21-719

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Salvatore Davi,

Plaintiff-Appellee,

v.

Michael P. Hein, Samuel Spitzberg, Krista Rock, and Jill Shadick,

Defendants-Appellants,

Eric Schwenzfeier, Sharon Devine, Samuel Roberts, Donna Faresta, and Wilma Brown-Philips,

Defendants

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

Brief of Institute for Free Speech and Cato Institute as *Amici Curiae* in Support of Plaintiff-Appellee

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INTEREST OF *AMICI CURIAE*[1]

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The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato conducts conferences, publishes books, studies, the annual Cato Supreme Court Review, and files amicus briefs with the courts.

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[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief. All parties have consented to the filing of this *amici* brief.

SUMMARY OF ARGUMENT

The First Amendment protects government employees who speak on matters of public concern. This is in part because public employees "are often in the best position to know what ails the agencies for which they work," so "public debate may gain much from their informed opinions." *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion).

A government employee's speech is afforded particularly strong protection when—as in this case—it takes place outside the workplace, on the employee's own time, in a private conversation among friends. As a general rule, courts should be "loath[] to sanction the intrusion of the government's ear into the private lives of its employees." *Waters v. Chaffin*, 684 F.2d 833, 839 (11th Cir. 1982).

Here, the petitioners (referred to collectively as the Office of Temporary Disability Assistance, or OTDA) sought to fire Davi because of statements he made off-duty in response to a suggestion to expand the public benefit system, a topic that is quintessentially a matter of public concern and on which he has special knowledge. In the court below, OTDA failed to show that the statements caused any actual disruption;

likewise, OTDA failed to credibly show a substantial likelihood of disruption.

But beyond that, Davi's statements were made while he was off duty, and were directed to friends of a Facebook friend of his, in a private Facebook group. OTDA only found out about Davi's statements because one of the friends—who took umbrage at the policy views he expressed—leaked them. OTDA explained its attempt to fire Davi, in large part, based on the unverified claim by the person that she informed the Legal Aid Society about Davi's statements. OTDA's decision to fire Davi thus represents an unacceptable imposition of a "snooper's veto," *Harnishfeger v. United States*, 943 F.3d 1105, 1118 (7th Cir. 2019).

Davi's statements also do not show recusable bias. OTDA's governing regulations provide specifically that a hearing officer can be recused if he shows bias or partiality to a party. Davi's statements only addressed abstract matters of policy—they certainly do not show that he "has a preconceived view of facts at issue *in a specific case*," which can justify recusal, "as opposed to prejudgment of general questions of law or policy," which cannot justify refusal. *1616 Second Ave. Rest., Inc. v. N.Y. State Liquor Auth.*, 75 N.Y.2d 158, 161 (1990) (emphasis added).

And it is unlikely that many applicants would improperly seek Davi's recusal. That some might do so cannot justify OTDA's conduct: OTDA cannot constitutionally fire or transfer Davi "as an expedient alternative to containing or snuffing out" improper recusal requests. *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 252 (6th Cir. 2015) (en banc) (explaining that "[w]hen a peaceful speaker, whose message is constitutionally protected, is confronted by a hostile crowd," the government "may go against the hecklers" but cannot "unnecessarily infringe upon the constitutional rights of law-abiding citizens").

The district court properly found that Davi's statements were on a matter of public concern. It correctly concluded that OTDA had failed to show that the government interest outweighed Davi's free speech interest. Accordingly, the grant of partial summary judgment in Davi's favor should be affirmed.

ARGUMENT

I. Davi Spoke Off-Duty, in a Private Conversation on a Friend's Facebook Page

Public employees have an "interest in being free from unnecessary work-related restrictions while off-duty." *Waters v. Chaffin*, 684 F.2d at

837. This is especially so when the "off-duty restrictions" "unnecessarily impinge upon private, social conversation." *Id.* at 838.

