

# 24-1778 (L)

24-2607 (CON)

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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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,  
TIFFANY RUTNICK, 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.

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

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**APPELLEE'S BRIEF**

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Table Of Contents

Table Of Contents . . . . . ii

Table Of Authorities . . . . . v

Statement of Jurisdiction . . . . . 1

Statement of Issues . . . . . 1

Statement Of The Case . . . . . 2

    A.    OTDA And The Individual Defendants-Appellants . . . . . 2

    B.    Hearing Officers . . . . . 4

    C.    Project Fair’s Formation And Dissolution . . . . . 6

    D.    Davi . . . . . 7

    E.    The Anonymous Complaint . . . . . 8

    F.    OTDA’s “Investigation” and Suspension of Davi . . . . . 10

    G.    Additional “Investigation” and Negotiations . . . . . 12

    H.    The Notice of Discipline And The Arbitration . . . . . 14

    I.    The Transfer Of Davi’s Civil Service Title And His Duties As A  
        Senior Attorney And General Counsel’s Designee . . . . . 16

    J.    Discipline Against Other Hearing Officers . . . . . 18

    K.    Other Complaints Against Davi . . . . . 19

    L.    Procedural Background . . . . . 20

Summary of Argument .....	26
Argument .....	28
I.    THE DISTRICT COURT CORRECTLY CONCLUDED THAT DAVI WAS ENTITLED TO PARTIAL SUMMARY JUDGMENT	30
A.    The District Court Did Not Abuse Its Discretion In Giving The Arbitrator’s Opinion Little Weight .....	30
B.    The District Court Properly Concluded That OTDA’s Investigation Was Not Reasonable .....	33
C.    The District Court Properly Concluded That OTDA Had Not Met Its Burden .....	36
1.    OTDA Did Not Meet Its Burden of Making A Substantial Showing of Likely Interference .....	36
2.    OTDA Failed To Meet Its Burden of Showing That Its Interests Outweighed Davi’s .....	39
II.   THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER ANY OTHER ISSUE .....	48
III.  DEFENDANTS CANNOT MEET THEIR BURDEN OF SHOWING AN ABSENCE OF GENUINE ISSUES OF MATERIAL FACT THAT WOULD SUPPORT SUMMARY JUDGMENT IN THEIR FAVOR .....	52
A.    Additional Evidence Of Retaliatory Intent .....	53
1.    Rule 30(b)(6) Testimony .....	54
2.    Comparators .....	55

3.	OTDA Continued To Send Notices With Davi Listed As The Hearing Officer .....	56
4.	Transfer of Civil Service Title .....	56
5.	Davi’s Status As General Counsel Designee .....	57
6.	OTDA’s Refusal To Follow The CBA .....	59
7.	OTDA’s Silence .....	60
B.	Schwenzfeier’s Involvement .....	60
	Conclusion .....	61

Table Of Authorities

Cases

<i>Alexander v. Garnder-Denver Co.</i> , 415 U.S. 36 (1974) .....	31
<i>Aptive Env'tl., LLC v. Vill. of East Rockaway</i> , 2020 U.S. Dist. LEXIS 243142 (E.D.N.Y. Dec. 23, 2020). .....	35
<i>Barhold v. Rodriguez</i> , 863 F.2d 233 (2d Cir. 1988) .....	29
<i>Bieluch v. Sullivan</i> , 999 F.2d 666 (2d Cir. 1993) .....	42
<i>Blue Ridge Invs., L.L.C v. Republic of Arg.</i> , 735 F.3d 72 (2d Cir. 2013) .....	50
<i>Blyden v. Mancusi</i> , 186 F.3d 252 (2d. Cir. 1999) .....	61
<i>Buckley v. Illinois Judicial Inquiry Bd.</i> , 997 F.2d 224 (7th Cir. 1993) .....	47
<i>Center v. Hampton Affiliates, Inc.</i> , 66 N.Y.2d 782 (1985) .....	35
<i>Famoso v. Marshalls of MA, Inc.</i> , 2015 US. Dist. LEXIS 134174 (E.D.N.Y. Sept. 30, 2015) .....	2
<i>Gorman-Bakos v. Cornell Co-op Extension of Schenectady County</i> , 252 F.3d 545 (2d Cir. 2001) .....	52
<i>Goza v. Memphis Light, Gas, and Water Division</i> , 398 F. Supp. 3d 303 (W.D. Tenn. 2019) .....	38, 54
<i>Heil v. Santoro</i> , 147 F.3d 103 (2d Cir. 1998) .....	34, 36
<i>In re Disciplinary Proceedings Against Richard B. Sanders</i> , 135 Wash. 2d 175, 955 P.2d 369 (1998) .....	46

<i>In re Fox Corp. Derivative Litig.</i> , 2024 Del. Ch. LEXIS 388 (Del. Ch. Ct. Dec. 27, 2024) .....	53
<i>James v. Bd. of Educ.</i> , 461 F.2d 566 (2d Cir. 1972) .....	38, 46
<i>Jeffries v. Harleston</i> , 52 F.3d 9 (2d Cir. 1995) .....	30
<i>Johnson v. Ganim</i> , 342 F.3d 105 (2d Cir. 2003) .....	54
<i>Jungels v. Pierce</i> , 825 F.2d 1127 (7th Cir. 1987) .....	38
<i>Lane v. Franks</i> , 573 U.S. 228 (2014) .....	44
<i>Levin v. Harleston</i> , 966 F.2d 85 (2d Cir. 1992) .....	45
<i>Liverman v. City of Petersburg</i> , 844 F.3d 400 (4th Cir. 2016) .....	40
<i>Lobster 207, LLC v. Pettegrow</i> , 2023 U.S. Dist. LEXIS 132792 (D. Me. Aug. 1, 2023) .....	32
<i>Locurto v. Guliani</i> , 447 F.3d 159 (2d Cir. 2006) .....	30, 49
<i>Mahanoy Area Sch. Dist. v. B.L.</i> , 594 U.S. 180 (2021) .....	40
<i>Maine Lobstermen’s Ass’n v. Nat’l Marine Fisheries Service</i> , 70 F.4th 582 (D.C. Cir. 2023) .....	36
<i>McDonald v. City of West Branch</i> , 466 U.S. 284 (1984) .....	31, 32
<i>Melzer v. Bd of Educ. Of the City School Dist. Of the City of New York</i> , 336 F.3d 185 (2d Cir. 2003) .....	47
<i>Murray v. Town of North Hempstead</i> , 853 F. Supp. 2d 247 (E.D.N.Y. 2012) ...	28
<i>Myers v. Hertz Corp.</i> , 624 F.3d 537 (2d Cir. 2011) .....	49

<i>Nick's Garage, Inc. v. Progressive Cas. Ins. Co.</i> , 875 F.3d 107 (2d Cir. 2017) .....	28, 29
<i>Noble v. Cincinnati &amp; Hamilton County Public Library</i> , 112 F.4th 373 (6th Cir. 2024) .....	39, 43, 46
<i>Papa v. New Haven Federation of Teachers</i> , 186 Conn. 725, 444 A.2d 196 (1982) .....	47
<i>Pappas v. Guiliani</i> , 290 F.3d 143 (2d Cir. 2002) .....	47, 58
<i>Perry v. Larson</i> , 794 F.2d 279 (7th Cir. 1985) .....	29
<i>Persaud v. City of New York</i> , 2024 U.S. Dist. LEXIS 87727 (S.D.N.Y. May 14, 2024) .....	43
<i>Pickering v. Bd. of Educ.</i> , 391 U.S. 563 (1968) .....	23, 24, 27, 39, 43, 45, 49, 50
<i>Piesco v. N.Y. Dept. Of Personnel</i> , 933 F.2d 1149 (2d Cir. 1991) .....	41, 42, 45
<i>Piscottano v. Murphy</i> , 511 F.3d 247 (2d Cir. 2007) .....	47, 48
<i>Radwan v. Manuel</i> , 55 F.4th 101 (2d Cir. 2022) .....	55, 60
<i>Rankin v. McPherson</i> , 483 U.S. 378 (1987) .....	39
<i>Republican Party v. White</i> , 536 U.S. 765 (2002) .....	47
<i>Reuland v. Hynes</i> , 460 F.3d 409 (2d Cir. 2006) .....	45, 46
<i>Richardson v. Pratcher</i> , 48 F. Supp. 3d 651 (S.D.N.Y. 2014) .....	49
<i>Rogers v. Lodge</i> , 458 U.S. 613 (1982) .....	53
<i>Sheppard v. Beerman</i> , 317 F.3d 351 (2d Cir. 2003) .....	43
<i>United States v. Anderson</i> , 747 F.3d 51 (2d Cir. 2014) .....	58

*Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982) . . . . . 40

*Weiss v. JPMorgan Chase & Co.*, 332 Fed. Appx. 659 (2d Cir. June 5, 2009) . . . 53

Constitutional Provisions, Statutes, and Rules

18 NYCRR § 358-2.3 . . . . . 3

18 NYCRR § 358-4.3(e) . . . . . 3

18 NYCRR § 358-5.6(a) . . . . . 15

18 NYCRR § 358-5.6(b)(9) . . . . . 4

18 NYCRR § 358-5.6(c) . . . . . 5

18 NYCRR § 358-5.6(c)(6) . . . . . 5

18 NYCRR § 358-5.6(c)(8) . . . . . 17

28 U.S.C. § 1291 . . . . . 27, 49

E.D.N.Y. Local Rule 56.1 . . . . . 2

Fed. R. Civ. P. 30(b)(6) . . . . . 28, 35, 54

Fed. R. Civ. P. 56 . . . . . 29

N.Y. Civ. Prac. L. Rules, art. 78 . . . . . 5, 13

N.Y. Soc. Serv. Law § 20-c(1)(b) . . . . . 3

N.Y. Soc. Serv. Law § 22 . . . . . 3

NY Labor Law § 201-i . . . . . 40

U.S. Const., amend. I . . . . . 1, 16, 24, 30-32, 38, 39, 42, 45-48

### Statement of Jurisdiction

Plaintiff-appellee Salvatore Davi (“Davi”) agrees with appellants’ Statement of Jurisdiction, except to the extent that it asserts this Court has jurisdiction over the order dated May 29, 2024 (the “May 2024 Order”) that denied defendants’ motion for summary judgment. For the reasons set forth in Davi’s motion to dismiss and in Part II of the Argument section of this brief, this Court lacks appellate jurisdiction over that order.

### Statement of Issues

1. Is Davi entitled to injunctive relief against the official capacity defendants because defendants violated his First Amendment rights when it tried to terminate him, and ultimately suspended him without pay for six months, for comments he made on a private Facebook page concerning government social welfare policy that resulted in virtually no public reaction?
2. Does this Court have jurisdiction over the part of the May 2024 Order that denied defendants’ motion for summary judgment?
3. If this Court does have jurisdiction over that part of the May 2024 Order, are there genuine issues of material fact precluding summary judgment?

## Statement Of The Case

The lead appeal here is an appeal of an order denying summary judgment to certain defendants. Accordingly, this statement will present the facts in the light most favorable to Davi, the plaintiff opposing summary judgment. Many facts, though, are undisputed. Since the consolidated appeal is an appeal of an injunction favoring Davi, this statement will note places where relevant facts are disputed.

