

24-1778(L)

24-2607(CON)

United States Court of Appeals for the Second Circuit

SALVATORE DAVI,

Plaintiff-Appellee,

v.

SAMUEL SPITZBERG, in his individual and official capacity,
ERIC SCHWENZFEIER, in his individual and official capacity,
SHARON DEVINE, BARBARA C. GUINN, in her official capacity,
TIFFINAY RUTNIK, in her individual and official capacity,
JAMES P. RYAN, in his individual and official capacity,

Defendants-Appellants,

WILMA BROWN-PHILIPS, in her individual and official capacity,

Defendant.

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

REPLY BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
PRELIMINARY STATEMENT.....	1
ARGUMENT	3
POINT I	
THE DISTRICT COURT ERRED IN CONCLUDING THAT DAVI’S TRANSFER TO A NON-PUBLIC-FACING ROLE VIOLATED THE FIRST AMENDMENT	3
A. OTDA Reasonably Concluded That Davi’s Comments Would Likely Disrupt Agency Operations.....	3
1. A government employer need not show actual operational disruption to justify employee discipline.....	4
2. OTDA conducted a reasonable investigation into Davi’s speech.	7
3. The district court erroneously disregarded the arbitrator’s factual findings.	9
B. Davi’s Speech Interest Does Not Outweigh OTDA’s Reasonable Concerns for Disruption.	11
C. OTDA Is Entitled to Summary Judgment on Davi’s Claim for Injunctive Relief.	17
1. The Court has jurisdiction to grant summary judgment in favor of OTDA.....	18
2. No reasonable jury could conclude that OTDA acted with retaliatory intent.....	20

Page

POINT II

**THE DISTRICT COURT ERRED IN DENYING THE
INDIVIDUAL DEFENDANTS QUALIFIED IMMUNITY 25**

CONCLUSION 31

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Bennett v. Metropolitan Gov’t of Nashville & Davison Cnty.</i> , 977 F.3d 530 (6th Cir. 2020).....	6, 14
<i>Blue v. Koren</i> , 72 F.3d 1075 (2d Cir. 1995)	26
<i>Collins v. New York City Transit Auth.</i> , 305 F.3d 113 (2d Cir. 2002)	10
<i>Connick v. Meyers</i> , 461 U.S. 138 (1983).....	5
<i>Davi v. Hein</i> , No. 21-719, 2023 WL 2623205 (2d Cir. Mar. 24, 2023).....	4-5, 26-28
<i>Davi v. Roberts</i> , 523 F. Supp. 3d 295 (E.D.N.Y. 2021).....	27, 30
<i>Heil v. Santoro</i> , 147 F.3d 103 (2d Cir. 1998)	8
<i>Islam v. Gonzales</i> , 469 F.3d 53 (2d Cir. 2006)	16
<i>Jeffries v. Harleston</i> , 52 F.3d 9 (2d Cir. 1995)	13
<i>Johnson v. Ganim</i> , 342 F.3d 105 (2d Cir. 2003)	18
<i>Lamar Advert. of Penn, LLC v. Town of Orchard Park</i> , 356 F.3d 365 (2d Cir. 2004)	18
<i>Lane v. Franks</i> , 573 U.S. 228 (2014).....	17

Cases	Page(s)
<i>Levin v. Harleston</i> , 966 F.2d 85 (2d Cir. 1992)	16
<i>Liu v. Board of Immigr. Appeals</i> , 167 F. App'x 871 (2d Cir. 2006)	16
<i>Locurto v. Giuliani</i> , 447 F.3d 159 (2d Cir. 2006)	12, 22
<i>Mandell v. County of Suffolk</i> , 316 F.3d 368 (2d Cir. 2003)	21
<i>Melzer v. Board of Educ.</i> , 336 F.3d 185 (2d Cir. 2003)	12-13, 17
<i>Noble v. Cincinnati & Hamilton County Public Library</i> , 112 F.4th 373 (6th Cir. 2024)	14-16
<i>Noel v. New York City Taxi and Limousine Commission</i> , 687 F.3d 63 (2d Cir. 2012)	19-20
<i>Packingham v. North Carolina</i> , 582 U.S. 98 (2017).....	14
<i>Panzella v. Sposato</i> , 863 F.3d 210 (2d Cir. 2017)	18
<i>Pappas v. Giuliani</i> , 290 F.3d 143 (2d Cir. 2002)	4, 14
<i>Persaud v. City of New York</i> , No. 22-cv-2919, 2024 WL 2159852 (S.D.N.Y. May 14, 2024).....	8
<i>Pickering v. Board of Education</i> , 391 U.S. 563 (1968).....	11, 17
<i>Piesco v. City of New York, Dep't of Pers.</i> , 933 F.2d 1149 (2d Cir. 1991)	17

