Case No. 19-5804

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL GOZA,

Plaintiff – Appellee,

v.

MEMPHIS LIGHT, GAS AND WATER,

Defendant – Appellant.

On Appeal from the United States District Court
for the Western District of Tennessee (Case No. 2:17-cv-02873)
The Honorable Jon Phipps McCalla

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STATEMENT REGARDING ORAL ARGUMENT

Appellee Michael Goza requests oral argument in this case. Although the issues in this case require no more than the straightforward application of established legal principles to the facts developed below, the factual record is lengthy and complex. Oral argument will give this Court a valuable opportunity to ask questions about the record and clarify the parties' arguments.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The district court correctly held that a public employee's First Amendment right to engage in core political speech, entirely on his own time, and on matters of urgent public concern, outweighed his employer's interest in terminating him based on hypothesized and highly implausible claims of disruption.

Appellee Michael Goza has worked for Appellant Memphis Light, Gas and Water ("MLGW") for three decades as a utility technician. His record as an employee is outstanding. In August 2017, he attended a protest to express his view that a statue of Jefferson Davis, a prominent Civil War-era southern leader, should remain in a Memphis city park. That didn't sit well with some of the protesters who believed the statue should come down. One of them filed a complaint against Goza with MLGW. The complaint included material gleaned from Goza's Facebook posts where he expressed, among other political opinions, his opposition to removing Confederate monuments. An investigator for MLGW discovered a Facebook post from a second protester criticizing Goza. Based on these materials, and convinced that its "customers didn't find Mr. Goza's views acceptable," Transcript, R.114, PageID.1753-54, MLGW demoted and terminated Goza.

The district court correctly concluded that Goza's interest in free speech outweighed MLGW's interest in promoting the efficiency of the

public services it performs through its employees. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

The free speech interests on Goza's side of the *Pickering* scale are compelling. Goza's speech substantially involved matters of public concern. He spoke entirely on his own time and on matters unrelated to his work at MLGW. His position as a utility technician involves none of the sensitive functions that justify greater restrictions on employees in law enforcement and education fields. And Goza's position involved no confidentiality or policymaking functions. Collectively, these facts weigh heavily in Goza's favor. MLGW would need to make a "particularly strong showing" to overcome them. *Leary v. Daeschner*, 228 F.3d 729, 737-38 (6th Cir. 2000).

MLGW failed to make that showing. As the district court found, MLGW's various claims of anticipated disruption were not just speculative but *pretextual*. MLGW's own witnesses conceded that they did not believe Goza would discriminate against MLGW's customers. They agreed that MLGW customers would not pose a threat to Goza. They admitted their generalized fear about "liability" was unfounded.

MLGW's executives were concerned, the district court found, that Goza's speech "threaten[ed] the Division's bonds with the public it serves." Order and Opinion, R.122, PageID.2301. But that concern, standing alone, is not sufficient to abridge Goza's speech. MLGW never

proved that its *customers* objected to Goza's political activities or expression. Neither of the protesters who registered complaints were MLGW customers. And although MLGW's witnesses made vague allusions to receiving additional complaints, MLGW never put these complaints in the record.

Striking the *Pickering* balance in Goza's favor also vindicates important values animating the First Amendment. Sanctioning MLGW's punishment in this case would amount to approval of a heckler's veto, "[a]n especially 'egregious' form of content-based discrimination...that…is designed to exclude a particular point of view from the marketplace of ideas." *Bible Believers v. Wayne Cnty., Mich.*, 805 F.3d 228, 248 (6th Cir. 2015). MLGW's decisionmakers conceded that they fired Goza not because of genuine disruption but because they had concluded that MLGW's "customers didn't find Mr. Goza's views acceptable." Transcript, R.114, PageID.1753-54. Terminating public employees on these grounds would inflict grave damage on the First Amendment's protections.

The heavy-handed speech restrictions MLGW placed on Goza suffered from another fatal flaw: they were *discriminatory*. MLGW terminated Goza after he spoke out on sensitive political and racial issues. But MLGW treated African American employees who spoke out on similar issues far more leniently. This double standard violated

MLGW's obligation to treat all employees in a non-discriminatory manner.

The district court correctly found MLGW responsible for these violations under principles of municipal liability. MLGW's President, who made the final decision to terminate Goza, was the official "responsible for establishing final policy" over matters of employee discipline. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). Nothing in any of the governing legal sources gives the MLGW Board the power to review employment decisions made by MLGW's President. And MLGW cannot rely on a claimed unwritten, ad hoc review procedure to defeat the President's explicit statutory policymaking authority. Because Goza was terminated by MLGW's final policymaking official, MLGW is responsible for that decision.

Finally, the district court did not abuse its discretion in refusing to grant MLGW's belated request for a jury. MLGW never served or filed a jury demand as required by Fed. R. Civ. P. 38(b). And the district court was not compelled to grant a jury trial under Fed. R. Civ. P. 39(b). MLGW's inadvertence in failing to demand a jury is not a sufficient reason to excuse MLGW's failure. And the district court identified other valid concerns—including the complexity of this case and the publicity surrounding the dispute—that further supported the court's exercise of discretion.

The district court's judgment should be affirmed.

STATEMENT OF THE ISSUES

1. Whether the district court correctly identified the President of MLGW as an official with final policymaking authority over employee disciplinary matters for purposes of municipal liability.

2. Whether the district court correctly found that Goza's interest in engaging in political speech unrelated to his work, and on his own time, outweighed MLGW's interest in avoiding potential disruption.

3. Whether MLGW discriminated against Goza on the basis of race by enforcing rules for punishing employee speech far more strictly against Goza than against similarly situated African American employees.

4. Whether the district court abused its discretion in trying this case before the court where MLGW failed to file or serve a timely demand for a jury trial.

STATEMENT OF THE CASE

I. FACTS.

A. Michael Goza Works For Memphis Light, Gas and Water as a Customer Service Technician.

Appellant Memphis Light, Gas and Water (also referred to as "MLGW" or "the Division") is a division of the City of Memphis, Tennessee providing utility services to city residents. Transcript, R.114, PageID.1657.

Appellee Michael Goza, a Caucasian man, was hired by MLGW in 1984. Stipulations, R.98, PageID.1505. Goza worked as a Customer Service Technician 3 (sometimes referred to as a "CST3," "CST III" or "Tech 3"). *Id.*; Transcript, R.114, PageID.1671. In that role, Goza was responsible for visiting the homes of MLGW customers who reported problems with their utility services and using his skills and experience to assess and diagnose the problems. *Id.* at 1671, 1821; Transcript, R.116, PageID.2117, 2140-41.

B. The Debate Over the Fate of Confederate Monuments.

This case arose against the backdrop of an intense national debate over the fate of Confederate monuments in public spaces. By August 2017, dozens of Confederate monuments across the United States had been removed or were under consideration for removal. *See Confederate Monuments Are Coming Down Across the United States. Here's a List*, N.Y. Times, Aug. 28, 2017, https://nyti.ms/2Pptc47. Although most of these monuments were removed by authorities following the legislative and judicial process, a handful were toppled by protesters acting outside the bounds of the law. *Id.* The public debate over the fate of these monuments, of course, directly implicated fraught questions about the legacy of the Civil War and its lessons today on a host of social, political, and cultural issues.

Most Americans believe that Confederate monuments "should remain in all public spaces." Chris Kahn, *A Majority of Americans Want To Preserve Confederate Monuments: Reuters/Ipsos Poll*, Reuters, August 21, 2017, https://reut.rs/2Pv0gaS. Goza counts himself among them. Transcript, R.116, PageID.2145-46. Goza has a passion for history. *Id.* at 2146. He has participated in Civil War reenactments, including reenactments of battles where his relatives fought for the Confederate army. *Id.*

C. Goza Attends a Protest in Support of Preserving a Monument to Jefferson Davis.

In August 2017, several activist groups, including the Memphis affiliate of the Black Lives Matter movement, began a protest campaign demanding the removal of a statue of Jefferson Davis located in Memphis Park. Trial Exhibit ("Ex.") 7, Appendix ("App.") 162. On August 15, 2017, these activists held a rally in front of the Jefferson Davis statue, chanting slogans and calling for the statue's removal. *Id.* The rally also drew counter-protesters, including Goza, who believed the statue should remain. *Id.* Goza attended the rally on his day off work. Transcript, R.114, PageID.1746; Ex. 9, App.181.

By all accounts the protest was peaceful. At first, Goza simply observed the scene. Transcript, R.116, PageID.2146; Ex. 9, App.182. But when Tami Sawyer, the leader of the protest, pointed at Goza and called

him a member of the KKK, Goza responded. He told Sawyer, "I'm not a klansman. I've never even seen one. I'm just simply here because I want to preserve our heritage." Transcript, R.116, PageID.2147; Ex. 9, App.182. Several protesters then began "screaming, shouting at [Goza], calling [him]…names." Ex. 9, App.182; Transcript, R.116, PageID.2147-48. At that point, Goza, concerned that the protesters might pull down the monument, pointed at the monument and said, "[Y]ou all are not to lay a hand on that statue." Ex. 9, App.182; Transcript, R.116, PageID.2145-46.

After the exchange, Goza walked away "followed…by a shouting, chanting crowd to the edge of the park." Ex. 7, App.162; Ex. 9, App.182. There, police officers asked Goza if he would leave the scene to avoid any conflict. Transcript, R.116, PageID.2148; Ex. 9, App.182. Goza said he would. Transcript, R.116, PageID.2148; Ex. 9, App.182.

D. Goza Makes a Comment to a Reporter.

As Goza was leaving the park, he was approached by a television reporter for MSNBC. Transcript, R.116, PageID.2148; Ex. 9, App.183. Speaking in a calm and measured tone, Goza gave a brief comment:

> What I'm tired of is being portrayed as KKK or a white supremacist simply because I'm a white guy that wants to preserve my heritage. I'm none of those. People I work with are black. Community I work in is black. I'm not racist. I just simply—I do want to preserve my heritage and I don't want to see them pull down monuments with rope and shout and call us all KKK because they're the ones whose message is a lie.

Ex. 6, App.161, also viewable at https://youtu.be/7Hn2-oMVAHQ.

