21-719

United States Court of Appeals for the Second Circuit

SALVATORE DAVI,

Plaintiff-Appellee,

v.

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

Defendants-Appellants,

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

Defendants.

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

REPLY BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Regulation

PRELIMINARY STATEMENT

The New York State Office of Temporary and Disability Assistance (OTDA) reasonably concluded that plaintiff Salvatore Davi could no longer serve as a hearing officer presiding over "fair hearings" for public benefits applicants after it received a complaint that Davi had posted comments on Facebook disparaging OTDA's clients as "an underclass" and associating their circumstances with "laziness" and "failure." The U.S. District Court for the Eastern District of New York (Korman, J.) disagreed, holding that Davi's transfer to a non-public-facing role (at the same grade and pay) violated the First Amendment, and directing OTDA to reinstate him as a hearing officer.

This Court should vacate the district court's permanent injunction and reverse the court's entry of partial summary judgment in Davi's favor. Because hearing officers serve as the public face of OTDA, and Davi's Facebook comments used disrespectful language to describe OTDA's client population, OTDA was reasonably concerned that keeping Davi in place as a hearing officer would irreparably harm the agency's reputation and operations. As OTDA's opening brief established, those interests outweighed Davi's speech interests under the balancing test set

forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968). The district court failed to grapple with OTDA's reputational interest and ignored the tone of Davi's speech and its nexus to his official duties. The court's *Pickering* analysis also improperly second-guessed OTDA's judgments and that of an independent arbitrator, whose findings the court was required to consider.

Davi's contrary arguments repeat the same errors. Among other things, there is no merit to his contention that OTDA's assessment of disruption was unreasonable because no recusal requests had been filed at the time of his transfer. Established circuit precedent clearly provides that employers may act before they experience any actual harm.

Because a proper application of *Pickering* balancing favors OTDA, in order to prevail on his First Amendment claim, Davi must show that his transfer was motivated by animus towards the content of his speech rather than by OTDA's legitimate concerns about reputation and disruption. He fails to do so, relying solely on conjecture that OTDA sought to retaliate against him for the content of his beliefs. Accordingly, this Court should vacate the district court's permanent injunction. For the same reasons, this Court should reverse the district court's entry of partial

summary judgment for Davi and enter partial summary judgment for OTDA. There is no merit to Davi's assertion that the Court lacks jurisdiction to grant that relief. It is well established that, where a summary judgment decision is the basis for the injunction being reviewed on appeal—as is the case here—the Court has jurisdiction to review the merits of the underlying summary judgment decision.

ARGUMENT

POINT I

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

Determining whether a public employer has "properly discharged an employee for engaging in speech requires" balancing "the interests of the [employee], as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Rankin v. McPherson*, 438 U.S. 378, 384 (1987) (quoting *Pickering*, 391 U.S. at 568). The court below erred in holding that this balancing analysis favored Davi. As OTDA's opening brief shows (Br. for Appellants (App. Br.) at 21-35), the agency was amply justified in transferring Davi to a non-public-

facing role because its assessment of the potential disruptive effect of Davi's Facebook comments was reasonable and "enough to outweigh the value of the speech," *Locurto v. Giuliani*, 447 F.3d 159, 172 (2d Cir. 2006) (quotation marks omitted).

A. OTDA Reasonably Concluded That Davi's Facebook Comments Would Likely Be Disruptive to Its Operations.

Davi does not dispute the strength of OTDA's asserted interests in maintaining public confidence in its services or its concern that adjudicating multiple recusal requests would undermine the agency's operations. Rather, he relies on the district court's erroneous conclusion that OTDA failed to make a "substantial showing" its predictions of harm were reasonable. *See* Br. for Appellee (Br.) at 25-30, 31-38.

1. OTDA made a substantial showing that Davi's speech had the potential to undermine its reputation.

Davi's Facebook comments disparaging public benefits recipients had the potential to bring "the judgment and professionalism of the agency . . . into serious disrepute," *Piscottano v. Murphy*, 511 F.3d 247, 271 (2d Cir. 2007). OTDA reasonably determined that Davi's statements would likely undermine OTDA's reputation in the community based on

the nature of Davi's comments, the fact that a member of the public had complained that his statements evinced serious bias, and the nexus between his speech and his role presiding over appeals brought by the very individuals he denigrated. See App. Br. at 8-10, 22-25. Indeed, an independent arbitrator who reviewed the Facebook comments at issue and the parties' evidence as to potential disruptive effects squarely concluded that Davi's statements made it "untenable" for him to continue serving as a hearing officer without jeopardizing the public's trust in the fair hearing system. (Joint Appendix (A.) 364.)

