No. 24-

IN THE

Supreme Court of the United States

R. MICHAEL CESTARO,

Petitioner,

v.

CLARISSA M. RODRIGUEZ, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a claim under 42 U.S.C. § 1983 in which a public employee alleges First Amendment retaliation, does the government successfully invoke the affirmative defense recognized by this Court in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274 (1977) – i.e., that the government employer would have taken the same action anyway for reasons other than the employee's Constitutionally-protected speech – by construing aspects of the *speech itself* as objectionable behavior for *Mt. Healthy* purposes?

2. In a claim under 42 U.S.C. § 1983 in which a public employee alleges First Amendment retaliation, is the plaintiff required to come forward with evidence tending to prove that the government employer acted with the subjective intent to deprive the plaintiff of his First Amendment rights?

It is respectfully submitted that the above questions must be answered in the negative.

RELATED PROCEEDINGS

Upon information and belief, there are no known related proceedings in this Court or in any other court or agency.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner R. Michael Cestaro respectfully petitions this Court of a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. *1a*) is an unpublished Summary Order. It is available at *Cestaro v. Rodriguez*, 2025 U.S. App. LEXIS 5730, 2025 WL 783636. The District Court's memorandum opinion and order (Pet. App. *7a*) is unpublished but is available at *Cestaro v. Rodriguez*, 2024 U.S. Dist. LEXIS 47454, 2024 WL 1116876.

JURISDICTION

The Second Circuit Court of Appeals entered its judgment on March 12, 2025 (Pet. App. *1a*). This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law … abridging the freedom of speech."

FACTUAL BACKGROUND

In August of 2021, during the COVID-19 pandemic, Petitioner R. Michael Cestaro, an attorney licensed in New York and New Jersey and, at the time, an Administrative Law Judge employed by the State of New York Workers'

Compensation Board ("WCB"), got into an argument on a New Jersey Transit train, when a train conductor approached him and ordered him to pull up his mask. The incident happened on a Saturday, and had nothing to do with Petitioner's work. Petitioner was dressed casually, and never identified himself as a lawyer or a judge. As a result of the words Petitioner spoke during that argument, his employers canceled a promotion he had previously been offered and accepted.

A year into the pandemic, masking in public places was still the order of the day. But, as Petitioner observed, many people flouted masking and distancing rules, including quite a few New Jersey Transit employees, who walked around with their own masks down to their chins. Petitioner suffers significant visual impairment, and he had pulled his mask down to his chin (as he was legally entitled to do) in order to more clearly see his digital train ticket on his phone, and because he would soon be standing up and walking down a tall stair onto the platform at his destination, Kingsland Station in New Jersey. For a host of reasons, Petitioner chafed at what he perceived to be an arbitrariness, and therefore oppressiveness, to the enforcement of masking rules. Nonetheless, he had purposely sat as from other passengers as he could, and pulled his mask down only briefly. The conductor happened to catch Petitioner at the right moment. Something about the conductor's command that day irritated Petitioner, and an argument ensued, 23 seconds of which were captured on video:

PETITIONER: This is a political symbol.

CONDUCTOR: Listen to me.

PETITIONER: No. Listen to me.

CONDUCTOR: Guess what.

PETITIONER: I don't have to listen to you.

CONDUCTOR: With New Jersey Transit, the police can come.

PETITIONER: Fine.

CONDUCTOR: (Inaudible/unclear) You can get a summons.

PETITIONER: Fine. Fine.

CONDUCTOR: You are just lucky that you are getting off at Kingsland. It's just a courtesy to everyone else.

PETITIONER: Fine. Then I'll challenge it in court.

CONDUCTOR: Absolutely you can.

PETITIONER Fine.

CONDUCTOR: Challenge it.

PETITIONER: Fine. But it's unconstitutional. The government can't compel me to do this. If you want to be an obedient dog, you can.[1]

1. The 23-second video was part of the record on Summary Judgment in the District Court and in the appeal to the Second

Petitioner stood and exited the train car as the argument wound down. The train had completed its six-minute route to Kingsland, and Petitioner went about his day. It is respectfully submitted, although there is no proof in the record to this effect, that the conductor probably went about his day as well. The argument was certainly not violent, and not even particularly disturbing. The worst the conductor did was to jab his finger towards Petitioner for emphasis (some degree of vague threat could possibly be discerned in the remark that Petitioner was "lucky [to be] getting off at Kingsland"); for Petitioner's part, the "obedient dog" metaphor (referring, of course, to a person who demonstrates an unbecoming degree of obsequiousness where authority crosses a line into the arbitrary and absurd) was by no means a compliment, but certainly did not cause the conductor to curl up in a ball and weep. It was two grown men having a brief argument. The entire fleeting exchange of raised voices was entirely within the bounds of what normal adult New Yorkers regularly tolerate and even embrace as part of the busy, discordant soundtrack of the city, along with honking traffic, screeching subway cars, and the rhythm of jackhammers and plastic bucket percussionists.

Certainly the subject of the argument was familiar to virtually every American at that particular time in history. Petitioner's strongly-expressed views – that wearing a mask was "a political symbol," that mask mandates were unlawful or even unconstitutional, and that those who did not bristle at the arbitrary government overreach which was suddenly the order of the day were

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Circuit. The video will promptly be made available by the undersigned on request.

akin to "obedient dogs" – had their corollary in familiar contrary views, often expressed with equal vehemence: that those who resisted the government's emergency COVID-19 measures were selfish, ignorant, or backwards-thinking.[2] Whatever one's views, it is unquestionable that few issues then polarized society as did mask mandates. Indeed, had the argument not concerned such a divisive social issue, the TikTok video would not have garnered any significant attention in the first place. Petitioner's words, in short, were made in his capacity as a private citizen, and addressed a matter of public concern.

The 23-second video of the incident, surreptitiously taken by an unknown passenger on the train, was subsequently posted to TikTok, and from there had a "viral" moment, garnering thousands of views and comments.

Two days later, on Monday, August 30, 2021, an attorney who regularly appeared before the WCB (and who admitted in deposition that he did not particularly like Petitioner personally) emailed a link to the TikTok video to Petitioner's supervisors at the WCB. Within eleven minutes of watching the video, Petitioner's immediate supervisor, Madeline Pantzer, made the

2. The comments section of the TikTok video offered a sampling of such contrary views, directed at Petitioner. For example: "Another old crusty queen for Trump. Lincoln logger"; "OMG just get tf off the train if you can't cooperate. These people are exhausting with their BS!"; "Throw his sorry ass off the train!!!!"; "Fine (him) about 5k or just put a bullet in his head"; and similar. A smaller proportion of commenters agreed with Petitioner's viewpoints, in remarks such as "There's no one around him even six feet away what's the problem…come on."

decision, based solely on what she saw in the video, to revoke a promotion, from Compensation Claims Referee to Senior Compensation Claims Referee, which Petitioner had previously been offered and had accepted. He was scheduled to begin in his new role within days.