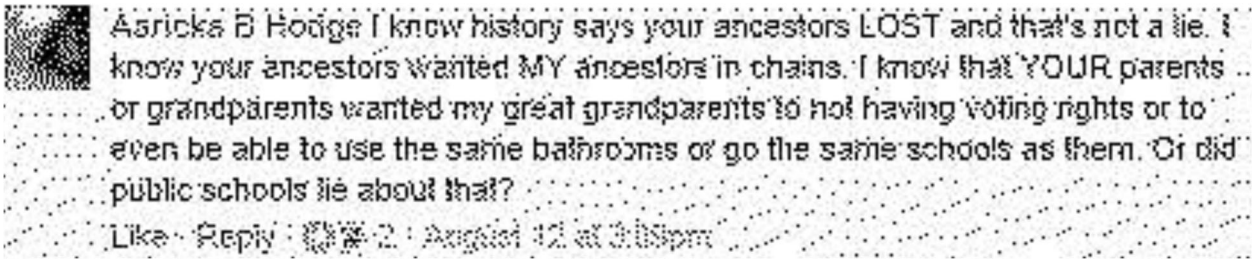
A reporter for The Commercial Appeal—the largest daily newspaper in Memphis—overheard Goza's comments. Ex. 9, App.183. Although Goza told the reporters they did not have permission to publish his remarks, his comments were aired that evening on MSNBC's television broadcast and website. The Commercial Appeal published Goza's remarks in an article the next day. Transcript, R.116, PageID.2148-49; Ex. 7, App.162; Ex. 9, App.183-84.

E. MLGW Receives a Complaint About Goza from One of the Pro-Removal Protesters.

The day after the protest, one of the protesters who supported removing the Davis monument made a complaint to MLGW about Goza. Ex. 1A, App.157. The protester gleaned Goza's name from the Commercial Appeal article and identified Goza's employer on Goza's Facebook page. Goza's Facebook profile did not explicitly list his employer. *Id.*, App.156. But Goza's page included a photograph of him in a truck with the MLGW logo visible. Stipulations, R.98, PageID.1505.

The complaint contained screenshots of two conversations between Goza and others on Facebook. Transcript, R.116, PageID.2216; Ex. 1, App.153-55. The first conversation involved an August 12, 2017 exchange on a Facebook page called "Take 'Em Down New Orleans." Transcript, R.116, PageID.2152. That page functioned as a forum to debate whether to remove Confederate monuments in New Orleans and elsewhere. *Id.* There, Goza engaged in a conversation with Aaricka Hodge, an African American woman. Ex. 1, App.153-54; Ex. 2, App.21-24. The conversation began about the monuments themselves, but quickly turned into a broader discussion about the Civil War's legacy, the treatment of African Americans by the federal government, crime and drug policies, education standards, abortion, and other thorny topics. Transcript, R.114,

PageID.1679-80; Transcript, R.116, PageID.2153. The conversation proceeded as follows:[1]



[1] Because the exchange took place on a third party's page that was not preserved, parts of the conversation are omitted from the record. The portions of the conversation that were sent to MLGW, however, are all reproduced here.

Aaricka B Hodge You think you're saying something by spewing irrelevant facts. I know Lincoln was racist (he wasn't even the first president to try to free slaves) The Emancipation Proclamation was just a wartime tactic to make the Confederacy mad. And because of it t... See More

Like · Reply · August 12 at 3:47pm

Michael Goza Blacks make up 13% of the population, but yet are responsible for almost 80% of violent crime. Every city that's a third world crap hole is majority black and ran by blacks. I could not agree more about what the federal government has done to blacks however. They're my enemy. I look at them as an enemy to Christianity. Planned Parenthood is defended by democrats mostly, but yet has murdered more blacks than all violent crime combined. I agree on the war on drugs. It's been used an excuse to destroy our liberty while the government ships the drugs into our country and profits from it. Why else do you think Heroin is epidemic while our troops guard the poppy fields in Afghanistan? So we may not agree on the South, but we can sure agree on the criminality of the federal government.

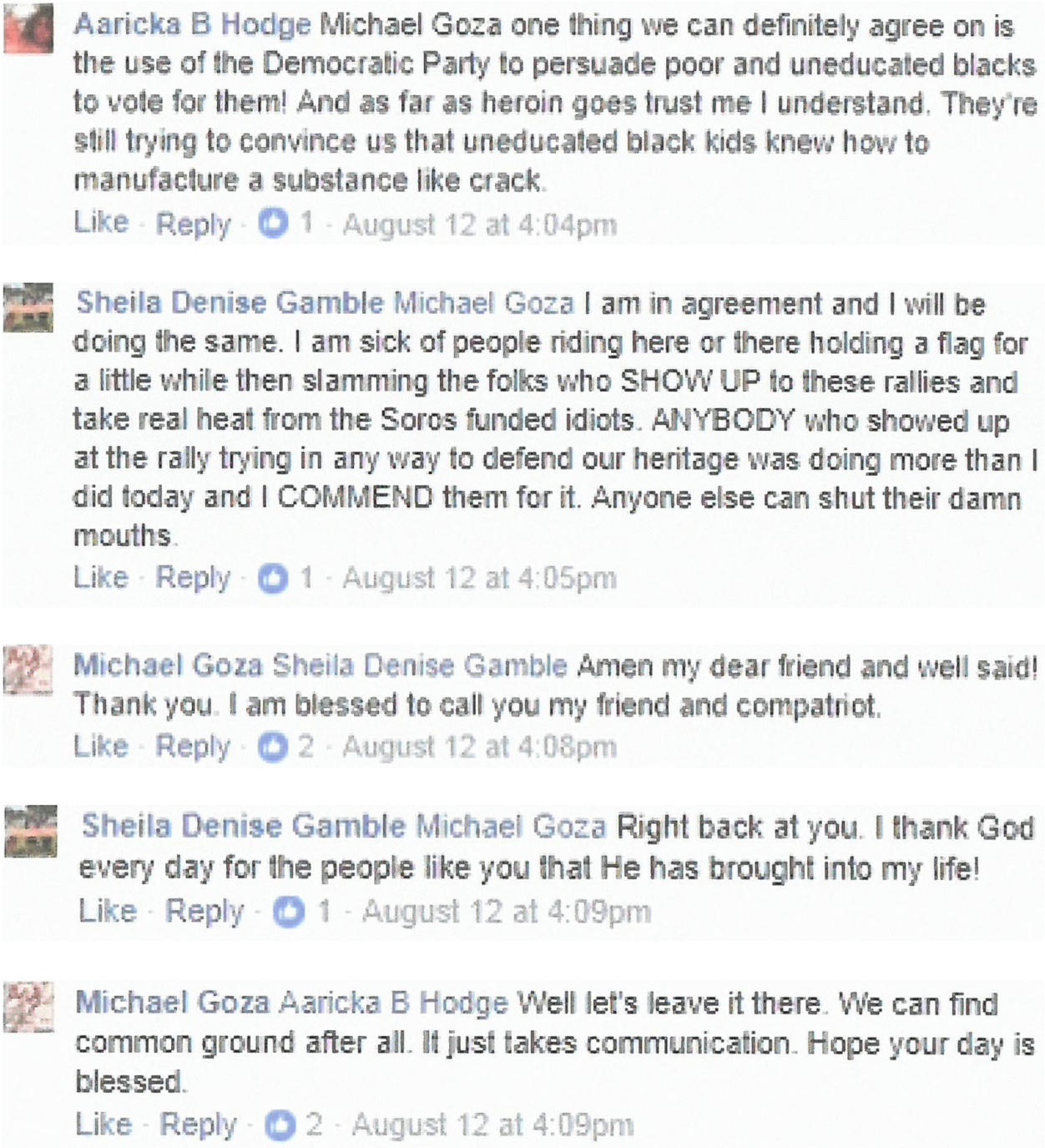
Like · Reply · 4 · August 12 at 3:56pm · Edited

Sheila Denise Gamble Michael Goza very well said. VERY WELL SAID. And, every word in each of your posts is spot on correct.

Like · Reply · 2 · August 12 at 4:00pm

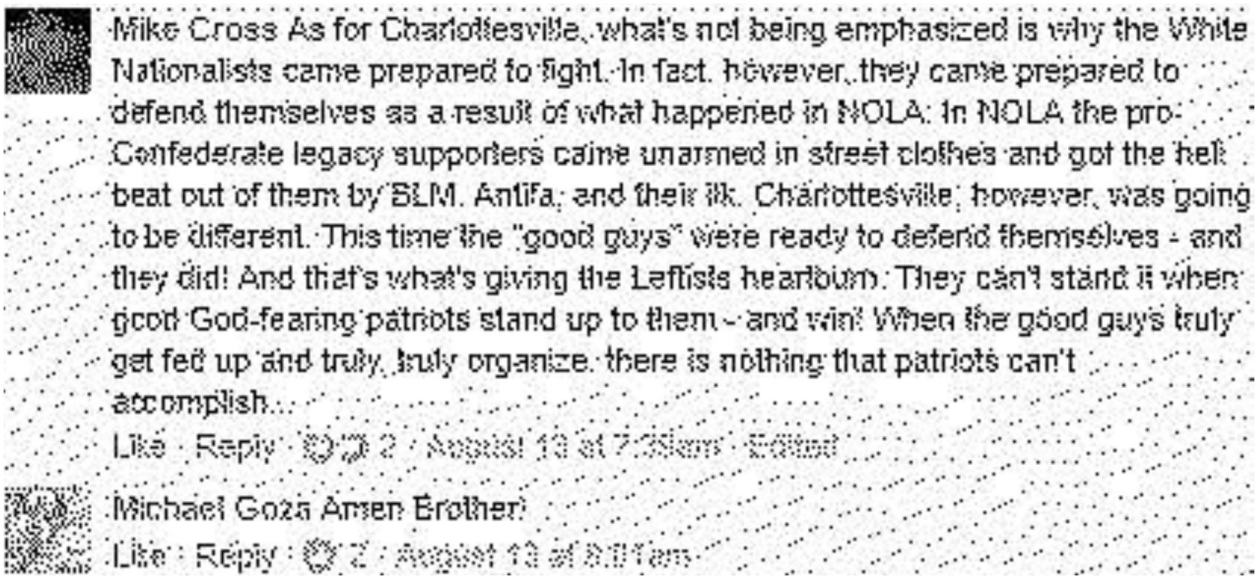
Michael Goza Sheila Denise Gamble thank you. I'm surprised, however, how many of our mutual friends are denouncing those who attended Charlottesville today. That sickens me. I'll soon be pruning my "friends' list.

