21-719

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SALVATORE DAVI,

Plaintiff-Appellee,

v.

MICHAEL HEIN, in his official capacity, SAMUEL SPITZBERG, in his individual and official capacities, KRISTA ROCK, in her official and individual capacities, and JILL SHADICK, in her official capacity,

Defendants-Appellants,

and

ERIC SCHWENZFEIER, in his individual capacity, SHARON DEVINE, in her individual capacity, SAMUEL ROBERTS, in his individual capacity, DONNA FARESTA, in her individual capacity, and WILMA BROWN-PHILIPS, in her individual and official capacities,

Defendants.

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

APPELLEE SALVATORE DAVI'S BRIEF

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Statement of Jurisdiction

Plaintiff-appellee Salvatore Davi ("Davi") agrees with appellants' Statement of Jurisdiction, except to the extent that it suggests that this Court has jurisdiction over the part of the March 3, 2021 memorandum and summary judgment order (SPA1 - SPA31, the "March 2021 M&O") that denied the motion of the official capacity defendants ("Defendants") for summary judgment. For the reasons set forth in Part II of the Argument section, this Court lacks appellate jurisdiction over that part of the order.

Statement of Issues

1. Is Davi entitled to summary judgment and injunctive relief 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?

2. Does this Court have jurisdiction over the part of the March 2021 M&O that denied Defendants' motion for summary judgment? If so, were Defendants entitled to summary judgment?

Statement Of The Case

These facts are taken from facts presented in the court below, with disputes resolved in Defendants' favor. Many are taken from Davi's statement of undisputed facts (E.D.N.Y. Loc. R. 56.1) which, for the most part, Defendants did not dispute with competent evidence. Instead, they mostly responded to Davi's

56.1 Statement by asserting objections to the various statements therein as "immaterial" or "vague" or stating "legal conclusions." A567 - A603. The court below at least implicitly rejected some of these objections. *See* SPA3 (citing Rule 56.1 Response ¶ 23 (A575) in support despite defendants' objections); SPA7 (citing Rule 56.1 Response ¶ 77 (A588) in support despite defendants' objection).

Under the E.D.N.Y.'s Local Rule 56.1(c) and (d), an assertion in a Rule 56.1 statement will be deemed admitted if it is not "specifically controverted" by the party opposing summary judgment, and each response of the opposing party controverting a statement in the moving party's submission "must be followed by citation to evidence which would be admissible . . ." Defendants' objections did not comply with these requirements. *E.g.*, *Stewart v. Fashion Inst. of Tech.*, 2020 U.S. Dist. LEXIS 214357, *27 (S.D.N.Y. Nov. 16, 2020) (holding that Rule 56.1 counterstatement "largely does not contain meaningful responses" where party "merely recites identical conclusory and boilerplate objections that Defendant's factual statements violate Federal Rule of Civil Procedure 56(c) and Local Civil Rule 56.1(a)."); *Leeber Realty LLC v. Trustco Bank*, 316 F. Supp. 3d 594, 600 (S.D.N.Y. 2018) ("[T]he purported legal objections Defendant raises are without merit . . . and, in any event, do not actually respond to or dispute the specific facts, supported by citations to admissible record evidence in the relevant paragraphs."); *Famoso v. Marshalls of MA, Inc.*, 2015 US. Dist. LEXIS 134174, *4 n.3 (E.D.N.Y. Sept. 30, 2015) ("Plaintiff's Rule 56.1 Counter-Statement of Material Facts is replete with responses neither admitting nor controverting a fact asserted by

Defendants, but instead merely objecting that the asserted fact is 'argumentative' or 'immaterial.' Not responding to an assertion of fact in this manner is grounds for deeming the fact admitted.").

Defendants' objections were frivolous. *Compare, e.g.*, A595-A596 (¶¶ 103-104) (objecting to term "title" as "vague") *with* A375 (¶ 6) (Director of Human Resources Donna Faresta testifying that "[t]he CBA did not allow us to transfer Plaintiff to another civil service title without his consent.") and A376 (¶ 10) (using phrase "civil service title" several times).

Since Defendants also assert (*see* Appellants' Brief ("Defs' Br.") 38-43) that the court below erred in denying its motion for summary judgment, additional facts will be presented in the section (Argument, III) addressing that argument.

A. OTDA, OAH, And Fair Hearings

The Office of Temporary and Disability Assistance ("OTDA") is a state agency of the State of New York. It administers social welfare programs in the State of New York. A45 (¶ 3).

During the year 2015, OTDA's mission and purpose emphasized the importance of assisting work-capable public assistance recipients in achieving entry into the workforce. A564-A565 (¶¶ 3-5); A46 (¶ 6); A98; A125-126 (No. 77).

Social service districts are agencies that make initial decisions on the eligibility of individuals for benefits under the programs that OTDA administers.

The New York City Human Resources Administration ("NYC HRA") is one such social services district and one that frequently appeared before Davi. Social service districts may contract with private contractors to perform some of their duties. N.Y. Soc. Serv. Law § 20-c(1)(b). A570 (¶¶ 6-7); A46 (¶¶ 7-8).

The Office of Administrative Hearings ("OAH") is an office in OTDA. It is responsible for holding hearings ("Fair Hearings") when an individual (the "Appellant") appeals the decision of a social services district with respect to that individual's benefits or eligibility under a social services program administered by OTDA. A570 (¶¶ 8-9); A46-A47 (¶¶ 9-10); N.Y. Soc. Serv. Law § 22.

Fair Hearings are usually conducted by Hearing Officers or Supervising Hearing Officers. A570-A571(¶ 10); A47 (¶ 11).

B. Davi's Work As A Hearing Officer

Davi was hired in 2010 to work as a Hearing Officer at OAH. As a Hearing Officer, Davi conducted Fair Hearings and accordingly heard appeals from initial denials of eligibility and reductions of benefits for various public assistance programs. Appearing before him at these hearings were the Appellants (the applicants for the benefits) and the New York City social service districts (or private contractors) that had made the initial determination with respect to the benefits being appealed. A572-573 (¶¶ 16-18); A47 (¶ 14); A20-A21 (¶ 14) & A33 (¶ 14); A106 (Nos. 5-6).

Davi worked as a Hearing Officer, and conducted Fair Hearings, through

early November 2015. 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. A573-A574 (¶¶ 19-20); A46 (¶¶ 15-16); A106-A107 (Nos. 7-8); A33 (¶ 15).

Davi received both six-month and annual performance reviews as a Hearing Officer. In the annual performance review, a reviewer would set forth more detailed written comments about Davi's job performance. In each annual review for the years ending in March 2011, 2012, 2013, 2014, and 2015, Davi's reviews were quite positive, as was the feedback in each of his six-month recertification assessments. A574-A575 (¶¶ 21-22); A48 (¶¶ 17-18); A107 (No. 9); A314 ("Hearing Officer Davi has excellent time and attendance, . . . maintains good control over his hearings and drafting time, . . . deals effectively with difficult parties at the hearings, . . . holds hearings in a substantial number of subject areas,. . . [and] prepares a complete record of each hearing.").

The Fair Hearings that Davi conducted generally had one of three disputed areas: documents, appointments, or income. The first involved whether the Appellant provided some document requested by the agency. The second involved whether the Appellant appeared at an appointment for a discussion of his/her eligibility for benefits. The third involved calculating Appellant's income and determining eligibility. A575 (¶ 23); A48 (¶ 19); A239-A241.

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. A575 (¶ 24); A49 (¶ 20); A241-A242.

C. Objections To Hearing Officers

Parties to a Fair Hearing can object to a particular Hearing Officer presiding over that hearing by seeking recusal of a Hearing Officer based on the bias of the Hearing Officer prior to the hearing, as well as at the hearing. A575-A576 (¶¶ 25-27); A49 (¶¶ 21-23); A243-A245; A262-267.

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. A576 (¶¶ 28-29); A49 (¶¶ 24-25); A329; A244-A245; A262-A263.

An Appellant 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, an Appellant may also file suit in federal court alleging that a Hearing Officer's bias deprived them of due process. A576-A577 (¶¶ 30-31); A49 (¶¶ 26-27).

D. 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") 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. A577-A578 (¶¶ 32-33); A64-A66; A108 (No. 12); A111 (No. 22). The Facebook Excerpt had an exchange between Salvatore P. Davi and Erin Lloyd. 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. The court below set forth a complete quotation of the salient parts of the Facebook Excerpt. SPA4-SPA5.