Petitioner's performance reviews were uniformly positive, including those covering the time period when the argument on the train occurred. After the incident, as he continued on in his capacity as Compensation Claims Attorney, Petitioner was given increasingly complex, sensitive, and public-facing duties. No other grounds, beyond what is seen in the video, has ever been advanced, purportedly justifying the decision to take away the pending promotion. In discussing amongst themselves their feelings about Petitioner's speech as captured in the TikTok video, Petitioner's supervisors mentioned things such as that his words constituted "unprofessional" behavior, that his words showed "ignorance and arrogance," and that the speech he engaged in was "a poor way to treat a worker [i.e., the train conductor]." Petitioner's words, in short, were the cause of the revocation of the promotion.

Petitioner brought suit in the Southern District of New York under, *inter alia,* the U.S. Constitution and 42 U.S.C. § 1983, maintaining that his supervisors' revocation of his pending promotion violated his free speech rights under the First and Fourteenth Amendments to the United States Constitution. Following discovery, defendants jointly moved for summary judgment on all of Petitioner's claims. In support of their motion, the defendants invoked, *inter alia,* the affirmative defenses available under *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (affirmative defense where potential disruption to workplace outweighs

the constitutional value of the speech) and *Mt. Healthy City School District Bd. of Educ. v. Doyle* 429 U.S. 274 (1976) (affirmative defense where same sanction would have been imposed anyway for reasons other than the speech). Petitioner opposed defendants' motion, arguing, *inter alia,* that *Mt. Healthy* was the incorrect framework for evaluating the case because the challenged action was taken solely based on his speech, and that although the *Pickering* case provided the correct framework for analyzing the facts of the case, that affirmative defense was not available either, because he spoke as a private citizen on a matter of public concern, and it was not reasonably likely that his speech would cause workplace disruption.

By Decision and Order dated December 21, 2023, the District Court of the Southern District of New York (Hon. Denise L. Cote) granted summary judgment in defendants' favor. The court did not address the questions comprising the inquiry into whether Petitioner established a *prima facie* case of First Amendment retaliation – i.e., whether was he speaking as a private citizen and whether was he speaking as on a matter of public concern. Nor did the Court make the *Pickering* inquiry into whether the speech was likely to cause workplace disruption outweighing the constitutional value of the speech. In explanation, the court merely stated in a footnote, without elaboration, that "[t]he defendants rely on the defenses offered by both *Pickering v. Board of Ed. Of Tp, High School Dist., 205, Will, Cnty, Illinois,* 391 U.S. 563 (1968) and *Mt. Healthy* 429 U.S. 274, 285-86 (1977). It is only necessary to address their arguments under *Mt. Healthy*" (Pet. App. [Petitioner's Appendix]: *15a*).

In disposing of the case solely on the grounds of *Mt. Healthy,* the District Court found that "any reasonable jury would find that [Petitioner's] promotion would have been revoked even absent any desire on the Defendants' part to punish him in retaliation for his allegedly protected speech." In the court's view, "even if the plaintiff had not stated his views about the unconstitutionality of mask mandates, the defendants would have revoked the promotion for his other conduct, namely, behaving unprofessionally, insulting a worker, and failing to follow the rules and regulations about wearing masks on public transport during a global health crisis" (Pet. App.: *20a*).

A Notice of Appeal was timely filed, and the parties briefed the issues in the Second Circuit Court of Appeals. Oral argument was held on March 3, 2025, a crisp morning in lower Manhattan. Petitioner argued on appeal that it was improper to apply *Mt. Healthy* in these circumstances without first defining what, precisely, constituted the constitutionally-protected speech, in the absence of which defendants purportedly would have revoked the promotion anyway. Without first defining what was, and what was not, constitutionally protected speech, Petitioner maintained, the *Mt. Healthy* question could not even be coherently asked. The entirety of the speech, and not merely certain words or phrases occurring within Petitioner's words spoken to the conductor on the train, Petitioner argued, was constitutionally protected.

The Second Circuit was not persuaded. In a Summary Order issued on March 12, 2025, a 3-Judge panel upheld Judge Cote's earlier application of *Mt. Healthy,* finding that Petitioner "failed to demonstrate a genuine dispute of material fact as to whether defendants would have

taken the same actions regardless of whether he engaged in any protected speech" (Pet. App.: *6a*). In this regard, the panel cited defendants' discussions among themselves concerning their feelings about what they saw in the TikTok video – e.g., that Petitioner's "conduct was a poor way to treat workers," that "he was not fair to the transit staff," and that he was "unprofessional and aggressive towards the conductor" (Pet. App.: *5a* [internal quotations omitted]). Defendants "did not discuss the constitutionality of masking requirements" or Petitioner's views on that subject (*id.*). And, the panel noted, "when pressed at oral argument," the undersigned "failed to point to any evidence in the record from which a reasonable jury could conclude [Petitioner's] views on masking, rather than his conduct toward the conductor, on a public train, played a substantial part in [defendants'] decision to revoke his promotion" (Pet. App.: *5a-6a*).

SUMMARY OF ARGUMENT

Petitioner respectfully submits that the Second Circuit erred in upholding Judge Cote's decision to discard his claims on summary judgment. Contrary to the reasoning both of the District Court and the appellate panel, Petitioner was not required to come forward with evidence of defendants' subjectively-held animus towards the views he expressed. His burden, rather, along with making a *prima facie* case that he spoke as a private citizen on a matter of public concern, was to establish causation in fact – i.e., that defendants revoked his promotion because of his constitutionally-protected activity. Both the *prima facie* case and causation are objective rather than subjective determinations, and both are clearly made out here. A clarification from this Court is required that **the**

concepts of "motivation" or permissible/impermissible "reasons" for the challenged action, as those terms are used in the context of certain cases applying the *Mt. Healthy* affirmative defense, in fact refer simply to an objective inquiry into the question of causation, and do not point to an additional, subjective, *mens rea* hurdle which plaintiffs in public employment retaliation cases must clear.

Further, since the question whether the speech (either in its entirety or some portion of it) was constitutionally-protected was never answered, it makes no sense to even ask the question whether the same action would have been taken in the absence of the constitutionally-protected speech. If a court is to dispose of Petitioner's claim on the grounds that the same action would have been taken even in the absence of the speech, then there must exist some reason separate and apart from the speech to which his employers objected. *Mt. Healthy* should therefore have no role in the disposition of this case. Rather, the proper framework the District Court should have applied is 1) determine if a *prima facie* case is made out; and 2) if so, determine whether, under *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), defendants can show a reasonable belief that Plaintiff's speech risked disruption to the workplace outweighing his First Amendment interest in that speech. This case warrants this Court's review because the rulings below represent such a gross misapplication of this Court's precedent.