This statement also cites statements from defendants' responses to Davi's Local Rule 56.1 statements of facts (JA585-621, JA846-852). ("JA" refers to the Joint Appendix on this appeal.) Defendants objected to many of these statements. The district court at least implicitly rejected a number of these objections by citing defendants' responses as authority. *E.g.*, Special Appendix ("SA") 2, 6, 8. Defendants do not challenge those implicit rulings on appeal. Where Defendants erroneously objected without offering any evidence to the contrary, the statements should be deemed conceded. *Famoso v. Marshalls of MA, Inc.*, 2015 US. Dist. LEXIS 134174, at \*4 n.3 (E.D.N.Y. Sept. 30, 2015).

### A. OTDA And The Individual Defendants-Appellants

The Office of Temporary and Disability Assistance ("OTDA") is a New York agency that administers social welfare programs. JA54 (¶ 3). OTDA's mission and purpose emphasizes the importance of assisting work-capable public assistance

recipients in achieving entry into the workforce. JA587-588 (¶¶ 3-5); JA55 (¶ 6); JA107; JA134-135 (No. 77); SA2.

The Office of Administrative Hearings (“OAH”) is an office in OTDA. It is responsible for holding hearings (“Fair Hearings”) when an individual appeals the decision of a social services agency, like the New York City Human Resources Administration (“NYC HRA”), with respect to that individual’s benefits or eligibility under a social services program administered by OTDA. 18 NYCRR § 358-2.3; JA588 ( ¶¶ 6-9); JA55-A56 (¶¶ 7-10); N.Y. Soc. Serv. Law §§ 20-c(1)(b), 22.

As a state agency, OTDA serves all the people of New York, not one segment. *Compare* Appellants’ Brief (“Appellants’ Br.”) 13 (“benefits recipients [are] the very population OTDA serves”), 49 (referring to appealing beneficiaries as “OTDA’s clients”). OAH is tasked with holding *fair* hearings – fair to the appealing beneficiaries, the social service agencies, and the taxpayers of New York. JA610-611 (¶¶ 89-90); JA64-A65 (¶¶ 63-64); JA134-135 (No. 77). 18 NYCRR § 358-4.3(e) (social services agencies have same rights as appealing beneficiaries, including to seek recusal).

The individual defendants-appellants are Sharon Devine, Samuel Spitzberg, and Eric Schwenzfeier. During the relevant time period, Devine was the Executive Deputy Commissioner of OTDA, Spitzberg was the Director of OAH, and Schwenzfeier was

the Assistant Deputy Commissioner of OTDA's Division of Administrative Services. Appellants' Br. 13, 54. Davi adopts defendants-appellants' convention of referring to Devine, Spitzberg, and Schwenzfeier as the "individual defendants," and the official capacity defendants as "OTDA." Appellants' Br. 1-2 n.1.

B. Hearing Officers

When OTDA conducts Fair Hearings, they are often presided over by Hearing Officers. JA588-589(¶ 10); JA56 (¶ 11). Hearing Officers have other potential duties, including (1) reviewing new legislation, regulations, and other developments that have an impact on the conduct of hearings or on hearing decisions, (2) studying court cases having an impact on the hearing process, and (3) assisting in defending lawsuits regarding hearing decisions by conducting research and drafting briefs and other supporting documents. JA615 (¶ 112); JA59 (¶ 28); JA68 (¶ 6); JA313-317.

Andrew Purrott is a Hearing Officer in OAH. Andrew Purrott has not conducted Fair Hearings since March 13, 2013. JA616 (¶¶ 113-15); JA242-243; JA70 (¶ 12); JA353-364. Rather, he works in litigation support.

When Hearing Officers conduct Fair Hearings, they prepare an official report containing the substance of what transpired at the Fair Hearing and including a recommended decision to a Commissioner's Designee, who issues a final decision. 18 NYCRR § 358-5.6(b)(9); JA591-592 (¶ 20); JA749 (¶ 13).

Both parties to a Fair Hearing can object to the Hearing Officer's conduct and objectivity. Parties to a Fair Hearing can object to a particular Hearing Officer presiding over that hearing by seeking recusal based on the bias of the Hearing Officer prior to the hearing, as well as at the hearing. JA593-594 (¶¶ 25-27); JA58 (¶¶ 21-23); JA254-256; JA273-278; 18 NYCRR § 358-5.6©.

Parties may also seek reconsideration of a decision issued by the Commissioner's Designee based upon the alleged bias of the Hearing Officer who conducted the Fair Hearing. OTDA has considered requests for reconsideration made long after the hearing. JA594 (¶¶ 28-29); JA58 (¶¶ 24-25); JA340; JA255-256; JA273-274.

Appealing beneficiaries may also file a petition under Article 78 of New York's Civil Practice Law and Rules asking that the decision be overturned on grounds of the Hearing Officer's bias. Finally, they may also file suit in federal court alleging that a Hearing Officer's bias deprived them of due process. JA594-595 (¶¶ 30-31); JA58 (¶¶ 26-27).

If a Hearing Officer denies a request to recuse, a review of that decision is done by a General Counsel's Designee. 18 NYCRR § 358-5.6(c)(6). Such reviews are not onerous. The first step is to determine if the final decision of the Commissioner's Designee was correct and, if it was, the recusal review ends there. JA626 (¶ 3); JA392

(¶ 7). Often that does not even require a review of the tape of the hearing, and when it does, most hearings are very short, about 10-15 minutes in length. JA626 (¶ 3); JA338 (Spitzberg listened to ten hearings in one evening). (Defendants dispute the time needed to review a recusal denial. JA392 (¶ 7).)

C. Project Fair's Formation And Dissolution

Project Fair was a project of various organizations to assist appealing beneficiaries. Those organizations included the Legal Aid Society (“Legal Aid”), the New York Legal Assistance Group (“NYLAG”), Legal Services NYC, the Urban Justice Center, and perhaps one other organization. JA794-795. It began as a project in 2004 and became a 501(c)(3) corporation in 2007. JA792, JA847 (Nos. 2-3). It essentially operated a help desk at one of OTDA’s offices (at Boerum Place in Brooklyn), manned by individuals from the various organizations that constituted it. JA792-793. It had a mailbox in Legal Aid’s offices. JA848 (No. 5). Ken Stephens was on the Board of Project Fair, and would collect mail for it. JA808.

Some time in 2014, the Board of Directors of Project Fair decided to dissolve it. JA796-797. Its mailbox in Legal Aid’s offices no longer existed after its dissolution in June 2015. JA807, JA815-817, JA848 (No. 6). The OTDA political appointee in charge of managing the building’s operations, Tom McCardle, was apprised that Project Fair was going to dissolve ahead of time. After the dissolution, employees of

Legal Aid and NYLAG would man the help desk at Boerum Place, but their presence “diminished significantly” after the dissolution because the other organizations involved with Project Fair dropped out. JA804; JA798; JA806-807; JA834-835 (¶ 3); JA849 (Nos. 7-8).

Legal Aid never made recusal requests. JA812 (“I don’t think we ever made a recusal request”). If they thought that a loss at a hearing was due to something improper, they would request a new hearing. JA811.

D. Davi

Davi was hired in 2010 to work as a Hearing Officer at OAH. Prior to the fall of 2015, he mostly conducted Fair Hearings. JA590-591 (¶¶ 16-18); JA56 (¶¶ 14-15); JA27-28 (¶ 14) & JA41 (¶ 14); JA115 (Nos. 5-6). Throughout that time, Davi did not make any final decisions, but rather recommendations. His recommendations were reviewed by, and a determination made by, a Commissioner’s Designee, usually a Supervising Hearing Officer. JA591-592 (¶¶ 19-20); JA56 (¶¶ 15-16); JA115-116 (Nos. 7-8); JA41 (¶ 15); Appellants’ Br. 7; SA2, SA23-24.

Davi received both six-month and annual performance reviews as a Hearing Officer. Davi’s reviews were uniformly positive. JA592-593 (¶¶ 21-22); JA57 (¶¶ 17-18); JA116 (No. 9); JA325 (praising Davi’s performance); SA7.

The Fair Hearings that Davi conducted generally had one of three disputed

areas: did the appealing beneficiary submit documents the social services agency requested, did (s)he attend a mandatory appointment with the agency, or was the appealing beneficiary's income within the eligibility limits. JA593 (¶ 23); JA57 (¶ 19); JA250-252; JA747 (¶ 6); SA2, SA23.

During the time that Davi conducted Fair Hearings as a Hearing Officer, most of the programs for which OAH conducted Fair Hearings included some kind of work or training requirement. JA593 (¶ 24); JA58 (¶ 20); JA252-253.

E. The Anonymous Complaint

On November 4, 2015, OTDA received an anonymous complaint (the "Anonymous Complaint") regarding Davi. The Anonymous Complaint attached an excerpt (the "Facebook Excerpt" or "Facebook comments") from a Facebook exchange regarding an article from the *Daily Kos*, posted by a Facebook user, that advocated the expansion of social welfare programs like food stamps. JA595 (¶¶ 32-33); JA73-75; JA117 (No. 12); JA120 (No. 22). The Facebook Excerpt had an exchange between Salvatore P. Davi and Erin Lloyd. In it, Davi took the position that social welfare programs should be assessed by how well they help recipients become self-sufficient rather than how many people they provide aid to. JA75. The Anonymous Complaint claimed that the comments by Davi in the Facebook Excerpt were inflammatory and unethical, and asked OTDA Commissioner Samuel Roberts

to investigate Davi's performance as a Hearing Officer. JA74. The district court set forth a complete quotation of the salient parts of the Facebook Excerpt in the May 2024 Order. SA3-4.

The Anonymous Complaint had a "cc" on it indicating that the author was sending a copy of the letter to Project Fair, which had dissolved months earlier, at Legal Aid headquarters. JA74; JA595-596 ( ¶ 34).

In the Facebook Excerpt, Erin Lloyd stated: "Salvator P. Davi I remember your bullshit from law school so I've got no patience for you." In contrast, the author of the Anonymous Complaint stated: "I do not personally know Mr. Davi . . . I merely observed his comments on a mutual friend's Facebook wall." JA596 ( ¶¶ 35-38); JA73-75; JA120 (No. 22).

However, OTDA later learned that, in fact, Erin Lloyd was the author of the Anonymous Complaint. Representatives of OTDA communicated with Ms. Lloyd, but no one at OTDA questioned Erin Lloyd about the contradictory statements she made concerning her knowledge of Davi and whether she "merely observed" his comments. JA596-597 ( ¶¶ 39-41); JA174-176, JA185-186.

OTDA employees tried to access the full discussion partially disclosed in the Facebook Excerpt but could not to do so because it was a private conversation. JA597-598 ( ¶¶ 42, 43); JA258-259; JA171-174; JA329; SA3.

F. OTDA's "Investigation" and Suspension of Davi

Based on the Facebook Excerpt, OTDA removed Davi from the duty of hearing cases on November 5, 2016. Davi's Supervising Hearing Officer, Kenneth Luciano, was told to tell Davi that he was being taken "off calendar," but was instructed not to tell him why. JA600-601 (¶¶ 54-55); JA120-121 (No. 23); JA262-263.