The district court's decision did not grapple with these concerns, failing altogether to weigh OTDA's interest in maintaining a reputation of respect for its clients and public confidence in the agency's impartiality. (*See* Special Appendix (SPA.) 19-21 (concluding only that Davi's Facebook comments did not reflect any actual bias and were unlikely to engender any recusal requests).)

Davi mistakenly contends (Br. at 32) that the district court implicitly weighed OTDA's reputational interest but concluded that Davi's comments do not undermine the agency's appearance of impartiality.

This supposed conclusion does not appear anywhere in the district court's decision, and Davi has not shown otherwise (*see id.* at 32-33).

In any event, OTDA's concern for its reputation extends beyond maintaining an appearance of impartiality. As OTDA explained (App. Br. at 21-25), the agency has an equally important stake in maintaining its relationship with the community (*Pappas*), public trust in its services (*Melzer*), and an appearance of professionalism (*Piscottano*).[1] Both the district court and Davi have wholly failed to address these interests, which tip the balance of interests firmly in OTDA's favor.

Equally baseless is Davi's contention (Br. at 28) that the absence of recusal requests shows that OTDA's predictions of harm were unreasonable. For starters, the absence of recusal requests has no bearing on the reasonableness of OTDA's concern for safeguarding its reputation and the public's trust in the fair hearing system, which were the primary reasons underlying Davi's transfer. Reputational harm can manifest in ways other than the filing of recusal requests against Davi specifically.

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[1] *See Pappas v. Giuliani*, 290 F.3d 143, 146-47 (2d Cir. 2002); *Melzer v. Board of Educ.*, 336 F.3d 185, 198 (2d Cir. 2003); *Piscottano*, 511 F.3d at 271.

See App. Br. at 33. And the lack of recusal requests also does not reflect the likelihood that the complainant—or another person privy to Davi's Facebook comments—could publicize those comments *in the future*, particularly if Davi were restored to the bench. Indeed, as explained below (at 10), the absence of such requests here is precisely because OTDA swiftly removed Davi from hearing cases.

More fundamentally, the law in this circuit is clear that a public employer may act before it has suffered any actual harm. See App. Br. at 29 & n.8 (collecting cases). Treating the absence of actual disruption as a factor weighing against the employer improperly presumes the opposite. Under the district court's reasoning (*see* SPA. 19-20), OTDA could have no recourse unless and until Davi's comments were widely publicized and the agency had already received recusal requests. But by that time, OTDA's operations—and certainly its reputation—would have sustained perhaps permanent harm. This outcome cannot be right, especially because this Court has precisely cautioned employers *against* adopting a wait-and-see approach, noting that employer inaction could later be "perceived as tolerating" the disruptive speech and being "in passive complicity," *see Pappas*, 290 F.3d at 151.

Finally, Davi mischaracterizes his Facebook comments as being mere expressions of "views over proper welfare policy"—and he contends, based on that mischaracterization, that OTDA could not have reasonably concluded that his Facebook comments jeopardized the public's perception of the agency.[2] *See* Br. at 27. But whether or not Davi intended to disparage benefits applicants and recipients, his comments indisputably used demeaning language to describe their circumstances. For example, Davi referred to benefits recipients as "an underclass" and further stated that their circumstances were due to "laziness and failure." (A. 66.)

OTDA was thus spurred to act, not by any policy viewpoint Davi claimed to express, but by the *manner* of Davi's speech, which could reasonably be construed as disparaging the very class of persons that OTDA is charged with serving. Consistent with this Court's recognition that the government need not "sit idly by while its employees insult those

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[2] Davi and his amici miss the mark in asserting that Davi's Facebook comments would not necessarily entitle a benefits applicant to recuse Davi. *See* Br. at 27-28; Br. of Inst. for Free Speech & Cato Inst. as *Amici Curiae* in Supp. of Pl.-Appellee ("Amicus Br.") at 19-23. OTDA's reputational harm does not turn on whether applicants ultimately succeed in recusing Davi. That harm exists so long as those who knew of Davi's comments would feel uncomfortable having him as their presiding officer or would question the agency's judgment and professionalism in maintaining Davi in that role.

they are hired to serve," *Locurto*, 447 F.3d at 183, the agency took immediate action to show that it did not condone its hearing officers disrespecting or demeaning its client population.

Davi cannot second-guess OTDA's reasoned assessment of reputational harm based on his own view of his speech. *See* Br. at 33. The relevant inquiry is whether OTDA reasonably determined that the public and, in particular, its clients would perceive Davi's statements as reflecting negatively on the agency's professionalism and judgment. See *infra* at 17. Courts regularly defer to the judgments of agency officials on such matters. *E.g.*, *Piscottano*, 511 F.3d at 276-77 (relying on assessment of top-ranking corrections officials); *Melzer*, 336 F.3d at 198 (relying on assessment of school principal). And here, the reasonableness of OTDA's assessment has additional support: a third-party arbitrator independently concluded that "[n]o one would feel comfortable with [Davi] being their decision maker after reading the post." (A. 364.)