Accordingly, the framework governing First Amendment retaliation claims by public employees requires clarification from this Court, in the form of a ruling that, in addition to the proposed rule of law noted

above, this Court clarify that, **prior to applying the *Mt. Healthy* or *Pickering* affirmative defenses in a case where a public employee alleges First Amendment retaliation, courts must first determine whether a *prima facie* case of First Amendment retaliation is made out, to include a determination whether the speech is constitutionally protected, in order that the subsequent steps in the *Mt. Healthy* and *Pickering* analyses can coherently be performed**. In the absence of clarification of this issue, the *Mt. Healthy* defense has the potential to morph, at the whim of any court, into a creature this Court never contemplated, one so massive as to be capable of swallowing the First Amendment in any case in which a government employee alleges retaliation based on speech. This is so because virtually all examples of free speech activity entail some physical activity which could be construed as "conduct" or "behavior" rather than pure expression of an idea. In the absence of guidance in this area, violations of a public employee's First Amendment rights may go undetected so long as government defendants simply incant the words "*Mt. Healthy*" and make a show of clutching their pearls and swooning upon hearing the speech. Likewise, under *Pickering,* in which the constitutional value of the speech is one item placed on the scales (opposite the potential workplace disruption of the speech), a *prima facie* determination as a first step is required to know the value to be afforded the speech.[3] Neither *Mt. Healthy* nor

3. The government employer's interest must be proportional to the value of the employee's speech; in other words, "the stronger the First Amendment interests in the speech, the stronger the justification the employer must have." *Curran v. Cousins,* 509 F.3d 36, 48 (1t Cir. 2007), citing *Connick v. Myers,* 461 U.S. 138, 150 (1983).

Pickering can be applied before a determination has been made whether a *prima facie* case is made out.

ARGUMENT IN SUPPORT OF GRANTING WRIT

The "unchallenged dogma" historically was that "a public employee had no right to object to conditions placed upon the terms of employment," including restrictions on his right to speak freely. *Garcetti v. Ceballos,* 547 U.S. 410, 417 (2006) (internal quotation marks omitted). In *Pickering v. Bd. of Educ.,* 391 U.S. 563, 568 (1968), however, this Court made clear that public employees do not automatically surrender all their rights of free expression at the office door, and may be protected from retaliation even when speaking in the workplace "as a citizen . . . upon matters of public concern." *Id.* at 568. At the same time, "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Bd. of Educ.,* 391 U.S. 563, 568 (1968). This Court, relying on *Pickering* and *Connick v. Myers,* 461 U.S. 138, 147 (1983), further explained in *Garcetti* that the First Amendment inquiry must proceed in two parts: first, if the employee did not speak "as a citizen on a matter of public concern," the employee has no First Amendment cause of action. *Garcetti,* 547 U.S. at 418 (citations omitted). If the employee does speak as a private citizen, on a matter of public concern, then the employer must show it had "adequate justification for treating the employee differently [based on the speech] from any other member of the general public." *Id.* Accordingly, in cases where a public employee alleges First Amendment retaliation against his government employer, the problem

is "to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon 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." *Connick,* 461 U.S. at 142.

In the Second Circuit, to survive summary judgment on a First Amendment retaliation claim, a public employee "must bring forth evidence showing that [1] he has engaged in protected First Amendment activity, [2] he suffered an adverse employment action, and [3] there was a causal connection between the protected activity and the adverse employment action." *Anemone v. Metro. Transp. Auth.*, 629 F.3d 97, 114 (2d Cir. 2011). "[T]he causal connection must be sufficient to warrant the inference that the protected speech was a substantial motivating factor in the adverse employment action." *Cotarelo v. Vill. of Sleepy Hollow Police Dep't,* 460 F.3d 247, 251 (2d Cir. 2006) (*quoting Blum v. Schlegel,* 18 F.3d 1005, 1010 [2d Cir. 1994]). To determine whether or not a plaintiff's speech is protected, a court must begin by asking "whether the employee spoke as a citizen on a matter of public concern." *Garcetti,* 547 U.S. at 418. If the court determines that the plaintiff either did not speak as a citizen or did not speak on a matter of public concern, "the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." *Id.*

Even where a public employee plaintiff has made out a *prima facie* retaliation claim, the government may nonetheless be entitled to summary judgment by establishing its entitlement to a relevant defense. Under this Court's ruling in *Pickering v. Bd. of Educ.,* 391 U.S. 563, 568 (1968), even where a public employee speaks

as a private citizen on a matter of public concern, if the constitutional value of the speech is outweighed by the likely disruption the speech will cause in the workplace, liability can be avoided. And, in *Mount Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1976), this Court recognized a defense to a claim of retaliation for constitutionally protected speech in the public employment context where the protected speech could not have substantially caused the adverse action because the employer would have taken that action in any event. A public-employee plaintiff's freedom from retaliation for his constitutionally-protected speech is "sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the [protected] conduct." *Mt. Healthy,* 429 U.S. at 285-86.

1. Under *Mt. Healthy,* causation is an objective inquiry

Contrary to the Second Circuit's reasoning below, it is respectfully submitted that, under a proper reading of *Mt. Healthy,* a public employee alleging First Amendment retaliation in the employment context does not bear the burden of proving that the employer acted based on some subjective animus to the ideas the plaintiff expressed. Causation, rather, is an objective inquiry. Following the District Court's incorrect assumption that Petitioner was required to show "[a] desire on the Defendants' part to punish him in retaliation for his allegedly protected speech." (Pet. App.: *20a*), the Second Circuit panel went astray in holding Petitioner to the task of coming forward with evidence in the record tending to show the defendants disagreed with his views about masking.[4]

4. The undersigned acknowledges having been caught flat-footed when pressed, at oral argument, as to what evidence in the record demonstrates the defendants' subjective disagreement with

This legal misstep is likely attributable to an uneasy melding of the legal doctrine underlying retaliation in employment law with the constitutional principles underlying *Pickering* and *Mt. Healthy.* This is seen in cases where *Mt. Healthy* is described as an affirmative defense available in a "dual motivation" case, such as *Scott v. Coughlin,* 344 F.3d 282 (2d Cir. 2003), a public employment retaliation case in which the Second Circuit stated, citing to *Mt. Healthy,* "[r]egardless of the presence of retaliatory motive," a government employer "may be entitled to summary judgment if he can show dual motivation, i.e., that even without the improper motivation the alleged retaliatory action would have occurred." Where such "dual motivations" exist, "[p]laintiff has the initial burden of showing that an improper motive played a substantial part in defendant's action. The burden then shifts to defendant to show it would have taken exactly the same action absent the improper motive." *Scott,* 344 F.3d at 288.

Petitioner's viewpoints (*see* Pet. App.: *5a*). The correct answer to this, consistent with the conception of causation as described herein, sounds flippant: even assuming Petitioner bears the burden of proving subjective disapproval of his viewpoints in the first place (which he does not), it can be inferred from the fact that they revoked his promotion within eleven minutes of watching the video. Additionally, moreover, although this fact did not make its way into the court's Summary Order, as Justice Michael H. Park pointed out from the bench, the record contains expression by the defendants of their view that the video of Petitioner speaking on the train demonstrated his "ignorance." This is accurate. Petitioner's supervisors all thought one way on this prominent political issue, while he thought the opposite way.

In a somewhat remarkable passage in *Greenwich Citizens Comm. v. Counties of Warren & Washington Indus. Dev. Agency,* 77 F.3d 26 (2d Cir. 1996), the Second Circuit even cites to the central holding of *Mt. Healthy,* and then promptly announces that this Court's words mean something other than what they say:

> In an effort to avoid the requirement of proving retaliatory intent, the Greenwich plaintiffs call our attention to certain language in *Mt. Healthy* that, if read in isolation, would appear to call for the strict cause-and-effect analysis adopted by the District Court. The Supreme Court articulated its test of "but for" causation as follows:
>
> > Initially, in this case, the burden was properly placed upon respondent to show that his conduct . . . was a "substantial factor" . . . in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct.
>
> *Mt. Healthy,* 429 U.S. at 287 (emphasis added). Thus, the Supreme Court focused on the causative effect of the plaintiff's protected conduct rather than the combined causative effect of the plaintiff's conduct and

> the defendant's impermissible reason. This language could be read to enunciate a test of strict liability that disregards the defendant's state-of-mind.

