United States Court of Appeals
for the Second Circuit

August Term 2020

(Argued: January 13, 2021 Decided: June 2, 2022)

Docket Nos. 20-1552(Lead), 20-1559(Con), 20-1588(Con), 20-1594(Con), 20-1608(Con)

MARCOS CALCANO, on behalf of himself and all other persons similarly situated; YOVANNY DOMINGUEZ, on behalf of himself and all other persons similarly situated; BRAULIO THORNE, on behalf of himself and all other persons similarly situated; JAMES MURPHY, on behalf of himself and all other persons similarly situated,

Plaintiffs-Appellants,

v.

SWAROVSKI NORTH AMERICA LIMITED; BANANA REPUBLIC, LLC; JERSEY MIKE'S FRANCHISE SYSTEMS, INC.; THE ART OF SHAVING-FL, LLC; KOHL'S, INC.,

Defendants-Appellees.[*]

Before:

LIVINGSTON, *Chief Judge*, and LOHIER and PARK, *Circuit Judges*.[**]

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[*] The Clerk of the Court is respectfully directed to amend the caption of the lead appeal, 20-1552, as set forth above.

[**] Judge Robert A. Katzmann, of the United States Court of Appeals for the Second Circuit, was part of this panel but passed away following oral argument. The panel was reconstituted in accordance with regular procedures.

This appeal involves five lawsuits in which visually impaired plaintiffs sued defendant stores under the Americans with Disabilities Act ("ADA") for failing to carry braille gift cards. The five nearly identical complaints allege that Plaintiffs live near Defendants' stores, have been customers in the past, and intend to purchase gift cards when they become available in the future. But missing from these conclusory allegations is any explanation of how Plaintiffs were injured by the unavailability of braille gift cards or any specificity about Plaintiffs' prior visits to Defendants' stores that would support an inference that Plaintiffs intended to return. The United States District Court for the Southern District of New York (Woods, *J.*) dismissed Plaintiffs' ADA claims for lack of standing and, in the alternative, for failure to state a claim. We **AFFIRM** because Plaintiffs' conclusory, boilerplate allegations fail to establish standing.

Judge LOHIER concurs in a separate opinion.

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Franchise Systems, Inc. and The Art of Shaving-FL, LLC.

MICHAEL VATIS (Michael Keough and Meghan Newcomer, *on the brief*), Steptoe & Johnson LLP, New York, NY, *for Defendant-Appellee Kohl's, Inc*.

James A. Dean, Womble Bond Dickinson (US) LLP, Winston-Salem, NC; A. Owen Glist, Constantine Cannon LLP, New York, NY, *for Amici Curiae The Retail Litigation Center, Inc., Restaurant Law Center, National Retail Federation, and National Association of Theatre Owners, in Support of Defendants-Appellees*.

PARK, *Circuit Judge*:

This appeal involves five lawsuits in which visually impaired plaintiffs sued defendant stores under the Americans with Disabilities Act ("ADA") for failing to carry braille gift cards. The five nearly identical complaints allege that Plaintiffs live near Defendants' stores, have been customers in the past, and intend to purchase gift cards when they become available in the future. But missing from these conclusory allegations is any explanation of how Plaintiffs were injured by the unavailability of braille gift cards or any specificity about Plaintiffs' prior visits to Defendants' stores that would support an inference that Plaintiffs intended to return. The United States District Court for the Southern District of New York

(Woods, *J.*) dismissed Plaintiffs' ADA claims for lack of standing and, in the alternative, for failure to state a claim. We affirm because Plaintiffs' conclusory, boilerplate allegations fail to establish standing.

We have held that an ADA plaintiff has suffered an injury in fact when, among other things, "it was reasonable to infer, based on the past frequency of plaintiff's visits and the proximity of defendants' [businesses] to plaintiff's home, that plaintiff intended to return to the subject location." *Kreisler v. Second Ave. Diner Corp.*, 731 F.3d 184, 188 (2d Cir. 2013). But conclusory allegations of intent to return and proximity are not enough—in order to "satisfy the concrete-harm requirement" and to "pursue forward-looking, injunctive relief," Plaintiffs must establish a "material risk of future harm" that is "sufficiently imminent and substantial." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210 (2021). Plaintiffs have not done that here. We thus agree with the district court that Plaintiffs lack standing and affirm. We do not reach Plaintiffs' other arguments because standing is a jurisdictional requirement.

