Specifically, in opposing the motions to dismiss, Havens asserted that "the [c]omplaint denies that these activities [set forth in paragraph 43] make [Havens and his association] 'officers, agents, servants, employees, or attorneys' of any enjoined defendant . . . or that they show 'active concert or participation' to aid or abet any enjoined defendants to violate the 2005 [I]njunction." (ECF No. 11, at 10 n.2.) Havens did not, however, assert that the complaint denies that these activities happened or otherwise suggest that they may not have occurred. (ECF No. 11, at 10 n.2 (acknowledging that, by incorporating these activities into his complaint, Havens went "farther than Rule 8 requires").

Similarly, in support of his preliminary injunction motion, he argued that the OAG's "evidence and authorities (Complaint, ¶¶42, 43)[] do not establish the elements of agency required to show that the conditions of Rule 65(d)(2) are satisfied." (ECF No. 12, at 8.) At oral argument in the district court, his counsel reiterated this "position": the OAG's evidence—such as "social media posts from Mary Melfi saying . . . I hope you support Jim Haven[s] and his sidewalk counseling"—"falls so short" of satisfying Rule 65 that the court should enter a preliminary injunction. (JA174; *see also* JA177-78 (counsel for the Attorney General observing—with no disagreement from Havens's counsel—that Havens does not dispute facts but rather "the legal conclusion" that the facts establish "acting in concert with" the named defendants).)

Thus, the district court—at Havens's behest—accepted as true the factual content of paragraph 43 but came to a different legal conclusion than that advocated by Havens. (JA216 (citing ECF No. 11, at 10 n.2).) Having pleaded himself out of court, Havens now claims that the district court erred by inferring that the activities detailed in paragraph 43 occurred. But he is precluded from challenging this purported error that his "litigation strategy below" provoked. *Filho v. Interaudi Bank*, 334 F. App'x 381, 382 (2d Cir. 2009) (summary order).

In any event, the district court did not err in inferring that the activities alleged in paragraph 43 took place. This is the only reasonable reading of the complaint. Paragraph 43 does not include any qualifier or caveat. Rather, as noted, it identifies the internet posts and mailings promoting Havens's activities as "the specific evidence [that] the OAG possessed." (JA12.) Indeed, on appeal, Havens does not dispute that the evidence detailed in paragraph 43 is accurate inasmuch as it refers to his Facebook post promoting his sidewalk-counseling training at Jost's organization. (JA12, ¶ 43(b)).

Nonetheless, Havens insists that the district court should not have inferred that the other activities in that paragraph—which concern Jost and Rescue Rochester's promotion of his activities—occurred because he "has no knowledge" of whether they took place. (Br. at 16 (citing JA12, ¶ 43(a), (c), and (d).) But nowhere in the complaint does Havens allege that he lacked such knowledge. To the contrary, the complaint expressly acknowledges, without reservation, the evidence that these named defendants were promoting his training or demonstrations, and it is fairly read as accepting that evidence as true.

Regardless, even if the Court sets aside the activities at issue (JA12 ¶ 43(a),(c), (d)), the complaint still fails to plausibly allege that Havens's conduct at issue was not taken "in active concert or participation" with several of the parties named in the Injunction. Havens does not, and cannot, dispute (Br. at 17) that:

- an organization founded and run by Jost hosted his training sessions on how to engage in sidewalk counseling;
- at these trainings, Havens did not instruct others to abide by the buffer zone, as he believed that it prevents "effective[]" sidewalk counseling and only applies to those named in the Injunction; and

- Havens and his association's members thereafter engaged in sidewalk counseling within the buffer zone throughout 2017 and 2018.

(JA214 (citing JA9 ¶¶ 23-24; JA13 ¶ 48); JA10 ¶¶ 27-31.) Further, as the district court noted, the complaint also shows that two other defendants named in the injunction, McBride and Pokalsky, supported Havens's activities by sidewalk counseling as part of his association. (JA215-17.)