Greenwich Citizens Comm., 77 F.3d at 32.[5]

Aside from this Court's straightforward enunciation of causation in *Mt. Healthy* itself, this Court has also found that "[g]overnment action based on protected speech may under some circumstances violate the First Amendment even if the government actor honestly believes the speech is unprotected." *Waters v. Churchill,* 511 U.S. 661, 669

5. Although a full law review article could be written describing in detail the different directions the various courts have gone in the nearly half century since *Mt. Healthy* was decided, suffice to say that in terms of objective/subjective causation, burden shifting schemes, levels of proof, and organization of what elements go into a *prima facie* case (including, sometimes, elements of *Pickering* or *Mt. Healthy)*, it is more accurate to say there exists a diverse hodgepodge of approaches, more so than an easily defined split among Circuits. The Seventh Circuit, to take one example, appears to have adopted a reading of *Mt. Healthy* according to which, quite the opposite of the approach the lower courts took here, so long as a plaintiff shows that his constitutionally protected speech was "a motivating factor and a constitutional violation, the fact that the defendants would have done what they did anyway, without being motivated by the protected speech, is not germane to the question of liability." *Gooden v. Neal,* 17 F.3d 925, 928, (7th Cir. 1994). Some courts appear to build *Mt. Healthy* into a burden-shifting scheme of various contours. In the First Circuit, for example, once a *prima facie* case is made out, the defendant may assert the *Mt. Healthy* defense by proffering a "motivating factor" other than the protected speech; the plaintiff may then "discredit the proffered" reason, "either circumstantially or directly." *Stuart v. City of Framingham,* 989 F.3d 29, 35 (1st Cir. 2021).

(1994).[6] This language directly refutes the notion that there can be no liability for First Amendment retaliation absent subjective intent. And, in 2006, this Court affirmed that the central holding of *Mt. Healthy* was that "adverse action against [a] government employee cannot be taken if it is in response to the employee's "exercise of constitutionally protected First Amendment freedoms." *Hartman v. Moore,* 547 U.S. 250, 256 (2006) ("when nonretaliatory grounds are in fact insufficient to provoke the adverse consequences, we have held that retaliation is subject to recovery as the but-for cause of official action offending the Constitution").

It is respectfully submitted that, insofar as *Mt. Healthy* can be described as a defense available in "dual motivation" cases, "motivation" should be understood

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6. In *Waters v. Churchill,* this Court further explained:

> "[i]t is necessary that the decisionmaker reach its conclusion about what was said in good faith, rather than as a pretext; but it does not follow that good faith alone is sufficient under the First Amendment [citing *Mt. Healthy* and *Pickering].* Thus, if an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected, the First Amendment requires that the manager proceed with the care that a reasonable manager would use before making an employment decision of the sort involved in the particular case." *Id.* at 664. No investigation whatsoever was made in the case at hand. Rather, the decision to revoke Petitioner's promotion was made within eleven minutes. His supervisors never made any attempt to learn his side of the story.

to refer simply to whether the moving force (i.e., the cause) behind the challenged action was the plaintiff's constitutionally protected speech, as opposed to some other factor. The term "dual motivation" merely reiterates the central holding of *Mt. Healthy,* rather than decimating it by adding an additional *mens rea* hurdle for the plaintiff to overcome. It would be entirely unreasonable to presume the law is otherwise, for such a *mens rea* element would relieve the government of liability for a clear-cut constitutional violation, so long as the plaintiff is unable to come up with evidence of the defendant's subjective state of mind, which in many cases would be prohibitively difficult or impossible.

Such a *mens rea* element would be glaringly out of place in the context of other constitutional cases litigated under 42 U.S.C. § 1983: where a police officer makes a warrantless arrest without probable cause, the objective factors known to the officer are what matters; his subjective state of mind does not. If a police officer were to drag a speaker down from a soap box in the public square, no inquiry would be made into the police officer's views on the subject on which the speaker was holding forth: all inquiries in that case would be objective in nature. The same should be true in a *Mt. Healthy* case. What matters is whether the speech is made as a private citizen on a matter of public concern, and whether the action was taken because of the speech, or whether the action would have been taken anyway because of something else. These are objective inquiries.[7] The use of the term "motivation" to

7. To be sure, while the case at bar is the rare – and may quite possibly prove to be the only – case where but-for causation is clear and the *Mt. Healthy* affirmative defense is nonetheless

refer to objective inquiries within the causation analysis is an unfortunate development in the Second Circuit's *Mt. Healthy* cases. This Court should clarify that **the concepts of "motivation" or permissible/impermissible "reasons" for the challenged action, as those terms are used in the context of certain cases applying the *Mt. Healthy* affirmative defense, in fact refer simply to an objective inquiry into the question of causation, and do not point to an additional, subjective, *mens rea* hurdle which plaintiffs in public employment retaliation cases must clear**.

2. "Other conduct," under *Mt. Healthy*, must be separate and distinct from the protected speech, not merely aspects of, or descriptions of, the speech

Furthermore, the appellate panel below, following the District Court, went astray in looking to aspects of Petitioner's speech – his words were "not fair to the transit staff," and comprised behavior that was "unprofessional and aggressive towards the conductor" (Pet. App.: *5a*) as factors available for consideration, under *Mt. Healthy,* as reasons why the promotion would have been revoked

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dispositive, it is easy to think of examples of a standard *Mt. Healthy* fact pattern where the plaintiff is unable to come up with evidence of subjective intent. To find each such plaintiff lacking in his proof is to permit defendants, in effect, to evade liability as long as they choose not to admit liability. This would be avoided if the rule is that the sanction imposed as a result of the protected speech must itself give rise to a permissible inference that the defendant objected to the speech. But, by this point, we have come full circle, and may as well just admit the rule, grounded in *Mt. Healthy* itself: causation may be proven entirely objectively, and the plaintiff need not prove subjective intent.

"anyway."[8] It is respectfully submitted that this is a gross misreading of *Mt. Healthy,* which expands the narrow holding of that case into a virtually unlimited exception, which swallows the First Amendment.

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8. To its credit, the District Court at least pointed to one factor which, if credited, would qualify as a factor separate and apart from Petitioner's speech: that Petitioner "fail[ed] to follow the rules and regulations about wearing masks on public transport during a global health crisis" (Pet. App.: 20a). Petitioner challenged both the District Court at summary judgment and the Second Circuit on appeal to reject this as a *Mt. Healthy* factor for summary judgment purposes on the grounds that, if the video merely showed Petitioner sitting silently albeit with his mask pulled down to his chin (an offense rising to the level of jaywalking) it would be absurd to suppose the same action would have been taken. Neither the District Court nor the panel deigned to engage with this counterfactual aimed, of course, at disproving the one arguable non-speech factor purportedly justifying the revocation of the promotion. Further, even allowing that Petitioner violated a masking rule or requirement, the dubious supposition that that violation actually motivated the revocation of the promotion is a fact question, on which Petitioner was entitled to inferences in his favor. Petitioner has consistently maintained that he complied with all relevant federal, state and local laws, rules and regulations regarding mask mandates since the initiation of this action – indeed, the argument on the train stemmed from Petitioner's insistence that he was doing nothing wrong by briefly pulling down his mask while he looked at his digital ticket. Of course, Due Process affords Petitioner the right to assert and attempt to prove his innocence against any accusation of having violated a law. *See e.g. Johnson v. Mississippi,* 403 U.S. 212 (1971) (when a petitioner is accused of violating a courtroom procedure during a prior trial, he must be given a fair hearing with the opportunity to contest the version of events presented by the judge).