The Anonymous Complaint had a "cc" on it indicating that the author was sending a copy of the letter to Project Fair, a Legal Aid organization that represents Appellants. A577-A578 (¶ 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." A578 (¶¶ 35-38); A64-A66; A111 (No. 22).

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 Salvatore Davi and whether she "merely observed" his comments. A578-A579 (¶¶ 39-41); A163-A165, A174-A175;

SPA4.

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 on Facebook. A579-A580 (¶¶ 42, 43); A247-A248; A160-A163; A318.

E. OTDA Removes Davi From Conducting Fair Hearings

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. A582-A583 (¶¶ 54-55); A111-A112 (No. 23); A251-A252.

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. A583 (¶¶ 56-57); A51-A52 (¶ 39); A246, A249-A250.

F. OTDA's Investigation Of The Anonymous Complaint

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. A582 (¶ 53); A175-A176; A224-A225; A203; A327.

According to Spitzberg, the OAH Director, he asked a contact at Legal Aid whether there had been any scuttlebutt concerning any Hearing Officer. His contact told him that there had not been. A379, A382 (¶¶ 2, 10).

In the ensuing months, no Appellant (1) asked for reconsideration of a decision in which Davi had served as the Hearing Officer at the Fair Hearing or (2) filed an Article 78 proceeding or any action claiming a due process violation on the ground that Davi's Facebook comments showed that he was biased. A581 (¶¶ 45-46); A138-A139 (Nos. 5-6).

OTDA did not receive any communication from any member of the public, aside from the author of the Anonymous Complaint, concerning the Anonymous Complaint, the Facebook Excerpt, or Davi's views concerning social welfare programs. A580 (¶ 47); A60-A61 (¶ 11).

OTDA had no other statements by Davi in the exchange on Facebook other than those that appeared in the Facebook Excerpt sent with the Anonymous Complaint. A581 (¶ 48); A178-A179; A248. In the Facebook Excerpt, Davi did not identify himself as an employee of OTDA, did not make any specific reference to any law, regulation, or program with respect to which he made recommendations, did not mention any specific applicant for aid, and did not mention any person who had appeared before him as a Hearing Officer. A581-A582 (¶¶ 49-52); A66; A111 (No. 22); A132-133 (Nos. 15-18).

G. OTDA's Interrogation And The Notice of Suspension

Davi was interrogated by a representative of OTDA (Wendy Phillips) on the morning of 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. At the end of the interrogation, Ms. Phillips handed Davi a letter (the "Notice of Suspension") from OTDA Director of Human Resources Donna Faresta apprising him that he was suspended without pay effective immediately. A583-A586 (¶¶ 58, 64-67); A53 (¶¶ 46-47); A118-A119 (Nos. 48-52); A73-A74. The Notice of Suspension did not mention the Anonymous Complaint or the Facebook Excerpt. A73-A74.

OTDA sends out Hearing Notices to the parties to an appeal. OTDA continued to send out Hearing Notices for hearings scheduled in November and early December with Davi's ALJ number (291) on them, indicating that he was going to be the Hearing Officer for the hearing. Advocacy organizations that represent Appellants are familiar with Hearing Notices and can look up the ALJ associated with an ALJ number on a public website. A587-A588 (¶¶ 74-76); A253-A255; A60 (¶ 9); A320-A325.

From November 1, 2015 to December 31, 2015, OTDA had no evidence that any Appellant or Appellant's representative complained about Davi being the assigned Hearing Officer on any hearing scheduled for November or early December or sought his recusal from a Fair Hearing ahead of the date of the

hearing. A588 (¶ 77); A122-A123 (No. 65); A138 (No. 5).

H. The Notice Of Discipline

The Collective Bargaining Agreement ("CBA") that governed Davi's employment permits suspension without pay under limited circumstances. It states: "A notice of discipline shall be served no later than five (5) calendar days following any such suspension . . ." OTDA did not serve a notice of discipline within five days of his notice of suspension. A586-A587 (¶¶ 68[2], 69); A79 (§ 33.4(a)(1)); A119-A121 (Nos. 54-55, 61-62). Although OTDA was then obligated to convert his suspension without pay to one with pay, Davi was not restored to the payroll until January. A587 (¶¶ 70-71); A53-A54 (¶¶ 49-53).

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. A589 (¶¶ 78-79); A88-A93; A123-A124 (Nos. 66, 67, 72); A54 (¶ 56).

Davi grieved the proposed discipline pursuant to the CBA. Had Davi not grieved the proposed discipline pursuant to the CBA within fourteen days of service of the notice, his employment at OTDA would have been terminated on January 13, 2016. A589-A590 (¶¶ 80-81); A55 (¶ 58); A93; A123 (Nos. 66, 67).

The Notice of Discipline identified five statements, all of which were taken from the Facebook Excerpt, which OTDA relied upon to support its decision to terminate Davi. They were:

1. This article and the underlying study use the wrong metric. These programs should be judge[d] by how many people or families they get back on their feet and off government assistance, not how well these programs enable their recipients to be poor and collect government assistance for the rest of their li[v]es.[1]

2. It is not the government's job to subsidize laziness and failure.

3. But I have zero sympathy for anyone who refuses to work and/or get the education or training to earn a livable wage.

4. This country has turned welfare into a generational career path!

5. If you are going to be that nasty then fuck you, too. Your 'morals' suck because they create an underclass dependent on government handouts that translates into generational poverty, while at the same time taxing productive members of our society to the breaking point.

The Notice of Discipline set forth seven different charges based on these five statements, *viz.*, that they (1) expressed opinions relative to a matter before the agency, (2) showed a bias, prejudice, and prejudgment against social welfare beneficiaries, (3) indicated that Davi was not impartial and objective, (4) violated OTDA's Mission and Purpose to assist work-capable public assistance recipients in achieving entry in the workforce, and to assist welfare recipients and potential welfare recipients in entering employment and promoting access to economic supports, (5) were likely to raise suspicions among the public that Davi was likely engaged in acts in violation of his trust in violation of § 74(3)(h) of New York's Public Officers Law, (6) gave an unreasonable basis for NYC HRA representatives to have the impression that they may unduly enjoy Davi's favor in violation of

[1] Although one of the five statements that supported OTDA's effort to terminate Davi, Defendants' brief on appeal omits this statement in its summary of the Facebook Excerpt. Defs' Br. 7.

§ 74(3)(f) of New York's Public Officers Law, and (7) showed that he was not an impartial Hearing Officer. A590-A592 (¶¶ 82-84, 87); A87-A93; A123 (Nos. 66, 67).

I. The Arbitration

Pursuant to Davi's grievance of the proposed discipline, an arbitration was held. In its closing brief in the arbitration, OTDA argued that Davi could not be a Hearing Officer because "aware that the magnifying glass will always be on him, and his decisions will be scrutinized," he would "be pre-disposed to rule in favor of Appellants and a pre-disposition to make any ruling (whether against or in favor of an Appellant) is bias." A592-593 (¶¶ 88-90); A55-A56 (¶¶ 63-64); A95-A100; A125-A126 (No. 77).

The arbitrator ruled that Davi's First Amendment rights and any alleged violation thereof were outside the scope of the CBA and the arbitration. A593 (¶ 91).

The arbitrator's decision upheld charges 1, 2, 4, and 5, and rejected charges 3, 6, and 7. 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 as his job as a Hearing Officer. 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.

A593-A594 (¶¶ 92-95); A358-A365; A56 (¶ 66); A61 (¶ 14); A134 (No. 82).

Prior to a decision of the court below (Dkt. No. 119), the Notice of Discipline remained in Davi's personnel file. If asked by a potential employer of Davi, people in OTDA could have disclosed the existence of the Notice of Discipline. The fact that OTDA suspended Davi was also reflected in various databases that can be accessed by other New York State agencies. A594 (¶¶ 96-98); A184-A185; A188-A190.

Davi petitioned to vacate the arbitration award in an Article 75 proceeding in New York State court, naming OTDA and Roberts as respondents. OTDA and Roberts cross-moved to dismiss the petition. The petition to vacate was denied, and the cross-motion granted, on the ground that Davi was not a party to the arbitration and thus had no standing to move to vacate. A595 (¶¶ 101-02); A61-A62 (¶ 14); A56 (¶ 68); A367-A371.