2. OTDA made a substantial showing that Davi's speech had the potential to generate disruptive recusal requests.

As explained in OTDA's opening brief (App. Br. at 26-27), OTDA also has satisfied its burden of demonstrating that Davi's Facebook comments had the potential to engender requests for recusal and reconsideration if he were again permitted to preside over fair hearings. And given that each request for recusal—regardless of its ultimate merit—takes several hours of work to adjudicate (A. 381), OTDA reasonably determined that receiving multiple requests would impede the operations of its Office of Administrative Hearings (OAH).

Davi's only rejoinder (Br. at 33) is to point to the lack of recusal requests in the record. But that does not suffice to show that OTDA was unreasonable in believing that a future applicant who actually appeared before Davi would likely seek his recusal. As OTDA has explained (App. Br. at 30-31), the absence of recusal requests reflects OTDA's prompt action to remove Davi from presiding over hearings—where requests for recusal must be made, 18 N.Y.C.R.R. § 358-5.6(c)(3)(ii)—and to transfer him to a non-public-facing role. Davi's quibbles over the record (*see* Br. at 33-34) are insufficient to entitle him to summary judgment. At most,

those disputes demonstrate that he has raised an issue of fact regarding whether the absence of recusal requests is attributable to Davi's prompt removal from the bench.

3. The district court improperly second-guessed the agency's assessment and disregarded the factual findings of the arbitrator.

Davi offers no meaningful response to OTDA's showing (App. Br. at 31-33) that, in rejecting OTDA's assessment of harm as unreasonable, the district court improperly second-guessed the agency's judgments and drew all inferences in Davi's favor. Davi does not dispute, for example, that the district court was required to afford the agency's judgments "a wide degree of deference." *See Connick v. Meyers*, 461 U.S. 138, 152 (1983). Nor does he defend the district court's erroneous conclusion that benefits applicants would be unlikely to seek his recusal because he purportedly ruled in their favor 95 percent of the time (*see* SPA. 6, 19)—a rate that Davi did even not proffer as an undisputed material fact (see App. Br. at 32-33). These errors alone warrant reversing the entry of partial summary judgment in Davi's favor. And there is more.

The district court also erroneously disregarded the arbitration finding that OTDA reasonably feared disruption here. See App. Br. at 34-

35. Contrary to Davi's assertions (Br. at 38-39), OTDA did not waive this argument. OTDA's briefing below expressly cited *Collins v. New York City Transit Authority*, 305 F.3d 113, 119 (2d Cir. 2002), for the proposition that the district court must "present strong evidence that the [arbitral] decision was wrong as a matter of fact . . . or that the impartiality of the proceeding was somehow compromised," should it disagree with the arbitral findings.[3] (Mem. of Law in Supp. of State Defs.' Mot. for Summ. J. (Defs.' Mem.) at 16, ECF No. 93; Reply Mem. of Law in Further Supp. of State Defs.' Mot. for Summ. J. at 6, ECF No. 99.)

In any event, the Court has discretion to—and should—review whether the district court improperly disregarded the arbitration decision because "the argument presents a question of law, and there is no need for additional fact-finding." *See Bogle-Assegai,* 470 F.3d at 504. The parameters of the arbitration are clearly set forth in the record (*see* A. 358-365; *see also* A. 83-84), and were also presented to the district

[3] To be sure, OTDA made this argument in conjunction with an argument that the doctrine of collateral estoppel should apply. But what matters is that OTDA did not raise this argument "for the first time on appeal," *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006) (quotation marks omitted).

court (*see* Defs.' Mem. at 6-7, 16). The merits are straightforward too: Davi does not contest that the district court's conclusion—that OTDA's assessment of disruption was unreasonable and thus indicative of pretext—directly contradicted the arbitrator's factual findings.

Davi is not aided by his unsupported attacks on the fairness of the arbitration. When arguing "there are any number of reasons why minimal weight should have been given" to the arbitration decision (Br. at 39-42), Davi fails to point to any specific arguments or evidence that he was prevented from making during the arbitration proceedings. Indeed, Davi's union offered substantially the same arguments and evidence in the arbitration that Davi presents here. (*See* A. 361-362.)

Davi's criticisms of the merits of the arbitration decision are likewise unavailing. Davi is wrong that the arbitrator "rel[ied] solely on his own impression of how [benefits applicants] would react" (Br. at 41) to Davi's Facebook comments. (*See* A. 360 (summarizing OTDA's position and evidence).) And in any event, Davi's disagreement with the arbitrator's conclusion about *one* of the charges is plainly insufficient to show "the decision was wrong as a matter of fact," *Collins*, 305 F.3d at 119. Nor is it a basis to question the arbitrator's other factual findings.