I. BACKGROUND

A. Factual Background

Plaintiffs Marcos Calcano, Yovanny Dominguez, Braulio Thorne, and James Murphy are visually impaired individuals who rely on braille to read written materials.[1] Defendants Swarovski North America Limited, The Art of Shaving–FL, LLC, Banana Republic, LLC, Jersey Mike's Franchise Systems, Inc., and Kohl's, Inc. are regional or national chains of retail stores that sell gift cards—*i.e.*, pre-paid cash cards that can be used to make purchases at Defendants' locations.[2]

The complaints identically allege that each Plaintiff "telephoned Defendant's customer service office in an attempt to purchase a store gift card from the Defendant and inquired if Defendant sold store gift cards containing Braille." App'x at 101, 166, 286, 350, 416. Plaintiffs were "informed," however, that Defendants "do[] not sell store gift cards containing Braille." *Id.* Moreover, Defendants failed to "offer any alternative auxiliary aids or services . . . with respect to [the] gift cards." *Id.*

[1] The following facts are taken from Plaintiffs' amended complaints, filed with the district court prior to dismissal. In reviewing the court's decision on a motion to dismiss for lack of standing, we accept these facts as true and draw all reasonable inferences in Plaintiffs' favor. *See Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56–57 (2d Cir. 2016).

[2] Specifically, Calcano sued Swarovski and The Art of Shaving, while Dominguez, Thorne, and Murphy filed complaints, respectively, against Banana Republic, Jersey Mike's, and Kohl's.

Plaintiffs thus allege that they were denied access to Defendants' goods and services, which they assert constitutes discrimination under the ADA. In particular, the complaints maintain that because of "the lack of auxiliary aids" for Defendants' gift cards, Plaintiffs are unable to "ascertain information about the gift card, like the balance, the gift card's terms and conditions of use," nor are they "able to distinguish" Defendants' "branded gift cards from others in the same manner as non-blind persons." *Id.* at 102, 167, 287, 351, 417. Plaintiffs assert that Defendants "failed to provide visually impaired patrons with the particular level of services available to non-disabled patrons." *Id.* In addition, Plaintiffs claim that the "inaccessibility of . . . store gift cards" amounts to "access barriers" that "have caused and continue to cause a denial" of Plaintiffs' "full and equal access, and . . . deter Plaintiff[s] on a regular basis from purchasing, accessing, and utilizing the store gift cards." *Id.* at 106, 171, 291, 355, 421.

Plaintiffs state that they live near their respective Defendants' stores and have been customers "on prior occasions." *Id.* at 102, 167, 287, 351, 417. Plaintiffs also claim that they "intend[] to immediately purchase at least one store gift card from the Defendant[s] as soon as the Defendant[s] sell[] store gift cards that are accessible to the blind." *Id.*

B. Procedural Background

Plaintiffs' actions—five out of hundreds of substantively identical lawsuits filed in the Southern District of New York in late 2019—were assigned to the same district judge and have a similar procedural history. Plaintiffs filed amended complaints between February and March of 2020. All of the amended complaints assert claims under the ADA and related state and local laws, seeking damages, attorneys' fees, and injunctive relief.

Defendants moved to dismiss for lack of standing and failure to state a claim. *See* Fed. R. Civ. P. 12(b)(1), (6). On April 23, 2020, the district court granted Banana Republic's motion and dismissed Dominguez's complaint. *See Dominguez v. Banana Republic, LLC*, No. 19-cv-10171, -- F. Supp. 3d --, 2020 WL 1950496 (S.D.N.Y. Apr. 23, 2020). Over the next several days, the district court issued separate orders granting the other Defendants' motions, concluding that the complaints "suffer[ed] from the same pitfalls as those in *Dominguez v. Banana Republic*." App'x at 126, 312, 376, 538. Plaintiffs challenge the court's reasoning in its *Dominguez* opinion, which provided the basis for each complaint's dismissal. We therefore summarize that decision to the extent it applies to all Plaintiffs.