During the time between November 5, 2015 and November 12, 2015, and with the knowledge of OTDA supervisors, Davi continued to draft recommendations for Luciano for appeals on which Davi had earlier conducted the Fair Hearings. At that time, Luciano was the Commissioner's Designee who reviewed Davi's recommendations and issued the actual opinions resolving those appeals. JA601 (¶¶ 56-57); JA60-61 (¶ 39); JA257-258, JA260-261; JA740 (¶ 3).

Shortly after receiving the Anonymous Complaint, OTDA had several of its representatives (Defendant Samuel Spitzberg and Nigel Marks) review a set of Davi's hearings and recommendations to determine if they reflected any bias. They concluded that Davi's conduct and recommendations did not reflect any bias. JA600 (¶ 53); JA186-187; JA235-236; JA214; JA338. Spitzberg concluded that the Facebook comments themselves did not show that Davi was actually biased. JA672.

On November 9, 2015, OTDA (through Wendy Phillips) sent Plaintiff a Notice of Interrogation stating that his attendance would be required at an interrogation on

November 13, 2015 pursuant to the Collective Bargaining Agreement (“CBA”) between the union representing him (Public Employees Federation, AFL-CIO) and the State of New York. The Notice of Interrogation stated that the interrogation would be regarding allegations that Plaintiff had made public comments that disparage the population that is served by OTDA. JA77; JA601-602 (Nos. 58, 60).

The next day, Plaintiff sent an email to Ms. Phillips and another OTDA employee (Denise Mastrianni) seeking additional information about “the subject matter of the interrogation, including whatever statement I am alleged to have made,” to assist him in preparing for the interrogation. Neither Ms. Phillips nor Ms. Mastrianni nor anyone else at OTDA responded to Plaintiff’s email. JA79, JA125-126 (Req. Nos. 37-42); JA61 (¶¶ 42-43); SA17.

Phillips interrogated Davi on November 13, 2015. During the course of the interrogation, Ms. Phillips did not show Davi (or specifically mention) either the Anonymous Complaint or the Facebook Excerpt, despite repeated requests for a copy and repeated assurances by Phillips that she would provide one. Accordingly, Davi did not remember having made the statements in the Facebook Excerpts, and OTDA had no more evidence that he had made them at the end of the interrogation than it had at the outset. Nonetheless, at the end of the interrogation, Ms. Phillips handed Davi a previously-signed letter (the “Notice of Suspension”) from OTDA Director of Human

Resources Donna Faresta apprising him that he was suspended without pay effective immediately. The Notice of Suspension did not mention the Anonymous Complaint or the Facebook Excerpt. JA875-877, JA603-604 (¶¶ 64-67); JA62 (¶¶ 46-47); JA127-128 (Nos. 45-52); JA81-83; SA17.

G. Additional “Investigation” and Negotiations

OTDA’s only further investigation after it suspended Davi was to speak with Erin Lloyd, who admitted to writing the Anonymous Complaint and purportedly represented that she had sent a copy to the then-defunct Project Fair. SA17; JA174. Legal Aid never received the Anonymous Complaint. JA850 (No. 9); JA801-802; JA813-814. No one from OTDA contacted anyone at Legal Aid to check. JA174. (Defendant Spitzberg, at least, apparently disputes this last sentence. He states that he called Ken Stephens and asked whether he had heard any “scuttlebutt” about any Hearing Officers. According to Spitzberg, Stephens told him he had not. JA393 (¶ 10)).

Under the CBA, a suspension without pay must be followed by a Notice of Discipline within five days. If it is not, the suspension must then be converted into a suspension with pay. OTDA did not serve a notice of discipline within five days (by November 18) of his notice of suspension. JA602-603 (¶¶ 68[2], 69); JA88 (§ 33.4(a)(1)); JA128-130 (Nos. 54-55, 61-62). Although OTDA was then obligated

immediately to convert his suspension without pay to one with pay, it did not do so even after Davi's express written demand. Davi was not restored to the payroll until January. JA605 (¶¶ 70-71); JA62-63 (¶¶ 49-53); ECF No. 96-11, PID 1543-44 ("ECF No." refers to the district court's docket; "PID" refers to the PageID in the district court.).

The parties unsuccessfully tried to negotiate a possible settlement, but those negotiations did not begin until after November 18. JA627 (¶ 6); JA629 (¶ 2). (Defendants dispute the starting date of the negotiations. JA459-460.) Eventually, OTDA offered to withhold the Notice of Discipline, but it would not agree to not take other adverse action against him for any past acts. JA583. It would require Davi to take a position as a Senior Attorney. Although the job would be at the same grade, OTDA would not promise the same pay. The proposal also required that OTDA issue a counseling memo to be placed in Davi's personnel file, and required Davi to relinquish rights under New York's Freedom of Information Law. JA580-581.

Throughout November and December, neither Legal Aid nor any appealing beneficiary made any challenge to any past decision by Davi, either by asking OTDA for reconsideration of a decision in which Davi had served as the Hearing Officer or by filing an Article 78 proceeding or any other action claiming a due process violation on the ground that Davi's Facebook comments showed, or gave the appearance, that

he was biased. JA598 (¶¶ 45-46); JA148-149 (Nos. 5-6); SA5. In fact, OTDA did not receive *any* communication from *anyone*, aside from the author of the Anonymous Complaint, concerning Davi's Facebook comments or views concerning social welfare programs. JA599 (¶ 47); JA69-70 (¶ 11).

OTDA sends out notices to the parties to an appeal. Even after he was taken off hearings, OTDA continued to send out Hearing Notices for hearings scheduled in November and early December showing that Davi was going to be the Hearing Officer for the hearing. JA605-606 (¶¶ 74-76); JA264-266; JA69 (¶ 9); JA333-336. Although recusal requests are generally made at the Fair Hearing, they have been made ahead of the hearing date as well. JA593-594 (¶¶ 25-27); JA58 (¶¶ 21-23); JA254-256; JA273-274. OTDA received no complaint about (or request to recuse) Davi being the assigned Hearing Officer on any hearing scheduled for November or early December. JA606 (¶ 77); JA131-132 (No. 65); JA148 (No. 5); SA5.

#### H. The Notice of Discipline And The Arbitration

On December 29, 2015, defendant Spitzberg, on behalf of OTDA, sent Davi a Notice of Discipline informing him that OTDA intended to terminate his employment at OTDA. JA607 (¶¶ 78-79); JA97-102; JA132-133 (Nos. 66, 67, 72); JA63 (¶ 56). Davi grieved the proposed discipline pursuant to the CBA, which required an arbitration between the union and OTDA. Had Davi not grieved the proposed

discipline, his employment at OTDA would have been terminated on January 13, 2016. JA607-608 (¶¶ 80-81); JA64 (¶ 58); JA102; JA132 (Nos. 66, 67).

The Notice of Discipline identified five statements, all of which were cherry-picked from the Facebook Excerpt, which OTDA relied upon to support its decision to terminate Davi. The NOD set forth seven different charges based on these five statements, *viz.*, that they (1) expressed opinions relative to a matter before the agency, (2) violated a rule in an ALJ manual requiring hearing officers to approach a case with an open mind, without prejudgment or prejudice, (3) violated an executive order requiring hearing officers to be impartial, objective, and free from inappropriate influence, (4) violated OTDA's Mission and Purpose, as set forth in its Employee Handbook, to assist work-capable public assistance recipients in achieving entry in the workforce, (5) were likely to raise suspicions among the public that Davi was likely engaged in acts in violation of his trust, (6) gave an unreasonable basis for NYC HRA representatives to have the impression that they may unduly enjoy Davi's favor in violation of New York's Public Officer Law, and (7) showed that he was not an impartial hearing officer in violation of 18 NYCRR § 358-5.6(a). JA608-610 (¶¶ 82-84, 87); JA96-102; JA132 (Nos. 66, 67).'

Davi had little control over the union's case in the arbitration proceedings. The union refused to call witnesses Davi wanted. JA625 (¶ 2).

The arbitrator ruled that Davi's First Amendment rights and any alleged violation thereof were outside the scope of the CBA and the arbitration. JA611 (¶ 91); SA14.

The arbitrator's decision upheld charges 1, 2, 4, and 5, and rejected charges 3, 6, and 7.<sup>1</sup> The arbitrator's ruling held that OTDA could suspend Davi for six months without pay. The arbitrator's decision stated that, upon Davi's return from his suspension, OTDA had to offer him a job in the New York City area at the same pay grade. The offered job did not have to involve hearing cases, but the ruling did not prohibit OTDA from offering Davi his previous position as a Hearing Officer upon the completion of his suspension. It said nothing about his civil service title. JA611-612 (¶¶ 92-95); JA369-376; JA65 (¶ 66); JA143 (No. 82).

I. The Transfer Of Davi's Civil Service Title  
And His Duties As A Senior Attorney  
And General Counsel's Designee

In a letter dated June 1, 2016, Faresta apprised Davi that OTDA would transfer his civil service title to the position of Senior Attorney at the end of his suspension.

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<sup>1</sup> This was incoherent. The arbitrator upheld the second charge that Davi "showed a bias . . . against recipients of Public Assistance" and the fifth charge that Davi's Facebook comments "raise suspicion among the public that [he] likely engaged in acts that are a violation of [his] trust," but rejected the sixth charge that the Facebook comments "give an unreasonable basis for NYC HRA representatives . . . to have the impression that they may unduly enjoy your favor." JA98, JA100-101, JA374.

The transfer of Davi's civil service title without his consent was unlawful (Appellants' Br. 14, JA386 (¶ 6)) and had adverse consequences for him, including a loss of relative seniority. JA613-615 (¶¶ 103-11); JA111; JA137 (Nos. 83-85); JA65-66 (¶¶ 69-76); JA202-203. Although Hearing Officers can be assigned to tasks other than conducting Fair Hearings, Spitzberg apparently convinced Faresta that Davi's civil service title should be changed. JA453-456; JA929-931. *But see* JA394.

In July, 2016, OTDA General Counsel Krista Rock designated Davi as a General Counsel's Designee. In that role, Davi reviews, and determines the correctness of, all Hearing Officers' initial denials of requests by parties at the Fair Hearings to recuse those Hearing Officers. JA616-617 (¶¶ 116-18); JA59 (¶¶ 31-32); JA217, JA221. Davi's decisions can have an effect on someone's social welfare benefits, since he essentially decides whether the Fair Hearing was "fair" (*i.e.*, was conducted by a proper hearing officer). His name and signature appear on these decisions and become part of the file for that appeal, which can be reviewed by the appealing beneficiaries affected. 18 NYCRR § 358-5.6(c)(8); JA617-618 (¶¶ 119-23); JA59-60 (¶¶ 33-37); JA215-217; JA70 (¶ 13); JA366-367. Because the first part of a recusal review is determining whether the underlying decision was correct (JA626 (¶ 3); JA392 (¶ 7)), Davi reviews the decision by the Commissioner's Designee. JA366-367.

OTDA did not communicate Davi's removal from holding hearings or his new title to Legal Aid. JA149-150 (No. 8). Indeed, there is nothing in the record to suggest that OTDA told *anyone* outside of the agency of the change in Davi's role.