Cases	Page(s)
<i>Piscottano v. Murphy</i> , 511 F.3d 247 (2d Cir. 2007)	3, 5, 13
<i>Rankin v. McPherson</i> , 483 U.S. 378 (1987).....	13, 15
<i>Reuland v. Hynes</i> , 460 F.3d 409 (2d Cir. 2006)	16
<i>Shumway v. United Parcel Serv., Inc.</i> , 118 F.3d 60 (2d Cir. 1997)	20
<i>Tangreti v. Bachmann</i> , 983 F.3d 609 (2d Cir. 2020)	29
<i>Wasson v. Sonoma Cnty. Junior Coll.</i> , 203 F.3d 659 (9th Cir. 2000).....	8
<i>Waters v. Chaffin</i> , 684 F.2d 833 (11th Cir. 1982).....	15
<i>Waters v. Churchill</i> , 511 U.S. 661 (1994).....	7-9
<i>Wernsing v. Thompson</i> , 423 F.3d 732 (7th Cir. 2005).....	8

PRELIMINARY STATEMENT

The New York State Office of Temporary and Disability Assistance (OTDA) reasonably concluded that plaintiff Salvatore Davi could no longer serve as an administrative law judge (ALJ) presiding over fair hearings for public assistance after he posted comments on Facebook disparaging benefits applicants. The U.S. District Court for the Eastern District of New York (Korman, J.) disagreed, holding that OTDA's disciplinary decision violated the First Amendment and also denying the individual defendants' motion for summary judgment based on qualified immunity. This Court should reverse and direct the entry of summary judgment for OTDA and the individual defendants on Davi's claims for injunctive relief and damages.

As OTDA explained in its opening brief, the agency reasonably concluded that Davi's Facebook statements were likely to result in operational disruption given the inflammatory nature of the comments, the fact that the comments related to the very recipients of public benefits whom the agency serves, and the public-facing nature of Davi's job as a hearing officer. Davi's chief rejoinder is to fault the agency for proceeding with his discipline despite having received no complaints from applicants

or the legal services community. But courts (including this Court during the prior appeal in this case) have routinely held that a governmental employer need not wait for actual disruption to occur before disciplining an employee. And here, the absence of complaints is likely attributable to the fact that OTDA promptly removed Davi from hearing cases after it received a complaint about his Facebook comments. Accordingly, OTDA is entitled to summary judgment on Davi's First Amendment claim.

For similar reasons, the individual defendants are entitled to qualified immunity. The district court's conclusion that the qualified immunity defense involves a triable issue of retaliatory intent is based on the court's erroneous determination that the absence of actual disruption from Davi's comments constitutes affirmative evidence of retaliatory pretext. That conclusion has no basis in law or the record, and this Court has jurisdiction to correct the error. Under a proper application of the qualified immunity inquiry, the individual defendants are entitled to summary judgment on Davi's claim for damages because their actions did not violate clearly established law—a point Davi does not contest.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN CONCLUDING THAT DAVI'S TRANSFER TO A NON-PUBLIC- FACING ROLE VIOLATED THE FIRST AMENDMENT

A. OTDA Reasonably Concluded That Davi's Comments Would Likely Disrupt Agency Operations.

As OTDA's opening brief established, Davi's Facebook comments disparaging public benefits recipients had the potential to bring "the judgment and professionalism" of the agency "into serious disrepute," *Piscottano v. Murphy*, 511 F.3d 247, 271 (2d Cir. 2007), and to engender disruptive recusal requests. See Appellant's Opening Br. (Opening Br.) at 28-34.

Davi does not dispute the strength of OTDA's asserted interests in maintaining public confidence in fair hearings or its concern that adjudicating multiple recusal requests could undermine the agency's operations. Rather, he relies on the district court's erroneous conclusion that OTDA failed to make a "substantial showing" that its predictions of harm were reasonable. See Appellee's Br. (Br.) at 36-39. In so doing, Davi repeats the district court's errors and disregards this Court's instructions on remand.

1. A government employer need not show actual operational disruption to justify employee discipline.

Davi is wrong to argue that OTDA’s prediction of operational disruption is unsupported merely because the agency had not received complaints from attorneys or litigants about Davi’s Facebook comments. *See* Br. at 36-37. To be sure, such complaints would have been a strong basis to conclude that the agency had suffered *actual* operational harm. But this Court has “expressly rejected the notion that the government must show actual disruption to meet its burden” of demonstrating that the employee’s discipline comports with the First Amendment. *See Davi v. Hein*, No. 21-719, 2023 WL 2623205, at *2 (2d Cir. Mar. 24, 2023). To the contrary, this Court has cautioned employers against adopting a wait-and-see approach, which could be “perceived as tolerating” the potentially disruptive speech and being “in passive complicity.” *See Pappas v. Giuliani*, 290 F.3d 143, 151 (2d Cir. 2002).