J. 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, Human Resouces Director Donna Faresta apprised Davi that OTDA would transfer his civil service title to the position of Senior Attorney. The transfer of Davi's civil service title has had adverse consequences for him, including a loss of relative seniority. A595-A597 (¶¶ 103-11); A102; A128 (Nos. 83-85); A56-A57 (¶¶ 69-76); A191-A192.

Hearing Officers' potential duties include (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. A597 (¶ 112); A50 (¶ 28); A59 (¶ 6); A302-A306.

Andrew Purrott is a Hearing Officer in OAH. From March 13, 2013 through at least when discovery was taking place in the fall of 2017, Andrew Purrott did not conduct Fair Hearings. During that time, his duties as a Hearing Officer were similar to Davi's duties when he was a Senior Attorney. Each of them defended OTDA in Article 78 proceedings, and each reported to the same supervisor (Frank Seminerio). A598 (¶¶ 113-15); A206; A231-A232; A61 (¶ 12); A342-353.

In or around July 8, 2016, OTDA General Counsel Krista Rock designated Davi as a General Counsel's designee. In that role, Davi reviews, and determines the correctness of, Hearing Officers' initial denials of requests by parties at the Fair Hearings to recuse those Hearing Officers. Anyone who is aware of an allegation of bias by a Hearing Officer is supposed to send the allegation to Davi, and he reviews all requests for recusal made at a Fair Hearing. A598-A599 (¶¶ 116-18); A50 (¶¶ 31-32); A206, A210. Davi's decisions can have an effect on an Appellants' social welfare benefits. His name and signature appear on these decisions and become part of the file for that appeal, which can be reviewed by the Appellants affected. A599-A600 (¶¶ 119-23); A50-A51 (¶¶ 33-37); A204-A206; A61 (¶ 13); A355-A356.

K. Complaints About Davi's Performance As A Hearing Officer And OTDA's Responses

On or around August 18, 2015, an Appellant wrote to OTDA complaining about Davi's rudeness at a Fair Hearing he conducted on August 17, 2015, as well as the conduct of the Commissioner's Designee for the case, Kenneth Luciano. A600 (¶ 124); A60-A61 (¶ 11); A337-A338.

Darla Oto, then a Principal Hearing Officer at OTDA, had previously been involved in OTDA's discipline against Davi (A246-A251). She wrote a responsive letter to the Appellant dated January 28, 2016. Ms. Oto did not reopen the hearing or assign it to another Hearing Officer, did not modify the decision that had been issued by the Commissioner's Designee, and did not mention the Facebook Excerpt in her letter. A600-A601 (¶¶ 125-27); A60-A61 (¶ 11); A339-A340.

On June 25, 2016, another Appellant wrote to OTDA to complain about a Fair Hearing that Davi had conducted on May 11, 2015. The letter stated that Davi "seemed not to be impartial," based on Davi's behavior at the Fair Hearing and the decision of the Commissioner's Designee, which had stated that the Appellant's claims were not credible. The letter did not mention the Facebook Excerpt or any of Davi's views on social welfare programs in general. A601-A602 (¶¶ 128-30); A60-A61 (¶ 11); A329-A330.

The underlying decision of the NYC HRA related to the Public Assistance program and was based on the Appellant's alleged failure to report for a work assignment. OTDA's response to the letter, dated July 7, 2016, was drafted by

Oto. It stated that it "found no impropriety on the part of Mr. Davi, nor any evidence of bias." The response found no basis to reopen, or change the outcome of, the hearing, and did not mention the Facebook Excerpt. A602-A603 (¶¶ 131-34); A60-A61 (¶ 11); A333-A334; A208-A209.

L. Proceedings In The Court Below

Davi filed the complaint in this action on September 13, 2016. A4. An amended complaint was filed on April 6, 2017. A18-A30. The discovery deadline was set for October 27, 2017 (ECF No. 29 at 2), and the parties reported that discovery had been largely completed in a letter dated November 15, 2017 (ECF No. 62). Pursuant to the individual rules of the then-presiding district judge (Chief Judge Mauskopf), each side wrote in late 2017 seeking a pre-motion conference prior to filing summary judgment motions (ECF Nos. 67, 69) and a conference was finally held on May 23, 2019. A12. The parties' summary judgment papers were filed on October 3, 2019. On December 4, 2020, the case was reassigned to Judge Korman. A15.

The March 2021 M&O resolved the competing motions for summary judgment by granting Davi's motion for partial summary judgment on the question of Defendants' liability, denying Defendants' motion for summary judgment (as well as the motions of three individual defendants, Samuel Spitzberg, Sharon Devine, and Eric Schwenzfeier, for summary judgment based on qualified immunity), and granting the motion for summary judgment of three other

individual defendants (Donna Faresta, Krista Rock, and Samuel Roberts).

After reciting the facts – including a detailed recitation of the Facebook Excerpt (SPA4-SPA5) and the arbitration (SPA7-SPA9) – the March 2021 M&O first addressed Defendants' argument that Davi was "[p]rocedurally [b]arred" from relitigating issues decided by the arbitrator (*viz.*, that Davi was disciplined because of the risk of disruption). SPA12. The court below found that "[t]he Supreme Court has long held . . . that arbitrations pursuant to a collective bargaining agreement do not preclude re-litigation of the issues or claims in a subsequent suit under § 1983." *Id.* Accordingly, it held that "the arbitrator's decision is not entitled to issue-preclusive effect." *Id.*

The March 2021 M&O then addressed whether summary judgment was appropriate on Davi's First Amendment claim. Noting that there was no dispute that Defendants disciplined Davi because of his speech (SPA 10), the court below then laid out the two-part inquiry required by the case law: whether the employee spoke as a citizen on a matter of public concern and whether the government had an adequate justification for treating the employee differently from any other member of the general public. SPA 11. It found that Davi "easily satisfie[d]" the first requirement because he plainly spoke as a private citizen on a matter of public concern. SPA13. It held that Davi's "comments were used to further [his] argument that welfare benefits should be limited," *id.*, and thus met the public concern requirement even if they were construed as Defendants wished. SPA15-SPA16.

The court then, under the test articulated in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), balanced Davi's First Amendment interests against the interests of OTDA in promoting the efficiency of the public services it performs, noting that the government's interests also included maintaining discipline and integrity, preventing disruption of operations, and avoiding having the judgment and professionalism of the agency brought into serious disrepute. It also noted the relevance of the employee's position within the agency. SPA 16-17. Following circuit precedent, it held that "[w]hile [defendants] need not prove actual harm, [they] bear the burden of making a 'substantial showing' that Davi's speech was 'likely to be disruptive' at this step." *Id.* It also found that, because Davi's speech touched on a matter of significant public concern, Defendants had to show a correspondingly greater risk of disruption to its operations. *Id.*

The court below found that Davi's "comments [were] primarily political speech about the proper role of government, which is among the most highly protected speech in our constitutional order." SPA18. It also concluded that the fact that Davi's speech was in his personal capacity, did not mention any role at OTDA, and was made on his own time all weighed in his favor. *Id.*

It then concluded that Defendants "failed to carry their burden to demonstrate Davi's comments were reasonably likely to disrupt OTDA's operations." *Id.* It pointed to Spitzberg's conversation with his contact at Legal Aid, indicating no concern on the part of that organization with Davi. SPA18-SPA19. It also noted that Legal Aid did not, in fact, make any objection despite

the fact that Davi's name continued to be listed as the relevant Hearing Officer on notices of hearing and that Appellants will sometimes request recusal in advance of hearings. SPA19-20. The absence of any objections "sharply undercuts [OTDA's] theory that Davi's comments were likely to substantially disrupt [its] operations." SPA20. The court below also pointed out that no "motion for reconsideration [was] ever filed based on Davi's comments in a case he had previously decided." *Id.* The court concluded that, although an employer's reasonable predictions of disruption are entitled to substantial weight, OTDA's predictions were not supported by an evidentiary foundation and were thus mere speculation. SPA20-SPA21.

The court opined that Davi's speech provided Defendants with a basis for his initial removal from the calendar for an investigation into whether his views affected his job performance. SPA21. It nonetheless concluded that Defendants did not meet their burden of showing actual bias that affected his job performance or that the comments were likely to cause disruption. *Id.*

Summary of Argument

Defendants have changed tactics once again. Gone are the arguments that Davi's speech was not on a matter of public concern or that the arbitrator's findings are collateral estoppel, prominent features of their argument in the court below. The latter is replaced by an argument that the court below failed to give adequate "weight" to the arbitrator's findings, an argument they conspicuously did

not make in the court below.