J. Discipline Against Other Hearing Officers

In 2010, Hearing Officer Edwin Pearson (while representing that he was working from home) attended a New York City Council meeting. After testimony by NYC HRA representatives and those critical of that agency, Mr. Pearson gave unanticipated testimony (speaking on company time) supporting the critics, which was reported in the press. He identified himself as a Hearing Officer. OTDA issued a Notice of Discipline against Mr. Pearson, alleging, among other things, that his speech called his impartiality into question. OTDA proposed a one-month suspension for Mr. Pearson, and ultimately settled the matter with him by agreeing to a four-day suspension, and Mr. Pearson eventually retiring. JA630 (¶ 5), JA703-714.

Hearing Officer Mark Reid was also alleged to have engaged in behavior hostile to the city agency around 2012. In response, OTDA chose to counsel him. JA647-649. Several years later, and just weeks before OTDA received the Anonymous Complaint, Reid was accused of engaging in unprofessional conduct towards an attorney for Senior Health Partners ("SHP"), a private agency that contracts with NYC HRA to administer certain services to program beneficiaries.

Defendant Spitzberg investigated the complaint. He concluded that Mr. Reid had displayed “unprofessional animosity” toward the attorney, but did not overturn Mr. Reid’s decision, and no discipline resulted. Mr. Reid continues to hear matters before SHP. JA665-668; JA701 (last line).

Paul Stewart repeatedly engaged in misconduct that resulted in appealing beneficiaries losing rights; specifically, he convinced those with meritorious appeals to withdraw them. JA826-827. He did so despite the fact that he had been specifically ordered not to take any withdrawals without his supervisor’s approval. *Id.* (He also threatened his supervisor, Kenneth Luciano, JA827.) Defendant Spitzberg reviewed his case and issued a Notice of Discipline proposing a two-week suspension. Years went by without any action on OTDA’s part and Mr. Stewart continued to hold hearings. OTDA eventually suspended Mr. Stewart for less than two weeks, after which he returned to holding hearings. JA826-833.

K. Other Complaints Against Davi

Aside from the Anonymous Complaint, there were only two complaints made against Davi during the five-plus years when he held hearings. JA69-70 (¶ 11); JA339-351. On or around August 18, 2015, someone wrote to OTDA complaining about Davi’s rudeness at a Fair Hearing he conducted the day before, as well as the conduct of the Commissioner’s Designee for the case, Kenneth Luciano. JA618

(¶ 124); JA69-70 (¶ 11); JA348-349. OTDA rejected any impropriety in its response letter in January 2016. It did not reopen the hearing or assign it to another Hearing Officer, did not modify the decision that had been issued by Luciano, and did not mention the Facebook Excerpt in its letter. JA618-619 (¶¶ 125-27); JA69-70 (¶ 11); JA350-351.

On June 25, 2016, another individual wrote to OTDA to complain about a Fair Hearing that Davi had conducted on May 11, 2015, complaining about his alleged partiality based on his behavior at the Fair Hearing and the decision of the Commissioner's Designee, which had stated that the appealing beneficiary's claims were not credible. The letter did not mention the Facebook Excerpt. JA619-620 (¶¶ 128-30); JA69-70 (¶ 11); JA340-341. The underlying decision of the NYC HRA related to the Public Assistance program and was based on the appealing beneficiary's alleged failure to report for a work assignment.

OTDA's response, dated July 7, 2016 stated that it "found no impropriety on the part of Mr. Davi, nor any evidence of bias." It did not mention the Facebook Excerpt. JA620-621 (¶¶ 131-34); JA69-70 (¶ 11); JA344-345; JA219-220.

L. Procedural Background

Davi filed a complaint on September 13, 2016, and an amended complaint on April 6, 2017. JA6, JA25-A38.

On March 3, 2021, the district court issued a memorandum and order resolving competing motions for summary judgment. It granted Davi's motion for partial summary judgment, granted the motion of three defendants for summary judgment, and denied the motion of the individual defendants for summary judgment. By order dated March 24, 2021, the district court ordered OTDA to reinstate Davi to the Hearing Officer position on April 1, 2021 and assign him to hearings beginning April 23, 2021. ECF No. 109.

OTDA (the official capacity defendants) appealed. The individual defendants did not. Appeal No. 21-719, Docs. 10 (notice of appearance on behalf of official capacity defendants), 38 at 2 (Form C), 43 (motion to amend caption) at 1-2 (¶ 5), 53, 69 at 1 n.1, 86 at 44-45; JA841.

On March 29, 2021, defendants moved in this Court for a stay pending appeal, as well as an administrative stay by April 1, 2021. In justifying the need for an administrative stay, defendants asserted:

To comply with the district court's order, the State will need to calendar Davi's hearings, and send out notices, as early as April 2, 2021. Notice of Davi's reinstatement and hearings will likely lead to recusal requests and a loss of public confidence in the agency's services in light of his speech disparaging recipients of public benefits.

Appeal No. 21-719, Doc. 20; JA839. In response to Davi's argument that defendants'

“likely” scenario was quite improbable given that 5½ years had passed since he had made the comments in the Facebook Excerpts in a *private* conversation and that there had been no complaints at all (other than the Anonymous Complaint) in all that time, defendants doubled down on their claim: “Although Davi’s words are ‘five years old’ . . . , their corrosive impact on the public’s perception of the agency and their potential to engender recusal requests will be revived as soon as Davi is restored to a public-facing role.” Appeal No. 21-719, Doc. 34 at 12. OTDA did not explain why the public would blame it for complying with a court order. *See also* ECF No. 107 at 2-3, PID 1630-31.

This Court denied OTDA’s request for an administrative stay. Appeal No. 21-719, Doc. 28. Accordingly, OTDA reinstated Davi to the civil service title of Hearing Officer on April 1, 2021. ECF No. 115 at 2. Subsequently, the parties agreed to modify the March 24 order and OTDA agreed to withdraw its motion for a stay pending appeal with prejudice; the stipulated judgment required OTDA to keep Davi in the Hearing Officer position, albeit without any obligation to assign him to conduct hearings, until the issuance of this Court’s mandate. It was approved by the district court on April 16, 2021. ECF No. 115; SA9.

Davi also moved for additional equitable relief, and the district court ordered OTDA to remove any reference to discipline against Davi based on the Facebook

Excerpts from his personnel file. ECF No. 119. OTDA did not appeal that order.

In a Summary Order dated March 24, 2023 (“Summ. Ord.”), this Court vacated and remanded the district court’s order. It found the district court’s *Pickering* analysis wanting in several respects and ordered that court to redo it, while “emphasiz[ing] that we do not intend to suggest or imply in this Order a view as to the conclusion the district court should reach as to the issues raised in this litigation based upon a correct application of the *Pickering* test . . .” Summ. Ord. at 10. Although the individual defendants had not appealed the denial of summary judgment on qualified immunity grounds, this Court nonetheless reached that part of the March 3, 2021 order, and similarly vacated and remanded it. It did not, however, grant the individual defendants summary judgment on qualified immunity grounds.

This Court’s mandate issued on April 14, 2023, at which point the April 16, 2021 order terminated according to its terms. The parties subsequently agreed on summary judgment that Davi remained a Hearing Officer after mandate issued and that OTDA was not required to assign him to conduct hearings. JA918-919 (No. 28).

Upon remand, the district court asked for supplemental briefing and evidence, including evidence from Legal Aid, which the parties proceeded to provide.

On May 29, 2024, the district court issued a memorandum opinion and order that (1) granted partial summary judgment to Davi and (2) denied the individual

defendants' motion for summary judgment. SA1-30.

After reciting the underlying facts, the district court set out the First Amendment balancing test under *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). SA11. It concluded the “only issue here is whether OTDA had an adequate justification for its treatment of Davi.” SA12.

The district court concluded that the arbitrator's decision was entitled to “little weight” because, although the arbitrator was neutral and independent, he had (1) not resolved any First Amendment rights because they were outside the scope of the CBA, (2) there was no indication that he had any special competence “concerning First Amendment matters,” and (3) there was nothing either in the arbitrator's opinion or elsewhere that identified what evidence was before him. SA14. It also concluded that OTDA's prediction of disruption was not entitled to deference because its investigation was not reasonable. SA16-17.

Moving to the *Pickering* balancing test, the district court considered three factors: the “manner, time, and place” of the speech, the content of the speech (and the degree to which it touches on matters of public concern), and the nature of the employee's responsibilities. It concluded that the first two factors favored Davi because Davi did not post his comments during work, they were posted on a private Facebook thread, and they touched squarely on matters of public concern that “lie at

the heart of First Amendment protection,” *viz.*, “welfare programs, their mission, their metrics for success, and their impact on society.” SA22. It held that the third factor favored OTDA, but it did not outweigh the other factors because Davi’s role and responsibilities were constrained, and his recommendations were subject to review. SA23-24. Given that the potential for disruption was only a “narrow possibility,” the district court held that OTDA’s burden was high and it had not met it. SA24.

Moving to the individual defendants’ motion, the district court concluded that a reasonable trier of fact could conclude that Spitzberg and Devine acted with retaliatory intent because the Notice of Discipline that they signed and approved charged Davi with “actual bias despite their knowledge to the contrary.” SA28. As for Schwenzfeier, the court concluded that there was evidence of his involvement in the decision to suspend Davi. SA29.

The individual defendants appealed on June 28, 2024. JA933-934. Appellants’ Br. 22; Appeal No. 24-1778, Doc. 10.1 (Form C) at 3 (Addendum B); Appeal No. 24-2607, Doc. 14.1 (motion to consolidate) at 5 (¶ 9).

The district court entered an order on September 20, 2024 (SA31, the “September 2024 Order”) enjoining defendants and any of their agents at OTDA from taking any adverse employment action against Plaintiff based on the Facebook comments. SA31. The official capacity defendants filed a notice of appeal on October

7, 2024. JA935-937.

Earlier in 2024, Davi had applied for a promotion to the position of Hearing Officer 2. ECF No. 163 at 2. On December 19, 2024, OTDA promoted him to that position “in accordance with the Court’s September 20 order.” *Id.* The parties agreed that Davi would be “exempt” from holding hearings during the pendency of Appeal No. 24-2607, which OTDA maintained was necessary to preserve its “reputational and operational . . . interests,” and that any statute of limitations for any claim or motion that Davi might have related to the promotion would be tolled. *Id.* at 2-3. The court ordered these provisions on December 20, 2024. ECF No. 163.

#### Summary of Argument

OTDA claims that its reasonable predictions of disruption or interference with its operations were entitled to deference. But they ignore this Court’s standard for what a *reasonable* prediction is: the government bears the burden of making a “substantial showing of likely interference” to its operations. Indeed, defendants never mention that standard, at least not on this appeal. *But see* Appeal No. 21-719, Doc. 102 (Reply Brief) at 17 (correctly noting that standard); ECF No. 134 at 7 (PID 1849) (same).

OTDA tries to transform the rule that a government employer need not wait for actual interference from the speech before taking action into authorization that it need

not wait for an actual *reaction* to the speech. Because, other than the Anonymous Complaint, from an individual who remembered Davi's "bullshit" from law school and had no "patience" for him, and who accordingly lied about her role and knowledge, there was not, and has not been, one peep from *anyone* about Davi's Facebook comments. Aside from that one person and the defendants in this lawsuit, Davi's words have been met by "massive apathy." *Pickering*, 391 U.S. at 570.