Taken together, these allegations demonstrate concerted action under Rule 65(d). The named defendants violated the Injunction by aiding Havens and others to do what they could not do directly—engage in sidewalk counseling without regard for the buffer zone. Havens, in turn, enabled these violations. He would engage in sidewalk counseling within the buffer zone and taught others to do so as well.[3]

[3] If the foregoing were not evident from Havens's allegations, his suit would fail for a different reason: it would not present a justiciable case or controversy. A complaint that sheds no light on the interactions between Havens and the named defendants or the extent to which Havens may or may not coordinate with those defendants in the future would fail to raise a "definite and concrete" dispute that would allow the court to issue "a decree of a conclusive character." *Saleh v. Sulka Trading Ltd.*, 957 F.3d 348, 354 (2d Cir. 2020). A conclusory assertion that Havens has not previously acted in concert with the named defendants could not sustain the relief he seeks, namely, a declaration that excludes him from the Injunction for unspecified future conduct.

2. Havens's Purported Belief That He Was Not Bound By the Injunction Is No Defense

Havens also argues he has stated a claim because he was "unaware" that the Injunction applied to him and thus was acting "in good faith" (Br. at 27-28, 35) when, in 2017 and 2018, he and others with him entered the buffer zone while sidewalk counseling. This argument should be rejected for two reasons. First, Havens has failed to preserve his "good faith" defense by failing to raise it in the district court. (ECF No. 11.) *See Wenegieme v. U.S. Bank Nat'l Ass'n*, 715 F. App'x 65 (2d Cir. 2018) (summary order).

Second, Havens's purported lack of knowledge that he was bound by the Injunction or violating its terms is irrelevant to whether he acted "in active concert or participation" under Rule 65. As this Court has made clear, a nonparty may be bound through operation of Rule 65—and held liable for civil contempt—even if she does not knowingly violate an injunction. *Canterbury Belts Ltd. v. Lane Walker Rudkin, Ltd.*, 869 F.2d 34, 39 (2d Cir. 1989); *see also Bear U.S.A., Inc. v. Kim*, 71 F. Supp. 2d 237, 246 (S.D.N.Y. 1999) (rejecting argument that nonparty did not violate order because it was "not aware that its conduct . . . was forbidden"), *aff'd sub nom. Bear U.S.A., Inc. v. Bing Chuan Grp. U.S.A.*, 216 F.3d 1071 (2d Cir. 2000) (summary order). As noted, aiding and abetting under Rule 65(d) turns on the "actuality" of the concerted action—that is, the "manner in which [the nonparty's conduct at issue] is pursued," not its "purpose." *Eli Lilly & Co.*, 617 F.3d at 193.

Nor does a nonparty's good faith immunize her from having to obey an injunction's commands. *See Canterbury Belts Ltd.*, 869 F.2d at 37, 39 (reversing district court's finding that "no contempt was shown" because nonparty had made "good faith efforts" to conform to injunction). As courts have recognized, "no principled basis" exists for "allowing nonparties (but not parties) to invoke a good-faith defense" and therefore nonparties, like parties, cannot evade Rule 65 by claiming good faith. *Goya Foods, Inc. v. Wallack Mgmt. Co.*, 290 F.3d 63, 76 (1st Cir. 2002); *see also ABI Jaoudi & Azar Trading Corp. v. Cigna Worldwide INS. Co.*, No. 91-6785, 2016 WL 3959078, at *13 (E.D. Pa. July 22, 2016).