The court first found that Dominguez failed to establish standing. *See Dominguez*, 2020 WL 1950496, at *4. It explained that an ADA plaintiff has standing to sue for injunctive relief if "it was reasonable to infer, based on the past frequency of plaintiff's visits and the proximity of defendants' [services] to plaintiff's home, that plaintiff intended to return to the subject location." *Id.* at *3 (quoting *Kreisler*, 731 F.3d at 187–88 (alteration in original)). Emphasizing the fact-intensive nature of this inquiry, the court determined that the "all-too-generic complaint" did not allege "enough facts to plausibly plead that [Dominguez] intends to 'return' to the place where he encountered the professed discrimination." *Id.* at *4. The court thus concluded that Dominguez "lacks standing to pursue injunctive relief under the ADA" because he failed "to allege any nonconclusory facts of a real or immediate threat of injury." *Id.*

In the alternative, the district court also concluded that the ADA does not require businesses to offer braille gift cards, and thus Dominguez failed to state a claim under the ADA. First, the court determined that "a retailer need not alter the mix of goods that it sells to include accessible goods for the disabled." *Id.* at *7. It found that braille gift cards fit into a category of "special, accessible merchandise" that a place of public accommodation is not required to provide. *Id.*

at *6–*7. Second, the court concluded that gift cards are not themselves places of public accommodation because they "fit into none" of the twelve categories included in the ADA's definition of that term and are not "space[s] . . . that can provide the services of a public accommodation." *Id.* at *7. Lastly, the court noted that "[a] public accommodation can choose among various alternative[]"auxiliary aids to offer customers, and Dominguez did not adequately plead that he explored "the range of auxiliary aids and services" Banana Republic provided to the visually impaired. *Id.* at *10–*11. Finally, the court declined to exercise supplemental jurisdiction over the remaining state- and city-law claims. *Id.* at *5, *12.

The court dismissed the amended complaints without prejudice, allowing Plaintiffs fifteen days to replead. Plaintiffs did not amend their pleadings, and the district court entered judgment for Defendants. These appeals followed.[3]

II. DISCUSSION

Plaintiffs argue that the district court erred both in determining that Plaintiffs lack standing and in finding that Plaintiffs failed to state a claim under the ADA. We begin with standing because it is a "jurisdictional" requirement and

[3] We consolidated the appeals on June 24, 2020. One of the appealed cases, *Mendez v. AnnTaylor, Inc.*, No. 20-1550, was voluntarily dismissed and severed on July 31, 2020.

"must be assessed before reaching the merits." *Byrd v. United States*, 138 S. Ct. 1518, 1530 (2018).

"We review *de novo* the district court's decision to dismiss a complaint for lack of standing . . . construing the complaint in plaintiff's favor and accepting as true all material factual allegations contained therein." *Katz v. Donna Karan Co.*, 872 F.3d 114, 118 (2d Cir. 2017) (cleaned up).

A. Legal Principles

Article III of the Constitution "confines the federal judicial power to the resolution of 'Cases' and 'Controversies.'" *TransUnion*, 141 S. Ct. at 2203. "For there to be a case or controversy under Article III, the plaintiff must have a personal stake in the case—in other words, standing." *Id.* (cleaned up). At all stages of litigation, "the party invoking federal jurisdiction bears the burden of establishing the elements of Article III standing." *Carter*, 822 F.3d at 56 (cleaned up). "[T]o establish standing, a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion*, 141 S. Ct. at 2203. A plaintiff pursuing injunctive relief may not rely solely on past injury, but also must establish that

"she is likely to be harmed again in the future in a similar way." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 239 (2d Cir. 2016). Such "threatened injury must be *certainly impending* to constitute injury in fact, and . . . allegations of *possible* future injury are not sufficient." *Am. Civ. Liberties Union v. Clapper*, 785 F.3d 787, 800 (2d Cir. 2015) (cleaned up).