In *Waters v. Chaffin*, the plaintiff police captain was demoted and transferred because, while talking off duty with a fellow officer, the plaintiff called their chief a "bastard," "'as sorry as they come and nothing but a back stabbing son of a bitch.'" *Id.* at 834. But the Eleventh Circuit held that punishing the plaintiff for such speech was unconstitutional, *id.* at 841:

> [The plaintiff spoke] 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 [he], like everyone, has a legitimate interest in maintaining a zone of privacy where he can speak about work without fear of censure.
>
> It must be remembered that we are talking about off-duty shoptalk, which, although regrettably indiscreet and tactless, is nonetheless basically idle barroom chatter. Such conversation generally is not subject to sanction. We do not doubt that the department may restrict the actions of its off-duty officers in many ways, but it does not follow that these off-duty restrictions may unnecessarily impinge upon private, social conversation. *Absent significant countervailing governmental interests, we are loath[] to sanction the intrusion of the government's ear into the private lives of its employees*.

Id. at 837-39 (emphasis and paragraph break added) (cleaned up).

Davi's statements were likewise made "after hours," Mem. of Law in Supp. of Pl.'s Mot. for Partial Summ. J. at 15, *Davi v. Roberts*, No. 16-cv-

05060 (E.D.N.Y. Oct. 3. 2019) (ECF No. 81), while he was conversing "on the personal Facebook page of someone he knew." (SPA 3.) Management only learned of them because they were leaked by a participant to the conversation. (*Id.*)[2]

Indeed, Davi's statements merit still more protection than those in *Waters v. Chaffin*, because Davi's statements were on a quintessential matter of public concern. In *Waters v. Chaffin*, the court held the statements were protected even though "[t]he public has little interest in an individual's uncouth deprecations of his superior, so the public's right of access to information is not implicated in this case." 684 F.2d at 838 n.11 (citations omitted).

And of course, social media—"today," "the most important place . . . for the exchange of views"—is entitled to the same First Amendment protections as any other form of media. *Packingham v. North Carolina*,

[2] In *Waters v. Chaffin*, the person who reported the plaintiff's statements was also employed by the police department, so she arguably had a legitimate basis for doing so. Not so for Ms. Lloyd's report, which was also not entirely candid: she falsely claimed not to know Davi, and omitted that she was arguing with him at the time the complained-of statements were made. (SPA 5-6.) It would seem that Ms. Lloyd's report was motivated by ill will towards Davi and his view on the welfare system, not solicitude for public benefits applicants.

137 S. Ct. 1730, 1735, 1738 (2017); *see also Liverman v. City of Petersburg*, 844 F.3d 400, 404-06, 411 (4th Cir. 2016) (holding that police department's discipline of plaintiff sergeants who posted Facebook comments critical of department policy was unconstitutional); *Harnishfeger*, 943 F.3d at 1118-19 (holding that plaintiff's termination because of Facebook post advertising plaintiff's book about her experiences as a phone sex worker was unconstitutional).

II. OTDA's Argument Is Incompatible With the Supreme Court's Reasoning In *Republican Party v. White*

Distilled to its essence, OTDA's argument is that it can fire Davi because his view on the expansion of welfare may have become publicly known. Yet this argument is inconsistent with the logic of *Republican Party of Minnesota v. White*, which struck down a rule barring judicial candidates from "announc[ing]" their "views on disputed legal or political issues." 536 U.S. 765, 768 (2002) (cleaned up).

The government in *White* claimed that this "announce clause" "preserv[ed] the impartiality of the state judiciary and preserv[ed] the appearance of the impartiality of the state judiciary." *Id.* at 775. The Court disagreed: focusing on the "root meaning" of impartiality—"the lack of bias for or against either *party* to a proceeding"—the Court

concluded that the announce clause was "barely tailored to serve that interest *at all*." *Id.* at 775-76. "[S]peech for or against particular *issues*" did not show bias, or the appearance of bias, "for or against particular *parties*." *Id.* at 776-77.

Likewise, in this case, OTDA's governing regulations expressly require recusal of a hearing officer who has "displayed bias or partiality to any *party* to the hearing." N.Y. COMP. CODES R. & REGS. tit. 18, § 358-5.6(c)(1)(iii) (emphasis added). OTDA, like the government in *White*, seeks to justify its punishment of speech by arguing that Davi's Facebook statements "raise[] at least the appearance of . . . partiality" and "would jeopardize the public's confidence in the fair hearing system." (Appellants' Br. 17.) But, as in *White*, Davi was speaking "against [a] particular *issue*[]," 536 U.S. at 776—the expansion of welfare—not about any person. As in *White*, such a restriction on speech is unconstitutional.