One thing has not changed, though, and that is Defendants' insistence that they can take Davi's words out of context and pretend that they were vicious attacks on Appellants rather than comments on what he believes are the ill-effects of certain government policies. It takes great ingenuity (or, perhaps, disingenuity) to effect this transformation. Thus, "it is not the government's job to subsidize laziness and failure" (A66, SPA4) – laziness and failure being characteristics almost everyone has some capacity for – becomes an insulting attack that the "circumstances of certain applicants were due to their own laziness and failure." Defs' Br. 23; *see id.* at 37. A statement that one has "zero sympathy for anyone who refuses to work and/or get the education or training to earn a livable wage" (A66, SPA4) becomes "'zero sympathy' for certain applicants who were *unable* to 'earn a livable wage'" (Defs' Br. 23) (emphasis added).[2] An attack on his debating opponent's "morals . . . because they create an underclass dependent on government handouts" becomes an effort to "demean" Appellants because they are part of that dependent underclass. *Id.* And so on.

In the end, though, Defendants' argument comes down to the proposition that they have no need for any evidence at all to overcome Davi's First Amendment right to express himself in a private Facebook conversation. As long

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[2] Why precisely Davi or any other Hearing Officer should have sympathy for *either* side – much less those who have failed to comply with the work requirements that Hearing Officers are generally obligated to enforce (A575 (¶ 24); A49 (¶ 20); A241-A242) – is a mystery that Defendants have never bothered to explain. Sympathy is a form of bias.

as the relevant decisionmakers *think* that his speech threatened the appearance of impropriety or *think* that it would cause disruption, that is sufficient. And this is so no matter how much evidence is to the contrary. When OTDA delivered the final coup de grace in July 2016 by gratuitously (and illegally) changing Davi's civil service title, *eight months* had gone by and not one request for reconsideration of any decision for which Davi had conducted the Fair Hearing had been made based on the Facebook Excerpt. Not one. Indeed, aside from the Anonymous Complaint, written by someone who had a history (which she lied about) with Davi, no member of the public at all complained about, or even commented upon, his Facebook opinions.

At the end of their brief, Defendants claim that this Court should grant them summary judgment. But, as they acknowledge, that question requires examination of a completely different issue than those that governed Davi's motion – whether OTDA was motivated by the content of Davi's speech rather than its potentially disruptive effects – and, accordingly, this Court lacks appellate jurisdiction over that part of the March 2021 M&O. Indeed, Defendants' argument on this point appears to be an improper backdoor effort to appeal the denial of certain defendants' motion for summary judgment on qualified immunity grounds.

Assuming *arguendo* that this Court has appellate jurisdiction over the denial of Defendants' motion for summary judgment, the denial should be affirmed. There was substantial evidence to support the proposition that OTDA was motivated by the content of Davi's speech. Most conspicuously, OTDA's Rule

30(b)(6) witness testified that OTDA would have disciplined Davi even if his views *were entirely unknown to the public*. A167, A169. As the court below noted (SPA26), this testimony undercuts Defendants' position that they were motivated by the potential disruption from the alleged public dissemination of the Facebook Excerpt.

Argument

In reviewing an order resolving a motion for summary judgment, this Court's review is *de novo*. On a motion for summary judgment, the moving party's burden on any elements on which it will bear the burden at trial is to demonstrate that there is no genuine issue of material fact. Fed. R. Civ. P. 56. For any elements on which the non-moving party bears the burden at trial, the moving party may produce evidence negating an element of the nonmoving party's case or show that the non-moving party will be unable to meet its burden. *B.C. v. Mt. Vernon School Dist.*, 837 F.3d 152, 157 (2d Cir. 2016). If movant meets its initial burden, the party opposing the motion must produce evidence sufficient to create a genuine issue of material fact. Evidence should be construed in the light most favorable to the non-moving party. *Id.* at 158.

I. THE COURT BELOW CORRECTLY CONCLUDED THAT DEFENDANTS VIOLATED DAVI'S FIRST AMENDMENT RIGHTS; DEFENDANTS' ARGUMENTS TO THE CONTRARY ARE MERITLESS

Davi's First Amendment rights were violated when Defendants tried to fire him, and ended up suspending him without pay for six months, for what he wrote

in the Facebook Excerpt. Defendants' arguments are in error.

A. The Court Below Correctly Concluded That Davi's Interest In Free Speech Outweighed Defendants' Unsupported Concerns About Disruption

A plaintiff asserting a First Amendment violation must show that his speech was protected by the First Amendment, that the defendant took an adverse action against him, and that there was a causal connection between the adverse action and the protected speech. *Matthews v. City of New York*, 779 F.3d 167, 172 (2d Cir. 2015). Defendants do not dispute the second and third elements. Davi was plainly the subject of adverse action because of the Facebook Excerpt.

In determining whether a public employee's speech is protected, a court first must determine whether the employee spoke as a citizen on a matter of public concern, and, second, determine whether the relevant government entity had adequate justification for treating the employee differently from any other member of the public based on the government's needs as an employer. *Id.* Again, Defendants do not dispute the court below's conclusion that Davi easily met the first part of the test.

To show that its needs as an employer justify treating a public employee who engaged in speech on a matter of public concern differently from a citizen, the government must show that (1) it reasonably believed that the speech in question would likely cause disruption in the workplace, (2) the potential disruption outweighed the First Amendment value of the 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).[3] The showing of likely disruption 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). It must be based upon a reasonable investigation. *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"). Finally, there must be a "proportion between the nature of the speech and the nature of the sanction that may ensue." *Jeffries*, 52 F.3d at 13.

In determining the value of the speech for purposes of the balancing between it and the potential disruption, "[t]he content of the employee's speech is an important consideration in determining the extent of the employer's burden to show likely disruption." *Dangler v. New York City Off Track Betting Corp.*, 193 F.3d 130, 140 (2d Cir. 1999). "The more the employee's speech touches on matters of significant public concern, the greater the level of disruption to the government that must be shown." *Jackler v. Byrne*, 658 F.3d 225, 237 (2d Cir. 2011). *See also Jeffries*, 52 F.3d at 13. The manner, time, and place is also important in weighing the First Amendment value to be accorded the speech, and

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[3] Davi's motion for partial summary judgment focused on just the first two of these elements. Dkt. No. 94 (Pl's SJ Opposition & Reply Memo.) at 10. In opposing Defendants' motion for summary judgment, it argued that a genuine issue of material fact existed with respect to the third. *Id.* at 20-24.

the burden placed on the government, as is whether the speech was made in private, on the employee's own time. *Dangler*. 193 F.3d at 139; *Gusler v. City of Long Beach*, 823 F. Supp. 2d 98, 129 (E.D.N.Y. 2011) (quoting *Lewis v. Cowen*, 165 F.3d 154, 162 (2d Cir. 1999)).

Indeed, in *Rankin*, the Supreme Court held that "a purely private statement on a matter of public concern will rarely, if ever, justify discharge of a public employee." *Rankin v. McPherson*, 483 U.S. 378, 388 n.13 (1987). *See also, e.g.*, *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. [Plaintiff] spoke the words at issue after he had left work, while he was out of uniform, while he was out of the department's jurisdiction, and to a person he considered a friend. We think it quite reasonable that he assumed he could vent a little steam over drinks, and we 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. Pappas v. Guiliani*, 290 F.3d 143,147 (2d Cir. 2002) (noting that plaintiff "deliberately sought to publicize his views"; "If [plaintiff police officer] had written his bigoted views in a private diary, or revealed them in confidence to his family or intimate friends, and they had become known accidentally, or through a breach of confidence, that case would present different

considerations"); *id.* at 149 (distinguishing *Rankin* because "Pappas disseminated his diatribes publicly while the *Rankin* plaintiff was overheard speaking privately to a coworker"). *See also Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2047 (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").

Accordingly, the balancing test on which the government bears the burden, between the value of the speech and the employer's interests, is a fact-sensitive one. *E.g.*, *DiMarco v. Rome Hospital and Murphy Memorial Hospital*, 952 F.2d 661, 665-66 (2d Cir. 1992). *See also Locurto*, 447 F.3d at 173 ("neat doctrinal boxes are of unusually limited usefulness").