Consequently, upon receiving notice of the Injunction in 2017 (JA10), Havens had a duty to avoid assisting the named defendants in violating the Injunction. *NML Capital, Ltd.*, 727 F.3d at 243; *Alemite*, 42 F.2d at 832. If he had a bona fide, concrete question about the Injunction's scope, he could have requested clarification from Judge Arcara, who issued the Injunction. *See NML Capital, Ltd.*, 727 F.3d at 243; *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 15 (1945) (courts should not "withhold a clarification in the light of a concrete situation that [leaves] . . . [nonparties] in the dark as to their duty toward the court"); *see, e.g.*, *Republic of Kazakhstan v. Does 1-100*, No. 15 CIV. 1900 ER, 2015 WL 6473016 (S.D.N.Y. Oct. 27, 2015) (resolving nonparty's motion to clarify).

Yet Havens did not seek clarification. Rather, he decided for himself that the Injunction did not bind him or anyone else not named as a defendant in it. (JA10.) Having made his "own determination of what the [Injunction] meant," Havens and his association's members "acted at their peril" when—aided by Jost and the other named defendants—they repeatedly entered the buffer zone while sidewalk counseling and when Havens trained others to do the same. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949); *see, e.g.*, *Goya Foods, Inc.*, 290 F.3d at 75 ("[T]hose who know of the decree, yet act unilaterally, assume the risk of mistaken judgments."); *Lake Shore Asset Mgmt. Ltd. v. Commodity Futures Trading Comm'n.*, 511 F.3d 762, 767 (7th Cir. 2007) (nonparties "act at their peril if they disregard commands of the injunction, for, if the district court ultimately determinate that they are in concert with a [party to the injunction], then they will be contempt of court").

To be sure, a nonparty's knowledge that she is bound by an injunction or violating its terms would be relevant to determine whether she has committed criminal contempt. This sanction, unlike its civil counterpart, is meant primarily to "punish the contemnor" rather than coerce compliance. *CBS Broad. Inc. v. FilmOn.com, Inc.*, 814 F.3d 91, 101 (2d Cir. 2016) (internal quotation marks omitted). As this Court has made clear—in cases cited by Havens (Br. at 24)—a nonparty who knowingly violates an injunction is subject to "civil as well as criminal proceedings for contempt." *United States v. Paccione*, 964 F.2d 1269, 1274 (2d Cir. 1992) (quoting *Alemite*, 42 F.2d at 832). In a similar vein, a nonparty who knowingly violates the injunction, or fails to make good faith efforts to comply with it, is liable for the attorney's fees of the plaintiff who initiates civil contempt proceedings. *See, e.g.*, *Canterbury Belts Ltd.*, 869 F.2d at 39; *Bear U.S.A., Inc.*, 71 F. Supp. 2d at 246. But whether Havens's conduct constituted criminal contempt, or what sanctions would be appropriate in any contempt proceeding, is not at issue in this action by Havens for a declaration that he is not bound by the Injunction. *See Vuitton et Fils S. A.*, 592 F.2d at 130 (distinguishing between whether "the terms of Rule 65(d) are satisfied" and "question[s] of contempt and appropriate relief").

Havens's reading of Rule 65 is also circular. Under his interpretation, the Injunction binds him only if he knows that he is violating it, but he can only knowingly violate the Injunction if it binds him. Equally unpersuasive is the out-of-circuit case that Havens cites for the proposition that the Injunction does not bind him because he did not knowingly violate it. (Br. at 26 (citing *Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 154 F.3d 1345, 1353 (Fed. Cir. 1998)). Although the Federal Circuit in *Additive Controls* observed that "non-parties are subject to contempt sanctions" only if they "know that their acts violate the injunction," it was applying "the requirements for finding active concert and participation *in the Fifth Circuit*." 154 F.3d at 1353 (emphasis added). But whatever the rule is in the Fifth Circuit, the precedent in this Circuit holds simply that a nonparty is bound when, with notice of the injunction, she "assist[s] a [party] in violating the district court's order." *NML Capital, Ltd.*, 727 F.3d at 243.