4. Davi's alternative bases for affirmance are meritless.

There is no merit to Davi's request for affirmance on the ground that OTDA "failed to make a reasonable investigation of the likelihood of potential disruption" (Br. at 30). The Supreme Court has long recognized that "there will often be situations in which reasonable employers [may] disagree about . . . how much investigation needs to be done, or how much evidence is needed to come to a particular conclusion." *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion). Thus, "[o]nly procedures outside the range of what a reasonable manager would use may be condemned as unreasonable." *Id.*

OTDA's investigation amply clears the threshold. As explained in OTDA's opening brief (App. Br. at 8), the agency reasonably concluded that if Davi in fact posted the Facebook comments at issue—which referred to the agency's clients in derogatory and demeaning terms—those statements had the potential to seriously undermine the agency's reputation if they were further publicized. OTDA thus sought to authenticate the Facebook post, confirm with the complainant whether she had sent her letter to the Legal Aid Society, and question Davi as to whether

he made the comments. (A. 504, 548, 700-701.) This investigation was entirely reasonable.[4]

Likewise baseless is Davi's contention (Br. at 31) that his proposed termination and eventual transfer to a non-public-facing role (at the same pay and grade) were "disproportionate." As an initial matter, OTDA tried—for weeks—to avoid imposing any formal discipline. It was only after *Davi* rejected the agency's proposal that he assume a non-public-facing position (with no suspension), that OTDA issued the Notice of Discipline. Because OTDA could not reassign Davi to a non-public-facing position without his consent, the agency had no choice but to seek his removal in order to safeguard the public's perception of the agency. See App. Br. at 11. This context (which the district court entirely ignored)

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[4] The district court was wrong to conclude that OTDA behaved unreasonably by failing to confirm with Legal Aid whether it had received the forwarded Facebook complaint. (SPA. 18-19.) *See also* Amicus Br. at 19. Even if this Court were to disagree with the OAH Director's chosen approach—inquiring of a friend at Legal Aid whether there was any "scuttlebutt" without getting into specifics (*see* A. 382)—nothing suggests that the Director's approach fell far outside "the range of what a reasonable manager" might do. *See Waters*, 511 U.S. at 678. This is especially so given that the agency's goal was to avoid any further publicization of Davi's Facebook comments.

clearly refutes Davi's claim that OTDA took disciplinary action to punish Davi for his speech.

Davi also cannot fault OTDA for ultimately imposing a six-month suspension and transfer when those actions were taken pursuant to the arbitration award. To be sure, the award did not mandate that the agency remove Davi as a hearing officer, but the arbitrator did expressly conclude: "The grievant made an error which makes his continued employment in the position of hearing office untenable." (A. 364.) Thus, OTDA was more than reasonable in concluding that Davi's transfer was necessary to safeguard the agency's reputation and the public's trust in the fair hearing system against any further publicization of Davi's comments.

B. Any Speech Interest of Davi's Is Insufficient to Outweigh OTDA's Reasonable Concerns for Disruption Under *Pickering*.

Davi offers two main reasons why his interests outweigh those of OTDA under the *Pickering* balancing test: the political nature of his speech and the allegedly "private" context in which they arose. Neither suffices. Instead, the vituperative manner of Davi's remarks and their relationship to his duties as a hearing officer firmly tip the balance of interests in favor of OTDA.

1. OTDA's ability to discipline Davi does not turn on whether Davi viewed his comments as private, civil discourse.

Davi misses the mark in trying to reframe his Facebook comments as laudable civil discourse about "proper welfare policy" (Br. at 27; *see also id.* at 27-30, 35-38). For one thing, the *Pickering* analysis does not turn on what Davi intended to express, and certainly not on the post-hoc framing offered in his brief. Rather, the proper inquiry is whether OTDA reasonably believed that the public—and, particularly, OTDA's clients—would construe Davi's Facebook comments as reflecting negatively on the agency. *See Locurto*, 447 F.3d at 178-80, 182 (focusing on the *public's perception* of the speech at issue); *Melzer*, 336 F.3d at 199 (same).