Here, Defendants failed on summary judgment to produce evidence to meet their burden. Indeed, they rely entirely on the Facebook Excerpt. But Davi's speech in the Facebook Excerpt was just his views over proper welfare policy, and whether there is a need for a work or training requirement (which, in the main, the law requires). The exchange on Facebook was not made publicly; only those participating in the private Facebook conversation would be aware of it. While the Anonymous Complaint indicated that a copy of it was sent to Project Fair, Spitzberg's communication with a contact there not only failed to provide a substantial basis for believing in a likely disruption, it suggested that Project Fair was either unaware of the Anonymous Complaint or indifferent to it. In any event, it was unreasonable to believe that an Appellant could properly call for Davi's

recusal based upon the Facebook Excerpt. The Fairness Hearings did not involve policy questions like those addressed in the Facebook Excerpt, but rather administrative issues like whether Appellants had kept their appointments or provided proper documentation, or the proper calculation of their income.

Defendants did not seek to terminate Davi until several months after they received the Anonymous Complaint, and they changed his civil service title long after that. In the meantime, no Appellant, represented by Project Fair or otherwise, ever sought reconsideration of *any* negative determination by a Commissioner's Designee based upon the views that Davi expressed in the Facebook Excerpt. Although his ALJ number continued to appear on Notices of Hearing after he was removed from conducting Fair Hearings, no one complained about the possibility of his conducting those hearings or sought his recusal. While the government need not show actual disruption, but only likely disruption, it must make a *substantial* showing and the absence of any actual disruption is hardly irrelevant. *Caracillo v. Village of Seneca Falls*, 582 F. Supp. 2d 390, 415 (W.D.N.Y. 2008) (citing *McFall v. Bednar*, 407 F.3d 1081, 1090 (10th Cir. 2005)).

All of this undermines Defendants' case even *before* taking the value of Davi's speech into account. As the court below found, that value is weighty and substantially increases the burden Defendants must meet. Davi's speech involved an important issue of public policy and was made on his own time in a private Facebook conversation that he made no effort to publicize. *See* Dkt. No. 93 (Defs' Memorandum of Law) at 11 (PageID#1339) (arguing erroneously that Davi's

speech was not on a matter of public concern because it was not available to the public). OTDA tried to access the conversation through the Facebook website, but could not because it was private. Davi did not identify himself as connected with OTDA. Davi has both a strong First Amendment interest and a privacy interest in expressing views to a limited group of listeners in response to a news article concerning whether social welfare programs like food stamps should be expanded. *Waters v. Chaffin*, 684 F.2d at 837.

Even judges (who, unlike Davi, make actual binding decisions about the cases before them) cannot be precluded from expressing views on general issues of the day. *E.g.*, *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 228-229 (7th Cir. 1993) (holding that rule prohibiting judicial candidates from announcing their views on disputed legal or political issues violated the First Amendment because it went "far beyond speech that could reasonably be interpreted as committing the candidate in a way that would compromise his impartiality"; "Almost anything a judicial candidate might say . . . could be taken to cast doubt on his capacity to decide some case impartially . . . If . . . [a judicial candidate] announced boldly that he did not think juries should be used in most civil cases, he could be thought to be casting doubt on his capacity to preside impartially at civil jury trials, to rule on motions for directed verdict in such trials, to conduct a fair jury voir dire, to administer the rules of evidence in jury trials, and to decide on proposed jury instructions."); *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"); *Papa v. New Haven Federation of Teachers*, 186 Conn. 725, 444 A.2d 196 (1982) (holding that judge's speech critical of teachers' strikes a month before case commenced was not sufficient ground to require recusal in case involving teachers' strike). The free speech rights of even actual adjudicators (much less those like Davi, whom Defendants unreasonably describe as "on the bench," Defs' Br. 22, 25) cannot be circumscribed by these kinds of undifferentiated fears because they do not outweigh the First Amendment interests involved.

Defendants violated the First Amendment in two other ways that the court below did not rely upon. First, while OTDA investigated whether Davi was actually biased – and concluded that he was not – it failed to make a reasonable investigation of the likelihood of potential disruption. *Heil v. Santoro*, 147 F.3d at 109-110. SPA18 (finding that Spitzberg's excuse for not further investigating "is hard to comprehend"). Indeed, when OTDA finally sought to terminate Davi, at the end of 2015, the evidence was overwhelming that there would be no disruption. No complaint based upon the Facebook Excerpt of any kind had been made by *any* Appellant who had appeared before Davi at a Fair Hearing. Against the weight of that evidence, OTDA's "investigation" consisted largely of its own say-so that

there would likely be disruption.

Second, both Defendants' proposed punishment of termination, and the punishment that it imposed after the arbitration – six months suspension without pay – is utterly disproportionate to any harm that Davi's speech could possibly have caused to OTDA. *Jeffries*, 52 F.3d at 13 (holding that there must be a "proportion between the nature of the speech and the nature of the sanction that may ensue."). Assuming *arguendo* that Davi could no longer conduct Fair Hearings, giving him different work to do (similar to the work that Hearing Officer Andrew Purrott had been doing for years) would have fully protected its interests. Indeed, OTDA has never explained how a six month suspension without pay served its interests in efficient operations. SPA8-SPA9 (noting that arbitrator failed to explain the same thing).

B. Defendants' Arguments To The Contrary Are Meritless

Defendants offer a hodgepodge of arguments attacking the conclusion of the court below. First, they claim that the court below failed to properly weigh its interests in removing Davi from holding hearings. Second, they claim that it overweighed Davi's interest in free speech. Third, they claim that the court below failed to give sufficient weight to the arbitrator's findings of fact. The last of these arguments was waived when Defendants failed to make it in the court below but, in any event, all three are wrong.

1. The Court Below Properly Weighed Defendants' Interests. – Defendants assert that the court below failed to take into account the possible

damage to its "appearance of impartiality" that Davi's speech could have caused. Defs' Br. 22-25, 27-35. This arguments fails on many grounds.

Defendants assert that "the district court failed to even mention – let alone weigh – this important governmental interest." Defs' Br. 28. In fact, the court below specifically stated that "having the judgment and professionalism of the agency brought into serious disrepute" (SPA17, cleaned up) was a consideration weighing on the employer's side. But this is just a part of determining whether the employer has reasonably concluded that the speech will cause "potential disruption." Thus, the three-part test that this Court repeatedly has set forth to assess public employee speech cases (*see* p. 24, *supra*) does not separately mention questions about "professionalism" or "impartiality."[4] A diminution in the reputation of an agency for impartiality would likely lead to a disruption of its operations. When the court below properly concluded that Defendants did not meet their burden of making a substantial showing with non-speculative evidence that Davi's speech would likely cause disruption to its operations, it necessarily decided that Defendants had failed to make a substantial showing that the speech was likely to adversely affect OTDA's reputation for fairness and impartiality. The court did not conclude that "Davi's having created the appearance of bias was not sufficient to justify transferring him," Defs' Br. 28, but rather that his speech did not create an appearance of bias.

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[4] *See, e.g.*, *Gusler v. City of Long Beach*, 715 Fed. Appx. 68, 70 (2d Cir. 2018) and cases cited therein; *Castine v. Zurlo*, 756 F.3d 171, 175 (2d Cir. 2014) and cases cited therein.

Second, and relatedly, Defendants' belief about its reputation was (and is – *see, e.g.*, Defs' Br. 23) based entirely on a distortion of Davi's speech, in which concerns about government policies' effects on potential recipients of social welfare benefits becomes an attack on the recipients themselves. *See* Summary of Argument. The potentially disruptive effects of Davi's comments on government policy cannot be compared to the potentially disruptive effects of the racist and anti-Semitic screeds in *Pappas v. Giuliani*, 290 F.3d 143 (2d Cir. 2002) or the obvious conflict of interest that a candidate for office would have serving on the Election Commission that would decide election disputes in *Castine v. Zurlo*, 756 F.3d 171 (2d Cir 2014). Davi made recommendations to Commissioner's Designees on cases where the issues were whether someone had kept an appointment or responded to a request for information. Indeed, OTDA itself recognized this difference when it had Davi complete his recommendations for cases on which he had conducted Fair Hearings even *after* it received the Anonymous Complaint.