Accordingly, this Court vacated the district court’s prior summary judgment decision in favor of Davi and ordered the district court to instead consider whether OTDA “reasonably believed, in good faith, that [Davi’s] speech would cause probable future disruption.” *Davi*, 2023 WL 2623205, at *3. In so doing, the Court specifically instructed the district

court to weigh “the possibility that [Davi’s] Facebook comments, if discovered by Project FAIR or members of the general public, would undermine OTDA’s reputation by suggesting that its hearing officers were biased or unprofessional.” *Id.*

Davi’s contention that the record does not support the agency’s prediction of disruption (*see* Br. at 37-38) is likewise based on legal and factual errors. *First*, Davi wrongly claims that OTDA lacked evidence that the public would react negatively to his Facebook comments. *See* Br. at 38. As an independent arbitrator observed, “[a]ny objective reading of the posting would certainly allow for a suspicion of bias.” (Joint Appendix (J.A.) 374.) Moreover, several OTDA leaders with no personal involvement in Davi’s discipline viewed Davi’s speech as undermining his and the agency’s appearance of impartiality. (*See, e.g.*, J.A. 470-471 (General Counsel); J.A. 529 (Principal Hearing Officer).¹) Courts have found such evidence amply sufficient to credit an employer’s predictions of potential reputational harm. *See Piscottano*, 511 F.3d at 276-77 (relying on assess-

¹ Davi insists that his “immediate supervisor supported him.” Br. at 44. But this just shows that his Facebook comments were polarizing and caused dissension in the workplace—a fact that also weighs against him in the balancing. *See Connick v. Meyers*, 461 U.S. 138, 151-52 (1983).

ment of “top-ranking officials”); *Bennett v. Metropolitan Gov’t of Nashville & Davison Cnty.*, 977 F.3d 530, 541-42 (6th Cir. 2020) (relying on complaint from single member of the public).

Second, Davi makes much of the fact that neither Project FAIR nor Legal Aid appears to have received the complaint letter and argues that OTDA was therefore unreasonable in believing that there was a risk of further publicization.² *See* Br. at 37; *see also id.* at 34. Regardless of whether these organizations in fact received the complaint, OTDA had a reasonable fear of future publicization of Davi’s comments because the complainant represented that she had sent Davi’s comments to Project FAIR (J.A. 515-516, 719-720), and the agency was aware that she could send the comments to additional organizations and news media at any point.

Finally, Davi misplaces his reliance (Br. at 37) on the absence of recusal and reconsideration requests. The absence of such requests does not undermine OTDA’s reasonable concern at the time for *potential* future

² Davi does not attempt to defend the district court’s erroneous reliance (Special Appendix (S.A.) 20-21) on present-day testimony from a Legal Aid representative purporting to guess how the organization would have responded had they received such a letter nearly a decade ago.

disruption. Indeed, the absence of recusal requests does not diminish the likelihood that the complainant—or another person privy to Davi’s Facebook comments—could publicize those comments in the future, particularly if Davi were restored to his public-facing position as a hearing officer. Nor does the absence diminish the likelihood that a future applicant who appeared before Davi would seek his recusal. Indeed, the lack of recusal requests received by OTDA is likely attributable to the fact that the agency promptly removed Davi from hearing cases.

2. OTDA conducted a reasonable investigation into Davi’s speech.

Davi is likewise wrong to insist that OTDA’s predictive judgments can be set aside because the agency purportedly conducted an inadequate investigation into his speech. *See Br.* at 33-36.

As an initial matter, Davi incorrectly asserts that the Supreme Court’s plurality opinion in *Waters v. Churchill*, 511 U.S. 661 (1994), required OTDA to conduct a lengthy investigation into the complainant, her motivations for reporting Davi’s speech, and whether she in fact reported the Facebook comments to Project FAIR. To the contrary, *Waters* requires only that government employers reasonably investigate “the

content of the speech at issue and the *identity* of the relevant speakers before disciplining their employees for expressive activity.” *Wernsing v. Thompson*, 423 F.3d 732, 753 (7th Cir. 2005) (emphasis added); see *Wasson v. Sonoma Cnty. Junior Coll.*, 203 F.3d 659, 663 (9th Cir. 2000); *Persaud v. City of New York*, No. 22-cv-2919, 2024 WL 2159852, at *4 (S.D.N.Y. May 14, 2024).³ Where, as here, there is no dispute about what Davi said, or whether he said it, *Waters* imposes no additional requirement to investigate the person reporting the speech or her claims of publicization. Moreover, *Waters* emphasized that the standard for a reasonable investigation is flexible: “there will often be situations in which reasonable employers would disagree about who is to be believed, or how much investigation needs to be done, or how much evidence is needed to come to a particular conclusion.” 511 U.S. at 678. Thus, “many different courses of action will necessarily be reasonable,” and “[o]nly procedures outside the range of what a reasonable manager would use may be condemned as unreasonable.” *Id.*

³ This Court’s decision in *Heil v. Santoro*, 147 F.3d 103 (2d Cir. 1998), does not suggest otherwise. In *Heil*, this Court held that there was “no First Amendment violation in investigating” the plaintiff’s speech, *id.* at 110, but did not address the proper scope of any such investigation.

There is no merit to Davi’s suggestion (Br. at 33) that OTDA’s investigation failed to meet the *Waters* standard. There is no indication, for example, that OTDA’s interrogation of Davi—including the notice provided, the choice of interviewer, and the interview format—deviated from the agency’s typical procedures, as set forth in Davi’s collective bargaining agreement (CBA). (See J.A. 86-87, 302-304.) Moreover, OTDA’s human resources representative in fact spoke with the complainant to authenticate her complaint and to confirm her asserted publicization of Davi’s comments. (See J.A. 567, 719-720.) Davi’s many aspersions on the good faith of the agency’s investigation (*see, e.g.*, Br. at 34-35) are legally irrelevant because Davi has failed to identify *any* procedures that OTDA undertook that fall “outside the range of what a reasonable manager would use,” *Waters*, 511 U.S. at 678.