Nor does the subject matter of Davi's comments insulate him from all discipline. As this Court has made clear, "even when [an employee's] speech is squarely on public issues—and thus earns the greatest constitutional protection"—it may still give way to the government's "substantial showing of *likely* interference." *Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir. 1995) (citing *Waters*, 511 U.S. at 673-74). In balancing "protected First Amendment activity against governmental disruption," the Court must take into account not only *the content* of the plaintiff's speech, but also

"the manner, time, and place in which [the] speech . . . occurred," *Melzer*, 336 F.3d at 197 (quotation marks omitted); the "nexus" between the speech and the employer's operations, *see Piscottano*, 511 F.3d at 276; and whether the employee served in a "confidential, policymaking, or public contact role," *Rankin*, 438 U.S. at 390-91. For the reasons explained in OTDA's opening brief (App. Br. at 36-38) and below (at 20-22), these factors weigh heavily in favor OTDA.

In contending that the "private" nature of his speech carries significant weight, Davi and amici mischaracterize his Facebook comments as a private conversation on which the complainant "snooped." *See* Br. at 28; Amicus Br. at 11-16. As Davi himself attested, he commented on an article that was posted on a friend's Facebook page and his comments were visible to anyone who had access to view that page—a group that included not only Davi's friend, but also the complainant, who was not Davi's friend, and a number of other individuals. (*See* A. 55 (¶ 60), 318, 363, 464, 498, 577 (¶ 33), 697 (¶ 5); *see also* A. 108-109 (objecting to Davi's characterization of his Facebook comments as "private"); A. 579 (¶ 42) (same).)

This case is thus plainly distinguishable from *Waters v. Chaffin* (*see* Br. at 26), where the plaintiff was speaking at a bar "to a person he considered a friend," 684 F.2d 833, 837 (11th Cir. 1982). And it is further distinguishable from *Harnishfeger v. United States* (*see* Amicus Br. at 12-16), where the speech at issue was posted on the plaintiff's own personal Facebook page *before* the plaintiff's public employment even began and was wholly unrelated to her work, 943 F.3d 1105, 1109-10, 1118 (7th Cir. 2019).

Given that any person who had access to Davi's friend's Facebook page could interact with, screenshot, and further disseminate Davi's comments (as the complainant did here), the context of Davi's speech is a far cry from a confiding in a close friend or writing in a diary (*see* Br. at 26). Indeed, the context of Davi's post suggests that he intended his comments to be viewed by others and, accordingly, he lacks any objectively reasonable expectation that his statements would not be further discussed or shared.[5] In any event, this Court has expressly held that a public

[5] Davi's characterization of his speech as akin to a private conversation is also in direct tension with his argument that his comments are entitled to heightened constitutional protection because he sought to contribute to the public discourse about social welfare policy.

employer may take action against even speech that was intended to be private or anonymous when it poses a "very high capacity to inflict serious harm on the employer's mission if it were discovered that [the speech] came from" an employee. *See Pappas*, 290 F.3d at 150.

2. The manner and context of Davi's remarks weigh in favor of OTDA.

The other factors the district court was required to consider—the manner, context, and relationship between Davi's speech and his duties as a hearing officer—all favor OTDA. See App. Br. at 36-38. Davi misses the point in deriding these factors as having "nothing to do with the value of his speech" (Br. at 35). As this Court observed in *Melzer*, "[t]he [*Pickering*] balancing test is less a matter of calculating and comparing absolute values than it is a *process* that looks at all the circumstances in a given situation and determines which interest weighs more heavily." 336 F.3d at 197.

For example, Davi's position as a hearing officer, the direct nexus of his comments to his work, and the fact that his comments were accessible by certain members of the general public distinguishes this case from *Rankin*, 438 U.S. 378—one of the cases on which Davi relies (Br. at 26-

27, 37). In *Rankin*, a data entry clerk in a county constable's office was discharged for remarking to a colleague about the President's assassination: "If they go for him again, I hope they get him." 438 U.S. at 379-82 (quotation marks omitted). The Supreme Court held that the termination violated the First Amendment. In particular, the Court concluded that the employee's statement was unlikely to discredit the constable's office or undermine its law enforcement mission because "[t]here is no suggestion that any member of the general public was present or heard [the employee's] statement," *id.* at 389; her "duties were purely clerical"; and there was "no indication that [the employee] would ever be in a position to further . . . law enforcement activity," *id.* at 392.[6]

By contrast, Davi served in a public-facing position of authority and trust, where he regularly interacted with the very community OTDA was created to serve. As a hearing officer, Davi was directly charged with

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[6] *See also Harnishfeger*, 943 F.3d at 1117 (plaintiff's "responsibilities with [the National] Guard were so routine and clerical that she could not be viewed by a reasonable member of the public as speaking for the Guard on any matter"); *Navab-Safavi v. Glassman*, 637 F.3d 311, 313, 316-17 (D.C. Cir. 2011) (plaintiff's appearance in a purportedly anti-American video was unlikely to undermine Voice of America's journalistic integrity because plaintiff held no editorial or on-air role and performed mostly low-level work).

carrying out OAH's responsibility of ensuring that New Yorkers who appeal adverse determinations of public benefits receive a prompt and impartial administrative hearing to adjudicate their entitlement to social services programs. (*See* A. 518, 569.)