Defendants complain that the district court should have given their conclusion that there would be recusal requests greater weight. Defs' Br. 26-27, 28, 30-31. Defendants ignore the fact that their conclusion flew in the face of the undisputed facts that, prior to seeking his termination at the end of December 2015, (1) no one had requested reconsideration of any decision in which Davi had been the Hearing Officer based upon the Facebook Excerpt and (2) no one had requested recusal in any upcoming hearing in which OTDA had sent notices indicating that

Davi would be the Hearing Officer. (Defendants claim that there is "nothing in the record [that] suggests that applicants ordinarily make recusal requests in advance." Defs' Br. 31 n.9. Perhaps they should have presented evidence to support that argument instead of objecting to Davi's statement of undisputed fact on that topic as "immaterial." A576 (¶ 26). The court below properly viewed that failure as a concession. SPA19-SPA20.)

The absence of any requests for reconsideration is particularly telling because they would come only after an Appellant had lost and would have nothing at all to lose by claiming that Davi was biased because of the Facebook Excerpt. Oddly, Defendants rely on defendant Rock's self-serving claim on November 5, 2015 that "Legal Aid may attempt to set aside some of these decisions," (Defs' Br. 33, citing A.460) but ignore the fact that, on December 29, 2015, when OTDA sought to terminate Davi, neither Legal Aid, nor anyone else, ever had.

Defendants' position would eviscerate this Court's rule that the government employer has the burden of demonstrating a *substantial* showing of *likely* disruption, and that the burden increases for speech addressing significant matters of public concern. The "substantial" showing, for Defendants, is the fact that *they* thought there would be disruption, and nothing more. They have cited no piece of evidence, other than the Anonymous Complaint, that it had prior to seeking Davi's termination at the end of 2015 that suggested that anyone even objected to Davi's views expressed in the Facebook Excerpt, and that evidence was from a plainly biased source, which Defendants never questioned. If that is all it takes to punish

public employees for their speech, then public employees will be at the mercy of their government employers.

2. The Court Below Properly Weighed Davi's Interest In Speech. – Defendants argue that "the district court overvalued Davi's interest in the Facebook comments." Defs' Br. 35. Their argument fails.

Defendants first suggest that Davi's interest in speech can be devalued because it was "vulgar, vituperative, or ad hominem in character." Defs' Br. 36. But even assuming *arguendo* this were true, the cases Defendant rely on here are ones in which the vulgar speech was made at work and/or to supervisors or co-workers. *E.g.*, *Sheppard v. Beerman*, 317 F.3d 351, 355 (2d Cir. 2003) (law clerk yelling at judge); *Morris v. Crow*, 117 F.3d 449, 458 (11th Cir. 1997) ("profane chewing out of one of her superiors--in full view of her co-workers"). The courts in these cases concluded that such speech was likely to be disruptive to the workplace, not that that speech was less valuable because of its manner of expression.

Defendants next rely on the fact Davi was a Hearing Officer and thus served in a "public contact" role to diminish the importance of his speech. Defs' Br. 37. But this has nothing to do with the value of his speech, which is based on its content; again, it simply repackages one of the "potential disruption" arguments. Indeed, none of the cases that Defendants cite uses this consideration to devalue the interest that employees have in their speech.

Finally, Defendants return to their old standby of cherry-picking and

reinterpreting Davi's speech as one in which "he repeatedly demeaned benefits recipients." *Id.* For example, Defendants entirely ignore Davi's statement that "I certainly agree that there most certainly should be a safety net, but it should be of limited duration and designed to get people back to self-sufficiency," even though it emphasizes the sentence before ("It is not the government's job to subsidize laziness and failure") and after ("But I have zero sympathy for anyone who refuses to work and/or get the education or training to earn a livable wage") that one. A66. Its recasting of the speech is inaccurate and unfair. The court below correctly concluded that "Davi's comments are primarily political speech about the proper role of government, which is among the most highly protected speech in our constitutional order." SPA18. The district court cited *Snyder v. Phelps*, 562 U.S. 443 (2011) for this proposition, a case in which a far stronger case could be made that the speech was demeaning. *Id.* at 454 (holding that signs used in protest, including ones stating that "God Hates Fags" and "Fags Doom Nations," "plainly relates to broad issues of interest to society at large, rather than matters of 'purely private concern.'").

The interest that Davi had in speaking on an important matter of government policy contrasts this case with many others in which the speech barely qualified as speech on a matter of public concern. *See generally Blackman v. N.Y. City Transit Auth.*, 491 F.3d 95, 99 (2d Cir. 2007) ("the fact that [plaintiff's] . . . comments at most only minimally touch on matters of public concern means that the government's burden, at the balancing stage, is at its lowest."). *Locurto v.*

Giuliani, 447 F.3d 159 (2d Cir. 2006), is distinguishable on both sides of the scale. The speech in *Locurto* was a parade float which "commented" on future integration by plaintiffs covering their face in black lipstick, wearing Afro wigs and ratty clothing, eating a watermelon, including two buckets of fried chicken on the float, and recreating a vicious racially-motivated murder. This Court just assumed *arguendo* that such "speech" may have tangentially touched on issues of "public concern" (*id.* at 175); it was not at its heart. (The named plaintiff testified at an administrative hearing that "he did not intend for the float to represent political commentary" and that his sole goal was to "win the prize for funniest float." *Id.* at 166.) Further, the float was covered extensively by the press, which reported that police officers and firefighters had taken part in it. Protesters led marches through plaintiffs' local community. *Id.* at 167. In *Piscottano v. Murphy*, 511 F.3d 247 (2d Cir. 2007), plaintiffs' "speech" was wearing the colors of an outlaw motorcycle gang, which, although held to touch on a matter of public concern (despite plaintiffs' concession that it did not), is not at the heart of the First Amendment. *See also Pappas*, 290 F.3d at 149 (distinguishing *Rankin* because "Pappas was venting his personal racial bias, while the *Rankin* plaintiff (albeit in foolishly hyperbolic terms) was discussing the governmental policies of the President").[5]

In contrast, Davi was speaking on a question of vital importance: the role of

[5] In *Pappas*, neither member of the two-person majority even held that the speech was on a matter of public concern. Judge Leval simply "assume[d] without deciding" (*Pappas*, 290 F.3d at 146) that to be the case, and Judge McMahon would have concluded that it was not.

government in providing social welfare benefits. Like the teacher in *Pickering*, who wrote a letter concerning his school board's allocation of resources between academics and athletics, Davi was well-situated to comment about overall policy even though his job had little to do with it. *Pickering*, 391 U.S. at 572 ("Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."); *id.* at 574 (stating that "the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by [the] teacher").

3. Defendants Waived Any Argument That The Court Below Failed To Give Proper Weight To The Arbitrator's Findings And, In Any Event, The Argument Is Meritless. – Defendants claim that the court below failed to give the arbitrator's findings adequate weight. Defs' Br. 18, 34-35. They apparently concede that this would not be dispositive; all agree that the arbitration did not address Davi's First Amendment rights and thus the arbitrator made no effort to engage in the *Pickering* balancing test. A593 (¶ 91).

The first problem with Defendants' argument is that they failed to make it in the court below. Rather, they argued only that the arbitration decision was collateral estoppel on the issue of OTDA's actual motive – that is, pretext (*not* whether its conclusion of likely disruption was reasonable). *See* Dkt. No. 93 at 15-18. The court below addressed that collateral estoppel argument and rejected it.

SPA12. Defendants do not renew it here on appeal. Defendants waived a "probative weight" argument, and should not now be able to attack the court below for failing to address an argument they did not make.

The significance of Defendants' failure to raise this issue is underscored by the rule itself: an arbitrator's decision is admissible, but the weight it should be given is up to the trier of fact and depends upon circumstances. *McDonald v. City of West Branch*, 466 U.S. 284, 292 n.13 (1984) (quoting *Alexander v. Garnder-Denver Co.*, 415 U.S. 36, 60 n.21 (1974)). *See also Siddiqua v. New York State Dep't of Health*, 642 Fed. Appx. 68, 71 (2d Cir. March 16, 2016) ("this prior arbitration does not preclude a federal court from reconsidering *all* factual issues underlying [plaintiff's] statutory . . . claims") (emphasis added); *Wallace v. Suffolk County Police Dep't*, 809 F. Supp. 2d 73, 87 (E.D.N.Y. 2011) (noting that an arbitrator had rejected the "very same evidence and arguments that the trial jury here found . . . gave rise to a First Amendment violation," and accordingly concluding that the arbitrator's conclusion "should not be accorded . . . even minimal weight" on issue of whether defendants' determination that plaintiff was fit for light duty caused damages); *Petrovits v. New York City Transit Authority*, 2003 U.S. Dist. LEXIS 18347, *12 (S.D.N.Y. Oct. 12, 2003) (giving less weight to arbitration decision in a Title VII case where "the arbitrator was not presented with . . . evidence of sex discrimination"). *Cf. Collins v. New York City Transit Authority*, 305 F.3d 113, 119 (2d Cir. 2002) (affirming district court's grant of summary judgment, and its granting of probative weight to arbitration board's

decision "based on substantial evidence" where board was "an undisputedly independent, neutral, and unbiased adjudicator"). Having failed to describe particulars of the arbitration to the court below to support an argument that the arbitrator's findings should be given significant weight, and to allow the district court to assess that contention, Defendants should be precluded from making those arguments here.