OTDA's appeal from the September 2024 Order enjoining it from taking any adverse action against Davi based on the Facebook comments is the only matter properly before this Court. As to qualified immunity, and as described in Davi's motion to dismiss, the district court found a genuine issue of material *fact* related to the individual defendants' motivation, which precludes jurisdiction here. The individual defendants try to evade this problem by ignoring the holding of the district court. The district court relied on evidence showing that Spitzberg and Devine promulgated *knowingly* false allegations of actual bias – trumped up charges, in essence – to support its conclusion that there were issues of fact as to their motive. With respect to the district court's denial of OTDA's motion for summary judgment, its breezy insistence that there is no evidence of any improper motive by anyone is both wrong on the facts and irrelevant to this Court's subject matter jurisdiction. A denial of summary judgment is not a final decision under 28 U.S.C. § 1291.

Even if this Court had jurisdiction, there is plenty of evidence, including the evidence of trumped up charges, to create issues of fact on both OTDA's and the individual defendants' motive for taking adverse action against Davi. Reading their brief, one would think that all defendants ever did was assign Davi to "non-public facing" duties. *E.g.*, Appellants' Br. 4 (Issue Presented No. 1), 29, 30, 50, 56. If that were the case, Davi might not have a strong basis for this lawsuit. *Cf. Murray v. Town of North Hempstead*, 853 F. Supp. 2d 247, 265-66 (E.D.N.Y. 2012) (holding that restriction of plumbing inspector to desk duty did not constitute an adverse employment action for First Amendment retaliation claim). But defendants did that, and then much more, even in the face of "massive apathy." They tried to terminate Davi, refused to comply with their contractual obligations, suspended him without pay for six months, inexplicably changed his civil service title, and placed notice of his discipline in his personnel file. There is substantial circumstantial evidence of improper motive, including a comparison of what OTDA did to others with similar speech and/or alleged misconduct, and direct evidence from OTDA's own Rule 30(b)(6) testimony.

#### Argument

On motions for summary judgment, the movant bears the burden of demonstrating the absence of a genuine issue of material fact. *Nick's Garage, Inc. v.*

*Progressive Cas. Ins. Co.*, 875 F.3d 107, 114 (2d Cir. 2017). Where the burden of persuasion at trial would be on the non-moving party, the party moving for summary judgment may satisfy his burden of production under Rule 56 by either (1) submitting evidence that negates an essential element of the non-moving party's claim, or (2) demonstrating that the non-moving party's evidence is insufficient to establish an essential element of the non-moving party's claim. *Id.* Generally, this Court reviews a district court's grant of summary judgment *de novo*, resolving all ambiguities and drawing all reasonable factual inferences in favor of the party against whom summary judgment is sought. *Id.* at 113. Here, though, the weight to be given to an arbitrator's findings is left to the discretion of the trial court, and should be reviewed for an abuse of discretion. *Perry v. Larson*, 794 F.2d 279, 284 (7th Cir. 1986).

When there are cross-motions for summary judgment, each motion should be viewed separately. *Barhold v. Rodriguez*, 863 F.2d 233, 236 (2d Cir. 1988).

Many of the issues that might need to be addressed in public employee free speech cases are undisputed here. SA12. OTDA does not dispute that it took adverse action against Davi because of the Facebook comments, and it no longer disputes that Davi was speaking as a private citizen on a matter of public concern. Accordingly, the issues here are whether OTDA can meet its burden of demonstrating that (1) it reasonably believed that the speech in question would likely interfere with its

operations, (2) the potential disruption outweighed the First Amendment value of Davi's speech, and (3) it acted in response to the potential disruption and not the content of the speech. It bears the burden on each of these, and if it fails on any one of them, it loses. *Locurto v. Guliani*, 447 F.3d 159, 175-76, 180 (2d Cir. 2006). The showing of likely interference must be substantial. *E.g.*, *Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir. 1995) ("the government's burden is to make a substantial showing of *likely* interference") (emphasis in original).

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT DAVI WAS ENTITLED TO PARTIAL SUMMARY JUDGMENT

The district court properly weighed the factors this Court asked it to. It concluded that OTDA failed to meet its burden of showing likely interference with its operations and that Davi's interests in speech outweighed the slight possibility of disruption. Defendants' arguments to the contrary do not create a genuine issue of material fact.

A. The District Court Did Not Abuse Its Discretion In Giving The Arbitrator's Opinion Little Weight

The district court held that the arbitrator's opinion was entitled to little weight. In reaching this conclusion, it noted that there was no issue of First Amendment rights addressed in the arbitration, the arbitrator had no special competence in First Amendment matters, and the record was completely unclear as to what evidence the

arbitrator heard.

In rejecting the proposition that an arbitration opinion should be given preclusive effect, the Supreme Court held that it could be given weight *as evidence*, but that the weight accorded should be left to the court and would depend upon circumstances. *McDonald v. City of West Branch*, 466 U.S. 284, 292 n.13 (1984) (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 n.21 (1974)). “Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with [the statute or constitution], the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue [in the judicial proceeding], and the special competence of particular arbitrators.” *Id.*

Here, defendants submitted no evidence on these factors. Indeed, defendants never submitted the arbitration opinion itself as evidence; to the contrary, they objected to its introduction. JA611 (No. 92). Nor did they submit evidence to show what was presented to the arbitrator, much less what he based his conclusions on, nor did it present any evidence on procedures. They claim that the union and OTDA “presented extensive evidence, argument, and briefing” (Appellants’ Br. 14) in the arbitration, but they cite only the arbitration opinion itself, which (1) does not say that the evidence was “extensive,” (2) neither identifies the evidence presented nor how it relates to the First Amendment issues in this case, and (3) is incompetent hearsay

to prove what transpired. *Lobster 207, LLC v. Pettegrow*, 2023 U.S. Dist. LEXIS 132792, at \*7 (D. Me. Aug. 1, 2023) (citing the general rule that an arbitrator’s award is inadmissible hearsay to prove the truth of the findings found therein). Moreover, the arbitrator could *not* have been aware of evidence (like OTDA’s improper transfer of Davi’s civil service title) that occurred later. *See also* n.1, *supra*.

Finally, OTDA essentially concedes that the arbitrator had no special competence in First Amendment issues. Appellants’ Br. 45 (not required). OTDA might not think such factors are important, but the Supreme Court does. This matters here because the First Amendment requires a “substantial showing of likely interference,” an evidentiary standard irrelevant to the arbitration.

Defendants quote the arbitrator to the effect that Davi’s “words speak for themselves,” Appellants’ Br. 15, but if that is all he based his “findings” on, and not the submission of evidence or the demeanor of witnesses, why should a court give any deference? A court is able to read words for itself. The whole point of *McDonald* and its progeny is to allow federal courts, not arbitrators, to determine important civil rights issues. The district court did not abuse its discretion in giving the arbitrator’s findings little weight.

B. The District Court Properly Concluded That OTDA's Investigation Was Not Reasonable

In concluding that OTDA did not conduct a reasonable investigation, the district court relied on the facts that (1) Spitzberg did not speak to Davi directly, (2) OTDA did not speak to Erin Lloyd until after it suspended Davi, (3) it neither provided Davi with reasonably specific information about the charges against him before its interrogation nor showed Davi the Facebook comments during that interrogation, which ended in a suspension, and (4) other than contacting Lloyd, it did nothing after the suspension. SA16-17.

OTDA does not dispute any of these underlying facts, yet argues that the district court nonetheless erred, and that these facts do not amount to an inadequate investigation, because (1) OTDA was in a hurry because of the danger of Davi's comments, and (2) the cases relied upon by the district court were more complex factually in that the speech was contested. Appellants' Br. 37-39. But these considerations do not really explain the deficiencies noted by the district court, which could have been remedied in little or no additional time. It also ignores the fact that OTDA already had taken Davi off of hearing cases. It had no need to hurry.

More importantly, OTDA ignores its obligation to demonstrate a reasonable inquiry into whether or not the Facebook comments would likely interfere with its

operations. *Heil v. Santoro*, 147 F.3d 103, 109-110 (2d Cir. 1998) (“an employer that has received a report of such [potentially disruptive] speech must make a reasonable investigation before deciding to take action”). The district court concluded that it was unreasonable for OTDA to assume that Legal Aid had received the Anonymous Complaint, SA20, and OTDA does very little to dispute this at all. At best, it claims that, after it had suspended Davi, Lloyd told OTDA that she had sent it to Project Fair (Appellants’ Br. 38). Lloyd plainly held a grudge against Davi from law school, and, accordingly, already had lied about her involvement in the whole affair. (Defendants blithely refer to her as “a member of the public.” Appellants’ Br. 33, 41.) Indeed, given that Legal Aid never received the Anonymous Complaint (JA801-802; JA813-814), it seems highly likely that she *did* lie about sending it. Given her previous misstatements and history with Davi, OTDA should have been well aware of that possibility. Its reliance solely on the word of someone who had already demonstrated her untruthfulness and a grudge against Davi was not reasonable.

And even if she *had* sent it, it was purportedly sent to Project Fair at Legal Aid Headquarters, and neither Project Fair nor its mailbox at Legal Aid existed in November 2015 (JA814-815). (OTDA only claims to have asked Lloyd whether the letter had been sent to Project Fair, not whether it had been returned.) OTDA’s building manager was told of the dissolution (*see supra* at 6), so that knowledge must

be attributed to OTDA. *E.g.*, *Center v. Hampton Affiliates, Inc.*, 66 N.Y.2d 782, 784 (1985). Thus, OTDA knew of Lloyd’s bias, *and* that Project Fair had dissolved, and yet it *still* did nothing else to confirm that anything had been received, much less that Legal Aid or anyone else would do anything about it. OTDA claims that it was not “required to affirmatively contact Legal Aid to verify receipt of the complaint or its impact” because “that would undoubtedly have risked further publication of Davi’s conduct” (Appellants’ Br. 39), but how so? If Legal Aid had received the Anonymous Complaint, and said so, it obviously would not “risk further publication.” And, if it had not, why would OTDA be obligated to disclose any further details? Further, OTDA’s entire argument is based on its insistence that the Facebook comments *had* been publicized; it cannot do so and simultaneously argue that a better investigation might have risked that very thing. SA20.

Spitzberg claimed he made some inquiry. JA393 (¶ 10); SA6. But this is inconsistent with the testimony of OTDA’s Rule 30(b)(6) witness (JA174), and thus is unavailable to OTDA itself. *Aptive Env’tl., LLC v. Vill. of East Rockaway*, 2020 U.S. Dist. LEXIS 243142, at \*18 (E.D.N.Y. Dec. 23, 2020). In any event, Spitzberg’s vague inquiry does not create a genuine issue of material fact on the reasonableness of OTDA’s investigation. SA20. Spitzberg received a *negative response* to his inquiry, which he and OTDA then ignored, so his alleged “scuttlebutt” question could hardly

*support* the reasonableness of OTDA’s investigation (or conclusion).<sup>2</sup>

The only error the district court made was concluding that OTDA’s inadequate investigation only diminished the deference owed to its conclusion. Under *Heil*, a demonstration that it made a reasonable investigation is part of the government’s burden; failing to do so is failing to meet its burden. Accordingly, on this ground alone, this Court may affirm the grant of partial summary judgment to Davi.