Pappas v. Giuliani, 290 F.3d 143, 146-47 (2d Cir. 2002) (cited by Appellants' Br. 24), falls on the bias-against-party side of the line: Pappas's racist and anti-Semitic speech exhibited bias against particular racial, ethnic, or religious groups. *Id.*; *see also Locurto v. Giuliani*, 447 F.3d 159 (2d Cir. 2006) (plaintiff's float identified a particular racial

group); *Jeffries v. Harleston*, 52 F.3d 9 (2d Cir. 1995) (plaintiff's speech identified a particular ethnic group). In contrast, Davi's comments regarding welfare policy dealt with a policy issue (the availability of welfare benefits). And, as with the judicial speech held to be constitutionally protected in *White*, such comments at most showed the sort of opinion about a policy issue that people who had extensively dealt with the issue will naturally have—whether that opinion ends up being a preference for broader welfare benefits or for narrower ones.

III. OTDA's Reasoning Would Undermine Both the Right of Government Employees to Inform the Public and the Public's Right to Receive Information About Government

Whether to expand the welfare system is, ultimately, a question for the democratic process. "On such a question free and open debate is vital to informed decision-making by the electorate." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571-72 (1968).

The First Amendment also protects the "right to receive information and ideas." *Virginia State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) (citation and internal quotation marks omitted). This is because "the protection afforded is to the communication, to its source and to its recipients both," *id.*, and "the right

to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom," *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1254 (3d Cir. 1992) (citation omitted).

"Government employees are often in the best position to know what ails the agencies for which they work; [thus,] public debate may gain much from their informed opinions." *Waters v. Churchill*, 511 U.S. at 674 (plurality opinion). "Underlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers . . . . Were they not able to speak up on these matters, the community would be deprived of informed opinions on public matters." *City of San Diego v. Roe*, 543 U.S. 77, 80-82 (2004). Restricting speech such as Davi's unduly interferes with the community's ability to access such opinions, and would "allow th[e] government"—or partisan actors such as Ms. Lloyd—to "control . . . the search for political truth," *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 538 (1980).

Davi has a wealth of knowledge about the public benefits system: "During his tenure, [Mr.] Davi often presided over as many as thirty

hearings per day to review decisions adverse to benefits applicants and recipients." (Appellants' Br. 6.) Since he worked as a hearing officer for six years (*id.*), he has presumably reviewed many thousands of denials. Thus, he is well placed to analyze proposals to change the benefits system, and his criticism of an article calling for the expansion of welfare is valuable to his acquaintances' understanding of the proposal. "Accordingly, it is essential that [he and others in similar positions] be able to speak out freely on such questions without fear of retaliatory dismissal." *Pickering*, 391 U.S. at 572.

IV. This Court Should Not Allow OTDA to Impose a "Snooper's Veto" On Davi

It was Ms. Lloyd, not Davi, who spread knowledge of comments Davi made on a private Facebook page.[3] If that can lead to Davi's firing, then every government employee would be at the mercy of the most easily offended participant in any of their conversations. This will chill a vast amount of speech by government employees on many different topics of public concern.

[3] "The complainant who alerted OTDA to Davi's Facebook comments confirmed that she had sent a copy of the comments to Project FAIR, which maintains space in the lobby of the fair hearing waiting room in OAH's Brooklyn office." (Appellants' Br. 26.)

Indeed, the Seventh Circuit rejected a similar argument in *Harnishfeger*: The court there held that the defendants could not constitutionally fire the plaintiff out of concern that a third party would spread information that the plaintiff posted to Facebook. 943 F.3d at 1118.

In *Harnishfeger*, a government employee posted on her Facebook page about her new self-published book, *Conversations with Monsters: 5 Chilling, Depraved and Deviant Phone Sex Conversations*. *Id.* at 1110. That book was based on her past job as a phone sex operator, where she had concluded that many callers were "vile, unrepentant, disgusting poor excuses for men." *Id.* at 1109 (cleaned up). The book "recounted five of [her] most horrifying phone-sex calls and meditated on the social role of phone-sex operators and on her own experiences as one of them." *Id.* Plaintiff's Facebook page was "set to private," so only "her [Facebook] 'friends' could view what she posted there." *Id.* (some internal quotation marks omitted). Since the plaintiff had published the book under a pseudonym, "only [her] Facebook 'friends' could tie her to it." *Id.*

But "[s]hortly after publishing *Conversations*," the plaintiff began working at the Indiana Army National Guard's Family Program Office.