Davi is not aided by his observations (Br. at 5, 33) that he held only certain types of hearings and that his decisions were subject to review. The impact of his speech turns on the public's perception of his role as a hearing officer. *See Pappas*, 290 F.3d at 144, 147 (police officer's distribution of bigoted flyers undermines reputation of police department even though officer's specific role was not community-facing). Because Davi served as the public face of OTDA to New Yorkers, his comments, which demeaned applicants and recipients of public benefits, posed a "very high capacity to inflict serious harm" on the public's trust in the agency. *See id.* at 150. As the arbitrator recognized, such loss of trust is fatal to OTDA's ability to "fulfill its responsibilities to the citizens of New York State." (A. 363.) Indeed, the public may impute Davi's expressed bias to all OTDA hearing officers or may forgo applying for public benefits altogether, for fear that they will not be fairly treated.

Finally, even if this Court disagrees that *Pickering* balancing favors OTDA as a matter of law, the Court should still vacate the injunction and the entry of partial summary judgment for Davi. Construing the facts in defendants' favor, OTDA has at least raised a triable issue as to whether its assessment of disruption was reasonable.[7] See *supra* at 4-22. And this Court has cautioned that so long as "there are questions of fact relevant to [*Pickering*'s] application"—such as "the degree to which the employee's speech could reasonably have been deemed to impede the employer's efficient operation"—summary judgment is improper. *Johnson v. Ganim*, 342 F.3d 105, 114-15 (2d Cir. 2003) (quotation marks omitted).

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[7] There is no merit to Davi's contention (Br. at 1-3) that defendants conceded the majority of facts in his Local Civil Rule 56.1 statement, thereby entitling him to summary judgment. As defendants' responses properly reflect, many of Davi's assertions were not proposed facts that could be admitted or denied. Davi likewise cannot fault defendants for objecting on materiality grounds to various of his assertions. On summary judgment, "[f]actual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). More fundamentally, this Court has recognized that "a Local Rule 56.1 statement is not itself a vehicle for making factual assertions that are otherwise unsupported in the record," *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 74 (2d Cir. 2001), and that, "[b]efore summary judgment may be entered, the district court must ensure that each statement of material fact is supported by record evidence sufficient to satisfy the movant's burden of production even if the statement is unopposed," *Jackson v. Federal Express*, 766 F.3d 189, 194 (2d Cir. 2014).

POINT II

THE COURT SHOULD ENTER SUMMARY JUDGMENT IN FAVOR OF OTDA ON DAVI'S CLAIM FOR INJUNCTIVE RELIEF

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

A. The Court Has Jurisdiction to Grant Partial Summary Judgment to OTDA.

As a threshold matter, Davi is wrong that this Court lacks jurisdiction to grant partial summary judgment in OTDA's favor. *See* Br. at 42-45. The Court has in fact done so in a case with nearly identical procedural facts: *Noel v. New York City Taxi and Limousine Commission*, 687 F.3d 63 (2d Cir. 2012). There, the plaintiffs sued the New York City Taxi and Limousine Commission for failing to provide meaningful access to taxi services for persons with disabilities. *Id.* at 65. Upon evaluating the parties' cross-motions for summary judgment, the district court

granted the plaintiffs' partial motion for summary judgment, denied in part the defendants' cross-motion, and issued a temporary injunction requiring that "all new taxi medallions and street-hail livery licenses be limited to vehicles that are wheelchair accessible" until the Commission proposed a court-approved remedial plan. *Id.* at 65, 67. On appeal, this Court vacated the injunction and remanded the case to the district court with instructions to grant partial summary judgment in favor of the defendants.[8] *Id.* at 74.

The law of this circuit is clear: upon review of an injunction order under 28 U.S.C. § 1292(a)(1), the Court's jurisdiction "extends to all matters inextricably bound up" with the injunction. *Lamar Advert. of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365, 371 (2d Cir. 2004) (quotation marks omitted); *see also Panzella v. Sposato*, 863 F.3d 210,

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[8] Under similar circumstances, other circuits have also found that they possess jurisdiction to review a district court's denial of summary judgment. *See NationsBank Corp. v. Herman*, 174 F.3d 424, 427 (4th Cir. 1999) (court may review denial of summary judgment that "is intimately bound up with the grant of the preliminary injunction" (quotation marks omitted)); *Wigg v. Sioux Falls Sch. Dist. 49-5*, 382 F.3d 807, 811-12 (8th Cir. 2004) (court reviewed district court's grant in part and denial in part of defendant's motion for summary judgment on appeal from the court's issuance of a permanent injunction).