Virtually every instance of First Amendment protected activity involving expression of an idea will also carry a "conduct" component which, theoretically, can be parsed out from that idea: striking the match which is then used to light a flag; typing out keystrokes or writing with a pen; physically holding up a sign.[9] For practical purposes, these cannot be parsed out, and an incident of speech must be viewed as a whole for *Mt. Healthy* purposes. Where a government employer is of the view that constitutionally-protected speech is egregious enough to justify a sanction, that is a *Pickering* question. But *Pickering* would require a rigorous analysis of exactly how the workplace would be disrupted. Applying the *Mt. Healthy* affirmative defense in these circumstances, by contrast, requires nothing more rigorous than a pronouncement by the defendants of how offended they were. That is what happened here. To allow the parsing out of the "pure idea" aspects of in instance of speech from the "conduct" aspects of the speech expands the narrow *Mt. Healthy* exception in a potentially unlimited way – rendering *Mt. Healthy* so slippery as to be unscalable.[10] Simply, *Mt. Healthy* is

9. If First Amendment activity is to be parsed in this manner, it would swallow the First Amendment in all First Amendment contexts. Members of the Fred Phelps church, for example, could be subjected to prior restraint on the theory that it is not the ideas they espouse which make it necessary to prevent them protesting at servicemembers' funerals, but rather their offensiveness – a distinction without a difference.

10. The undersigned spent some time attempting, as a thought experiment, to conceive of a fact pattern involving a First Amendment claim by a public employee involving "pure idea" with no "conduct" or "behavior" element, such that the claim could survive the turbocharged version of *Mt. Healthy* the lower courts applied in this case. This proceeded only as far as envisioning

glaringly inapposite to these facts, where the action was without question taken due to Plaintiff's speech.

Mt. Healthy itself is instructive. In that case, the plaintiff, a public school teacher, was fired for a course of conduct which included an incident of protected speech – i.e., calling a radio station to complain about the school principal's dress code. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. at 276. But, the defendants would have fired the Plaintiff anyway, for other reasons, including an argument with another teacher which led to her slapping him, an "obscene gesture" he made to a student, and another argument "with employees of the school cafeteria over the amount of spaghetti" he was served, plus calling students, in connection with a disciplinary complaint, "sons of bitches." *Id.* at 278. These other factors were separate, distinct incidents, wholly unrelated to the call to the radio station. Even if the defendants fired the plaintiff based in part on his call to the radio station, there was ample reason, completely separate and apart from that constitutionally protected speech, to justify the firing. In sum, in a proper *Mt. Healthy* fact pattern, the challenged action would have happened anyway, for reasons entirely separate and distinct from to the employee's speech.

The posture of this case is of course singular, having been disposed of on *Mt. Healthy* grounds even where there is really nothing other than a single incident of speech comprising the but-for cause of the sanction imposed on a

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an alternate universe in which Steven Hawking has taken a job at an inner-city DMV for some reason, before the futility of the exercise became plain.

government employee. From this dearth of on-point cases should not be inferred that the case is a mere aberration not warranting this Court's attention. Quite the contrary, another case is unlikely to come along soon, highlighting just how starkly courts may depart from the correct understanding of *Mt. Healthy* absent further guidance from this Court. Although another court is unlikely soon to make so egregious an error as applying *Mt. Healthy* where there is nothing whatsoever causing the sanction beyond the speech, it is quite likely that a court may apply the *Pickering* affirmative defense without having first defined the parameters of the constitutionally-protected speech, via the *prima facie* case inquiry. The lower court's failure here to find whether a *prima facie* case was made out led to the confusion on the question of what, precisely, constituted the speech, beyond which we have to look for causation under the *Mt. Healthy* exception. The same failure prior to application of the *Pickering* analysis would mean that, when the court goes to weigh the likelihood of workplace disruption against the constitutional value of the speech, no matter how well calibrated the scale, the material on one side of the scale having been improperly measured, the result will be tainted. For this reason, Petitioner asks this Court to clarify that, **prior to applying the *Mt. Healthy* or *Pickering* affirmative defenses in a case where a public employee alleges First Amendment retaliation, courts must first determine whether a *prima facie* case of First Amendment retaliation is made out, to include a determination whether the speech is constitutionally protected, in order that the subsequent steps in the *Mt. Healthy* and *Pickering* analyses can coherently be performed**.

CONCLUSION

The lower court erred in applying the *Mt. Healthy* framework to these facts, where the adverse action happened because of Plaintiff's speech, since this Court's holding in *Mt. Healthy,* properly understood, entails an objective, "but for" causation factor. And, this Court's guidance on the order of procedure to be applied in cases of public employment First Amendment retaliation is needed to ensure that the *Mt. Healthy* and *Pickering* tests are not performed until the constitutional right at issue is defined with precision. This is an area of First Amendment law of tremendous public importance, because in the absence of guidance in this area, the robust yet unique framework this Court has set out will continue to be misapplied and eroded by lower courts. This case, arising at the intersection of COVID-19, cancel culture in the age of social media, and free expression, is an ideal vehicle for this Court to provide much needed clarity. In the absence of such clarification, government agencies may continue to feel secure in self-selecting for ideological affinity in the shadows, potentially violating the rights of numerous Americans and freezing out full participation in public service.[11]

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11. On reexamination by the New Yorker itself, New Yorker film critic Pauline Kael's famous quote by which myopic liberal provincialism is frequently summarized as "I can't believe Nixon won. I don't know anyone who voted for him" has been expanded as follows: "'I live in a rather special world. I only know one person who voted for Nixon. Where they are I don't know. They're outside my ken. But sometimes when I'm in a theater I can feel them." *See* Brody, Richard. "My Oscar Picks," New Yorker, Feb. 24, 2011. Available at: https://www.newyorker.com/culture/richard-brody/my-oscar-picks#ixzz1FCt1d1Mw.

Brockport, NY
June 10, 2025

Respectfully Submitted,

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APPENDIX

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED MARCH 12, 2025

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

24-973-cv

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of March, two thousand twenty-five.

PRESENT: DENNY CHIN,
MICHAEL H. PARK,
SARAH A. L. MERRIAM,
Circuit Judges.

Appendix A

R. MICHAEL CESTARO,

Plaintiff-Appellant,

v.