C. The District Court Properly Concluded That OTDA Had Not Met Its Burden

Even if OTDA had conducted a reasonable investigation, it failed to meet its burdens.

1. OTDA Did Not Meet Its Burden of Making A Substantial Showing of Likely Interference. – OTDA had no reasonable basis for concluding that interference with its operations was likely, much less did it make a “substantial showing” of that. SA19. “Likely” means more likely than not. *E.g., Maine Lobstermen’s Ass’n v. Nat’l Marine Fisheries Service*, 70 F.4th 582, 595 (D.C. Cir. 2023) (vacating agency’s biological opinion where opinion relied upon worst-case

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<sup>2</sup> In a footnote, defendants claim that they would not have suspended Davi had the interrogation revealed “exculpatory information” (Appellants’ Br. 37 n.6). But they also argue that the only “exculpatory information” Davi could have supplied to OTDA’s satisfaction was that he had not written the Facebook comments (*e.g.*, Appellants’ Br. 9-10, 11). JA177.

scenarios and pessimistic assumptions; “A key term limiting this duty [to refrain from actions likely to jeopardize a species] is ‘likely,’” which means “more likely than not jeopardize a species. No more, and no less.”).

Not only did OTDA not have a reasonable basis for believing that Legal Aid had received the letter at the outset, the evidence either that it had not, or that Legal Aid was indifferent to the complaint, grew with each passing day. The Anonymous Complaint was received on November 4. Nine days passed before the interrogation and the Notice of Suspension, almost eight weeks passed before the Notice of Discipline was sent out, and months went by before OTDA changed Davi’s civil service title. OTDA repeatedly claims it was concerned about requests for “reconsideration of [Davi’s] past decisions,” Appellants’ Br. 10; *see also id.* at 24, 29, 35, but *there simply were not any*. SA6. That was *not* because OTDA took such quick action in removing Davi from conducting hearings, because such action obviously could not change the past. And the fact that there were no requests for reconsideration (combined with the facts that Legal Aid never made requests for recusal and that no one objected when Hearing Notices went out with Davi as the assigned Hearing Officer in November 2015) made it highly unlikely that there would be any requests for recusal in the future.

Given that gaping hole in its “substantial showing of likely interference,”

OTDA argues that it was concerned about its reputation and/or the public's trust in it. Since "reputation" and "trust" are somewhat difficult to measure, OTDA figures this will somehow allow it to circumvent or perhaps eliminate the "substantial showing" requirement. But it can cite no case in which these considerations were deemed dispositive without some reasonable evidence of the reaction of the public. *E.g.*, *Jungels v. Pierce*, 825 F.2d 1127, 1132 (7th Cir. 1987) (reversing dismissal of First Amendment claim by Civil Service Commissioner who had written a letter to the editor claiming that Hispanics were causing neighborhoods to deteriorate; "[n]o evidence was presented concerning public perceptions and their impact, if any, on [plaintiff's] ability to perform his duties as a civil service commissioner"); *Goza v. Memphis Light, Gas, and Water Division*, 398 F. Supp. 3d 303, 321 (W.D. Tenn. 2019) (holding that employee speech should not be restricted "based on a government official's speculation as to the public's eventual reaction").

In short, the district court was correct in concluding that "the potential for disruption to OTDA – while not nonexistent – was slim." SA22. Since showing a "substantial showing of likely interference" was part of OTDA's burden, there was, in fact, no need to weigh this "undifferentiated fear" against Davi's First Amendment rights. *James v. Bd. of Educ.*, 461 F.2d 566, 572 (2d Cir. 1972) (principal's belief that teacher's wearing black armband would be disruptive insufficient because

“undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression”).

2. OTDA Failed To Meet Its Burden of Showing That Its Interests Outweighed Davi’s. – But even assuming *arguendo* that it is necessary to engage in *Pickering* balancing, the district court also correctly held that any slim possibility of interference was outweighed by Davi’s First Amendment interests. The district court emphasized two points here: first, that Davi’s comments were not made during work and “were posted on a private Facebook thread that only Facebook friends of the original poster could see”; and, second, it “touched squarely on matters of public concern.” SA22.

OTDA does not dispute the first factor, nor that it weighs heavily in Davi’s favor. SA18. Moreover, Davi said nothing at all to identify his employment or his work. *See* JA599-600 (¶¶ 49-52); JA75; JA120 (No. 22); JA141-142 (Nos. 15-18). *See also, e.g., Rankin v. McPherson*, 483 U.S. 378, 388 n.13 (1987) (“a purely private statement on a matter of public concern will rarely, if ever, justify discharge of a public employee.”); *Noble v. Cincinnati & Hamilton County Public Library*, 112 F.4th 373, 377, 382 (6th Cir. 2024) (holding that firing of library employee “for a post made on his private Facebook page while he was at home and not working . . . raises . . . First Amendment red flags” even though Facebook page identified plaintiff as library

employee) (cleaned up); *Liverman v. City of Petersburg*, 844 F.3d 400, 409-10 (4th Cir. 2016) (“we find it significant that the officers chose Facebook as the forum for their communication . . . Facebook is a dynamic medium through which users can interact and share news stories or opinions with members of their community”); *Waters v. Chaffin*, 684 F.2d 833, 837 (11th Cir. 1982) (holding that police department could not discipline a police captain for criticizing the chief of police as a “son of a bitch” and a “bastard” in conversation at a bar after several drinks; “In addition to [plaintiff’s] fundamental interest in speaking as he chooses, he has an interest in being free from unnecessary work-related restrictions while off-duty. . . [W]e think that [plaintiff], like everyone, has a legitimate interest in maintaining a zone of privacy where he can speak about work without fear of censure.”). *Cf. Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 191 (2021) (holding that school violated student’s First Amendment rights because, *inter alia*, fact that the offending speech was sent by cellphone to “a private circle of Snapchat friends . . . diminish[es] the school’s interest”); NY Labor Law § 201-i.

As to the second, OTDA insists upon misreading and twisting the actual comments to try to diminish their value. *But cf.* Summ. Ord. at 10 (“this case . . . involv[es] . . . Plaintiff’s exercise of quintessential First Amendment rights”). Thus, an assertion that “it is not the government’s job to subsidize laziness and failure”

(SA3) – does OTDA believe that it *is* the government’s job to subsidize laziness and failure? – is, in OTDA’s misreading, an attack alleging that the “circumstances of certain benefits applicants were due to their own ‘laziness and failure.’” Appellants’ Br. 29; *id.* at 47. An argument against Lloyd’s “morals . . . because they create an underclass dependent on government handouts” (SA4) -- a claim that beneficiaries were *victims* of government policies -- is, OTDA argues, an attack that “demeaned [beneficiaries] as members of ‘an underclass dependent on government handouts.’” Appellants’ Br. 29; *see also id.* 46. Davi’s assertion that he had no sympathy – that is, a form of bias – in favor of “anyone who *refuses* to work and/or get . . . education or training to earn a living wage” (SA3 (emphasis added)) is misread to be a lack of sympathy for “for certain applicants who were *unable* to ‘earn a livable wage’” (Appellants’ Br. 29, emphasis added). (OTDA has never explained why Davi, or any other Hearing Officer, should be biased *in favor of* those who refuse to work.)

If OTDA truly believes that “any objective reading of [the] Facebook comments” (Appellants’ Br. 23) supports its position, why must it mischaracterize them? *See, e.g., Piesco v. N.Y. Dept. Of Personnel*, 933 F.2d 1149, 1152 (2d Cir. 1991) (holding that defendant’s characterization of employee’s speech was

“misleading”).<sup>3</sup>

Remarkably, OTDA then attacks the district court for reading the actual words in context – context, for example, including Davi’s support for a “safety net” (SA3) which OTDA invariably omits – instead of the “expert judgment of OTDA’s senior officials” and the “public’s perception.” Appellants’ Br. 43. In its view, the district court (and this Court) is *bound* by OTDA’s misreadings. If this were so, the First Amendment rights of public employees would be eviscerated. As for the “public’s perception,” the actual public (other than Lloyd) was entirely silent and has been for years.

In short, the district court properly held that Davi simply “offered his views on matters of public concern – welfare programs, their mission, their metrics for success, and their impact on society,” SA22, and gave substantial weight to that speech. *Bieluch v. Sullivan*, 999 F.2d 666, 671 (2d Cir. 1993) (reversing district court for failing to weigh speech more heavily); *Piesco*, 933 F.2d at 1157 (“Speech critical of the government is precisely the kind of speech the first amendment was designed to protect.”).

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<sup>3</sup> OTDA also refers to the district court’s reference to the Facebook conversation as “unsavory,” Appellants’ Br. 46, but the court was plainly referring to the fact that the exchange between Davi and Lloyd became “personal and nasty.” SA3.

It is unlikely that adverse action would be taken against an employee for speech *no one* found offensive or disparaging. Accordingly, statements regarding such “quintessential First Amendment” matters of public concern do not lose weight in the *Pickering* balancing test because the employer labels them “demeaning” or “offensive.” *E.g., Noble*, 112 F.4th at 379, 382 (holding that Facebook post with a “highly offensive message” about Black Lives Matters nonetheless “receives significant First Amendment weight for two reasons: its general content and the context in which it was made”) (internal quotation marks omitted); *Persaud v. City of New York*, 2024 U.S. Dist. LEXIS 87727, at \*3, \*8-\*9 (S.D.N.Y. May 14, 2024) (holding that Facebook comments referring to certain Guyanese as “ghetto rats” who did not deserve jobs for decent, hardworking respectable people “occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection”) (cleaned up). The only Second Circuit authority OTDA cites, *Sheppard v. Beerman*, 317 F.3d 351 (2d Cir. 2003) (Appellants’ Br. 46) involved a law clerk who refused an assignment, cursed at his judge, and claimed the judge had engaged in misconduct. *Id.* at 353, 355. Even with all that, this Court did *not* rely on any diminished value of the speech, but rather solely on the fact that the clerk’s remarks made a “harmonious working relationship . . . difficult to imagine.” *Id.* at 355.

As OTDA notes (Appellants’ Br. 36), speech that seriously harms relationships

between co-workers is a consideration in the balancing, but OTDA has never made any showing that anyone with whom Davi worked with on a daily basis objected to his Facebook comments. To the contrary, Davi's immediate supervisor supported him. JA259-260, JA826. *See also* JA645-646 (principal hearing officer James Dalton explaining that he did not report Davi's comments as expressing bias because they were mainstream views similar to the 1996 Welfare Reform Act).

The district court also held that “the close nexus between Davi’s line of work and the topic of his protected speech heightens the government’s burden.” SA22. Indeed, the Supreme Court repeatedly has emphasized the public’s interest in hearing from government employees with knowledge of programs. *Lane v. Franks*, 573 U.S. 228, 236 (2014) (“There is considerable value, moreover, in encouraging, rather than inhibiting, speech by public employees. For government employees are often in the best position to know what ails the agencies for which they work. . . . The interest at stake is as much the public’s interest in receiving informed opinion as it is the employee’s own right to disseminate it”) (cleaned up); *id.* at 240 (“our precedents dating back to *Pickering* have recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment.”).