In the ADA context, we have held that a plaintiff seeking injunctive relief has suffered an injury in fact when: "(1) the plaintiff alleged past injury under the ADA; (2) it was reasonable to infer that the discriminatory treatment would continue; and (3) it was reasonable to infer, based on the past frequency of plaintiff's visits and the proximity of defendants' [businesses] to plaintiff's home, that plaintiff intended to return to the subject location." *Kreisler*, 731 F.3d at 187–88. These considerations may assist courts in determining whether an alleged prospective injury is sufficiently "concrete and particularized." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).[4] In particular, the focus of the third factor—*i.e.*, intent to return based on past visits and proximity—is to ensure that "the risk of

[4] In *Kreisler*, we held that "deterrence constitutes an injury under the ADA." 731 F.3d at 188 (citing *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1137–38 (9th Cir. 2002)). A plaintiff "need not attempt to overcome an obvious barrier" to allege an injury in fact, which in some cases could result in physical harm. *Id.* This is consistent with the ADA's remedy provision, which provides that "[n]othing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization . . . does not intend to comply with [Title III of the ADA's] provisions." 42 U.S.C. § 12188(a)(1).

harm is sufficiently imminent and substantial" to establish standing. *TransUnion*, 141 S. Ct. at 2210. Thus, the central inquiry is not whether a complaint pleads the magic words that a plaintiff "intends to return," but if, "examined under the 'totality of all relevant facts,'" the plaintiff plausibly alleges "a real and immediate threat of future injury." *Kennedy v. Floridian Hotel, Inc.*, 998 F.3d 1221, 1233 (11th Cir. 2021) (including "definiteness of the plaintiff's plan to return" and "frequency of the plaintiff's travel near the defendant's business" as factors to consider in assessing whether a plaintiff "faces a real and immediate threat of future injury" (cleaned up)).[5]

Although we generally accept the truth of a plaintiff's allegations at the motion to dismiss stage, the plaintiff still "bears the burden of alleging facts that affirmatively and plausibly suggest that [the plaintiff] has standing to sue." *Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.à.r.l.*, 790 F.3d 411, 417 (2d Cir. 2015) (cleaned up); *see also Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 148 (2d Cir. 2011) ("[F]or [a plaintiff] to have standing to sue, its alleged injury in

[5] The concurrence claims that the majority opinion has added a new "intent-to-return prong as a necessary element of standing," which "erect[s] an[] additional requirement that disabled individuals must meet to have standing." Concurrence at 3. But intent to return is neither new nor is it an additional requirement—it is how our Court has determined whether a plaintiff has demonstrated a likelihood of future injury for injunctive relief. *See supra* at 11–12.

fact must be plausible."). Assessing plausibility is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). We need not credit "a legal conclusion couched as a factual allegation" or a "naked assertion devoid of further factual enhancement." *Id.* at 678 (cleaned up). Instead, we must refer to a complaint's "factual context" to discern whether to accept "a complaint's conclusory statements." *Amidax Trading Grp.*, 671 F.3d at 146 (quoting *Iqbal*, 556 U.S. at 686).

B. Analysis

Plaintiffs challenge the district court's conclusion that their amended complaints do not plausibly demonstrate their intent to return to Defendants' stores if braille gift cards were available. Plaintiffs claim that the district court should have accepted as true the allegations that each "Plaintiff has been a customer at Defendant's [business] on prior occasions and intends to immediately purchase at least one store gift card from the Defendant as soon as the Defendant sells store gift cards that are accessible to the blind." App'x at 102, 167, 287, 351, 417. Plaintiffs also rely on their allegations that they reside in "close proximity" to

Defendants' stores. *Id.* at 103, 168, 288, 352, 418. We agree with the district court that these allegations fail to establish standing.