Like · Reply · 3 · August 12 at 4:02pm



Ex. 1, App.153-54; Ex. 2, App.21-24.

The second conversation included in the complaint involved an August 13, 2017 exchange between Goza and Mike Cross:



Ex. 1, App.153-54.

F. The Protester's Complaint Is Circulated to the Highest Level of the Company.

On Friday, August 18, 2017, an MLGW employee received the complaint and forwarded it to her superiors. *Id.*, App.151. Within minutes, the complaint was sent to MLGW's top executives, including President Jerry Collins. Ex. 42, App.398-99; Transcript, R.114, PageID.1679; Transcript, R.116, PageID.1991-93.

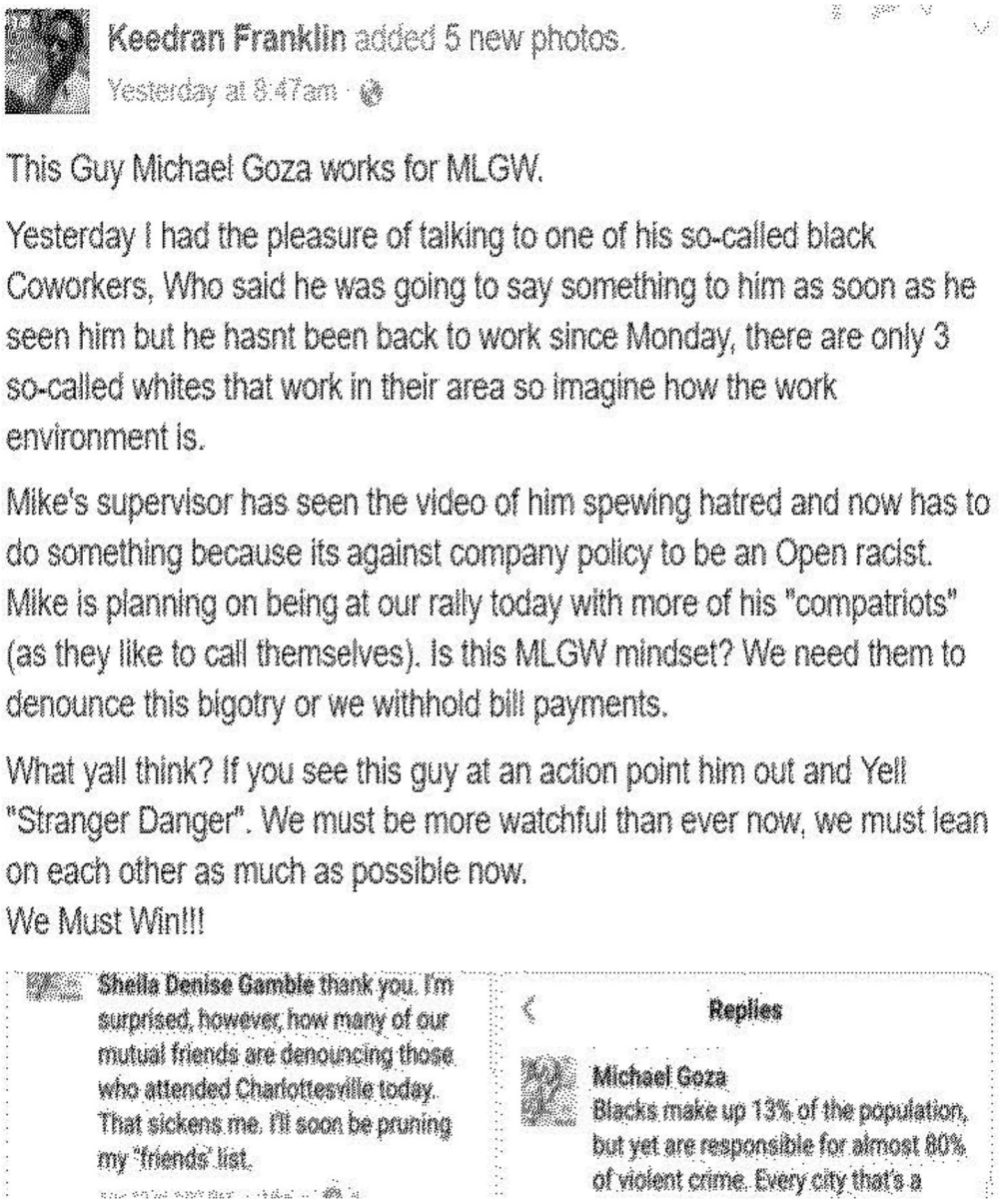
Virginia Leonard, a senior human resources representative, was assigned to investigate. Transcript, R.114, PageID.1668, 1680, 1814; Transcript, R.116, PageID.2048. Leonard contacted Goza's supervisor and union representative and set up a meeting with Goza for the following Monday morning. Transcript, R.114, PageID.1682; Transcript, R.116, PageID.2108.

G. MLGW Decides to Suspend Goza Before Conducting Any Investigation.

Leonard made the *decision* to remove (although did not actually remove) Goza from his position immediately, however. Transcript, R.114, PageID.1690, 1731. Leonard conceded that she could not identify any MLGW policies that Goza had violated. *Id.* at 1692, 1731. MLGW did not have a policy governing employee use of social media. *Id.* at 1711; Transcript, R.116, PageID.2043. Nevertheless, Leonard concluded that Goza could no longer work in any position that involved potential customer contact. Transcript, R.114, PageID.1692.

H. MLGW Identifies Additional Facebook Posts.

Over the weekend, Leonard searched for additional Facebook activity concerning Goza. *Id.* at 1697-98, 1821-22; Ex. 5, App.25. She discovered a post authored by Keedran Franklin, a local African American activist who also participated in the August 15 protest. Transcript, R.114, PageID.1698. Franklin's post read as follows:



Ex. 5, App.26. When Leonard discovered it, Franklin's post had received 42 reactions, drawn six comments, and had been shared 21 times:

Edie Love
Thank you for being so vigilant, **Keedran Franklin**.
Sat at 8:54 AM • Like • 2

Mac Daro
Sat at 9:01 AM • Like • 2

Danielle Anderson-Jones
So he's been tagged in post that **Karen Spencer-Mcgee** has been tagged in omg that means he's been around her. She's going to be livid when she sees this

Scott Banbury
Have you passed this along to MLGW's CEO, Jerry Collins, or to the Mayor? I'd be happy to facilitate it.
Sat at 2:50 PM • Like • 4

Maureen Spain
what's to facilitate?
Sun at 1:06 AM • Edited • Like

Scott Banbury
Maureen Spain, email addresses, making sure they got it, pushing for follow though?
Yesterday at 9:23 AM • Like

Ex. 26, App.369-72.

Leonard also discovered an August 10, 2017 Facebook post by Goza responding to another commenter:

Ex. 2, App.20.

I. Goza's Work Performance and Treatment of Customers and Co-Workers Was Outstanding.

Goza's performance over three decades of work at MLGW was outstanding. MLGW never received a single complaint about Goza.

Transcript, R.114, PageID.1734-36; Transcript, R.116, PageID.2140-42, 2145. Goza consistently treated his customers and co-workers with dignity and respect. Transcript, R.116, PageID.2184, 2203. No one ever complained that Goza treated them unfairly—on account of race or otherwise. Transcript, R.114, PageID.1735-36, 1745; Transcript, R.116, PageID.2140-41, 2145, 2183-84, 2207-08. The quality of his work was consistently excellent. Transcript, R.114, PageID.1735-36, 1745; Transcript, R.116, PageID.2141, 2145.

In fact, Goza received strong *praise* for his work and customer service. Transcript, R.114, PageID.1739-40, 1744. Responding to one of the many customer compliments MLGW had received about Goza, MLGW's Customer Service Manager wrote: "Mr. Goza is a shining example of the type of employee we depend on to represent MLGW and convey an image of professionalism and compassion. Some utilities refer to their customer contact employees as field ambassadors. Mr. Goza is truly a good ambassador for MLGW." Ex. 15, App.255; Ex. 16, App.277. Goza received similar praise from his managers. One stated that "Goza has a very good attitude about customer service work" and "communicates very well with customers when working in their homes." Transcript, R.114, PageID.1743; Ex. 16, App.288. Every performance review Goza ever received from MLGW was similarly positive. Transcript, R.114, PageID.1741, 1744; Ex. 15, App.232.

J. Goza Continues Working Without Incident.

After receiving the August 16 complaint, MLGW permitted Goza to continue working his regularly scheduled shifts. *Id.* at 1820; Transcript, R.116, PageID.2149-50. He worked four days—August 17 through 20—without incident. Transcript, R.114, PageID.1758; Transcript, R.116, PageID.2149-50. In Goza's words, they were "like any other workday[s]." Transcript, R.116, PageID.2150. He received no complaints and had no unusual or out-of-the-ordinary interactions with customers or co-workers. *Id.* at 2150-51.

K. MLGW's Human Resources Representative Meets with Goza and Suspends Him.

As planned, Leonard met with Goza, Goza's supervisor, and Goza's union representative on Monday, August 21. Transcript, R.114, PageID.1704-05; Ex. 8, App.165; Ex. 9, App.166-98.

Goza told Leonard that all of his Facebook posts were made on his own time—not during work hours. Transcript, R.114, PageID.1746. He pointed out that his political activities on Facebook remained substantive and civil. Ex. 9, App.172. Goza's conversation with Hodge, for example, ended with a reaffirmation of the value of debate and well wishes to his online sparring partner: "We can find a common ground after all. It just takes communication. Hope your day is blessed." *Id.*, App.173.

Leonard responded by asserting that Goza was speaking on a "pretty sensitive subject," and telling him "we now have a public

perception problem." *Id.*, App.176-80. She told Goza that the complaint about his speech had made its way to MLGW's President and the mayor of Memphis. *Id.*, App.186.