3. The district court erroneously disregarded the arbitrator’s factual findings.

Finally, Davi is incorrect (Br. at 30-32) to defend the district court’s decision to disregard the findings of an independent arbitrator with respect to Davi’s speech. Contrary to Davi’s suggestion (*id.* at 30-31), OTDA does not contend that the arbitrator’s decision has preclusive

effect on Davi’s First Amendment claim. Rather, the district court erred in giving no credence at all to the arbitrator’s conclusion that OTDA disciplined Davi because of its legitimate concern for potential operational disruption—a finding that required “no special competence in First Amendment matters” (*id.* at 30).

Where an arbitration decision “follows an evidentiary hearing and is based on substantial evidence,” the plaintiff must “present strong evidence that the decision was wrong as a matter of fact” before the decision can be disregarded. *See Collins v. New York City Transit Auth.*, 305 F.3d 113, 119 (2d Cir. 2002). Here, however, Davi does not dispute that the arbitration proceedings were conducted pursuant to standard procedures set by the American Arbitration Association, as provided in his CBA. (*See* J.A. 93.) And the arbitration decision makes clear that the parties “had full opportunity to present evidence and argument” (J.A. 370)—including the testimony of Davi, several of his supervisors, and at least one of the individual defendants, Samuel Spitzberg (*see* J.A. 371-373).

Nor does Davi provide any reason to conclude that the arbitrator’s decision was unsupported by substantial evidence. As the arbitrator determined, the plain text of Davi’s Facebook comments “more than suggest

that he has a prejudice against people” applying for public assistance and strip him of any “credibility in making or determining the appeal of benefit.” (J.A. 375.) Therefore, the arbitrator found that OTDA’s proposed discipline was “not trying to deny [Davi] the ability to communicate on public policy” (J.A. 373), and that, going forward, “[t]he agency could not allow its impartiality to be damaged and still fulfill its responsibilities to the citizens to New York State” (J.A. 374). Davi’s failure to respond to any of the arbitrator’s substantive analysis is telling and fatal to his claim that the district court acted properly in refusing to give weight to the arbitrator’s decision.

B. Davi’s Speech Interest Does Not Outweigh OTDA’s Reasonable Concerns for Disruption.

Davi also fails to rebut OTDA’s showing that the agency’s operational interests outweigh Davi’s interest in his speech under the balancing test set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968). Neither the purportedly political nature of Davi’s speech nor the allegedly “private” context in which they arose tip the balance of interests in Davi’s favor as a matter of law.

First, Davi misses the mark (Br. at 40-41) in trying to reframe his Facebook comments as political commentary about welfare policy. The *Pickering* analysis does not turn on what Davi *intended* to express, and certainly not on the post-hoc framing offered in his brief. Rather, the proper inquiry is whether OTDA reasonably believed that the public—and, particularly, benefits applicants appearing before Davi—would construe his Facebook comments as evincing potential bias against those applying for public assistance. *See Locurto v. Giuliani*, 447 F.3d 159, 178-80, 182 (2d Cir. 2006) (focusing on the *public’s perception* of the speech at issue); *Melzer v. Board of Educ.*, 336 F.3d 185, 199 (2d Cir. 2003) (same). Every member of the public who shared an opinion on the matter concluded that the statements evinced bias. (*See* J.A. 74 (complainant) (comments “expose a severe bias against many of the individuals who may be coming before him”); J.A. 373 (arbitrator) (“Any appellant or their representative reading the Facebook [posting] . . . would not conclude that they would be given a fair hearing.”); J.A. 823.1, 823.5 (Legal Aid representative) (post “seems serious” and would have prompted “some conversation about bias”).)

Nor does the subject matter of Davi's comments insulate him from discipline. As this Court has made clear, "even when [an employee's] speech is squarely on public issues—and thus earns the greatest constitutional protection"—it may still give way to the government's "substantial showing of *likely* interference." *Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir. 1995) (citing *Waters*, 511 U.S. at 673-74). In balancing "protected First Amendment activity against governmental disruption," the Court must take into account not only *the content* of the plaintiff's speech, but also "the manner, time, and place in which [the] speech . . . occurred," *Melzer*, 336 F.3d at 197 (quotation marks omitted); the "nexus" between the speech and the employer's operations, *see Piscottano*, 511 F.3d at 276; and whether the employee served in a "confidential, policymaking, or public contact role," *Rankin v. McPherson*, 483 U.S. 378, 390-91 (1987). For the reasons explained in OTDA's opening brief (Opening Br. at 45-50) and below (at 15-17), these factors weigh heavily in favor OTDA.

Second, Davi's assertion (*see* Br. at 39-40) that his Facebook comments were part of a "private conversation" is erroneous and irrelevant. This Court has expressly held that a public employer may discipline an employee even for speech that was intended to be anonymous

so long as it poses a “very high capacity to inflict serious harm on the employer’s mission” if the speaker’s identity were discovered and publicized. *See Pappas*, 290 F.3d at 150.