First, Plaintiffs' conclusory invocations of the factors we found relevant in *Kreisler* are insufficient to establish standing. In *Kreisler*, we identified several categories of information that could be helpful in determining whether "it was reasonable to infer . . . that plaintiff intended to return to the subject location." 731 F.3d at 188. Kreisler, the plaintiff in that case, "live[d] within several blocks of the Diner," "passe[d] by it three to four times a week," and "frequent[ed] diners in his neighborhood often." *Id.* at 186, 188. These facts "show[ed] a plausible intention to return to the Diner," *id.* at 188, which established a "sufficiently imminent and substantial" "risk of harm." *TransUnion*, 141 S. Ct. at 2210.

Here, each Plaintiff pleads the identical assertion that he resides "in close proximity to" Defendants' businesses, has been a "customer at Defendant's [location] on prior occasions," and "intends to immediately purchase at least one store gift card from the Defendant as soon as the Defendant sells store gift cards that are accessible to the blind." App'x at 102–03, 167–68, 287–88, 351–52, 417–18. These allegations parrot the court's language in *Kreisler*, *see* 731 F.3d at 188, and Plaintiffs characterize them as factual assertions that we must presume as true.

But these assertions are nothing more than "legal conclusion[s] couched as . . . factual allegation[s]." *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *see also Baur v. Veneman*, 352 F.3d 625, 636–37 (2d Cir. 2003) (explaining that "[w]hile the standard for reviewing standing at the pleading stage is lenient," a plaintiff may not "rely solely on conclusory allegations of injury or ask the court to draw unwarranted inferences in order to find standing"). Plaintiffs' threadbare assertions are conclusory and do not raise a reasonable inference of injury.

Second, Plaintiffs' assertions of proximity and prior visits are vague, lacking in support, and do not plausibly establish that Plaintiffs "intended to return to the subject location." *Kreisler*, 731 F.3d at 188.

As an initial matter, the district court did not err in dismissing Murphy's amended complaint for lack of standing. Murphy alleges that he "resides on W. 23rd Street, New York, NY, on the same street and less than a block from [the Kohl's] retail store at 271 W. 23rd St, New York, NY." App'x at 417. But there is no Kohl's store anywhere in Manhattan, let alone at that address.[6] Murphy thus lacks standing.

[6] Murphy concedes that Kohl's never operated a store at that address, describing this as "an error . . . regarding the location." Appellants' Reply Br. at 10 n.3.

As to the remaining Plaintiffs, only Calcano—in his suit against The Art of Shaving—provides an accurate address for a Defendant's business, stating that he lives "in Bronx, NY, and close to Defendant's retail store located at 10 Columbus Circle, New York, NY." *Id.* at 351.[7] But depending on where Calcano lives in the Bronx, which the complaint does not say, that address could be up to an hour away from The Art of Shaving store at Columbus Circle.[8] Standing on its own, this bare allegation of so-called "proximity" hardly supports an inference that Calcano, who is blind, would "immediately" make this inter-borough trip just to purchase braille gift cards from The Art of Shaving at Columbus Circle.

Nor do Plaintiffs' vague assertions that they have been customers at Defendants' businesses "on prior occasions," *see, e.g.*, *id.* at 102, nudge their claims "across the line from conceivable to plausible," *Iqbal*, 556 U.S. at 680 (citation omitted). Calcano, Dominguez, and Thorne fail to provide *any* details about their past visits or the frequency of such visits. They do not specify which stores they visited or what items they purchased. And they do not say why they want to

[7] Neither Calcano nor Dominguez provides an address for Swarovski and Banana Republic, respectively, stating only that they "reside[] within close proximity to at least one of Defendant's physical locations." App'x at 103, 168. And Thorne alleges only that the Jersey Mike's he wishes to visit is located in the Bronx.