At the conclusion of the meeting, Leonard suspended Goza without pay until MLGW concluded its investigation. *Id.*, App.179, 190; Transcript, R.114, PageID.1713; Ex. 10, App.28; Stipulations, R.98, PageID.1506; Ex. 26, App.56.

No further investigation ever occurred, however. No one at MLGW ever spoke to Goza's co-workers, supervisors, or character references. Transcript, R.114, PageID.1722-23, 1759, 1889; Transcript, R.116, PageID.2027, 2209. Nor did anyone at MLGW ever attempt to reach out to the complaining parties. Transcript, R.114, PageID.1723.

L. MLGW Presents No Documentary Evidence of Further Complaints.

MLGW, in its brief to this Court, fundamentally misrepresents the timing, nature, and number of complaints lodged against Goza.

Start with the timing. MLGW told this Court that, after receiving the initial complaint on August 16, "MLGW began to receive complaints about Mr. Goza from angry ratepayers." MLGW Br. at 8-9. This is misleading. The record shows that by August 18, 2017—three days after the protest—MLGW had received only *the single complaint* discussed above. Ex. 1, App.151. When Leonard met with Goza on August 21—now

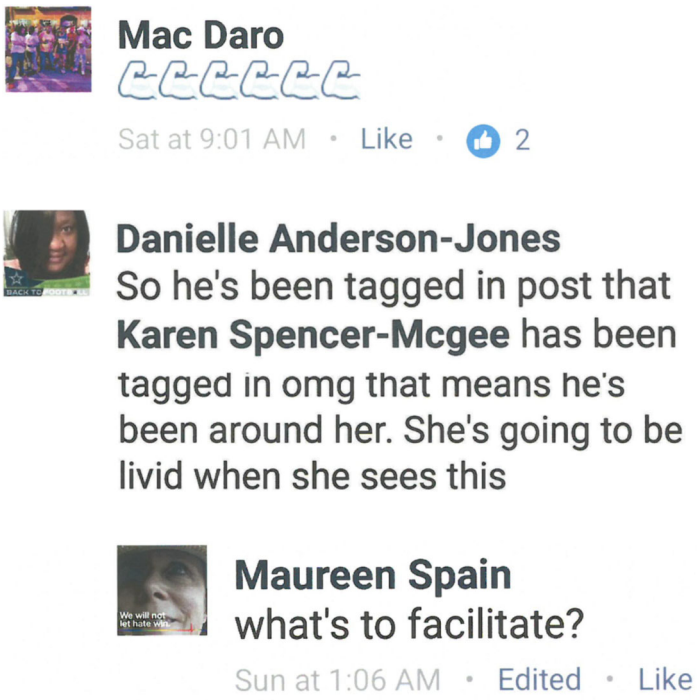
six days removed from the protest—only the August 16 complaint and the two additional Facebook posts Leonard had discovered independently were discussed. Ex. 9, App.166-98. MLGW's witnesses all agreed that MLGW received no complaints about Goza after August 29, 2017—13 days after receiving the initial complaint. Transcript, R.114, PageID.1755; Transcript, R.120, PageID.2253.

MLGW also exaggerates the nature and number of complaints against Goza. MLGW told this Court that the author of the original August 16 complaint was a "ratepayer." MLGW Br. at 9. There is no evidence that that is true. Transcript, R.114, PageID.1681. MLGW offered as evidence only an *employee's recitation* of the complaint—not the complaint itself. Ex. 1A, App.157. When the district court asked MLGW's witness why MLGW had not introduced the actual complaint, the witness promised to locate it and present it to the court the next day. Transcript, R.116, PageID.2229-31. The following morning, however, the witness returned empty-handed. She told the court she could not find the original complaint anywhere. Transcript, R.120, PageID.2245.

MLGW's witnesses claimed they received additional complaints about Goza. Transcript, R.114, PageID.1843, 1853, 1871. But at trial, MLGW never sought to introduce any *documentary evidence* of these additional complaints. No emails from customers. No Facebook posts or messages. No letters. No call records. Making matters worse, the

testimony about these alleged additional complaints was vague and contradictory. Leonard, for example, alternatively testified that MLGW received "twentyish" or perhaps "[t]wenty-some odd, maybe thirty" complaints about Goza. *Id.* at 1843. She described one by a customer who said, "Don't send him on my property." *Id.* at 1853. That complaint is not in the record. She described another as a "screenshot of a Facebook post" calling for Goza's termination. *Id.* at 1871. That post is not in the record. Another witness testified that one Facebook post calling for Goza's termination was shared 81 times. Transcript, R.116, PageID.2224. That post is not in the record. MLGW's witnesses made no attempt to explain why they were not introducing any documentation of these additional alleged complaints.

Under cross-examination, it became clear that MLGW's claimed mountain of complaints was more of a molehill. Leonard admitted, for example, that MLGW counted every comment on Franklin's Facebook post (as well as comments on alleged posts that are not in the record) as discrete "complaints" against Goza. Transcript, R.114, PageID.1871. To illustrate, the following comments were counted by MLGW as four separate complaints:



Ex. 26, App.370-72; Transcript, R.114, PageID.1871.

MLGW witnesses similarly exaggerated the viral reach of these alleged complaints. One witness claimed that complaints about Goza were "being seen by tens of thousands of customers." Transcript, R.116, PageID.2220. Under cross-examination, though, she admitted that this figure was based on a cascading series of implausible and unsupported assumptions and that she had no way of knowing the real number. Transcript, R.120, PageID.2252.

MLGW also exaggerates the *source* of the alleged complaints. Even taking MLGW's witnesses at their word, most of the complaints MLGW claimed it received were not from ratepaying customers. Among all the alleged complaints, MLGW only identified 10 from customers.

Transcript, R.114, PageID.1754-55, 1909; Ex. 39, App.394. MLGW has approximately 430,000 customers at any given time. Transcript, R.116, PageID.2007. Ten complaints represent a miniscule fraction of MLGW's customer base. *Id.*

The exaggerations do not end there. MLGW's underlying claim that 10 customers complained about Goza could not withstand minimal scrutiny. No one at MLGW ever contacted the "complaining" parties to identify them as customers. Transcript, R.114, PageID.1723. Instead, an MLGW employee compared the list of people who made "complaints" against MLGW's customer rolls. Ex. 39, App.394. MLGW assumed that any match meant the complaint came from a customer. *Id.* But the evidence at trial revealed serious reasons to doubt that assumption. One complaining party's name matched *multiple* MLGW customers. *Id.* In other cases, the supposedly matching names were spelled differently. *Id.* To highlight one particularly egregious example, MLGW assumed that Edie Love—the first commenter on Franklin's post—was MLGW customer Edward Love. *Id.* But Edie Love is a woman. Ex. 26, App.370-72; Facebook Profile, https://www.facebook.com/singingtreez. Edward Love is a man. U.S. Social Security Administration, Baby Names, https://www.ssa.gov/oact/babynames/.

Collectively, these exaggerations are far greater than the sum of their parts. MLGW's entire case rests on the premise that Goza's political

speech caused a torrent of customer complaints that disrupted its business and diminished customer trust. MLGW Br. at 19. But there is no documentation in the record to support that narrative. Only three of the 10 customer "complaints" identified by MLGW—Edie Love's, Scott Banbury's and Maureen Spain's—are even in the record. Ex. 26, App.369-72; Ex. 39, App.394. Love was mistakenly identified as an MLGW customer. And none of the three can fairly be characterized as complaining about Goza. *None* of the remaining customer "complaints" MLGW claimed to receive are in the record. There is no evidence that *any* MLGW customer ever expressed discomfort with interacting with Goza. There is no evidence that *any* MLGW customer ever threatened to withhold payment. There is no evidence that *any* MLGW customer ever demanded Goza's termination.

So who authored the two complaints that are actually in the record? Protesters Goza encountered at the August 15 rally. Ex. 1A, App.157; Ex. 7, App.163. Neither the author of the original August 16 complaint nor Franklin were identified as MLGW customers. Ex. 39, App.394; Transcript, R.114, PageID.1681. Both, however, were among the protesters who confronted Goza at the August 15 protest. Ex. 1A, App.157; Ex. 7, App.163.

In sum, MLGW received a single complaint from a protester who is not an MLGW customer. An MLGW manager discovered a Facebook post

criticizing Goza from another protester who is also not an MLGW customer. From there, MLGW offered only vague and unsubstantiated testimony about additional "complaints," refusing to provide any documentation to support its claims. At every step, MLGW exaggerated the *nature*, the *source*, and the *viral reach* of those "complaints." And MLGW conceded that all such "complaints" ceased within two weeks—more than a month before MLGW demoted and terminated Goza.

M. MLGW's Executives Decide to Demote and Terminate Goza.

The decision to demote and terminate Goza was made at the highest level of the organization. Transcript, R.114, PageID.1719-20, 1892; Transcript, R.116, PageID.2023-24, 2040, 2061. Gale Carson, MLGW's Director of Corporate Communications, wanted Goza terminated. Transcript, R.114, PageID.1715-16. Carson is African American. *Id.* at 1716. Carson emailed the rest of MLGW's executive team: "Based on his own racist comments and hate for African-American[s], I strongly disagree with him [working] in African-American neighborhoods…. I certainly wouldn't want him near my home. A desk job would be suitable." Ex. 43, App.400; Transcript, R.116, PageID.1997.[2] Collins, MLGW's President, expressed his view that Goza not be in

[2] In her email, Carson inadvertently misidentified Goza as Michael Page, Goza's supervisor. There is no dispute, however, that she was expressing her opinion about Goza. Ex. 43, App.400; Transcript, R.116, PageID.1997, 2042.

contact with MLGW customers. Ex. 31, App.380-81. MLGW's top executives, including its President (Collins), Vice President of Customer Service Field Operations (Chris Bieber) and Vice President of Human Resources (Goodloe) expressed their views that Goza was a "liability." Transcript, R.114, PageID.1755. In addition, MLGW's executives testified to several off-the-record conversations where Goza's fate was discussed. Transcript, R.116, PageID.1999-2002, 2023-24, 2041-42, 2049-50, 2060. Leonard conceded that she did not want to see Goza terminated but was getting pressure "from above." Transcript, R.116, PageID.2164; Transcript, R.114, PageID.1714. Ultimately, MLGW President Collins, as the final arbiter of all employee discipline, approved Goza's demotion and termination. *Id.* at 2062, 2068.