CLARISSA M. RODRIGUEZ, CHAIR, NEW YORK STATE WORKERS' COMPENSATION BOARD, IN HER INDIVIDUAL AND OFFICIAL CAPACITY; DAVID WERTHEIM, FORMER ACTING EXECUTIVE DIRECTOR AND FORMER GENERAL COUNSEL, NEW YORK STATE WORKERS' COMPENSATION BOARD, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; HEATHER MACMASTER, ACTING GENERAL COUNSEL, NEW YORK STATE WORKERS' COMPENSATION BOARD, IN HER INDIVIDUAL AND OFFICIAL CAPACITY; MADELINE H. PANTZER, FORMER PROJECT DIRECTOR AND CHIEF OF ADJUDICATION, NEW YORK STATE WORKERS' COMPENSATION BOARD, IN HER INDIVIDUAL AND OFFICIAL CAPACITY,

Defendants-Appellees.

Filed March 12, 2025

Appeal from an order of the United States District Court for the Southern District of New York (Cote, *J.*).

UPON DUE CONSIDERATION, the March 14, 2024, judgment of the District Court is **AFFIRMED.**

Appendix A

Plaintiff-appellant R. Michael Cestaro, an Administrative Law Judge for the New York State Workers' Compensation Board ("WCB"), appeals from the District Court's grant of summary judgment to defendants-appellees Clarissa Rodriguez, David Wertheim, Heather MacMaster, and Madeline Pantzer on Cestaro's First Amendment retaliation claims. Cestaro alleged that his supervisors at WCB violated his First Amendment rights when they rescinded his promotion to Senior Administrative Law Judge after viewing a TikTok video that depicted Cestaro arguing with a New Jersey Transit conductor about the requirement that he cover his mouth and nose with a mask while on the train. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, to which we refer only as necessary to explain our decision.

On appeal, Cestaro argues that the District Court improperly granted summary judgment to defendants on his First Amendment retaliation claims, based on their affirmative defense under *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). We disagree.

This Court

> review[s] de novo a district court's decision to grant summary judgment, construing the evidence in the light most favorable to the party against whom summary judgment was granted and drawing all reasonable inferences in that

> party's favor. Summary judgment is required if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

Unkechaug Indian Nation v. Seggos, 126 F.4th 822, 828 (2d Cir. 2025) (citation and quotation marks omitted).

"To survive summary judgment on a First Amendment retaliation claim, a public employee must bring forth evidence showing that [1] he has engaged in protected First Amendment activity, [2] he suffered an adverse employment action, and [3] there was a causal connection between the protected activity and the adverse employment action." *Anemone v. Metro. Transp. Auth.*, 629 F.3d 97, 114 (2d Cir. 2011) (citation and quotation marks omitted). We assume for purposes of this appeal that Cestaro established a prima facie case of First Amendment retaliation. But "[e]ven if the plaintiff makes out a prima facie retaliation claim, a government defendant may still receive summary judgment if it establishes its entitlement to a relevant defense." *Id.* As relevant here, a defendant can prevail on summary judgment by establishing an affirmative defense under *Mt. Healthy*, 429 U.S. 274.

The *Mt. Healthy* defense "provides that even if there is evidence that the adverse employment action was motivated in part by protected speech, the government can avoid liability if it can show that it would have taken the same adverse action in the absence of the protected speech." *Anemone*, 629 F.3d at 114 (citation and quotation

marks omitted). "This principle prevents an employee who engages in unprotected conduct from escaping discipline for that conduct by the fact that it was related to protected conduct." *Id.* at 115 (citation and quotation marks omitted). Defendants were entitled to summary judgment because they established as a matter of law that they revoked Cestaro's promotion based on his unprotected conduct, rather than on any protected speech. *See id.*

Defendants established that they revoked Cestaro's promotion because his conduct was a "poor way to treat workers," he was not "fair to the [transit] staff," and he was "unprofessional and aggressive" towards the conductor. App'x at 135, 137. After viewing the video, one of Cestaro's supervisors commented: "this [is] so unprofessional and a poor way to treat workers." *Id.* at 137. Another supervisor observed: "When [Cestaro] is confronted by the conductor, a young man of color, he behaves in an unprofessional and aggressive manner." *Id.* at 135. Defendants "did not discuss the constitutionality of masking requirements on public transit, or [Cestaro's] views on that subject, in their discussions of [his] conduct in the TikTok video and how the WCB should respond to this conduct." *Id.* at 802. Instead, defendants expressed concern about "hav[ing] a supervisor at the state who *behaves* in this manner, [because] he cannot be trusted to be fair to the staff or the public." *Id.* at 135 (emphasis added). Indeed, when pressed at oral argument, Cestaro failed to point to *any* evidence in the record from which a reasonable jury could conclude that Cestaro's views on masking, rather than his conduct toward the conductor, on a public train,

"played a 'substantial part'" in WCB's decision to revoke his promotion. *Mt. Healthy*, 429 U.S. at 285.[1]

Cestaro has failed to demonstrate a genuine dispute of material fact as to whether defendants would have taken the same actions regardless of whether he engaged in any protected speech. Accordingly, defendants were entitled to summary judgment based on the *Mt. Healthy* defense.

For the foregoing reasons, the judgment of the District Court is **AFFIRMED.**

1. Cestaro contends that his claims should be reviewed under *Pickering v. Board of Education*, 391 U.S. 563 (1968), rather than under *Mt. Healthy.* Because we conclude that *Mt. Healthy* applies here and that it provides a sufficient basis for the grant of summary judgment to defendants, we need not reach the *Pickering* defense.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED MARCH 13, 2024

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 23cv593 (DLC)

R. MICHAEL CESTARO,

Plaintiff,

v.

CLARISSA M. RODRIGUEZ, *et al.*,

Defendants.

Filed March 13, 2024

OPINION AND ORDER

DENISE COTE, District Judge.

The plaintiff, an attorney working for the New York State Workers' Compensation Board ("WCB"), complains that his promotion was improperly revoked for his exercise of his First Amendment rights. For the following reasons, the defendants' motion for summary judgment is granted.

Appendix B

Background

The following facts are undisputed unless otherwise noted. Plaintiff Michael Cestaro is a Compensation Claims Referee with the WCB. In early August of 2021, Cestaro was offered a promotion to a Senior Compensation Claims Referee/Administrative Law Judge position. The promotion was scheduled to take effect on September 2.

On August 28, Cestaro boarded a New Jersey Transit ("NJT") train to complete a personal errand. At the time, passengers on NJT were required, with certain exemptions, to wear masks on the train due to the COVID-19 pandemic. While Cestaro was traveling on that train, a train conductor, who was wearing a mask and appeared to be young African American male, encountered Cestaro with his mask pulled down under his chin. The conductor told Cestaro that he had to pull up the mask. Cestaro responded, "I don't have to listen to you," stood up, following the conductor to the train compartment's exit, stating, "fine, I'll challenge it in court" and "it's unconstitutional, the government can't compel me to do this," and, finally, stated to the conductor "if you want to be an obedient dog, you can." Cestaro exited the train at the next stop. At no point did Cestaro inform the train conductor of any condition that required Cestaro to pull down his mask.

This interaction was captured on video by an unknown individual, and the video was posted on TikTok on or about August 29. At the end of the video, a display screen on the train stating "WEAR MASKS WHILE ON BOARD" is visible.

Appendix B

On August 30, at 9:50 a.m., an attorney who regularly represents workers before the WCB, and who had appeared before Cestaro several times, emailed a link to the TikTok video to Madeline Pantzer, then the Chief of Adjudication at WCB. The attorney stated to Pantzer in the email that he "just thought you should be made aware of this recent video posted of Judge Cestaro."