The district court also considered Davi’s role at OTDA and his contact with the

public. It concluded that this factor favored OTDA and lowered the burden on OTDA, but that it did not do so sufficiently to allow OTDA to meet its burden of showing that its interests outweighed Davi's. SA23. OTDA, though, claims that the public-facing nature of Davi's role is dispositive. Appellants' Br. 45. But there is plenty of authority demonstrating that an employee's role, while not inconsequential, does not control the *Pickering* balancing test – starting with *Pickering* itself since *Pickering* was a public school teacher who authored a letter published in a newspaper that the school board deemed detrimental to the efficient operation of the district's schools. (The letter was in several particulars false. *Pickering*, 391 U.S. at 570, 581-82.) Nonetheless, his termination violated the First Amendment. *Id.* at 574. *See also Reuland v. Hynes*, 460 F.3d 409, 411-412, 421 (2d Cir. 2006) (holding that demotion of a prosecutor who told *New York* magazine falsely that Brooklyn had “more dead bodies per square inch than anyplace else” violated First Amendment); *Levin v. Harleston*, 966 F.2d 85, 87, 88-90 (2d Cir. 1992) (holding that creation of “shadow classes” for philosophy professor who wrote various public articles that “contained a number of denigrating comments concerning the intelligence and social characteristics of blacks” and creation of committee to investigate limits on academic freedom violated First Amendment); *Piesco*, 933 F.2d at 1151 (Deputy Personnel Director for Examinations in New York City Department of Personnel who said that a moron could pass the

police entrance exam); *James*, 461 F.2d at 568 (teacher who wore black armband); *Noble*, 112 F.4th at 377, 379 (holding that termination of library employee with substantial contact with the public who “shared an insensitive meme” mocking Black Lives Matter, with “an offensive graphic of a vehicle running over protestors,” on his Facebook page violated First Amendment); *id.* at 385 n.5 (“the fact that [employee] was a public-facing employee does not alter this analysis”).

No doubt the false “more dead bodies per square inch” statement in *Reuland* reflected badly on the DA’s office. *Reuland*, 460 F.3d at 424 n.6 (Winter, J., dissenting). That alone is not enough to overcome the significant First Amendment interests of an employee, even a “public-facing” one.

To elevate Davi’s importance, OTDA repeatedly refers to his presence “on the bench.” Appellants’ Br. 10-11, 29, 33. This is rather odd because, if Davi actually *were* a judge, his ability to speak out on issues would not be questioned. *E.g.*, *In re Disciplinary Proceedings Against Richard B. Sanders*, 135 Wash. 2d 175, 192, 955 P.2d 369, 377 (1998) (reversing reprimand against Supreme Court Justice who spoke at an antiabortion rally; the “limitations [in the Canons of Judicial Conduct] must not be interpreted in the individual case to go so far as to permit sanctioning speech and conduct that does not clearly and convincingly lead to the conclusion that the words and actions call into question the integrity and impartiality of the judge”). *See also*

*Republican Party v. White*, 536 U.S. 765, 776-77 (2002) (holding that rule precluding judicial candidates from announcing a position on any legal issue violated the First Amendment); *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 228-229 (7th Cir. 1993); *Papa v. New Haven Federation of Teachers*, 186 Conn. 725, 444 A.2d 196 (1982). In any event, Davi was not a judge.

OTDA's cases all involve (1) speech less central to matters of public concern and (2) evidence of substantial public interest or concern with the speech. *Pappas v. Guiliani*, 290 F.3d 143 (2d Cir. 2002) involved racist and anti-semitic diatribes that the police officer in question tried to publicize (*id.* at 147, 149) and which were the subject of several newspaper and TV reports (*id.* at 145). *Melzer v. Bd of Educ. Of the City School Dist. Of the City of New York*, 336 F.3d 185 (2d Cir. 2003) involved a teacher who was a "self-described pedophile" and member of the North American Man/Boy Love Association who had been seen in a TV news expose at a NAMBLA meeting, which was picked up by other news agencies. He became the center of heated discussion in the community; he admitted that it would be difficult for him to report an incident of child molestation at the school; and an expert in psychology had testified that his continued presence in the classroom would provoke anxiety for the average student. *Id.* at 190-91, 199. In *Piscottano v. Murphy*, 511 F.3d 247 (2d Cir. 2007), plaintiffs were correction officers. Their "speech" was wearing the colors of

an outlaw motorcycle gang that had been reported to have engaged in violent criminal activity. Although this Court held that speech to touch on a matter of public concern (despite plaintiffs' concession that it did not), it is hardly at the heart of the First Amendment. A reporter for a major Connecticut newspaper made a freedom-of-information inquiry of the Department of Corrections regarding plaintiffs. *Id.* at 255, 276.

## II. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER ANY OTHER ISSUE

OTDA claims that this Court should not only reverse or vacate the order granting Davi injunctive relief, but also instruct the district court to grant it summary judgment.<sup>4</sup> But, for several reasons, this Court lacks jurisdiction over the part of the May 2024 Order that denied OTDA summary judgment.

First, OTDA – the official capacity defendants – did not file a timely notice of appeal. Although a timely notice of appeal for “defendants” was filed on June 28, 2024, the papers filed in this Court make clear that that notice was only on behalf of the individual defendants. Appellants’ Br. 22; Appeal No. 24-1778, Doc. 10.1 (Form

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<sup>4</sup> Puzzlingly, OTDA asserts that the Court should “reverse the . . . injunction reinstating Davi as a hearing officer and grant partial summary judgment in favor of OTDA.” Appellants’ Br. 23. The September 2024 Order did not “reinstate” Davi to anything but simply precluded OTDA from taking adverse action against Davi in the future based on the Facebook comments. SA31.

C) at 3 (Addendum B); Appeal No. 24-2607, Doc. 14.1 (motion to consolidate) at 5-6 (¶ 9). The notice of appeal filed on September 30, 2024 refers to the May 2024 Order, as does the amended notice filed on October 8. JA935-937. But while the part of the May 2024 *opinion* that supports the September 2024 Order granting Davi injunctive relief may be disputed in challenging that relief, these later notices were not timely to appeal the part of the May 2024 Order that denied OTDA's motion for summary judgment.

Moreover, the order *denying* OTDA summary judgment is not a final judgment, and therefore not appealable under 28 U.S.C. § 1291. Nor can this Court assert pendent jurisdiction over it, which is a narrow exception that this Court “will only exercise . . . in ‘exceptional circumstances.’” *Myers v. Hertz Corp.*, 624 F.3d 537, 553 (2d Cir. 2010). That standard is “not satisfied when we are confronted with two similar, but independent, issues, and resolution of the non-appealable order would require us to conduct an inquiry that is distinct from and ‘broader’ than the inquiry required to resolve solely the issue over which we properly have appellate jurisdiction.” *Id.* at 553-54. OTDA's motion for summary judgment requires that it meet the burden under the *Pickering* balancing test *and* show that it did *not* act because of the content of Davi's speech. *Locurto v. Guliani*, 447 F.3d at 175-76; *Richardson v. Pratcher*, 48 F. Supp. 3d 651, 669 (S.D.N.Y. 2014) (“it is never

objectively reasonable to act with a retaliatory intent, regardless of which direction Pickering balancing tips.”). In granting Davi’s motion for partial summary judgment, the district court did not reach that second issue with respect to OTDA; accordingly, this Court would have to make that “distinct” and “broader” inquiry, making pendent jurisdiction improper. In short, this Court is “able to determine conclusively whether” Davi wins on the *Pickering* balancing test “without discussing, much less deciding” whether OTDA acted with retaliatory intent. *Blue Ridge Invs., L.L.C v. Republic of Arg.*, 735 F.3d 72, 82 (2d Cir. 2013).

For the reasons set forth in Davi’s motion to dismiss the lead appeal, this Court also lacks jurisdiction over the individual defendants’ appeal of the denial of their motion for summary judgment on qualified immunity grounds, because that denial was based on a genuine issue of material fact, not an issue of law. Specifically, the district court found an issue of fact over the motivation with which defendants acted, and that a trier of fact could conclude that they acted because of the content of Davi’s speech. Central to this holding was the district court’s conclusion that at least two of the individual defendants charged Davi with “actual bias” in their effort to terminate him even though they did not believe that his Facebook statements reflected actual bias. *E.g.*, SA26-27; ECF No. 103 at 27. Defendants have never explained why they charged Davi with something they did not believe to be true.

Defendants claim that the district court actually denied the individual defendants' motion because of a lack of "actual disruption." Appellants' Br. 21, 26, 56. But the opinion makes no mention of "actual disruption" in denying the individual defendants' motion.

The individual defendants do not explain why they did not appeal the March 3, 2021 order denying them summary judgment on the same ground; the simplest explanation is that they recognized that the district court's holding relied on a genuine issue of material fact, not a question of law. It is true that this Court nonetheless addressed that part of the March 2021 order despite the individual defendants' failure to appeal, and the individual defendants try to take advantage of that on this appeal. (As far as Davi can ascertain, the Summary Order is the only opinion from any federal appellate court that relies on pendent appellate jurisdiction to assert jurisdiction over the denial of a motion for qualified immunity.) But this appeal is different. First, the other order appealed from was entered months after the order denying the individual defendants' motion. Under a pendent appellate jurisdiction theory, this Court had no jurisdiction over the lead appeal for about four months, and then suddenly obtained jurisdiction when a subsequent notice of appeal was filed. Second, the individual defendants' appeal is no more "inextricably intertwined" with the order granting Davi partial summary judgment than OTDA's appeal of the denial of its summary judgment

motion. In either case, this Court must make a separate and distinct inquiry from the balancing test that resolved Davi's motion: whether defendants acted because of the content of Davi's speech.

III. DEFENDANTS CANNOT MEET THEIR BURDEN OF SHOWING AN ABSENCE OF GENUINE ISSUES OF MATERIAL FACT THAT WOULD SUPPORT SUMMARY JUDGMENT IN THEIR FAVOR

Assuming *arguendo* that this Court has jurisdiction over the other parts of defendants' appeal, genuine issues of material fact preclude summary judgment for defendants on any issue. To the extent that there are genuine issues of material fact concerning whether a reasonable employer would have found that Davi's Facebook comments presented a risk of interference, that itself would preclude summary judgment. *Gorman-Bakos v. Cornell Co-op Extension of Schenectady County*, 252 F.3d 545, 557 (2d Cir. 2001) (holding that question of whether plaintiffs' speech "had the potential to disrupt the [organization's] functioning" could not be resolved on summary judgment).

Moreover, the district court concluded that a reasonable trier of fact could conclude that Spitzberg and Devine charged Davi with trumped up charges of actual bias that they themselves did not believe. Because they pretend that the district court's conclusion was based on the absence of "actual disruption," defendants never bother to address the evidence supporting that finding.