N. MLGW Demotes and Terminates Goza.

On September 8, 2017, Leonard wrote to Goza's union representative informing him that MLGW had decided to permanently prohibit Goza from holding any position that involved the potential for customer contact. Ex. 11, App.199; Stipulations, R.98, PageID.1506. MLGW offered Goza a job as a Material Handler in a storeroom—a position that, compared to Goza's technician position, paid significantly less. Transcript, R.114, PageID.1717, 1722, 1850; Transcript, R.116, PageID.2118, 2165; Ex. 11, App.199; Stipulations, R.98, PageID.1506.

Leonard explained that if Goza did not accept the demotion, he would be terminated. Transcript, R.114, PageID.1717; Ex. 11, App.199.

Goza rejected the demotion. Transcript, R.114, PageID.1723; Ex. 12, App.201; Stipulations, R.98, PageID.1507. MLGW formally terminated Goza on October 3, 2017. Transcript, R.114, PageID.1725; Ex. 13, App.31; Stipulations, R.98, PageID.1507.

O. MLGW's Witnesses Offered Conflicting and Contradictory Reasons for Goza's Termination.

MLGW's witnesses offered shifting and conflicting testimony regarding the *reason* for Goza's termination. They ultimately conceded that Goza was terminated because of his political expression.

At the time of Goza's suspension, MLGW's managers were unable to articulate *any* company policies Goza had broken. Ex. 9, App.180, 185-88. As previously discussed, MLGW had no policy governing employees' use of social media. Transcript, R.114, PageID.1711.

The reasons offered in support of demoting and terminating Goza grew and evolved from there. In one email, a human resources employee asked Leonard for a "violation type" to classify Goza's suspension. Ex. 29, App.378. Leonard responded: "That's a good question. I'm not sure what the violation code is going to be because this is the first time we've had this. If you must have one, make it about violation of the Ethics policy." *Id.*

Goza's termination letter identified, for the first time, five policies that MLGW claimed Goza had violated, including policies addressing harassment, standards of business conduct, civility in the workplace, and fostering a respectful workplace. Transcript, R.114, PageID.1726, 1877; Ex. 13, App.31. The claimed violation of MLGW's ethics policy was apparently abandoned. Ex. 13, App.31; Ex. 29, App.378. Goza's termination letter made no claims about any alleged disruptions to MLGW's business. Ex. 13, App.31.

MLGW's managers conceded that they strained to look for policy violations to match Goza's conduct only after the decision to demote and terminate him had already been made. Transcript, R.114, PageID.1748, 1752, 1875-76.

MLGW's witnesses similarly struggled to identify the conduct they were punishing. Leonard, for instance, initially testified that Goza's presence at the August 15 protest and comments to reporters played no role in his termination. *Id.* at 1726. Later, when confronted with documents directly contradicting her testimony, she agreed that Goza's protest activities and comments to the press were among the reasons for his firing. *Id.* at 1728-30; Ex. 14, App.207-08.

At trial, MLGW's justifications for terminating Goza evolved yet again—this time focusing on claims of disruption common in the First Amendment employment analysis.

MLGW principally argued that sending Goza back into the field would jeopardize his safety because MLGW's African American customers might harm him. *Id.* at 1756, 1803, 1816, 1834, 1853; Transcript, R.116, PageID.2050. But MLGW's witnesses admitted that this concern was purely speculative. Transcript, R.114, PageID.1891. MLGW received no threats against Goza. *Id.* at 1757; Transcript, R.116, PageID.2050. Goza was "not at all" worried about his safety. Transcript, R.116, PageID.2158. When asked, "[W]hat evidence is there that would affect Mr. Goza's safety?," Leonard responded, "Well, there is none." Transcript, R.114, PageID.1757, 1891. Bieber, MLGW's Vice President of Customer Service Field Operations, similarly conceded that removing Goza from his position "had nothing to do with his safety." Transcript, R.116, PageID.2025.

To be sure, Goza did express concern over his family's safety for a few days following the August 15 protest. *Id.* at 2159. The day after the protest, a local television crew arrived unannounced at Goza's home seeking further comment from Goza. *Id.*; Ex. 9, App.184. Concerned that anyone could find his address using publicly available sources, Goza sent his family to a relative's house until the weekend. Transcript, R.116, PageID.2159; Ex. 9, App.184. His family returned a few days later, and Goza had no safety concerns for his family after that. Transcript, R.116, PageID.2159.

MLGW also claimed that Goza could not perform his job because he was liable to mistreat his African American customers. Transcript, R.114, PageID.1757, 1803, 1817, 1853. MLGW's managers even went so far as to hypothesize that Goza's discriminatory work servicing utilities could lead to a gas explosion or similar violent incident. *Id.* at 1757-58, 1834, 1853, 1892-93; Transcript, R.116, PageID.2002-03. MLGW's claim that Goza might threaten or advocate violence was raised for the first time at trial; it was never brought up during the disciplinary process. Transcript, R.114, PageID.1893, Transcript, R.116, PageID.2203. MLGW's newly articulated concern also flew in the face of Goza's decades of work, during which he never received a single complaint about bias. *Id.* at 1757-58; Transcript, R.116, PageID.2003. As for the explosion hypothetical, instances of injuries caused by technician mistakes are "exceedingly rare." Transcript, R.114, PageID.1758. And there was zero evidence that Goza ever made *any* such technical mistakes—let alone mistakes motivated by bias. *Id.* at 1759; Transcript, R.116, PageID.2003-04. Leonard conceded that MLGW's fear of bias towards customers was "just speculation." Transcript, R.114, PageID.1759. Bieber similarly testified that he "knew" Goza "would not deliberately do anything…to harm customers." Transcript, R.116, PageID.2004; Transcript, R.114, PageID.1759.

MLGW's other claims of disruption were shown to be similarly illusory. MLGW's witnesses cited the risk of customers refusing to pay their bills. Transcript, R.116, PageID.2175. But MLGW only offered one complaint, Franklin's, that threatened nonpayment—and Franklin was not an MLGW customer. Ex. 5, App.26; Ex. 39, App.394; Transcript, R.114, PageID.1681. MLGW submitted no evidence that any customers actually withheld payment. Transcript, R.116, PageID.2203. If they had, MLGW could have simply cut off service. *Id.* at 2175, 2202. This "happens every day" at MLGW. *Id.* at 2175.

Crucially, MLGW made no claim that Goza's conduct caused discord among his co-workers or superiors. Transcript, R.114, PageID.1801-02; Transcript, R.116, PageID.2208.

At trial, the truth eventually came out: MLGW terminated Goza because of his political views. When pushed to reveal the real reason for firing Goza, Leonard testified that "[t]he attitudes and the opinions in the community had changed, and these sort of opinions that Mr. Goza was expressing were no longer acceptable." Transcript, R.114, PageID.1753. Essentially, MLGW believed that its "customers didn't find Mr. Goza's views acceptable." *Id.* at 1753-54.

MLGW's managers acknowledged that Goza's posts involved core political speech: "expressi[on] [of] his opinion on racial issues," the "treatment of the African-American community by the federal

government," and "his opinion on the need to preserve the Confederate statues." *Id.* at 1679-80.

MLGW's executives and managers understood that the complaints they received about Goza were driven not by genuine customer concern but rather a "vibrant movement" among activists to identify people engaging in disfavored speech and "out" them at work. Transcript, R.114, PageID.1677, 1702; Ex. 43, App.402.

P. MLGW Treated Goza More Harshly than African American Employees.

The evidence at trial also demonstrated that MLGW treated Goza far more harshly than similarly situated African American employees.

The prime example of MLGW's double standard was Deandre Stewart, an African American employee who worked as Maintenance Helper. Transcript, R.114, PageID.1760; Transcript, R.116, PageID.1962. Like Goza, Stewart worked around people's homes and interacted with customers. Transcript, R.114, PageID.1760. And like Goza, Stewart posted photos on his Facebook page which identified him as an MLGW employee. *Id.* at 1767; Transcript, R.116, PageID.1967, 1975-76, 2090.

Stewart, while on duty in his MLGW truck, used Facebook Live to record and publicly broadcast a 24-minute video of himself speaking. Transcript, R.114, PageID.1767; Transcript, R.116, PageID.1983, 2078; Ex. 18, App.299; Ex. 19, App.300-25. In the video, Stewart made a

number of disparaging and threatening statements towards Memphis' Arab American, Asian American, and Caucasian residents:

> We need to boycott (unintelligible) stores run by the Asians, these Chinese stores. All these fucked up (unintelligible). We need to boycott all them bitches. For real, that what we need to do. We can—we can even get some (unintelligible) man and start killing these motherfuckers too. You got—you got—a lot. People gonna—people gonna have to die behind this shit, man, to let motherfucker know this shit real.

Ex. 18, App.299; Ex. 19, App.307.

> They don't—white people don't respect shit but money and crime and shit probably. You got—you got to hurt them be some pocket right here.

Ex. 18, App.299; Ex. 19, App.308.

> [W]e need to come together, man, as a motherfucking race. We need to boycott all these Arabs. Get these motherfuckers (unintelligible). Get they ass up out of here. I ain't see not—I didn't see not one Arab at the rally.

Ex. 18, App.299; Ex. 19, App.317.

> Ask those Chinese—the Chinese lady at the (unintelligible) store, man. Go to them Chinese ladies and say, why the fuck y'all ugly ass bitch didn't come to the rally for…. They don't give a fuck about y'all, you hear me? They take y'all money and they send that shit overseas to they ugly ass kids. They ugly ass kids come over here and go to these motherfucking school and shit off your dime. Real motherfucking talk.

Ex. 18, App.299; Ex. 19, App.318.

> I don't give a fuck about Arab, you hear me? I don't give a fuck about their asses either. I don't give a fuck. If you don't like me, I don't like your ass.

Ex. 18, App.299; Ex. 19, App.319.

Stewart's Facebook page also contained a number of explicit and controversial posts. Two posts described or portrayed explicit sexual acts.