217 (2d Cir. 2017). Here, Davi concedes (Br. at 43) that the district court's grant of partial summary judgment in his favor is inextricably intertwined with the court's injunction order. It necessarily follows then that the court's denial of defendants' cross-motion on precisely the same grounds (*see* SPA. 21-22, 30) satisfies this standard as well.

There is no merit to Davi's contention (Br. at 43-44) that granting OTDA partial summary judgment would require this Court to consider an issue wholly unrelated to the district court's basis for issuing the injunction. The only such issue that Davi identifies—whether OTDA acted with retaliatory intent—is part of the *Pickering* analysis, and the district court relied on its view as to that issue when (erroneously) concluding that "Defendants' failure to show any reasonable likelihood of disruption suggests that their justifications were pretextual" (SPA. 21). As this Court has long recognized, "[t]o the extent that the district court fully adjudicated the plaintiff's substantive claims in ordering injunctive

relief, it is proper for a court of appeals to review the merits of the case."[9] *E.E.O.C. v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2d Cir. 1996).

B. OTDA Is Entitled to Partial Summary Judgment Because Davi Fails to Raise a Triable Issue of Fact That the Agency Acted with Retaliatory Intent.

As shown in OTDA's opening brief (App. Br. at 38-43), the record is devoid of any evidence that any of the defendant OTDA officers sought to retaliate against Davi for the viewpoint he expressed. Davi does not even attempt to defend the district court's erroneous conclusion that, if OTDA failed to show a reasonable likelihood of disruption, that suggests the agency's "justifications were pretextual and that [defendants] instead sought to fire Davi because he held disfavored views" (SPA. 21).[10] He

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[9] Contrary to Davi's suggestion (Br. at 43), this Court's decision in *Lynch v. City of New York*, 589 F.3d 94, 98 n.1 (2d Cir. 2009), does not hold otherwise. That case concerned whether the Court may properly review the district court's denial of the defendant's motion for summary judgment in an appeal from the denial of plaintiff's motion for preliminary relief. Unlike in this case, there was no indication in *Lynch* that the district court's basis for the two rulings were inextricably intertwined. *See id.* at 98 & n.1.

[10] There is no merit to Davi's accusation (Br. at 45) that defendants are attempting to "backdoor" their way into challenging the district court's qualified immunity ruling. Evidence that the district court considered probative of the individual defendants' retaliatory intent is relevant to

(*continued on the next page*)

instead attempts to manufacture a triable issue of fact by pointing to four categories of circumstantial evidence: (i) OTDA's purportedly "differential treatment" of two comparators (Br. at 46-48); (ii) the agency's assignment of Davi to adjudicate recusal requests against other hearing officers after his transfer (*id.* at 48-49); (iii) the agency's alleged efforts to inflict gratuitous harm on him (*id.* at 49-50); and (iv) the agency's "false" allegations of bias in his Notice of Discipline (NOD) (*id.* at 50-51). None give rise to an inference that the OTDA decisionmakers acted with retaliatory intent.

First, there is no merit to Davi's contention (*id.* at 46) that OTDA treated more favorably other hearing officers who expressed bias against social service agencies. Davi cannot rely on hearing officers Mark Reid and Edwin Pearson as comparators because they are not "similarly situated." *See Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 64 (2d Cir. 1997).

"In the Second Circuit, whether or not co-employees report to the same supervisor is an important factor" in the comparator analysis.

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the question whether *the agency* acted with retaliatory intent. *Cf. Willingham v. Morgan*, 395 U.S. 402, 406 (1969) (government "can act only through its officers and agents" (quotation marks omitted)).

Conway v. Microsoft Corp., 414 F. Supp. 2d 450, 465 (S.D.N.Y. 2006) (collecting cases); *see also Shumway*, 118 F.3d at 64 (no inference of discrimination can be drawn where alleged comparators were supervised by different individuals). Here, both Reid and Pearson were disciplined several years before Davi by different decisionmakers. (*See* A. 628-629 (Reid was counseled in 2012 by J. Dalton); A. 690-692 (Pearson was issued a notice of discipline in 2010 by P. Nostramo).)

More fundamentally, Davi cannot establish that Pearson and Reid "engaged in comparable conduct," which requires "a reasonably close resemblance" in "the facts and circumstances" of their cases. *See Ruiz v. County of Rockland*, 609 F.3d 486, 494 (2d Cir. 2010) (quotation marks omitted). Pearson was disciplined for commenting at a New York City Council hearing that he agreed with the criticisms of the City's administration of benefits offered by legal services providers who represented agency clients. (*See* A. 690-691; *see also* A. 685-688.) And Reid's alleged acts involved incidents where he behaved in an unprofessional manner while presiding over fair hearings, such as asking an attorney to leave the room for being unprepared to resolve a case (A. 629), and admonishing a managed care attorney for "speculating instead of answering

questions with facts and evidence" (A. 682).[11] Pearson's and Reid's conduct was thus different in kind from Davi's posting of Facebook comments disparaging benefits recipients. Neither the manner of their speech nor the degree of apparent bias expressed rose to the level of Davi's statements.