Aside from the trumped-up charges that the district court relied upon, there is more evidence supporting the conclusion that defendants were motivated by the content of Davi's speech. In reviewing this evidence, several principles deserve emphasis. First, defendants do not usually admit to an improper motive; circumstantial evidence is often used to show improper intent. *Rogers v. Lodge*, 458 U.S. 613, 618 (1982). Second, a deviation from standard procedure is evidence of pretext or improper intent. *Weiss v. JPMorgan Chase & Co.*, 332 Fed. Appx. 659, 664 (2d Cir. June 5, 2009). Third, entities do not have their own intent; OTDA's intent can be attributed to those who made particular decisions on its behalf – and vice versa (their intent can be attributed to OTDA). *In re Fox Corp. Derivative Litig.*, 2024 Del. Ch. LEXIS 388, \*3 (Del. Ch. Ct. Dec. 27, 2024) (“Corporations don't have minds or bodies. They only act when humans cause them to act.”). Defendants do not dispute that Spitzberg and Devine made the decision to issue the Notice of Suspension and the Notice of Discipline seeking to terminate Davi. Appellees' Br. 13-14. As Part “B” below demonstrates, Schwenzfeier was also involved.

A. Additional Evidence Of Retaliatory Intent

As the individual defendants concede (Appellants' Br. 53), it is clearly established that government employers cannot use alleged concern about potential disruption to retaliate against the content of speech. Thus, an issue of fact with respect

to defendants' motive precludes summary judgment on qualified immunity grounds. *E.g., Johnson v. Ganim*, 342 F.3d 105, 117 (2d Cir. 2003).

1. Rule 30(b)(6) Testimony. – One strong piece of evidence that OTDA acted because of the content of Davi's speech is that its Rule 30(b)(6) witnesses *said so*. One (Schwenzfeier) said it did not matter whether Davi actually communicated his views on social welfare to anyone, so long as he believed them. JA178, 180; ECF No. 103 at 25-26. The other (*see* JA402 ("G")), when asked to explain why Davi's punishment was so much more severe than that for Edwin Pearson, accused of displaying bias against social service agencies, testified:

Mr. Davi's comments put into question whether or not *an appellant* would have a fair hearing before the entire OAH. Mr Pearson's comments did not put into question whether or not *appellants* could get a fair hearing before OAH. There's a difference in severity in the potential impact. Therefore, there's a difference in the severity of the punishment.

JA529-530 (emphasis added). Since social service agencies have the same rights to a fair hearing and to seek recusal as appealing beneficiaries (and, indeed, appear with much greater frequency), a reasonable trier of fact could conclude that OTDA (and thus any decision-maker for OTDA) acted because of the content of Davi's speech, and not because of any possible interference with its operations. *Goza*, 398 F. Supp. 3d at 320.

2. Comparators. – In examining how OTDA treated others, the Court should examine those who were “similarly situated” in all material respects. This requires a reasonably close resemblance of the facts and circumstances, but the cases need not be identical, and the behavior need only be of “comparable seriousness.” *Radwan v. Manuel*, 55 F.4th 101, 132 (2d Cir. 2022). These are questions for the trier of fact. *Id.* Nor is there any requirement that the same decisionmaker impose the adverse action. *Id.* at 136. Thus, in *Radwan*, a Title IX case, a female soccer player who “gave the finger” at a TV camera in a post-game celebration was deemed “comparable” to a male football player who kicked a football into the stands during a game. *Id.* at 134.

Here, Davi presented evidence of three comparable incidents: those involving Edwin Pearson, Mark Reid, and Paul Stewart. *See* Statement of the Case, Part “J.” Although Pearson’s acts were a few years earlier, he engaged in speech suggesting bias against a social service agency (specifically NYC HRA), and was accused of bias and other rules violations; OTDA tried to suspend him for two weeks, and settled for four days.

Reid and Stewart’s misconduct came at around the same time as Davi’s Facebook comments, and both were investigated by Spitzberg. Reid expressed “unprofessional animosity” towards a social services agency and received no adverse action. Stewart engaged in misconduct that actually harmed appealing beneficiaries

(convincing them to withdraw meritorious appeals). Spitzberg's Notice of Discipline (JA831-833) proposed a two week suspension. Stewart continued to hold hearings for *3½ years* while the NOD was pending; eventually he received a suspension of less than two weeks and returned to holding hearings. JA827. Davi and Stewart's mutual immediate supervisor (Kenneth Luciano) believes the two cases "can be compared." JA826.

3. OTDA Continued To Send Notices With Davi Listed As The Hearing Officer. – After Davi was taken off hearings in November 2015, OTDA continued to send out Hearing Notices indicating that he would be the Hearing Officer for those hearings. *See* discussion *supra* at 14. Yet almost 5½ years later, OTDA told this Court that merely sending out Hearing Notices with Davi identified as the Hearing Officer would cause irreparable harm to it, even before any hearings with Davi took place, through recusal requests and a loss of public confidence in its services. JA839.

A reasonable trier of fact could conclude that OTDA had no such concern about the Hearing Notices in November 2015 because it knew that no such reaction would result, and, accordingly, that it was not motivated by any concern of disruption or public reputation.

4. Transfer of Civil Service Title. – In July 2016, OTDA (through Faresta) unlawfully transferred Davi's civil service title from Hearing Officer to Senior

Attorney without his consent, which had adverse consequences for Davi. Spitzberg apparently convinced Faresta that Davi could not retain the civil service title of Hearing Officer. JA453-456; JA929-931. OTDA's rationale for this move is that Davi could not hold hearings and Hearing Officers must be capable of being assigned to hearings. (ECF No. 99 (PID 1580) n.3.) It has not actually submitted any evidence to support this proposition, and it would be a disputed issue of fact if it had. Andrew Purrott is a Hearing Officer and there is evidence that he has not conducted a hearing in years. *See* discussion at 4, *supra*. Even more on point, *Davi himself* was a Hearing Officer between April 2023 and December 2024 (and still is), and the parties have agreed that OTDA did not have to assign him to hold hearings after April 2023. JA918-919 (No. 28). No court order required OTDA to retain him in the Hearing Officer title during that time, but it did so even though it purportedly believes he is just as incapable of holding hearings as he was in 2016. ECF No. 163 at 2, PID 2824. A reasonable trier of fact could conclude from this evidence that Spitzberg and OTDA's transfer of Davi's civil service title in July 2016 was entirely gratuitous and vindictive, motivated by the content of his speech.

5. Davi's Status As General Counsel Designee. – In July 2016, OTDA made Davi a General Counsel Designee. In that role, he both reviews the substance of the Commissioner's Designee's decision and the Hearing Officer's decision not to recuse.

He issues these opinions under his own authority (rather than the recommendations he made as a Hearing Officer), and his name appears on his decisions and can be seen by appealing beneficiaries. *See* discussion *supra* at 17.

Given this, a reasonable trier of fact could conclude that OTDA's concern about its reputation and the public's trust are pretexts. OTDA claims otherwise, because the appealing beneficiaries are not in the same room at the same time as Davi (and, thus, his role as General Counsel Designee is not "public facing"). *See* ECF No. 136-1 at 45 (PID 1921) ("he sits in a separate room from the applicant . . . after the hearing is over").

This is both absurd and ironic.<sup>5</sup> It is absurd that appealing beneficiaries would care only about the impartiality of the OTDA employees in physical proximity and not ones who make decisions. It is ironic because OTDA falsely accuses Davi of "demeaning" appealing beneficiaries, yet it is OTDA that argues that they lack the basic intelligence to understand that they may not be in the same room with every decisionmaker. A trier of fact is still permitted to use common sense. *United States v. Anderson*, 747 F.3d 51, 70 (2d Cir. 2014) ("a jury [is not] required to leave its

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<sup>5</sup> It is also inconsistent with one of defendants' main cases, *Pappas*. There, the court held that it did not matter that Pappas had no contact with the public because the public was unlikely to make such a distinction. *Pappas*, 290 F.3d at 149-50. *See* Appellants' Br. 49.

common sense at the courthouse door”). Accordingly, it could reject OTDA’s implausible explanation and conclude that OTDA made Davi a General Counsel’s Designee because it knew, having heard no complaints about the Facebook comments for months, that the public was not even remotely concerned about Davi’s impartiality.

6. OTDA’s Refusal To Follow The CBA. – OTDA handed Davi the pre-signed Notice of Suspension on November 13, 2015 at the close of the interrogation, suspending him without pay. Pursuant to the CBA, by November 18 it had to either serve him with a Notice of Discipline or convert the suspension to one with pay and put him back on the payroll. It is undisputed that it did neither one. In fact, in an effort to pressure him, it did not put him back on the payroll until mid-January.

OTDA’s excuse for this failure is that it began negotiations with Davi to resolve the matter immediately after November 13. This is disputed. JA627 (¶ 6); JA629 (¶ 2). Moreover, as OTDA concedes, it is irrelevant. JA734-735 (No. 20) (“immaterial”). Settlement negotiations did not excuse OTDA from its contractual obligation to restore Davi to payroll and they refused his written demand to be restored. A reasonable trier of fact could conclude that OTDA breached the CBA and kept Davi off payroll to pressure him because of its distaste for the content of his speech.

*Radwan*, 55 F.4th at 140 (holding that failure to follow proper procedures and efforts to frustrate internal appeal raised issue of fact that proffered reason for terminating scholarship was pretextual).

7. OTDA's Silence. – OTDA asserts that it moved Davi away from “public-facing” duties – and, of course, it did much more – because it was concerned about the agency’s reputation and the public’s trust. *E.g.*, Appellants’ Br. 9-10, 42. Yet, it said nothing to Legal Aid about Davi, JA149-150 (No. 8), nor is there any evidence it said anything to anyone. Anyone reading a decision of Davi as the General Counsel’s Designee – where he reviews the decisions of Commissioner’s Designees and could reverse Hearing Officers’ decisions not to recuse – would think he had received a promotion. OTDA’s failure to communicate at all to Legal Aid or the public about Davi could lead a reasonable trier of fact to conclude that OTDA’s professed concern with its reputation was pretextual.

B. Schwenzfeier’s Involvement

Appellants’ very brief argument with respect to Schwenzfeier is that he was not involved in the independent decision to issue a Notice of Suspension. Appellants’ Br. 57-58. Schwenzfeier said otherwise. JA504-505 (meeting on November 5 included Schwenzfeier), JA512-513 (collective decision that Davi could not be a hearing officer), JA177 (decision to suspend without pay made); ECF No. 103 at 25-26. Nor

do appellants cite any evidence to support the proposition that Schwenzfeier’s “review” and “discussion” of the Notice Of Discipline was just perfunctory. *E.g.*, *Blyden v. Mancusi*, 186 F.3d 252, 264 (2d. Cir. 1999) (identifying ways that supervisors can be held liable under Section 1983 for the actions of their subordinates). Accordingly, the district court correctly concluded that there is a genuine issue of fact concerning Schwenzfeier’s involvement.

Conclusion

For the foregoing reasons, the September 2024 Order of the district court below should be affirmed. The appeal from the May 2024 Order should be dismissed for want of appellate jurisdiction.

Respectfully submitted,

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Certificate of Compliance

Pursuant to Fed. R. App. P. 32(g), I certify that this brief contains 13,963 words exclusive of the items listed in Fed. R. App. P. 32(f).

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