Id. at 1109-10. Later, "[the plaintiff's] direct supervisor[] asked to become her Facebook 'friend.'" *Id.* at 1111. "She accepted . . . and thereby gave [the supervisor] access to all of her 'friends-only' Facebook activity." *Id.*

The supervisor found the post announcing *Conversations*' publication, bought a copy, and "brought the book's contents to the attention of . . . the Guard's State Family Program Director." *Id.* The Director fired the plaintiff, explaining that the "'activities and conduct found on [the plaintiff]'s social media Facebook account . . . do not favorably represent our Family Program Office or its core programs.'" *Id.* at 1117. But the Seventh Circuit rejected this argument:

> The district court weighed in defendants' favor the possibility that [the plaintiff's supervisor], not [the plaintiff], would disrupt the Guard's mission by spreading knowledge of *Conversations*. We must disagree. Aside from the lack of evidence on this point, the government cannot be handed a "snooper's veto" when it uncovers otherwise secreted employee speech and then invokes the possibility that its own agents would publicize it.

Id. The court conceived of the "snooper's veto" as an extension of the heckler's veto. *Id.* (citing *Craig v. Rich Twp. High School Dist. 227*, 736 F.3d 1110, 1121 (7th Cir. 2013) (recognizing that "heckler's veto" cannot be used to silence unpopular speech)).

The Seventh Circuit's analysis is correct: Allowing firing based on a snooper's veto would powerfully deter government employees from discussing matters of public concern even in private settings. And the same analysis applies to OTDA's actions in this case.

Indeed, OTDA's reasoning would be even more harmful than the government's approach in *Harnishfeger*, because it would extend this sort of surveillance to all social media posts, whether made on the employee's own page or elsewhere. Under OTDA's reasoning, government employees would have to consider the sensibilities not only of those who currently have access to their Facebook friends' pages, but also of those who may gain access to those pages in the future. To be safe, government employees would have to go back through their entire social media history and scrub any posts that may cause controversy.

The snooper's veto is particularly insidious because of the chilling effect it would have on the First Amendment rights of both public employees and their friends. The Supreme Court has recognized that "the identity of the speaker is an important component of many attempts to persuade." *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994). This is because people generally trust their friends and acquaintances more than they

trust strangers, and are more willing to listen to those in their social circle than to strangers. *See id.* at 56 n.14. Thus, to the extent that the risk of a snooper's veto pressures public employees to self-censor on matters of public concern when speaking to their Facebook friends, it would abridge their right to speak to the audience that they are most likely to persuade. Likewise, the snooper's veto would infringe the right of their friends to receive information from those who they would find most persuasive.

And the Seventh Circuit's rejection of the "snooper's veto" should apply equally to snooping by nongovernment agents (such as Ms. Lloyd) and not just by the speaker's supervisor. The rejection of the snooper's veto is an extension of the rejection of the heckler's veto, and the typical heckler's veto scenario is one in which members of "the public" use "the government's help[] to shout down unpopular ideas." *Melzer v. Board of Education*, 336 F.3d 185, 199 (2d Cir. 2003); *Reno v. ACLU*, 521 U.S. 844, 880 (1997) (striking down provisions of Communications Decency Act which "would confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech"); *Bible Believers*, 805 F.3d at 255 (en banc) (holding that there was "no reasonable dispute"

that the respondent county's sheriffs "effectuated a heckler's veto" by failing to protect the petitioners from the "lawlessness of the hecklers"); *United States v. Marcavage*, 609 F.3d 264, 282 nn.13 & 14, 283 (3d Cir. 2010) (holding that park rangers unconstitutionally imposed heckler's veto by removing petitioner, whose anti-abortion protest included "vivid depictions of mutilated fetuses," because "visitors and pedestrians were disturbed by and complained about [petitioner]'s preaching and the graphic images"); *Ovadal v. City of Madison*, 416 F.3d 531, 537-38 (7th Cir. 2005) (holding that, when defendants banned plaintiff from protesting on highway overpasses because "drivers, angry with the message displayed, began driving erratically and causing congestion on the highway," "it is the reckless drivers, not [petitioner], who should have been dealt with by the police"; "there is no heckler's veto" (cleaned up)).