Ex. 21, App.329, 332. Another expressed, in graphic terms, approval of domestic violence:

Id., App.333-34. Yet another post expressed his view that "child molesters and gays run hand in hand." *Id.*, App.335-36. One post seemingly approved of violence during protests over the fate of Confederate monuments. Responding to a news report describing the motorist who drove his car into a crowd during the Charlottesville,

Virginia protests, killing one and injuring others, Stewart wrote "Lol." *Id.*, App.330-31.[3]

MLGW's managers were aware of Stewart's Facebook video and posts. Transcript, R.114, PageID.1773. Yet MLGW gave Stewart just a three-day suspension. Transcript, R.116, PageID.1971; Ex. 40, App.59. He remained in his position—a position Goza was permanently banned from holding. Transcript, R.114, PageID.1840-41; Transcript, R.116, PageID.2102.

Leonard conceded that MLGW's decisionmakers considered company precedent, including Stewart's case, before demoting and terminating Goza. Transcript, R.114, PageID.1760. MLGW's witnesses readily conceded that Stewart's Facebook activities would violate the same company policies MLGW cited to fire Goza. *Id.* at 1776-77. And MLGW's witnesses conceded that the same claims of potential disruption used to fire Goza would apply in equal—if not greater measure—to Stewart. *Id.* at 1778. Leonard justified Goza's demotion and termination by citing the "Internet is Forever" principle, telling the court that the mere possibility that someone might, in the future, discover the information posted by Goza and react negatively was a justification for a

[3] In its brief to this Court, MLGW claims that Goza "appeared to have condoned the Charlottesville, Virginia violence…." MLGW Br. at 8. But MLGW cites to a portion of the record discussing *Stewart's comment* on the Charlottesville protests, not Goza's. Transcript, R.116, PageID.2097-98. Goza has never condoned violence. Ex. 9, App.177.

permanent sanction. *Id.* at 1863. But MLGW's lenient response to Stewart's social media activities proved that MLGW's claimed concerns about future reactions to Goza's speech were pretextual. *Id.* at 1778, 1863-67; Transcript, R.116, PageID.2092.

MLGW's relaxed approach toward Stewart was hardly an outlier. MLGW consistently took a hands-off approach to claims of potential disruption caused by the speech of African American employees. Another African American employee, Kevin Taylor, worked as a Customer Service Tech 2. Transcript, R.114, PageID.1779. MLGW received multiple customer complaints about Taylor, including complaints about unwanted sexual advances and lewd behavior. *Id.* at 1780-89; Ex. 22, App.337-59. One complaint alleged that Taylor demanded sexual favors from customers in exchange for not cutting off utility services. Transcript, R.114, PageID.1780-81; Ex. 22, App.337-39. Another customer complained that Taylor made unwanted sexual advances towards her and assaulted a neighbor who tried to intervene. Transcript, R.114, PageID.1784-85; Ex. 22, App.349. Yet another accused Taylor of soliciting a bribe. Transcript, R.114, PageID.1786; Ex. 22, App.351. On one occasion, Taylor inadvertently used his truck radio to broadcast a sexual encounter to other MLGW employees. Transcript, R.114, PageID.1878. Despite these complaints, Taylor kept his job at MLGW for years, never receiving more than a warning or short suspension for this misconduct.

Id., PageID.1781, 1784. Taylor was ultimately terminated for stealing. *Id.*, PageID.1789.

There are other examples yet. One of MLGW's executives received a report that an African American employee had made a social media post about killing white people. Transcript, R.116, PageID.2008-09. MLGW took no action in response. *Id.* Brenda Flowers, an African American employee who worked in the same position as Goza, admitted to repeatedly harassing MLGW customers during work hours. Transcript, R.114, PageID.1905-08; Ex. 38, App.382-93. She received only written reprimands and a short suspension. Transcript, R.114, PageID.1906; Ex. 38, App.382-93.

MLGW's witnesses maintained that MLGW did not treat Goza more harshly than African American employees. For example, Bieber agreed that "it would be a dereliction of duty to leave somebody with [Goza's] beliefs in [his] position." Transcript, R.116, PageID.2033. He testified that "[i]f an African-American had for whatever reason made those same comments, the same logic would apply." Transcript, R.116, PageID.2033-34. But MLGW's treatment of its African American employees plainly belies that claim. *Id.* MLGW even took the unprecedented step of drafting a document describing Goza's alleged policy violations as more serious than those of Stewart and other African American employees. Transcript, R.116, PageID.2053-54, 2088-89; Ex.

45, App.407-08. But the superficial distinctions contained in MLGW's analysis failed to explain why Goza's heated political speech warranted termination while death threats, customer harassment, and overtly bigoted speech deserved only a slap on the wrist. Transcript, R.116, PageID.2053-54, 2088-89; Ex. 45, App.407-08. At trial, MLGW's witnesses were left scrambling trying to defend the indefensible. For example, Eric Conway, the manager responsible for disciplining Stewart, testified that Stewart's Facebook video "did not demonstrate an animosity towards a particular class of people." Transcript, R.116, PageID.2093; Ex. 45, App.407. This was MLGW's official position on an employee who, while working, publicly broadcast death threats and insults explicitly targeting Chinese and Arab Americans, gays, and women. Ex. 18, App.299; Ex. 19, App.307-08, 317-19; Ex. 21, App.333-36.

II. PROCEDURAL HISTORY.

A. Goza Files Suit.

Goza sued MLGW, raising claims of unlawful retaliation under the First Amendment and race discrimination under 42 U.S.C. § 1981. Complaint, R.1, PageID.6.

B. MLGW Never Demands a Jury Trial.

Goza did not ask for a jury trial. Complaint, R.1, PageID.1-7. Neither did MLGW, either in its answer or any other timely pleading. Answer, R.21, PageID.76-85. MLGW tells this Court that "[d]uring the

Scheduling Conference, MLGW's counsel clearly and unequivocally communicated to Mr. Goza's counsel and the Court its desire for a jury trial." MLGW Br. at 15-16. That's not so. MLGW merely "indicated that it would be demanding a jury." Motion to Strike, R.61, PageID.1043. At the time of the scheduling conference, MLGW was still within the time allowed to do so. While a handful of standard pre-trial documents mentioned a potential jury trial in boilerplate language, Rule 26(f) Report, R.17, PageID.61-66; Notice of Setting, R.19, PageID.67; Scheduling Order, R.20, PageID.74, those documents were drafted based "on the assumption that MLGW would demand a jury," as MLGW said it would. Order Granting Motion to Strike, R.91, PageID.1376-77. But MLGW's deadline to demand a jury came and went with no demand.

The district court ruled that MLGW had failed to timely file or serve a jury demand as required by Rule 38(b). Order Granting Motion to Strike, R.91, PageID.1376. The court similarly declined to order a jury trial under Rule 39(b). The court chalked up MLGW's failure to demand a jury to "inadvertence," which this Court's precedents recognize as a ground sufficient to deny a motion under Rule 39(b). *Id.* at 1378 (citing *Kitchen v. Chippewa Valley Sch.*, 825 F.2d 1004, 1013 (6th Cir. 1987)). The district court identified other "compelling reasons to hold a bench trial"—including the "complexity of the case" and the "significant

obstacle[s] to trying this case before a jury" in light of "the publicity surrounding" the case. *Id.* at 1378-79.

C. The District Court Finds in Favor of Goza.

Following a three-day bench trial, the district court issued an opinion finding in favor of Goza on both claims. Order and Opinion, R.122, PageID.2282.[4]

(1) Municipal liability.

Starting with municipal liability, the court held that Goza's termination was made "by those whose edicts or acts may fairly be said to represent official policy." *Id.* 2288. The court concluded that the Memphis City Charter gives the MLGW President the power of "general supervision over…all officers and employees of" MLGW. *Id.* at 2289-90 (quoting Memphis City Charter, Part I, Art. 65, § 672). This power, the district court recognized, "includes the authority to make final disciplinary decisions." *Id.* at 2290.

(2) First Amendment retaliation.

The court then addressed Goza's First Amendment claim. Applying *Pickering*, the court concluded that Goza's right to free expression outweighed MLGW's interest in avoiding any claimed disruption to its business. *Id.* at 2297-98.

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[4] In the interest of saving space, the district court's detailed opinion is described here only in broad strokes. The reader should consult the opinion for a more thorough analysis.

The court first found "that the demotion and termination in this case were not actually motivated by liability, safety, or operational concerns." *Id.* at 2300. That finding was based on a wide range of evidence, including the "demeanor at trial" of MLGW's managers and executives. *Id.* at 2299-2300.

The court instead found that MLGW's true motivation for demoting and terminating Goza was the belief that Goza's speech "threaten[ed] the Division's bonds with the public it serves." *Id.* at 2301. But, the court went on to hold, "[a] concern about MLGW's brand or reputation is not sufficient to outweigh Goza's rights." *Id.* Reputational concerns—unconnected to actual or reasonably anticipated disruption—will rarely suffice to censor speech, the court held. *Id.* As the court observed, "[p]articipants in an orderly demonstration in a public place" cannot be silenced by the specter of hostile audiences. *Id.* (quoting *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966)). And just as "[v]oters cannot use the ballot box to make the government silence their opponents; the public cannot use social media to do so either." *Id.* at 2301.

The court acknowledged that the "rise of social media" suggests that "government officials may soon have to weigh the free-speech interests of their employees against a tsunami of public uproar." *Id.* at 2302. But, the court reasoned, "fear of 'going viral,' by itself, does not appear to be a reasonable justification for a restriction on an employee's speech." *Id.*

Permitting the punishment of employee speech based on this justification, the court recognized, "would permit the government to censor certain viewpoints based on the whims of the public—or, worse, based on a government official's speculation as to the public's eventual reaction." *Id.* "The advent of social media," the court concluded, "'does not…provide a pretext for shutting off meaningful discussion of larger public issues in this new public sphere.'" *Id.* at 2303 *(*quoting *Liverman v. City of Petersburg*, 844 F.3d 400, 414 (4th Cir. 2016)).

In the alternative, the court concluded that even if concern about public perception was *generally* a valid ground for suppressing speech, *in this case* "[t]he evidence d[id] not support a finding that MLGW reasonably feared that Goza's continued employment would have adversely affected the MLGW brand or the ability of Tech III's generally to do their jobs." *Id.*

The district court next held—in the alternative on this count as well—that *even if* MLGW's decisionmakers genuinely believed Goza's speech was likely to cause disruption, these claims of potential disruption "were too speculative to pass Constitutional muster." *Id.* at 2304-06.