[8] *See* Google Maps, https://www.google.com/maps/ (using Bronx, NY as the starting point and 10 Columbus Circle, New York, NY as the destination).

purchase braille gift cards—for their own use or as gifts—so urgently that they intend to do so "immediately . . . as soon as the Defendant[s] sell[] store gift cards that are accessible to the blind." App'x at 102, 167, 287, 351. Without such basic information, Plaintiffs cannot possibly show that they have suffered an injury that is "concrete and particularized."[9] *Lujan*, 504 U.S. at 560.

Third, we cannot ignore the broader context of Plaintiffs' transparent cut-and-paste and fill-in-the-blank pleadings. The four Plaintiffs before us filed eighty-one of over 200 essentially carbon-copy complaints between October and December 2019. All of the complaints use identical language to state the same conclusory allegations. Of the roughly 6,300 words in Calcano's complaint against Swarovski, for example, only 26 words—consisting of party names, dates, and Defendants' office addresses and states of incorporation—are different from Dominguez's complaint against Banana Republic. They even contain the same

[9] To the extent Plaintiffs fault the district court for declining to hold a factual hearing, there was no need to do so when, as here, the court granted leave to amend. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("[I]t is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing."). Moreover, Plaintiffs refused the district court's invitation to "cure the deficiencies articulated" in the orders by "alleging additional facts about the interactions" they had with Defendants. App'x at 128, 211, 315, 379, 541.

typos. *See, e.g.*, App'x at 105, 169, 289, 353, 419 (same missing space between the period and "Gift" in Paragraph 35).

This backdrop of Plaintiffs' Mad-Libs-style complaints further confirms the implausibility of their claims of injury. As noted above, Murphy asserts that he would return to a Kohl's that doesn't exist. *See supra* at 15. Dominguez seeks to go back to Banana Republic for its food.[10] Thorne doesn't even allege where he lives, making an assessment of proximity to a Jersey Mike's impossible.[11] Calcano plans to travel from somewhere in the Bronx to Columbus Circle for a shaving supply gift card. And all of these plans depend on the availability of braille gift cards even though Plaintiffs never explain why they want those cards in the first place. Although we might excuse a stray technical error or even credit an odd allegation standing alone as an idiosyncratic preference—to do so here in light of the cumulative implausibility of Plaintiffs' allegations would be burying our heads in the sand. "[J]udicial experience and common sense" suggest that the errors,

[10] In the district court, Dominguez repeatedly stated that Banana Republic's "primary business is selling food." *See* Mem. of Law in Opp. to Def.'s Motion to Dismiss at 3, 15, 16, 20, *Dominguez v. Banana Republic, LLC*, No. 19-cv-10171.

[11] The concurrence would fill in this blank by purporting to take judicial notice of Thorne's alleged residence in Chelsea from the allegations in another lawsuit. Concurrence at 8 n.3. This questionable invocation of judicial notice only highlights the deficiencies in Thorne's complaint. *See* Fed. R. Evid. 201(b) (a court may take judicial notice of a fact that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned").

oddities, and omissions in the complaints are a result of their mass production, and they render each Plaintiff's cookie-cutter assertion of standing implausible. *Iqbal*, 556 U.S. at 679.

In sum, Plaintiffs have offered only "naked assertions" of intent to return to Defendants' stores if they offer braille gift cards. *Id*. at 678. This reliance on a mere "profession of an intent to return to the places" previously visited is "not enough" to establish standing for prospective relief. *Lujan*, 504 U.S. at 564 (cleaned up). Without any factual support for their conclusory claims, Plaintiffs have failed to establish a "real and immediate threat of repeated injury." *Kreisler*, 731 F.3d at 187 (citation omitted). We thus agree with the district court that Plaintiffs failed to establish standing.[12]

III. CONCLUSION

For the reasons described above, the district court did not err in dismissing Plaintiffs' amended complaints for lack of standing. We also find that the district court acted within its discretion in declining to exercise supplemental jurisdiction

[12] In light of our determination on standing, we do not reach Plaintiffs' arguments as to whether their complaints state an ADA claim. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998).

over Plaintiffs' state and local law claims. *See Giordano v. City of New York*, 274 F.3d 740, 754 (2d Cir. 2001). We thus affirm the district court's judgments.