Here, there are any number of reasons why minimal weight should have been given even if Defendants had raised the issue below.

First, Davi showed that he had little control over the union's case in the arbitration proceedings. A606 (¶ 2). Indeed, based on OTDA's arguments, the state court ruled that Davi was not a party to the arbitration and thus had no standing to challenge the outcome. Dkt. No. 96-10; A367-A371. Accordingly, Defendants are precluded by judicial estoppel from arguing otherwise, and it would be unfair to give substantial weight to findings against Davi's interests made in such a proceeding. *E.g.*, *Intellivision v. Microsoft Corp.*, 484 Fed. Appx. 616, 618-19 (2d Cir. June 11, 2012) (noting that the doctrine of judicial estoppel is necessary to protect the integrity of the judicial process by preventing parties from taking different positions whenever their momentary interests change).

Second, rather than being based on "substantial evidence," the arbitration decision identifies no evidence at all to support its conclusion that OTDA's concern over disruption was reasonable. Like Defendants, the arbitrator appeared to rely solely on his own impression of how Appellants would react (and ignoring

how they did react). The arbitration decision does not address the complete absence of any requests for reconsideration, complaining about the Facebook Excerpt, by any Appellant who had appeared before Davi. Further, it was impossible for the arbitrator to address some of the evidence before the district court, for the simple reason that it had not yet taken place at the time of the arbitration: OTDA's gratuitous transfer of Davi's civil service title (A102) and its naming him as a General Counsel's Designee where he held a role in deciding the outcome of Fair Hearings. Perhaps the arbitrator was entitled under state law to rely on only his suppositions, but that still militates against giving his "findings" substantial weight. Courts are equally capable of reading the Facebook Excerpt.

Third, the arbitration decision is internally incoherent. For example, the arbitrator concluded that Davi had created the appearance of impropriety because his speech suggested that he disfavored Appellants. But the arbitrator *also* rejected the sixth charge, which alleged that the Facebook Excerpt gave "an unreasonable basis for NYC HRA representatives appearing before [Davi] to have the impression that they may unduly enjoy [his] favor." A91-A92 (Charge No. 6); A363. So, the arbitrator concluded that the Facebook Excerpt gave one side to a Fair Hearing an impression that it would be *dis*favored, but did not give the other side the impression that it would be favored. The decision has no explanation for this illogical result. Neither do Defendants.

Finally, Defendants themselves assail the arbitrator's findings. They repeatedly attack the decision of the court below for concluding that Davi favored

the Appellants in 95% of the cases before him. Defs' Br. 16 ("no basis in the summary judgment record"); *id.* at 32-33. As Defendants recognize, this was a finding of the arbitrator. *Id.* at 12; A362 ("Not one of his current or former supervisors detected any bias in his recommendations citing a 95% affirmation rate"); A364. And, unlike other of his findings, this one at least identified the evidence (testimony from Davi's supervisors) on which it was relying. Defendants cannot have it both ways.

II. THIS COURT LACKS JURISDICTION OVER THE DENIAL OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

In the last section of Defendants' brief (pp. 38-43), they argue that they are entitled to summary judgment. If this Court affirms the grant of injunctive relief to Davi, that part of their appeal will be moot. But even if it does not, this Court lacks appellate jurisdiction over the part of the March 2021 M&O (SPA30) that denied Defendants' motion for summary judgment.

The March 2021 M&O did not itself order injunctive relief. Rather, it ordered the parties "to confer on a proposed order reinstating Davi as an administrative law judge." SPA30. After they did, the court below issued a second order on March 24, 2021 requiring defendants to reinstate Davi. SPA32.

Defendants appeal both of those orders. A719. Their Jurisdictional Statement states that their notice "brings up for review not only the injunction order, but also the district court's earlier opinion and order *granting* partial summary judgment *against* OTDA (SPA. 1-31)." Defs' Br. 3 (emphasis added). But they do not explain how this Court has jurisdiction over that part of the March

2021 M&O that denied their motion for summary judgment.

As a general rule, orders denying defendants' motions to dismiss, and/or for summary judgment with respect to, claims for injunctive relief are not appealable because (1) they are not final and (2) they are not orders "granting, continuing, modifying, refusing, or dissolving" injunctive relief under 28 U.S.C. § 1292(a). This is so even if the order denying the motion to dismiss and/or for summary judgment is in the same order addressing a motion for injunctive relief. *Lynch v. City of New York*, 589 F.3d 94, 98 n.1 (2d Cir. 2009). *See also Samuel v. Herrick Memorial Hospital*, 201 F.3d 830, 837 (6th Cir. 2000); *Ass'n of Cooperative Members, Inc. v. Farmland Industries, Inc.*, 684 F.2d 1134, 1138 (5th Cir. 1982) ("Appellate review under § 1292(a)(1) . . . ordinarily extends only to those parts of an interlocutory order that relate to the grant of an injunction.").

Defendants' unhelpful Jurisdictional Statement makes no mention of "pendent appellate jurisdiction," perhaps recognizing that that limited doctrine is of no help to them here. Pendent appellate jurisdiction is a judge-made doctrine and this Court has advised that it "will only exercise it in 'exceptional circumstances.'" *Myers v. Hertz Corp.*, 624 F.3d 537, 553 (2d Cir. 2010). Specifically, the additional issue must be "inextricably intertwined" with the part of the order over which the Court has jurisdiction. *Id.* at 552. 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.

That is the case here. As noted previously, once Davi established that the discipline against him was based on speech as a citizen on a matter of public concern, the burden then shifted to Defendants to meet the three-part test. *See* discussion *supra* at 24. The court below found that defendants could not meet their burden on the first and second parts of the test, and so it did not reach the third: whether Defendants acted because of the likely disruptive effects of the speech or because of its content. (It did note that Defendants' "failure to show any reasonable likelihood of disruption suggests that their justifications were pretextual and that they instead sought to fire Davi because he held disfavored views." SPA21.) But, in order to grant Defendants summary judgment, this Court would have to address that additional issue.

Defendants recognize this. They assert that they are "entitled to partial summary judgment on Davi's claim for injunctive relief because the record is devoid of any evidence that the agency acted with retaliatory intent." Defs' Br. 38. They acknowledge that "[t]he district court did not expressly reach this final step because the court incorrectly concluded that *Pickering* balancing favored Davi." Defs' Br. 39. It wants this Court to address the additional issue, but that is precisely why this Court lacks jurisdiction and why this is not one of those extraordinary cases in which it should exercise "pendent appellate jurisdiction."

Another consideration weighs against jurisdiction here. The individual defendants whose motion for summary judgment based on qualified immunity was

denied (Schwenzfeier, Spitzberg, and Devine) have not appealed. They presumably recognize that their motion was denied because the court below believed there were issues of fact as to retaliatory motive and, accordingly, this Court lacks jurisdiction over those denials. *E.g.*, *Mahoney v. Hankin*, 844 F.2d 64, 68-69 (2d Cir. 1988) (dismissing appeal of denial of qualified immunity because the denial involved questions of both law and fact). But Defendants' brief on the question of retaliatory intent reads as if they had appealed. *E.g.*, Defs' Br. 40-41 (noting that "the district court found a triable issue of fact regarding the intent of three of the defendants"); *id.* at 41 ("The court likewise erred in finding a triable issue as to whether Schwenzfeier acted with retaliatory intent."). Indeed, the entire section seems to be a backdoor attempt at appealing the denial of qualified immunity.