More fundamentally, courts have recognized that social media sites like Facebook are *not* purely private mediums of expression. Rather, they offer users some of “the most powerful mechanisms available to . . . make his or her voice heard,” *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017), and “amplif[y] the distribution of the speaker’s message.” *Bennett*, 977 F.3d at 542 (quoting *Grutzmacher v. Howard Cnty.*, 851 F.3d 332, 345 (4th Cir. 2017)). Here, Davi commented on an article posted to his friend’s Facebook page (J.A. 64), and those comments were therefore visible not only to Davi’s friend, but also to *any* person who could view his friend’s page—a group that included the complainant and a number of others, who interacted with the post. (*See* J.A. 64, 75; *see also* J.A. 597 (¶ 42) (objecting to characterization of post as “private”).)

This case is thus plainly distinguishable from *Noble v. Cincinnati & Hamilton County Public Library* (*see* Br. at 39), where the plaintiff posted an offensive meme on his personal Facebook page “for less than a day,” and where it was unlikely that any member of “the public would

have seen the post” because the plaintiff had turned on privacy settings and “had few Facebook friends,” 112 F.4th 373, 383-84 (6th Cir. 2024). Here, by contrast, any number of people with no personal relationship to Davi could interact with, screenshot, and further disseminate Davi’s comments (as the complainant did here). Thus, even though Davi posted on his own time and using his own Facebook profile, the context of Davi’s speech is a far cry from the plaintiff’s private post in *Noble*, and even further from confiding in a friend at a bar⁴ or having a private conversation with a coworker.⁵

Third, Davi mistakenly minimizes the importance of the other factors the district court was required to consider in its *Pickering* analysis—namely, the manner, context, and relationship between Davi’s speech and his duties as a hearing officer. *See* Br. at 45. As OTDA explained in its opening brief (at 45-50), the balance of considerations as to these factors favors OTDA because the disparaging nature of Davi’s comments and the fact that they were directed towards the very individuals whose cases Davi was tasked with adjudicating fundamentally

⁴ *See Waters v. Chaffin*, 684 F.2d 833, 837 (11th Cir. 1982).

⁵ *See Rankin*, 483 U.S. at 381, 389.

undermines his appearance of impartiality and professionalism—core duties of an ALJ. Indeed, this Court has long recognized the paramount importance of ALJs maintaining an appearance of impartiality. *See Islam v. Gonzales*, 469 F.3d 53, 55 (2d Cir. 2006) (remanding immigration judge’s decision where judge’s “conduct result[ed] in the appearance of bias or hostility”); *Liu v. Board of Immigr. Appeals*, 167 F. App’x 871, 874 (2d Cir. 2006) (same).

The facts of this case are therefore distinguishable from those on which Davi relies. Most critically, none of Davi’s cited cases (Br. at 44-46) sanction judges or ALJs speaking about litigants in a manner that evinces bias or contempt. The cases instead involve speech that is far more attenuated from the job duties of the plaintiff. For example, the Sixth Circuit found in *Noble* that the plaintiff’s speech disparaging Black Lives Matter protestors had little bearing on his ability to successfully perform his role as a library security guard.⁶ *See* 112 F.4th at 379, 384.

⁶ The other cases cited by Davi are even further inapposite. *See, e.g., Reuland v. Hynes*, 460 F.3d 409, 419 (2d Cir. 2006) (declining to reach *Pickering* balancing because the defendant “affirmatively waived the issue”); *Levin v. Harleston*, 966 F.2d 85, 87-88 (2d Cir. 1992) (concluding that university’s interference with professor’s teaching in response to

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Davi's speech is also different in kind from the plaintiff's testimony about public corruption in *Lane v. Franks*, 573 U.S. 228, 232-34 (2014), and the superintendent's letter to the editor regarding school funding choices in *Pickering*, 391 U.S. at 564-65. Unlike this speech, Davi's Facebook comments went beyond merely commenting on the policy of public assistance programs to demeaning their recipients. At bottom, there is no case that supports an unfettered right for a public employee to engage in speech that calls into question his employer's ability to administer public services fairly.

C. OTDA Is Entitled to Summary Judgment on Davi's Claim for Injunctive Relief.

Because a proper application of the *Pickering* balancing test weighs in favor of OTDA, the agency is entitled to summary judgment on Davi's claim for injunctive relief unless he can show that he raised a triable issue on the question whether OTDA's proffered justifications were pretextual. *See Melzer*, 336 F.3d at 193. He fails to do so.

controversial writings violated his academic freedom); *Piesco v. City of New York, Dep't of Pers.*, 933 F.2d 1149, 1159-60 (2d Cir. 1991) (applying now-abrogated "actual disruption" standard), *abrogated by Jeffries*, 52 F.3d at 12.