Moreover, *Additive Controls* misapplies the Fifth Circuit case on which it relies, *Waffenschmidt v. MacKay*, 763 F.2d 711 (5th Cir. 1985). The Fifth Circuit in that case held only that a knowing violation of a court order suffices on its own to create personal jurisdiction over an out-of-state nonparty. *Id.* at 718-19; *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 137 (2d Cir. 2014) (discussing *Waffenschmidt*). Such a rule makes sense given the jurisdictional context. A nonparty's knowing violation can provide the requisite contacts with the relevant forum—i.e., the territorial jurisdiction of the district court—to the extent it is "conduct designed to have purpose and effect in the forum." *Gucci Am., Inc*, 768 F.3d at 137 (internal quotation marks omitted).

In sharp contrast, there is no reason to engraft Havens's proposed "knowing violation" requirement onto Rule 65 (even if this assertion were not foreclosed under this Court's precedent). If adopted, it would override the guidance of the Supreme Court and this Court that a nonparty with a bona fide, concrete question about an injunction's scope should seek clarification from the issuing court to avoid "unwitting contempts." *Regal Knitwear Co.*, 324 U.S. at 15; *see NML Capital, Ltd.*, 727 F.3d at 243. Under Haven's interpretation, there is no need to seek clarification: a court order extends no further than a nonparty's self-serving understanding of its terms. Such a result would be untenable. It would "invite experimentation with disobedience" and impair the ability of courts to ensure compliance with their orders. *McComb*, 336 U.S. at 192.

POINT II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING HAVENS'S PRELIMINARY INJUNCTION MOTION

Because the complaint fails to state a claim, the district court properly denied as moot Havens's motion for a preliminary injunction. It also did not abuse its discretion when it held that, even if not moot, the motion was "meritless." (JA219.)

"A preliminary injunction is an extraordinary and drastic remedy; it is never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008). The movant must prove "(1) irreparable harm; (2) either a likelihood of success on the merits or both serious questions on the merits and a balance of hardships decidedly favoring the moving party; and (3) that a preliminary injunction is in the public interest." *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018).

Even setting aside whether Havens has shown irreparable harm (which he has not), the district court did not abuse its discretion in denying Havens's motion for numerous reasons. First, Havens has not shown "a likelihood of success on the merits" or a "serious questions on the merits." *Id*. As this district held, the complaint establishes "the great lengths to which [Havens] and [the] enjoined parties went to coordinate their efforts to violate the Arcara Injunction." (JA220.) This conclusion is confirmed by the evidence submitted in opposition to Havens's preliminary injunction motion.

This evidence, which includes blog posts written by Jost in 2017 and 2018 (JA101-19), reveals numerous other ways that Jost aided Havens and his association's sidewalk counseling outside Planned Parenthood Rochester. She gave Havens a key to her organization, which, according to Jost, Havens needs for when he protests at Planned Parenthood Rochester "all day." (JA113; *see also* JA117 (Havens's association holds monthly meeting at Jost's organization).) And while engaging in sidewalk counseling, Havens and his association's members refer patients to Jost's organization, which is across the street. (JA111, 117, 126.) The evidence also indicates Jost knew that Havens was not respecting the buffer zone while engaging in his sidewalk activities. (JA104 (noting in August 2017 that "PP Security guard [sic] came by & read the Injunction" to Havens).)

Second, Havens has not shown that the "balance of hardships decidedly favor[s]" him. *N. Am. Soccer League, LLC*, 883 F.3d at 37. Even with the Injunction, Havens can engage in myriad anti-abortion activities outside Planned Parenthood Rochester. He can pray, pass out materials, and engage in other forms of protest, including sidewalk counseling, albeit not within 15 feet of the clinic's entrances and exits. *Operation Rescue Nat'l*, 273 F.3d at 211 (listing various anti-abortion activities that the Injunction permits).