V. The Trial Court Correctly Concluded That OTDA's Decision to Fire Davi Was Unreasonable

Courts must ensure that a judgment in a First Amendment case "does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508 (1984). As explained above, Davi's private speech concerned the broad purpose and role of the public benefit system, a quintessential subject of public

concern. Thus, for instance, in *Harman v. City of New York*, this Court ruled in favor of a child welfare agency employee who was disciplined for public comments about flaws in the child welfare system because "[d]iscussion regarding current government policies and activities is perhaps the paradigmatic matter of public concern." 140 F.3d 111, 118 (2d Cir. 1998).

Here, OTDA acted unreasonably when it judged that Davi's Facebook comments would threaten the agency's operations. "[T]he closer the employee's speech reflects on matters of public concern, the greater must be the employer's showing that the speech is likely to be disruptive before it may be punished." *Jeffries,* 52 F.3d at 13.

OTDA received the anonymous complaint with screenshots of Davi's comments from a person claiming to have "observed a disturbing exchange on Facebook regarding individuals receiving public assistance." (A. 65.) The anonymous complainant was actually Ms. Lloyd, a former law school classmate of Davi's, and the person who was arguing with Davi when he made the comments. (A. 66.) The complaint incorrectly stated that its author did "not personally know Davi nor are we Facebook

'friends'; [she] merely observed his comments on a mutual friend's Facebook wall." (A. 65.)

OTDA's argument that Davi's comments were likely to be disruptive turns on the claim that members of the public were likely to see the comments and request reconsiderations and recusals, thus gumming up the works of OTDA's operations. But Davi's comments were unlikely to pose such a threat because they were posted on a *private* Facebook page, invisible to members of the public. Indeed, OTDA failed to investigate whether Davi's comments were visible to the broader public. (A. 278.)

OTDA's argument that the comments were disseminated more widely was based on Ms. Lloyd's contention that she had sent the complaint to Project FAIR. (A. 65.) But no OTDA official asked Project FAIR if they had, in fact, received the letter. (A. 163-64, 183.) And OTDA apparently never received complaints from Project FAIR representatives about any social media comments that Davi or any other ALJ had made. (SPA 18.)

Even though Davi's comments were not public, they still could have become public at a later date, thus enabling the kind of disruption to operations that OTDA feared. But there is no evidence in the record to suggest that OTDA considered this possibility when it judged that

suspending Davi was proper. Courts must give "substantial weight to government employers' reasonable predictions of disruption." *Waters v. Churchill*, 511 U.S. at 673 (plurality opinion). But they do not need to give "substantial weight" to possibilities of disruption that government employers never actually considered:

> *Pickering* balancing is not like rational basis review . . . , under which it is enough to imagine any rational underpinning for a challenged government action. First Amendment rights cannot be trampled based on hypothetical concerns that a governmental employer never expressed. A court must look instead to what the public employer's concerns really were.

Harnishfeger, 943 F.3d at 1116.

OTDA thus had little evidence to suggest that Project FAIR—or anyone else who could reasonably interfere with OTDA's operations—had actually received a copy of Davi's Facebook comments. The agency failed to perform basic diligence to confirm that Davi's comments had been made public. OTDA has not met its burden of making a "substantial showing" that disruption was likely.

VI. OTDA's Governing Regulations Do Not Call for Davi's Recusal

The court below briefly observed that "[i]t is unclear whether a hearing officer's statement on a matter of policy, not directed at any specific 'party to the hearing,' would entitle a benefit applicant to that hearing officer's

recusal." (SPA 20.) In context, this seems to convey skepticism that recusal would be justified—and this skepticism is warranted.

OTDA's governing regulations guarantee public benefit applicants a hearing "conducted by an impartial hearing officer." N.Y. COMP. CODES R. & REGS. tit. 18, § 358-5.6(a). They provide for recusal of a hearing officer who has "displayed bias or partiality to any *party* to the hearing." *Id.* § 358-5.6(c)(1)(iii) (emphasis added). *Amici* are not aware of any authoritative construction of this specific regulation. But New York cases generally establish that the bar to recusal of a hearing officer is quite high.