Accordingly, this Court should vacate the injunction and direct the entry of partial summary judgment in favor of OTDA. At a minimum, the Court should reverse the entry of summary judgment in favor of Davi because OTDA has at least demonstrated that “there are questions of fact relevant to [Pickering’s] application” regarding the nature of Davi’s speech and its impact on his role as an ALJ. *See Johnson v. Ganim*, 342 F.3d 105, 114-15 (2d Cir. 2003) (quotation marks omitted).

1. The Court has jurisdiction to grant summary judgment in favor of OTDA.

As a threshold matter, Davi is wrong that this Court lacks jurisdiction to grant partial summary judgment in OTDA’s favor on the injunctive relief claim. *See Br.* at 48-49. The law of this circuit is clear: upon review of an injunction order under 28 U.S.C. § 1292(a)(1), the Court’s jurisdiction “extends to all matters inextricably bound up” with the injunction. *Lamar Advert. of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365, 371 (2d Cir. 2004) (quotation marks omitted); *see also Panzella v. Sposato*, 863 F.3d 210, 217 (2d Cir. 2017). Davi does not dispute that the district court’s *grant* of his motion for partial summary judgment is inextricably intertwined with the court’s basis for ordering injunctive

relief. *See* Br. at 1. It follows, then, that the court’s *denial* of OTDA’s cross-motion on precisely the same grounds (*see* Special Appendix (S.A.) 24), satisfies this standard as well.⁷

Indeed, this Court has directed the grant of summary judgment to an appealing party in a case involving a virtually identical procedural posture. *See Noel v. New York City Taxi and Limousine Commission*, 687 F.3d 63 (2d Cir. 2012). The plaintiffs in *Noel* sued the New York City Taxi and Limousine Commission for failing to provide meaningful access to taxi services for persons with disabilities. *Id.* at 65. Upon evaluating the parties’ cross-motions for summary judgment, the district court granted the plaintiffs’ partial motion for summary judgment, denied in part the defendants’ cross-motion, and issued a temporary injunction requiring that “all new taxi medallions and street-hail livery licenses be limited to

⁷ There is no merit to Davi’s contention (Br. at 49-50) that granting OTDA partial summary judgment would require this Court to consider an issue wholly unrelated to the district court’s basis for issuing the injunction. The only issue that Davi identifies—whether OTDA acted with retaliatory intent—is part of the *Pickering* analysis required to evaluate whether Davi is entitled to summary judgment. Indeed, if the Court were to conclude that *Pickering* balancing favors OTDA, Davi can prevail on summary judgment only by proving that his discipline was motivated by animus towards his views.

vehicles that are wheelchair accessible” until the Commission proposed a court-approved remedial plan. *Id.* at 65, 67. On appeal, this Court vacated the injunction and remanded the case to the district court with instructions to grant partial summary judgment in favor of the defendants. *Id.* at 74. The same outcome is warranted here.

2. No reasonable jury could conclude that OTDA acted with retaliatory intent.

Davi is wrong to argue that there are triable issues of fact as to whether OTDA acted with retaliatory intent in disciplining him.

First, there is no merit to Davi’s contention (Br. at 55-56) that OTDA treated more favorably other hearing officers who expressed bias against social service agencies, rather than benefits applicants. Davi cannot rely on Mark Reid and Edwin Pearson as comparators because they are not “similarly situated.” *See Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 64 (2d Cir. 1997). Reid was counseled for behaving in an unprofessional manner during hearings, such as asking one attorney to leave the room for being unprepared (J.A. 648), and admonishing another for “speculating instead of answering questions with facts and evidence”—not for expressing bias (J.A. 699). Similarly, Pearson was disciplined for

commenting at a New York City Council hearing that he agreed with certain criticisms of the City's administration of benefits. (*See* J.A. 706; *see also* J.A. 710-711.) Neither the manner of Reid or Pearson's speech, nor the degree of apparent bias expressed, rose to the level of Davi's statements, which called into question his ability to fairly assess the credibility of any applicant who appeared before him and to impartially adjudicate their entitlement to public benefits.⁸

Second, Davi is wrong to argue (Br. at 54) that the testimony of OTDA's Rule 30(b)(6) witnesses reflected animus towards his expressed views.⁹ Contrary to Davi's suggestion, one of the 30(b)(6) witnesses

⁸ Davi's attempted reliance on hearing officer Paul Stewart is even further afield. *See* Br. at 55. As Davi concedes, Stewart also engaged in conduct that evinced a predisposition *against benefits applicants*. *Id.* at 55-56. Stewart therefore cannot serve as a comparator because he does not fall "outside [Davi's] protected group." *See Mandell v. County of Suffolk*, 316 F.3d 368, 379 (2d Cir. 2003) (standard for showing disparate treatment).

⁹ Nor is Davi correct that OTDA "breached the CBA" in issuing his Notice of Discipline (NOD) because of "distaste for the content of his speech." Br. at 59. Although OTDA exceeded the default deadline in the CBA for issuing the NOD, the agency promptly restored Davi to the payroll and reinstated his leave credits after the NOD was issued. (*See* J.A. 305-307, 387.) Nothing in the CBA required OTDA to immediately reinstate Davi to the payroll as soon as the NOD deadline expired. (*See* J.A. 90 (article 33.4(d)).)