In perhaps the most peculiar manifestation of this phenomenon, Defendants complain that the court below treated Schwenzfeier's Rule 30(b)(6) testimony on behalf of the agency as if he were testifying about his own intent. Defs' Br. 41-42. This might be a plausible argument to make if Schwenzfeier himself were appealing the denial of qualified immunity. But he is not; the official capacity defendants are appealing the grant of injunctive relief. Defs' Br. 1 n.1. The fact that he was testifying on behalf of the agency makes his testimony quite important on the question of whether the agency acted with retaliatory intent.

III. THERE ARE ISSUES OF FACT RELATED TO THE AGENCY'S RETALIATORY MOTIVE

Even if Davi were not entitled to summary judgment, and even if this Court

had appellate jurisdiction over the March 2021 M&O's denial of Defendants' motion for summary judgment, this Court should affirm that denial. On defendants' motion, any dispute of fact, or any inference from an undisputed fact, must be resolved against them. *E.g.*, *Reuland v. Hynes*, 460 F.3d 409, 419 (2d Cir. 2006); *Gorman-Bakos v. Cornell Co-op Extension of Schenectady County*, 252 F.3d 545, 557 (2d Cir. 2001). *Compare* Defs' Br. 9 (recusal reviews could require several hours of work) *with* A607 (¶ 3), or Defs' Br. 42 (OTDA "decided that action was warranted if [it] determined that Davi had posted the Facebook [Excerpt]") *with* Dkt. No. 90-2 (Devine Tr. 30). So, too, the reasonableness of OTDA's investigation and whether its discipline was disproportionate, assuming *arguendo* that Defendants had raised a genuine issue of material fact, would be appropriately left to the trier of fact.

Most importantly, though, there is a genuine issue of material fact on whether OTDA was motivated by the content of Davi's speech. There is substantial evidence from which a reasonable trier of fact could conclude that Defendants were so motivated.

A. Differential Treatment

OTDA has had evidence of Hearing Officer bias, or accused Hearing Officers of bias, against Appellees (social service agencies). Treatment on those occasions differed markedly from OTDA's treatment of Davi.

In 2010, Hearing Officer Edwin Pearson (after 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 supporting the critics, identifying himself as a Hearing Officer. His testimony was reported in the press. 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. A611 (¶ 5), A684-A695. OTDA's representative testified that alleged bias against Appellants would be treated more harshly than alleged bias against Appellees. A391 ("G"), A518-A519.

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. A628-A630. Several years later, and just weeks before OTDA received the Anonymous Complaint against Davi, Reid was accused of engaging in unprofessional conduct towards an attorney for Senior Health Partners, a private agency that contracts with the NYC HRA to administer certain services to program beneficiaries. Defendant Spitzberg investigated the complaint, and although agreeing that Mr. Reid had displayed "unprofessional animosity" toward the attorney, did not overturn Mr. Reid's decision and no discipline resulted. Mr. Reid continues to hear matters before Senior Health Partners. A646-A649; A682 (last line).

Defendants repeatedly argue that the Facebook Excerpt threatened OTDA's

reputation for impartiality. Yet when Hearing Officers displayed *actual* partiality ("unprofessional animosity") *in favor of* Appellants, or against social services agencies, OTDA did little to nothing. A reasonable trier of fact could conclude that Defendants' sudden concern with appearances is a cover for viewpoint discrimination.

B. Maintaining Davi In Decision-Making Roles Affecting Appellants

In several different ways, OTDA has shown that its concern for likely disruption is pretextual because, after learning of his speech, it has kept Davi in a role that allows him to make decisions that affect whether an Appellant receives benefits. First, OTDA knowingly allowed Davi to continue to write draft decisions for hearings he had previously conducted even after it received the Anonymous Complaint. A51-A52 (¶ 39); A246, A249-A250; A583 (¶¶ 56-57). Second, right after his suspension, he was designated as a General Counsel's Designee, in which role he makes decisions about *other* Hearing Officers' recusal determinations, which usually involve allegations of bias. A50-A51 (¶¶ 32-37); A204-A206; A598-A600 (¶¶ 116-123). Defendants emphasize that they transferred Davi to a "non-public facing role" (Defs' Br. 17, 22, 23), but this is meaningless if Davi's alleged appearance of partiality would cause Appellants to doubt the fairness of his decisions. Defendants do not dispute Davi's signed decisions become part of the file and can be viewed by Appellants. Because he does not physically meet with Appellants does not mean his role is not "public." That Defendants were perfectly comfortable with Davi being in such a role after his suspension casts further doubt

on their motivation.

C. Inflicting Harm

Additional insight into Defendants' motive can be gleaned from their efforts to inflict harm on Davi unconnected to any concern they allegedly had about potential disruption.

First, when OTDA failed to send a Notice of Discipline within five days of the date of the Notice of Suspension (purporting to suspend him without pay), it was obligated to restore him to the payroll (*i.e.*, convert his suspension without pay to one with pay). But it did not do so, although Defendants now misleadingly claim otherwise. Defs' Br. 11 n.5. Rather, OTDA forced Davi to use his leave credits until they were almost depleted, causing him undue anguish. A587 (¶¶ 70-71); A53-A54 (¶¶ 49-53); A608 (¶ 6). Defendants have claimed that OTDA did not send the Notice of Discipline out within five days because they were in settlement negotiations with Davi (*e.g.*, A376 (¶ 8)), but this is both false and irrelevant. It is false because there were no settlement negotiations on or before November 18 (five days after the Notice of Suspension was issued). A608 (¶ 6); A610 (¶ 2). It is irrelevant because the requirement that Davi's suspension be deemed one with pay is not affected by the existence of settlement negotiations. A81 (§ 33.4(d)); A376 (¶ 8) ("the employee may not be suspended without pay after that point"). A reasonable trier of fact could conclude that OTDA's failure to restore Davi to the payroll in November 2015 can be attributed to a desire to punish Davi because of an animus against his speech.

Second, after the suspension, OTDA gratuitously transferred Davi to a Senior Attorney position which has had deleterious effects on him. A56-57 (¶¶ 69-76); A101-102; A128 (Nos. 83-84); A191-A192; A596-A597 (¶¶ 105-111). It was gratuitous because Hearing Officers do not have to hold hearings; if Defendants were truly concerned about the potential disruption that Davi holding hearings would cause, they could have simply given him different duties as a Hearing Officer, ones that did not involve holding hearings – the "non-public facing role" they claim protected them from public obloquy. Hearing Officer Andrew Purrott did not hold hearings for years. A231-A232; A61(¶ 12) & A341-A343; A598 (¶¶ 113-15). Moreover, OTDA's transfer of Davi's title violated civil service law, and defendants have never cited authority to the contrary or suggested that an arbitrator could have authorized it (which he did not). Defs' Br. 11; A134 (No. 82); A375 (¶ 6). Again, a reasonable trier of fact could conclude that OTDA's decision to violate civil service rules and punish Davi unnecessarily by gratuitously changing his civil service title is best explained by an animus against his speech.

D. False Allegations Of Actual Bias

The Notice of Discipline against Davi specifically made charges of actual bias. A90 (charge 3 alleging that Davi violated an Executive Order requiring impartiality), A92 (charge 7 alleging that Facebook comments "show that you are not an impartial Hearing Officer"). Indeed, Spitzberg signed the Notice of Discipline on behalf of OTDA with these allegations despite believing that the Facebook Excerpt did *not* show that Davi was biased. A653. The arbitrator

rejected these charges, A593 (¶ 93), and Defendants have tried to distance themselves from them ever since. A605 ("OTDA has never relied on [claims of actual bias] to support its actions against him"); Defs' Br. 11-12. A reasonable trier of fact could conclude that these false allegations were added to support the proposed harsh punishment of termination, and further support the conclusion that OTDA was motivated by the content of Davi's speech.

As the court below noted, the testimony of OTDA's Rule 30(b)(6) witness (Eric Schwenzfeier) could reasonably be understood to state that OTDA would have taken action against Davi regardless of whether his views would likely cause disruption. SPA26. Defendants try to resist this, but misrepresent the testimony. Defs' Br. 42 n.12. Schwenzfeier testified that OTDA would have disciplined Davi even if those views were unknown to the public. A169 (testifying that the fact that Davi articulated his views was irrelevant if he believed them). Considering this testimony in the light most favorable to Davi, a trier of fact could conclude that OTDA did not care about – and was not motivated by – any likely disruption.

Conclusion

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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Certificate of Compliance

Pursuant to Fed. R. App. P. 32(g), I certify that this brief contains 13,095 words exclusive of the items listed in Fed. R. App. P. 32(f).

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