The district court was careful to disclaim any sweeping holdings or categorical rules. *Id.* at 2307. "The Court's Opinion," the court explained, "should not be understood as disagreeing with the[] cases [cited by MLGW] or as holding that offensive speech by public employees is always

protected…." *Id.* Instead, the court engaged in precisely the sort of fine-grained factual analysis *Pickering* demands: distinguishing MLGW's authorities based on the responsibilities or policymaking roles of the employee at issue, the nature and context of the speech, the nexus between the speech and the speaker's role as a public employee, and the likelihood of disruption caused by the speech, among other factors. *Id.* at 2307-09.

(3) Race discrimination.

The district court also concluded that MLGW had discriminated against Goza on the basis of race. *Id.* at 2311.

The court found that Goza was "treated differently from similarly situated" employees, including Deandre Stewart. *Id.* at 2314, 2016 (citing *Leadbetter v. Gilley*, 385 F.3d 683, 690 (6th Cir. 2004)). Citing a wide range of evidence, the court rejected MLGW's arguments that Goza's speech was more culpable or worthy of punishment. *Id.* at 2315.

MLGW's proffered reasons for terminating Goza were pretextual, the court concluded. *Id.* MLGW's neutral policies, the court observed, were not applied evenhandedly. *Id.* at 2317. MLGW's written analysis comparing Goza and Stewart was, on the court's view, riddled with misrepresentations and drafted "to exonerate Stewart, rather than to provide a fair and honest assessment of his actions." *Id.* The court found MLGW's witnesses "not…credible" to the extent they claimed they "did

not believe that Stewart's statements demonstrated genuine racial animus or represented a serious violation of MLGW policy." *Id.*

ARGUMENT

I. MLGW VIOLATED GOZA'S RIGHTS UNDER THE FIRST AMENDMENT AND SECTION 1981.

The district court correctly found MLGW liable for infringing on Goza's First Amendment rights and discriminating on the basis of race.

A. Standard of Review.

"In an appeal from a judgment entered after a bench trial, [this Court] review[s] the district court's findings of fact for clear error and its conclusions of law de novo." *United States v. Real Property 10338 Marcy Road Northwest, Canal Winchester, Ohio*, 938 F.3d 802, 806 (6th Cir. 2019) (citations omitted). "Clear error will be found only when the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Max Trucking, LLC v. Liberty Mut. Ins. Corp.*, 802 F.3d 793, 808 (6th Cir. 2015). This Court "must give due regard to the trial court's opportunity to judge the witnesses' credibility." *Id.* (quoting Fed. R. Civ. P. 52(a)(6)). "If the district court's account of the evidence is plausible in light of the entire record, this court may not reverse that accounting, even if convinced that, had it been sitting as trier of fact, it would have weighed the evidence differently." *Harlamert v. World Finer Foods, Inc.*, 489 F.3d 767, 771 (6th Cir. 2007) (citations

omitted). "This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *T. Marzetti Co. v. Roskam Baking Co.*, 680 F.3d 629, 633 (6th Cir. 2012) (citations omitted).

B. MLGW Is Liable Under Principles of Municipal Liability.

The district court correctly found that MLGW is subject to municipal liability.

(1) Standards governing municipal liability.

Section 1983[5] provides, in relevant part, that "[e]very person who, under color of [law], subjects…any [person] to the deprivation of any rights…secured by the Constitution…shall be liable…." 42 U.S.C. § 1983. Municipalities and other local government units are "persons" within the meaning of the statute. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978).

A municipality is liable under § 1983, however, "only if a custom, policy, or practice attributable to the municipality was the moving force behind the violation of the plaintiff's constitutional rights." *Gohl v. Livonia Pub. Sch. Dist.*, 836 F.3d 672, 685 (6th Cir. 2016). A municipal

[5] "[T]he express cause of action for damages created by § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state governmental units." *Arendale v. City of Memphis*, 519 F.3d 587, 598-99 (6th Cir. 2008) (citations omitted).

defendant "cannot be held liable under § 1983 on a respondeat superior theory." *Monell*, 436 U.S. at 691.

A "policy or custom does not have to be written law; it can be created 'by those whose edicts or acts may fairly be said to represent official policy.'" *Paige v. Coyner*, 614 F.3d 273, 284 (6th Cir. 2010) (quoting *Monell*, 436 U.S. at 694).

"[M]unicipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances." *Pembaur*, 475 U.S. at 481. With respect to such single decisions, "municipal liability under § 1983 attaches where…a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id.* at 483.

The question "is not whether an official is a policymaker on all matters for the municipality, but whether he is a policymaker 'in a particular area, or on a particular issue.'" *Valentino v. Village of S. Chic. Heights*, 575 F.3d 664, 676 (7th Cir. 2009) (quoting *McMillian v. Monroe Cnty.*, 520 U.S. 781, 785 (1997)). "[H]ere, the relevant question is whether [the official in question] is a policy-maker on personnel decisions." *Id.*

In many cases, "policymaking responsibility is shared among more than one official or body." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 126 (1988); *Pembaur*, 475 U.S. at 483. In such cases, "policy decisions

made" by *any* such officials or bodies are "attributable to" the municipality, unless one official or body retains the ultimate right to review the policy decisions of the others. *Praprotnik*, 485 U.S. at 126. In a similar vein, municipal liability attaches where "a municipal policymaker has delegated his policymaking authority to another official." *Id.*; *Pembaur*, 475 U.S. at 483.

"Whether an official has final policy making authority is a question of state and local law." *O'Brien v. City of Grand Rapids*, 23 F.3d 990, 1001 (6th Cir. 1994). And "[a] federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it." *Praprotnik*, 485 U.S. at 126.

(2) Final policymaking authority over disciplinary actions is vested in MLGW's President.

The district court correctly concluded that final policymaking authority over disciplinary decisions rests with MLGW's President.

The Memphis City Charter vests the MLGW President, "subject to the regulations of the board of Light, Gas and Water Commissioners," with the duty of "general supervision over the operation of said light, gas and water division and of all officers and employees of said light, gas and water division." Memphis City Charter, Part I, Art. 65, § 672. The Charter further provides that the powers granted to the President,

among others, "be liberally construed to effectuate the purposes hereof." *Id.* § 699.

The Charter also establishes MLGW's Board of Commissioners. *Id.* § 667. The Charter grants the Board the power to operate utilities, *id.* §§ 677-679, establish rates, *id.* § 680, enter into contracts, *id.* § 681, and condemn property, *id.* § 684, among others.

Nothing in the Charter gives the Board the power to review employment decisions made by MLGW's President. *See generally id.* §§ 665.1-699. And to the extent such power could be inferred from the Board's authority to promulgate "regulations" governing the President's power to supervise employees, the Board has issued no such regulations.

A separate section of the Memphis City Charter establishes a Civil Service Commission empowered to "review disciplinary actions" taken against city employees. Memphis City Charter, Part I, Art. 34, §§ 240, 245-247. Employees of MLGW, however, are exempted from the jurisdiction of the Civil Service Commission. *Id.* § 250.

These facts, among others, distinguish this case from *Praprotnik*, 485 U.S. 112, on which MLGW principally relies. In *Praprotnik*, the plaintiff, a city architect, was transferred and ultimately terminated by mid-level managers—in retaliation, the plaintiff alleged, for his prior employment-related complaints. *Id.* at 114-16. A Supreme Court plurality concluded that the city's Mayor, Aldermen, and Civil Service

Commission were the parties "whom the law established as the makers of municipal policy in matters of personnel administration." *Id.* at 126, 128. In *Praprotnik*, "the city established an independent Civil Service Commission and empowered it to review and correct improper personnel actions." *Id.* at 128. The plaintiff had appealed his termination to the Civil Service Commission, but the Commission stayed its proceedings after the plaintiff filed suit. *Id.* at 116. The court of appeals upheld municipal liability on the grounds that the decisions of the managers who fired the plaintiff were "not individually reviewed for 'substantive propriety' by higher supervisory officials," and "the Civil Service Commission…gave substantial deference to the original decisionmaker." *Id.* at 129. The Supreme Court "f[ou]nd these propositions insufficient to support the conclusion that" the supervisors who fired the plaintiff "were authorized to establish employment policy for the city." *Id.* "[W]hen a subordinate's decision is subject to review by the municipality's authorized policymakers," the plurality explained, "they have retained the authority to measure the official's conduct for conformance with *their* policies." *Id.* at 127. The Court did not reverse outright, however. Instead, it remanded for "further review…in light of the principles…discussed." *Id.* at 131. On remand, the Eighth Circuit held that the plaintiff failed to establish municipal liability because the mid-level managers who terminated him "did not possess *final* policymaking authority under the

city's charter." *Praprotnik v. City of St. Louis*, 879 F.2d 1573, 1575-76 (8th Cir. 1989) ("*Praprotnik II*").

This case differs in several crucial respects. First, the President of MLGW is not similarly situated to the mid-level decisionmakers in *Praprotnik*. He is the chief executive of Goza's employer. The City Charter vests him with the duty of "general supervision over…all officers and employees of [MLGW]." Memphis City Charter, Part I, Art. 65, § 672. The decisionmakers in *Praprotnik* had no such policymaking authority. *Praprotnik II*, 879 F.2d at 1576. And, critically, the Memphis City Charter provides no mechanism for the MLGW Board to review employment decisions. *See generally* Memphis City Charter, Part I, Art. 65 §§ 665.1-699; *id.* Art. 34, §§ 240, 250. In the absence of any such review procedures, *even if* one concluded that "policymaking responsibility [wa]s shared" between MLGW's President and Board, decisions made by *either* would be "attributable to" the municipality under *Praprotnik*, 485 U.S. at 126. And *even assuming* (very generously on this count), that the Board's authority to make the President's employment decisions "subject to the regulations of the board" made the Board MLGW's *exclusive* employment policymaker, the Board's failure to promulgate any such regulations amounts to a "delegat[ion]" of the Board's "policymaking authority" to the President. *Id.*; Memphis City Charter, Part I, Art. 65,

§ 672; *Hunter v. Town of Mocksville, North Carolina*, 897 F.3d 538, 556 (4th Cir. 2018).