(Schwenzfeier) in fact explained that OTDA was not concerned with Davi's political beliefs but with the fact that the Facebook comments he posted "indicated a predisposition of bias" that could undermine his and the agency's appearance of impartiality. (J.A. 178-180, 516-517.) The other 30(b)(6) witness likewise expressed concern about the "potential impact" of Davi's Facebook comments, and explained that Davi received a more severe punishment than Pearson because his speech was likely more harmful to the public's perception of the integrity of fair hearings. (See J.A. 529-30.) Where, as here, "a Government employee's job quintessentially involves public contact, the Government may take into account the public's perception of that employee's expressive acts in determining whether those acts are disruptive to the Government's operations." *Locurto*, 447 F.3d at 179.

Third, Davi is wrong (Br. at 56-57) that OTDA could have—in the ordinary course of business—permitted him to retain his hearing officer title even after the agency determined that he could no longer hold hearings. As OTDA's then-Director of Personnel and Head of Human Resources attested, only the Senior Attorney civil service title complied

with the arbitration decision and did not involve holding hearings.¹⁰ (*See* J.A. 386-387.)

Fourth, OTDA's assignment of Davi to review recusal requests against other hearing officers does not suggest that the agency's concern for its reputation was pretextual. *Contra* Br. at 57-58. Quite the opposite. Because OTDA determined that Davi could no longer represent the agency in a public-facing role without undermining its reputation, the agency transferred him to a role that entailed no direct contact with benefits applicants or adjudicatory responsibility over benefits.

Equally irrelevant is the fact that OTDA mailed some scheduling notices with Davi's ALJ number after he was removed from hearing cases. *See* Br. at 56. These notices do not undermine OTDA's reasonable

¹⁰ Neither of Davi's rejoinders has merit. For starters, Davi contention that another hearing officer purportedly has not held a fair hearing in several years (Br. at 57)—misses the mark. Unlike Davi, that hearing officer still possesses the ability to hold hearings; he remains able to serve in a public-facing-role without jeopardizing the public's perception of the agency. Nor can Davi rely on the fact that OTDA restored him to the hearing officer civil service title pursuant to the district court's first injunction order and has permitted him to retain that title even though the parties stipulated that Davi will hold any hearings while this litigation is still pending. What OTDA is required to do in the face of ongoing litigation is plainly distinguishable from what it is permitted to do under the standard civil service process.

concern that, if Davi were permitted to continue holding hearings, those appearing before him may feel uncomfortable with him as a decision-maker and may seek his recusal at the hearing. In any event, the latest of the notices is dated November 14, 2015, the day after Davi was interrogated and suspended. (*See* J.A. 331-336.) There is no evidence that OTDA continued to schedule Davi long after it ascertained that he in fact posted the Facebook comments.

Finally, Davi faults OTDA for failing to say “anything to anyone” about Davi’s discipline. Br. at 60. But that is wholly beside the point when the agency promptly removed Davi from his public-facing and adjudicatory role, and has spent the last nine years trying to ensure that it is not required to return him to the bench. Those actions are amply sufficient evidence of OTDA’s bona fide concern for maintaining its reputation and the public’s trust. OTDA was not required to damage Davi’s reputation in order to protect its own.

POINT II

THE DISTRICT COURT ERRED IN DENYING THE INDIVIDUAL DEFENDANTS QUALIFIED IMMUNITY

As the individual defendants explained (Opening Br. at 60-62), and Davi does not dispute, no decision from the U.S. Supreme Court or from this Court clearly established that their decision to initiate disciplinary proceedings against Davi based on these facts violated Davi's First Amendment rights. Accordingly, this Court should hold that the individual defendants are entitled to qualified immunity.

In arguing to the contrary, Davi chiefly insists that this Court lacks jurisdiction to reverse the denial of qualified immunity because the district court found disputed issues of fact as to whether the individual defendants acted pretextually. *See* Br. at 50-51. However, the district court relied solely on the absence of actual disruption from Davi's Facebook comments as affirmative proof that the individual defendants disciplined Davi in retaliation for his political views. (*See* S.A. 26-27.) This was erroneous, and this Court has jurisdiction to review that legal error.¹¹

¹¹ Separately, this Court also may exercise pendent jurisdiction to consider the denial of qualified immunity, as it did in the previous appeal,
(continued on the next page)

Under settled precedent, the proper standard for demonstrating “improper motive” requires “particularized evidence,” such as “expressions by the officials involved regarding their state of mind” or “circumstances suggesting in a substantial fashion that the plaintiff ha[d] been singled out.” *Blue v. Koren*, 72 F.3d 1075, 1084 (2d Cir. 1995). The decision below, however, found potential pretext based solely on the absence of actual disruption to OTDA’s operations (S.A. 26-27)—in clear contravention of circuit precedent, see Opening Br. at 55-56 & n.9.