"In the sphere of administrative law, 'state administrators are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Grant v. Senkowski*, 146 A.D.2d 948, 949 (1989) (quoting *Withrow v. Larkin*, 421 U.S. 35, 55 (1975)). "Because hearing officers are presumed to be free from bias, an appearance of impropriety is [an] insufficient" basis for recusal. *Compasso v. Sheriff of Sullivan Cty.*, 29 A.D.3d 1064, 1065 (2006) (citations omitted). "Mere allegations of bias

are insufficient to require recusal or disqualification of [a] Hearing Officer." *Id.* at 1064 (citation omitted).

Further, "administrative officials are expected to be familiar with the subjects of their regulation and to be committed to the goals for which their agency was created. Thus, a predisposition on questions of law or policy and advance knowledge of general conditions in the regulated field are common." *1616 Second Ave. Rest.*, 75 N.Y.2d at 162. Therefore, "[d]isqualification is more likely to be required where an administrator has a preconceived view of facts at issue *in a specific case* as opposed to prejudgment of general questions of law or policy." *Id.* at 161 (emphasis added). A hearing officer cannot be recused based on his public statements unless "a disinterested observer [could] conclude that he has in some measure adjudged the facts as well as the law *of a particular case* in advance of hearing it." *Id.* at 162 (cleaned up) (emphasis added).

Davi's statements therefore would not be a basis for recusal. They simply expressed his view on three aspects of the public benefits system: (1) its proper role in society (the social safety net "should be of limited duration and designed to get people back to self-sufficiency," A. 66); (2) that long-term or perpetual welfare is harmful (it "create[s] an

underclass dependent on government handouts" and leads to "generational poverty," *id.*); and (3) the proper measure of its success ("[t]hese programs should be judge[d] by how many people or families they get back on their feet and off government assistance," *id.*). Davi's statements were not directed at any person who had appeared, or might appear, before him, nor did he express any opinion on facts pertinent to any specific applicant. Accordingly, it is unlikely that Davi could have been recused on the basis of his Facebook statements.

Of course, some applicants might still nonetheless request Davi's recusal, even without an adequate legal basis. But the risk of such unfounded requests by others cannot justify OTDA infringing his First Amendment rights: "[i]f the speaker's message does not fall into one of the recognized categories of unprotected speech, the message does not lose its protection under the First Amendment due to the lawless reaction of those who hear it." *Bible Believers*, 805 F.3d at 252 (en banc) (footnote omitted). OTDA cannot constitutionally fire or otherwise punish Davi "as an expedient alternative to containing or snuffing out" improper recusal requests. *Id.* And the "absence" of recusal requests and requests to

reconsider Davi's prior decisions further "sharply undercuts [OTDA's] theory." (SPA 20.)

Accordingly, this "conditional and remote eventualit[y] simply cannot justify silencing" Davi's speech on a matter of serious public concern. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 569 (1980). And "[i]n a balance between two important interests—free speech on one hand, and" an incremental burden on OTDA's resources "on the other—the scale is heavily weighted in favor of the First Amendment." *Bible Believers*, 805 F.3d at 252 (en banc) (rejecting a heckler's veto as a basis for restricting speech).

CONCLUSION

Government employees are entitled to broad First Amendment protection when they speak on matters of public concern, because they are well positioned to inform the public about the government and its problems. OTDA's reasoning would significantly reduce this flow of information to the public, by allowing a public employee to be fired for any social media post that may engender mild controversy.

OTDA's reasoning would also allow the "intrusion of the government's ear into the private lives of its employees," *Waters v. Chaffin*, 684 F.2d at

839, and would pressure government employees to self-censor even when speaking off-duty among friends. This would infringe the right of government employees to speak to those who will find them most persuasive, and will infringe their friends' right to receive information from those by whom they are most likely to be persuaded. Accordingly, *amici* respectfully ask that the judgment of the District Court be affirmed.

Date: October 8, 2021

s/ Eugene Volokh
Attorney for *Amici Curiae*
Institute for Free Speech and
Cato Institute

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of 2d Cir. Loc. R. 29.1(c) because this brief contains 4,826 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook.

Date: October 8, 2021

s/ Eugene Volokh
Attorney for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of Institute for Free Speech as *Amicus Curiae* in Support of Plaintiff-Appellee with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on October 8, 2021.

All participants in the case are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Date: October 8, 2021

s/ Eugene Volokh
Attorney for *Amici Curiae*