At 10:01 that day, Pantzer forwarded the attorney's email to WCB's ethics counsel, Cheryl Wood, defendant Heather MacMaster (then Acting General Counsel of WCB), and Pantzer's supervisor, defendant David Wertheim (then Acting Executive Director of WCB). In the email, Pantzer stated: "I can not believe this is the new Sr. ALJ for Manhattan, it seems to me this is so unprofessional and a poor way to treat workers along with the absolute wors[t] choice on his part. I[s] there any way to pull the promotion or do I need to wait and see during probation."

At 11:38, Wertheim responded to the email, stating, "MP—Very very disappointing, and a clear demonstration of both ignorance and arrogance. I am chewing on this and will talk to you soon." Wertheim then emailed and called Paul Connelly, the director of Human Resources at WCB, requesting guidance about how to "pull the promotion" if Pantzer decided that that was the proper course of action. Connelly emailed Wertheim, stating that Pantzer would need to "send us an email requesting we rescind the job offer, including the reason for rescinding it." Wertheim and Pantzer spoke on the telephone shortly thereafter, and at 2:29, Connelly emailed Wertheim stating that Pantzer

"just called me and will be sending me an email requesting we revoke Judge Cestaro's promotion."

At 3:11, Pantzer emailed Connelly. The email states:

> Michael Cestaro is a Compensation Claims Referee at the Board, he is supposed to be promoted to Senior CCR later this week, on September 2. He is in a video on the application Ti[k]Tok. He has told his supervisor that it is him in the video. This is very disturbing. In it he is not wearing a mask on a NJ transit train. When he is confronted by the conductor, a young man of color, he behaves in an unprofessional and aggressive manner. The conductor asks him to wear a mask and he refuses and says he will challenge it in court and that it is unconstitutional. He states you can't compel me to do this and finally states to the conductor that he is behaving like an obedient dog. The conductor never raises his voice and just goes on with his business. We cannot have a supervisor at the state who behaves in this manner, he cannot be trusted to be fair to the staff or the public, nor does he appear to be capable of following rules and regulations. I would like to have this pending promotion revoked. Please advise how we may go about this.

The next morning, Connelly emailed Pantzer. Connelly stated that "[w]e have reviewed this with Counsel's Office. It is okay to revoke Michael Cestaro's pending promotion.

Please let us know when he has been notified. Then, HR will send him official notification." Pantzer emailed Cestaro at 10:58 a.m. that day informing him that his promotion had been revoked.

At 3:50 p.m. on August 31, Pantzer emailed Wood, MacMaster, and Wertheim, stating "Just as an update: per the approval of HR, Michael Cestaro's promotion to senior CCR has been revoked. I have advised him." On September 7, MacMaster, who was on vacation between August 27 and September 7, responded to that email, stating, "[t]his is awful," and inquiring about next steps for filling the position.

On January 24, 2023, Cestaro sued Wertheim, Pantzer, MacMaster, and Rodriguez pursuant to 42 U.S.C. § 1983 in their individual and official capacities. Cestaro's complaint alleges that the revocation of his promotion to Senior Compensation Claims Referee violates his right to free speech under the First and Fourteenth Amendments to the United States Constitution and Article I, § 8 of the New York State Constitution. The complaint seeks damages, including punitive damages, and injunctive relief, specifically, enjoining defendants from continuing to deny Cestaro any employment benefits that would have accrued to him had his promotion not been revoked, requiring defendants to promote Cestaro to the position of Senior Compensation Claims Referee or a similar position, requiring defendants to purge the video and any mention of it from Cestaro's personnel file, and enjoining defendants from considering Cestaro's speech in any future personnel decision effecting him.

Appendix B

Defendants each answered separately but filed a joint motion for summary judgment on December 1, 2023. Defendants included a copy of the video in their exhibits in support of the motion. Discovery was extended, on consent, to December 15. The motion was fully submitted on January 26, 2024.

Discussion

Summary judgment may be granted only when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "To present a genuine issue of material fact sufficient to defeat a motion for summary judgment, the record must contain contradictory evidence such that a reasonable jury could return a verdict for the nonmoving party." *Horror Inc. v. Miller,* 15 F.4th 232, 241 (2d Cir. 2021) (citation omitted). Material facts are facts that "might affect the outcome of the suit under the governing law." *Choi v. Tower Rsch. Cap. LLC,* 2 F.4th 10, 16 (2d. Cir 2021) (citation omitted). In considering a motion for summary judgment, a court "construe[s] the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant." *Kee v. City of New York,* 12 F.4th 150, 159 (2d Cir. 2021) (citation omitted).

Although the movant bears the initial burden of showing that there is no genuine dispute as to a material fact, when "the burden of proof at trial would fall on the nonmoving party, the moving party can shift the initial

burden by pointing to a lack of evidence to go to the trier of fact on an essential element of the nonmovant's claim." *McKinney v. City of Middletown,* 49 F.4th 730, 738 (2d Cir. 2022) (citation omitted). If the moving party carries its burden, the nonmoving party must "come forward with evidence that would be sufficient to support a jury verdict in its favor." *Id.* (citation omitted). Rather than merely "deny the moving party's allegations in a general way," the party opposing summary judgment "must present competent evidence that creates a genuine issue of material fact." *Id.* (citation omitted). Unsupported allegations do not create a material issue of fact. *Id.*

I. Eleventh Amendment Immunity

The claims against Pantzer and Wertheim in their official capacities, and those against Rodriguez and MacMaster in their individual capacities, are barred by sovereign immunity. Any claim for relief under the New York State Constitution is also barred.

A. Official Capacity Claims

The Eleventh Amendment to the United States Constitution bars federal courts from adjudicating claims against a state, including its agents in their official capacities, absent a state's express waiver or an act by Congress under Section 5 of the Fourteenth Amendment. *74 Pinehurst LLC v. New York,* 59 F.4th 557, 570 (2d Cir. 2023). The only exception exists for claims for prospective relief against state officials in their official capacities. *Id.* It is undisputed that neither Wertheim nor Pantzer can

be sued for prospective injunctive relief in their official capacities, given that they no longer work for the WCB and thus have no authority or ability to effect such relief.

B. Individual Capacity Claims

Personal involvement by a defendant is a prerequisite to liability in a § 1983 action. *Victory v. Pataki,* 814 F.3d 47, 67 (2d Cir. 2016). "[A] defendant in a 1983 action may not be held liable for damages for constitutional violations merely because [s]he held a high position of authority." *Id.*

There is no genuine dispute as to the lack of personal involvement in the decision to revoke plaintiff's promotion on the part of MacMaster or Rodriguez. Cestaro admits that Rodriguez was not involved. Although MacMaster was copied on several of the relevant emails, it is undisputed that she was on vacation during the relevant period and did not reply to the email until more than a week after the promotion was revoked. In her deposition, MacMaster denied having any role in the decision. Cestaro's unsupported speculation to the contrary—including his contention, without citation, that personal involvement is a "term of art" for present purposes—does not create a genuine issue of material fact.

C. State Law Claims

Furthermore, sovereign immunity prohibits federal courts from providing injunctive relief against state officials on the basis of state law. *See Vega v. Semple,* 963 F.3d 259, 283 (2d Cir. 2020). Thus, Cestaro's official-

capacity claims based on the New York State Constitution are barred.