Contrary to Davi’s assertion (Br. at 51), the district court made clear that lack of disruption was the sole basis for its conclusion that two of the individual defendants—Samuel Spitzberg, then—Director of the Office of Administrative Hearings, and Sharone Devine, then—Executive Deputy Commissioner—may have acted with retaliatory intent. (See S.A. 26-27.) For example, the court held that “a jury could reasonably conclude” that

see Davi, 2023 WL 2623205, at *4, for the reasons given above (at 18-19 & n.7). Davi is wrong that the Court’s previous decision is “the only opinion from any federal appellate court” which exercised pendent jurisdiction in this manner. See Br. at 51. In *Blue v. Koren*, this Court likewise asserted pendent jurisdiction to reverse the denial of qualified immunity, where the plaintiff’s “evidentiary proffer f[ell] woefully short of” the standard for demonstrating improper motive. 72 F.3d 1075, 1084 (2d Cir. 1995); *see id.* at 1084-85 & n.6.

Spitzberg acted with retaliatory intent because he took “adverse action against Davi, despite knowing of mitigating information in Davi’s favor.” (S.A. 26.) The only “mitigating” information the court cited, however, was the fact that Spitzberg had “reviewed a sample of Davi’s decisions and found no evidence of actual bias,” and heard no “scuttlebutt’ regarding OTDA’s hearing officers” from his “contact at Legal Aid.” (S.A. 26.) The court relied on exactly the same evidence to find a triable issue regarding Devine’s motivations. (*See* S.A. 27.)

The above analysis clearly establishes that the only evidence of pretext on which the district court relied was Legal Aid’s silence and the fact that OTDA had not uncovered any biased decisions by Davi that required immediate reconsideration—i.e., the absence of actual disruption. Thus, the fact that the district court did not expressly use this term is immaterial because the court unambiguously faulted Spitzberg and Devine for acting before they had uncovered any actual harm to agency operations.

The district court in fact relied on exactly the same evidence of pretext in its previous summary judgment decision, *see Davi v. Roberts*, 523 F. Supp. 3d 295, 311-13 (E.D.N.Y. 2021), and this Court expressly reached and vacated that qualified immunity ruling, *see Davi*, 2023 WL

2623205, at *4. Davi offers no good reason why the district court’s identical reasoning here—which expressly incorporates by reference its now-vacated decision (*see* S.A. 26-27)—fares any better.

Davi also mischaracterizes the record when he asserts that “the individual defendants charged Davi with ‘actual bias’ . . . even though they did not believe that his Facebook statements reflected actual bias.” Br. at 50. Davi points to no evidence in the summary judgment record to support this proposition, and the record is in fact replete with undisputed evidence (contemporaneous emails and deposition testimony) to the contrary. As explained, the OTDA decisionmakers—including Spitzberg and Devine—concluded that Davi’s Facebook comments had the potential to disrupt agency operations precisely because they believed that the comments expressed a bias against applicants for public assistance that undermined Davi’s appearance of impartiality and that of the agency. See Opening Br. at 50-51.

This Court likewise has jurisdiction to reverse the denial of summary judgment as to Eric Schwenzfeier, then–Assistant Deputy Commissioner of OTDA’s Division of Administrative Services, based on his lack of personal involvement. Davi does not (and cannot) defend the

district court's failure to apply the correct standard for supervisory liability set forth in *Tangreti v. Bachmann*, 983 F.3d 609, 618 (2d Cir. 2020). He instead argues, in a cursory paragraph, that appellants failed to substantiate that Schwenzfeier's administrative involvement in the disciplinary process "was just perfunctory." Br. at 60-61. But under *Tangreti*, it is the plaintiff who bears the burden to plead and prove that the supervisor's "own individual actions . . . violated the Constitution." 983 F.3d at 616 (quotation marks omitted). And, where, as here, the asserted constitutional claim involves a subjective component, the plaintiff must further establish that the supervisor undertook the actions with the required state of mind. *See id.*

Davi has pointed to no evidence here that suggests Schwenzfeier acted to suspend Davi or to facilitate the issuance of his notice of discipline (NOD) in retaliation for his views. Nor did "Schwenzfeier s[ay] otherwise." *Contra* Br. at 60. Indeed, Schwenzfeier was deposed solely as a Rule 30(b)(6) witness (*see* S.A. 29), and thus offered no testimony regarding his personal views. Moreover, Schwenzfeier expressly attested that he "did not draft [the NOD], issue it, or authorize its issuance." (J.A. 397.) Given these undisputed facts, the district court's conclusion that

Schwenzfeier is personally liable for Davi's suspension and proposed termination is fundamentally at odds with its previous holding that the former General Counsel of OTDA *lacked* any personal involvement in these decisions, even though she attended the same meeting as Schwenzfeier and likewise "arranged to implement the decisions others had made." *See Davi*, 523 F. Supp. 3d at 313.

CONCLUSION

For the foregoing reasons, this Court should (i) vacate the district court's permanent injunction; (ii) reverse the entry of partial summary judgment for Davi on his claim for injunctive relief; (iii) direct the entry of partial summary judgment in favor of OTDA on the injunctive relief claim; (iv) reverse the denial of the individual defendant's motion for summary judgment based on qualified immunity; and (v) direct the entry of summary judgment in favor of the individual defendants on Davi's damages claim.

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April 7, 2025

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Ava Mortier, 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 6,059 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7) and Local Rule 32.1.

/s/ Ava Mortier