Whatever interest Havens has in engaging in these activities within the buffer zone is outweighed by the threat that such activity will pose to two significant governmental interest: (i) ensuring effective enforcement of the Injunction and (ii) protecting patient access to the facility. As this Court highlighted, "the clarity of [the Injunction's] nonporous no-protest zone will help police violations of the [it]." *Id.* The relief Havens seeks would undermine this clarity, as it would allow Havens and unidentified members of his association to freely enter, or flood, the buffer zone. An injunction would also hinder the Attorney General's enforcement efforts; if she initiated contempt proceedings before Judge Arcara based on Havens's violative conduct (only part of which has been revealed in this proceeding), Havens would almost certainly initiate dueling contempt proceeding before Judge Larimer.

Equally problematic, the relief he seeks would interfere with, and potentially usurp, Judge Arcara's authority to supervise the Injunction over which he has continuing jurisdiction. (JA18, 25.) By seeking to enjoin enforcement of the Injunction in certain circumstances, Havens is asking one district court to issue an order that impacts the scope of the order of a coordinate court. At the very least, Judge Larimer would have to adjudge the propriety of contempt proceedings before Judge Arcara that involve Havens, his association, or its unidentified members.

Considerations of comity and the orderly administration of justice militate against forcing one district court to second-guess a coordinate court. *See, e.g.*, *Brittingham v. U.S. Comm'r*, 451 F.2d 315, 318 (5th Cir. 1971) ("comity dictates that courts of coordinate jurisdiction . . . not interfere with one another's jurisdiction"); *Exxon Corp. v. U.S. Dep't of Energy*, 594 F. Supp. 84, 91 (D. Del. 1984) ("dictates of comity" require district court not to "interfere with . . . a court of coordinate jurisdiction . . . which has been involved in the general subject-matter of this action for" many years). Unsurprisingly, Havens fails to cite a single case in which an injunction was issued in remotely analogous circumstances.

Lastly, Havens does not even argue on appeal, let alone show, that a preliminary injunction would be "in the public interest." *N. Am. Soccer League, LLC*, 883 F.3d at 37. By failing to raise this issue, he has abandoned it, and the denial of the preliminary injunction can be affirmed on this basis alone. *See Lore v. City of Syracuse*, 670 F.3d 127, 149 (2d Cir. 2012). Regardless, the record fails to show that the injunction he seeks would be in the public interest for the reasons noted above. It would hinder enforcement of the Injunction and potentially force one district judge to supervise the enforcement of a coordinate court's order.

In sum, Havens has not shown that the district court abused its discretion in denying the preliminary injunction.

POINT III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE COMPLAINT WITH PREJUDICE

Contrary to Havens's argument (Br. at 43-44), the district court did not abuse its discretion by dismissing the complaint with prejudice. While courts should grant leave to amend pleadings "when justice so requires," Fed. R. Civ. P. 15(a)(2), a court does not "err[] in failing to grant a request that was not made." *Hu v. City of New York*, 927 F.3d 81, 107 (2d Cir. 2019) (internal quotation marks omitted); *see Horoshko v. Citibank, N.A.*, 373 F.3d 248, 249-50 (2d Cir. 2004) ("[The plaintiffs'] contention that the District Court abused its discretion in not permitting an amendment that was never requested is frivolous.").

Here, Havens's failure to request leave to amend in the district court "alone supports [the court's] dismissal with prejudice." *Cybercreek Entm't, LLC v. U.S. Underwriters Ins. Co.*, 696 F. App'x 554, 556 (2d Cir. 2017) (summary order). (*See* ECF No. 11.) What is more, he never advised the district court of any proposed revisions to the complaint and, on appeal, he "still has not identified any additional facts that [he] could plead in support of [his] claim." *Id.*; *see also Cruz v. FXDirectDealer, LLC*, 720 F.3d 115, 126 (2d Cir. 2013). The district court properly dismissed the insufficiently pleaded complaint with prejudice.

CONCLUSION

The district court's order dismissing the complaint with prejudice and denying the motion for preliminary injunction should be affirmed.

Dated: Albany, New York
June 10, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Dustin J. Brockner, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains **9,560** words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7).

/s/ Dustin J. Brockner