II. First Amendment Retaliation

To establish a *prima facie* First Amendment retaliation claim, a plaintiff must show (1) that the speech or conduct at issue was protected from the particular retaliatory act alleged; (2) that the retaliatory act qualifies as an adverse action taken against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action. *Heim v. Daniel,* 81 F.4th 212, 221 (2d Cir. 2023). But, even if the plaintiff makes out a prima facie retaliation claim, a government defendant may still receive summary judgment if it establishes its entitlement to a relevant defense. *Id.* Defendants have done so here.[1]

To show causation, a plaintiff must show that the protected speech was "a substantial motivating factor in the adverse employment action." *Id.* at 222 (citation omitted). Protected speech could not substantially cause an adverse action if the employer would have taken that action "in any event." *Id.* (citation omitted). Thus, a defendant "can rebut a *prima facie* showing of retaliation by demonstrating by a preponderance of the evidence that it would have taken the same adverse employment

1. The defendants rely on the defenses offered by both *Pickering v. Board of Ed. Of Tp. High School Dist. 205, Will Cnty, Illinois,* 391 U.S. 563 (1968), and *Mt. Healthy v. Doyle,* 429 U.S. 274, 285-86 (1977). It is only necessary to address their arguments under *Mt. Healthy.*

action even in the absence of the protected conduct." *Id.* (citation omitted); *see also Mt. Healthy v. Doyle,* 429 U.S. 274, 285-86 (1977) ("The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct."). This principle, articulated in *Mt. Healthy*, "ensures that an employee who makes an unprotected statement is not immunized from discipline by the fact that this statement is surrounded by protected statements," and "prevents an employee who engages in unprotected conduct from escaping discipline for that conduct by the fact that it was related to protected conduct." *Anemone v. Metropolitan Transp. Authority,* 629 F.3d 97, 115 (citation omitted).

Here, even assuming, arguendo, that the defendants improperly considered Cestaro's statement that the NJT's rule requiring masks was "unconstitutional" in deciding to revoke his promotion, they have amply demonstrated with undisputed evidence that they would have revoked it even in the absence of that statement. First, Pantzer's initial email to Wertheim, MacMaster, and Wood makes no mention of the allegedly protected speech. It focused instead on Cestaro's "unprofessional" conduct, noting that it was "a poor way to treat workers."[2]

Pantzer's August 30 email to Connelly, outlining her reasons for wishing to revoke the promotion, does mention

2. Cestaro's response to the defendants' Rule 56.1 statement notes that the contents of emails between Connelly and personnel from the WCB General Counsel's Office on the afternoon of August 30 have been redacted. The plaintiff did not raise this issue during discovery and therefore may not do so now.

the statement but largely focuses on plaintiff's other conduct. Pantzer explains that the video shows Cestaro not wearing a mask on public transit, and that when Cestaro "is confronted by the conductor, a young man of color, he behaves in an unprofessional and aggressive manner." She further states that "[w]e cannot have a supervisor at the state who behaves in this manner, he cannot be trusted to be fair to the staff or the public, nor does he appear to be capable of following rules and regulations." Although Pantzer notes, by way of narration, that "[t]he conductor asks him to wear a mask and he refuses and says he will challenge it in court and that it is unconstitutional," the rationale focuses on his failure to wear a mask and his behavior towards the conductor—including "stat[ing] to the conductor that he is behaving like an obedient dog."

Connelly's emails stated that the issue was that "[w]e have a judge who was filmed giving a transit authority employee a very hard time about wearing a mask on the train" and noted that "[t]he video was posted on tiktok and one of the outside attorneys shared the video" with Pantzer. Connelly noted in an email to Wertheim that "[o]bviously, at least one person from outside the Board connected him to the Board."

Thus, Wertheim and Pantzer both voiced concerns that Cestaro's conduct, as captured by the video, cast doubt on his ability to treat workers fairly and with respect. It is undisputed that the role of Senior Compensation Claims Referee requires, *inter alia*, adjudicating workers' compensation claims, including presiding over cases and conducting hearings if necessary. Cestaro's inability to

treat those appearing before him respectfully, or the appearance of such inability, would be a sufficient reason to revoke the promotion.

Pantzer also expressed concern that Cestaro did not appear able to follow rules and regulations. It is undisputed that a Senior Compensation Claims Referee must "ensur[e] that hearing and conciliation meetings are conducted in compliance with established professional standards, law, and procedures."

Cestaro has failed to raise a question of fact regarding the defendants' evidence that they would have revoked his promotion even in the absence of any protected speech. He first contends that he argued with the conductor because he "felt" the conductor was being rude. Whatever the plaintiff's motivation may have been, the defendants were entitled to make their assessment about the plaintiff's suitability for the Senior Compensation Claims Referee role based on his conduct depicted in the TikTok video and their knowledge of the requirements for that role. In any event, no reasonable juror viewing the video would find that the conductor acted either rudely or inappropriately.

Cestaro next argues that his protected speech must have caused the defendants to revoke his promotion because if he had "remained entirely silent and motionless," the promotion would not have been revoked. This argument does not raise a question of fact. As the plaintiff admits, he did not remain silent. Instead, he argued with the conductor, and the defendants were entitled to find that the plaintiff's manner in doing so disqualified him from receiving the promotion.

Plaintiff's interactions with the conductor included his use of the expression "obedient dog." Plaintiff points out that he used the conditional tense when addressing the conductor as an obedient dog, and argues that, even if it was an inappropriate thing to say, it should be considered a metaphor and protected speech. Cestaro's attempt to excuse his use of this phrase fails. His interaction with the conductor, including this parting statement by the plaintiff, was disrespectful. Under *Mt. Healthy*, evidence of the disruptive impact of potentially protected speech may provide a "further permissible and non-retaliatory" reason to act. *Anemone,* 629 F.3d at 120.

Finally, Cestaro suggests that he was in fact following the rules because the rules provided for medical exemptions. He explains that his impaired vision requires him to lower his mask to read and would qualify him for such an exemption. It is undisputed, however, that he did not mention his impaired vision to the conductor and never requested an exemption from the NJT, the MTA, or the WCB. Cestaro testified that he wore a mask in WCB offices in compliance with the WCB's requirement and did not ask anyone at WCB to be excused from wearing a mask; he also wore a mask while traveling on the subway in New York and did not ask the MTA that he be excused from wearing a mask.

Thus, the undisputed evidence shows even if the plaintiff had not stated his views about the unconstitutionality of mask mandates, the defendants would have revoked the promotion for his other conduct, namely, behaving unprofessionally, insulting a worker, and failing to follow

the rules and regulations about wearing masks on public transit during a global health crisis. Given the undisputed evidence of Cestaro's behavior, "any reasonable jury would find that [Cestaro's promotion would have been revoked] even absent any desire on the Defendants' part to punish him in retaliation for his allegedly protected speech." *Id.* at 117. The defendants are thus entitled to summary judgment on the plaintiff's claims.

Conclusion

Defendant's December 1, 2023 motion for summary judgment is granted.

Dated: New York, New York
March 13, 2024

/s/
Denise Cote
United States District Judge