Second, OTDA's assignment of Davi to complete drafting decisions in cases for which he already held a fair hearing, and to review recusal requests against other hearing officers, does not suggest that the agency's concern for its reputation was pretextual. *See* Br. at 48-49. Quite the opposite. Because OTDA determined that Davi could no longer represent the agency in a public-facing role without undermining its reputation, the agency transferred him to a role that entailed no direct contact with benefits applicants.

Third, there is no basis in the record for Davi's assertion that OTDA sought to "inflict harm on [him] unconnected to any concern . . . about

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[11] OTDA, in the course of evaluating the managed care attorney's recusal request, concluded that although Reid's behavior evidenced unprofessional "animosity" towards the attorney, "bias did not affect [Reid's] decision." (A. 683.) OTDA also investigated the managed care attorney's allegation that Reid called his client a "black hat"—an incident which Reid denied—but OTDA failed to adduce any corroborating evidence to substantiate that allegation. (*See* A. 658-660.)

potential disruption" by intentionally delaying the issue of his NOD (*id.* at 49-50). As OTDA's then–Director of Human Resources (Donna Faresta) testified, the agency exceeded the five-day deadline for issuing the NOD under the collective bargaining agreement (CBA) between OTDA and Davi's union because the parties were actively engaged in negotiations to resolve this matter without resorting to formal discipline. (*See* A. 448 ("The negotiations were taking place during the first five days.").) Moreover, OTDA fully complied with the terms of the CBA by reinstating Davi's leave and pay for the time that exceeded the five-day deadline. (*See* A. 294-295.)

Davi is further incorrect in asserting (Br. at 50) that OTDA could have permitted him to retain his hearing officer title without assigning him to any hearing duties. As Faresta testified, to satisfy the hearing officer class standard, an individual holding that civil service title must at least have the ability to hold hearings. (A. 442-443.) Davi's only rejoinder—that another hearing officer within OAH purportedly has not held a fair hearing in several years (Br. at 50)—misses the mark. Unlike Davi, that hearing officer remains able to serve in a public-facing role

(and does so currently) without jeopardizing the public's perception of the agency.

In the face of these deficiencies with his evidence, Davi cannot survive summary judgment by offering mere speculation that the actions he identifies were taken in retaliation for the content of his speech. *See McPherson v. New York City Dep't of Educ.*, 457 F.3d 211, 215 n.4 (2d Cir. 2006). The record is entirely devoid of any direct or circumstantial evidence giving rise to a reasonable inference that the agency's decisionmakers were motivated by improper retaliation when they acted to protect the agency's public reputation and to minimize the potential disruption to agency operations.[12]

Finally, Davi mistakenly argues (Br. at 50-51) that, because OAH did not uncover any instances of actual bias in the small sample of Davi's previous decisions that it reviewed, the agency's inclusion of charges in his NOD that his statements reflected actual bias gives rise to an

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[12] Davi's mischaracterization of OTDA's testimony (*see* Br. at 51) cannot give rise to a genuine dispute of material fact. As explained in OTDA's opening brief (App. Br. at 42 n.12), the context of OTDA's Rule 30(b)(6) deposition makes clear that it was Davi's Facebook comments themselves and not what Davi actually believed that motivated the agency's decision.

inference of retaliatory intent. OTDA was plainly entitled to charge Davi with expressing actual bias based on his Facebook statements. That the arbitrator ultimately rejected this charge is insufficient to show that it was motivated by animus towards Davi's viewpoint. In any event, this Court has long held that even incorrect charges of misconduct are insufficient to show that an employer's motivation was discriminatory. *See, e.g., McCullough v. Wyandanch Union Free Sch. Dist.*, 187 F.3d 272, 281 (2d Cir. 1999). This is especially so when the arbitrator ultimately concluded that OTDA's actions were justified by the agency's legitimate concern for its operations—a finding the district court should have afforded probative weight.

CONCLUSION

For the foregoing reasons, the district court's permanent injunction should be vacated and the entry of partial summary judgment in favor of Davi reversed. The Court should enter summary judgment in OTDA's favor on Davi's claim for injunctive relief.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Kelly Cheung, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,822 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7) and Local Rule 32.1.

/s/ *Kelly Cheung*