MLGW cites this Court's opinion in *Meyers v. City of Cincinnati*, 14 F.3d 1115 (6th Cir. 1994), but that case does not support MLGW's position either. *Meyers upheld* municipal liability—chiefly because the plaintiff had exhausted the city's explicit review procedures and received a final adverse ruling from the city's civil service commission. *Id.* at 1118-19. The holdings in both *Meyers* and *Praprotnik*, however, were premised on the *existence* of explicit review procedures by the ultimate policymaking bodies designed "to measure the [original decisionmaker]'s conduct for conformance with *their* policies." *Praprotnik*, 485 U.S. at 127. Those procedures simply don't exist here. And where, as here, the "applicable law" does not "provide for further review" by another policymaking body, the decisionmaker has "'final policy making authority' with respect to [the] disciplinary charge." *Arendale*, 519 F.3d at 587 (quoting *Praprotnik*, 485 U.S. at 123).

(3) MLGW's Memorandum of Understanding with union employees does not diminish the President's policymaking authority.

Unable to find refuge in the City Charter, MLGW claims that a union agreement covering certain employees proves that the MLGW Board—and not the President—exercises exclusive policymaking

authority over disciplinary matters. MLGW Br. at 25-31. The district court correctly rejected this argument, too.

MLGW has entered into a Memorandum of Understanding (or "MOU") with the International Brotherhood of Electrical Workers. Ex. 48, App.63-132. Goza is a union member covered by the agreement. Transcript, R.114, PageID.1704-05.

MLGW first cites the MOU's general language, including the following provisions:

> [T]he Board of Commissioners was created to administer the affairs of the utility systems and the exclusive management, control and operation of [the utility] systems was imposed upon said Board of Commissioners, with the exclusive authority to engage, determine the number of, and fix the duties and salaries of all employees.

Ex. 48, App.66.

> Nothing in this Memorandum of Understanding shall be interpreted as abrogating the authority vested in the Board for the exclusive management, control and operation of the Division.

Id., App.72.

> It is the intent of the parties to preserve such rights of appeal as employees may have possessed prior to the effective date of this Memorandum of Understanding and it is not the intent of the parties, through this Grievance and Arbitration Procedure, to diminish the authority vested in the Board.

Id., App.99.

These provisions fail to support MLGW's argument. First, the MOU is not a primary source of legal authority. Its provisions cannot abrogate

the City Charter, which gives the MLGW president the "general supervision over the operation of [MLGW] and of all officers and employees of [MLGW]." Memphis City Charter, Part I, Art. 65, § 672.

Further, none of the MOU provisions cited by MLGW grant the Board *exclusive* control over employment policy. These provisions, even if accepted as a valid source of positive law, describe, at most, a scenario where "policymaking responsibility is shared among more than one official or body." *Praprotnik*, 485 U.S. at 126; *Pembaur*, 475 U.S. at 483. Like the Aldermen in *Praprotnik*, the MLGW Board has the authority, according to the MOU, to establish salaries. *Praprotnik II*, 879 F.2d at 1576. And like the Civil Service Commission in *Praprotnik*, MLGW's President has the power to make final decisions with respect to personnel and employment matters. *Id.* at 1575. As *Praprotnik* held, *both* are properly characterized as policymakers for purposes of municipal liability. *Praprotnik*, 485 U.S. at 126, 128.

Ultimately, it's what the MOU *does not say* that seals MLGW's fate. No provision in the agreement vests the Board with exclusive or final authority over personnel matters. Ex. 48, App.63-132.

(4) The MOU's grievance procedure does not diminish the President's policymaking authority.

The last point leads directly to MLGW's core argument: that the MOU's multi-step grievance procedure vests policymaking authority in

disciplinary matters exclusively in the Board. MLGW Br. at 27-31. The district court correctly rejected this claim as well.

The MOU's grievance procedure proceeds in four steps. *Id.* Step one involves "[o]ral discussion" designed to "encourage a cooperative and direct resolution of differences." *Id.*, App.98. Step two contemplates a "written grievance" followed by "an effort to settle the grievance." *Id.* Step three involves a hearing attended by a variety of union and employer representatives but no neutral decisionmaker. *Id.*, App.98-99. Hearing attendees are to make "[e]very effort…to review the facts objectively and to dispose of the grievance" by reaching an "agreement." *Id.*, App.99. Step four involves arbitration. *Id.* The arbitrator's jurisdiction is "limited to questions, grievances or disputes involving the working conditions, or interpretation, application or performance of specific provisions of th[e] Memorandum of Understanding." *Id.*, App.100. The arbitrator "ha[s] no authority to set policy…." *Id.*

It is undisputed that Goza has not yet completed the union grievance process. Transcript, R.120, PageID.2264. Goza and MLGW completed steps one and two, with no resolution. Transcript, R.116, PageID.2124. Goza requested a step-three hearing. *Id.* But once Goza filed his federal lawsuit, MLGW refused to participate further in the grievance process. *Id.* at 2070, 2124.

The fact that the grievance process was never completed does not *preclude* a finding of municipal liability. The exhaustion of grievance procedures is not a prerequisite to bringing an action under Section 1983. *See Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 516 (1982). Rather, review procedures are relevant only to the extent they shed light on which "official or officials [are] responsible for establishing final policy with respect to the subject matter in question." *Pembaur*, 475 U.S. at 481.

Here, nothing in the text of the MOU's grievance procedure can be fairly characterized as a final policymaking review. The first three steps are entirely nonadjudicative—"a mechanism for facilitating settlement between the labor union and MLGW." Order and Opinion, R.122, PageID.2291. The fourth step does not contemplate municipal policymaking either. The arbitrator's jurisdiction is limited to disputes involving working conditions and disputes arising under the MOU itself. Ex. 48, App.100. The arbitrator would have no authority to determine, for example, whether MLGW retaliated against Goza for engaging in free speech or discriminated against him on the basis of race. *Id.* And the arbitrator "ha[s] no authority to set policy." *Id.* MLGW does not argue that the *arbitrator* exercises final policymaking authority over disciplinary matters. Any such claim would be soundly foreclosed by precedent. *See Carter v. City of Melbourne, Fla.*, 731 F.3d 1161, 1167 (11th Cir. 2013) ("An independent arbitrator's review of a decision by a

city employee does not constitute a 'review by the municipality's authorized policymakers….'" (quoting *Praprotnik*, 485 U.S. at 127)); *accord Lytle v. Carl*, 382 F.3d 978, 985-86 (9th Cir. 2004).

That leaves the Board. Crucially, none of the steps in the grievance procedure contemplates review by the MLGW Board. Ex. 48, App.97-100. Undaunted by that absence, MLGW tells this Court that the arbitrator's decision is "subject to review/approval/disapproval by MLGW's Board." MLGW Br. at 28. But that is simply not true. The best support MLGW can muster for its claim is language in the MOU providing that "it is not the intent of the parties, through this Grievance and Arbitration Procedure, to diminish the authority vested in the Board." Ex. 48, App.99. To state the obvious, this language does not provide a mechanism for Board review. It merely references pre-existing "authority." *Id.* That authority resides in the City Charter, which, as previously discussed, similarly contains no mechanism for Board review of disciplinary decisions. Memphis City Charter, Part I, Art. 65, §§ 665.1-699.

At bottom, MLGW asks this Court to elevate an unwritten—indeed nonexistent—Board review procedure over the President's explicit statutory policymaking authority of "general supervision over…all officers and employees of [MLGW]." Memphis City Charter, Part I, Art. 65, § 672. And to find, based on *Praprotnik*, that this unwritten procedure

gives the Board *exclusive* policymaking sway in the area of employee discipline.

Courts, including this Court, have uniformly rejected this argument. "[A]ny review procedure…must be meaningful—as opposed to merely hypothetical—in order to strip an official of 'final policymaking' authority." *Randle v. City of Aurora*, 69 F.3d 441, 449 (10th Cir. 1995). Uncertain, ad hoc, or hypothetical review procedures are not sufficient to divest municipal officials of policymaking authority. *See Arendale*, 519 F.3d at 587, 602 (finding that a police chief had final policymaking authority with respect to disciplinary charges where "neither the Memphis Charter nor the Memphis City Code provide[s] for further review of Plaintiff's suspension"); *Flanagan v. Munger*, 890 F.2d 1557, 1569 (10th Cir. 1989) (city's claimed unwritten, nonmandatory, and informal review procedure insufficient to defeat municipal liability); *Valentino*, 575 F.3d 664, 677-78 (same); *Ware v. Jackson Cnty., Mo.*, 150 F.3d 873 (8th Cir. 1998) (same); *Hunter*, 897 F.3d 538 (municipality delegated policymaking authority to city officials where it had not exercised its authority to oversee disciplinary decisions).

MLGW's argument, if accepted, would also "insulate [MLGW] from liability in virtually every case—a result contrary to the principles underlying Section 1983." *Hunter*, 897 F.3d at 558. Municipalities cannot have it both ways: delegating all disciplinary policymaking authority and

then avoiding liability by pointing to unexercised higher authority, unwritten constraints, or nonexistent review procedures. "To hold that [MLGW's President] is not a final policymaker" would, in effect, mean that MLGW has "*no* policymakers with regard to [his] personnel decisions." *Id.*; *Barnes v. City of Cincinnati*, 401 F.3d 729, 744 (6th Cir. 2005). The Supreme Court cautioned that if municipalities were permitted to "insulate the government from liability" in this manner, "§ 1983 could not serve its intended purpose." *Praprotnik*, 485 U.S. at 126.

Finally, a ruling in MLGW's favor would violate notions of fair notice and fair play. If MLGW's Board had a clearly established procedure to review personnel decisions for "conformance with the[] [Board's] policies," *id.* at 127, Goza would have exhausted those procedures before filing suit. It would be profoundly unfair to plaintiffs seeking to protect their constitutional rights to make them hazard a guess about informal and unwritten sources of policymaking authority—and bear the consequences for guessing wrong. And it would perversely reward municipalities for deliberately obscuring the identity of policymaking officials and bodies. This Court need not endorse such a result.

C. MLGW Infringed on Goza's Freedom of Speech.

The district court correctly concluded that MLGW violated Goza's First Amendment rights when it terminated him because of his off-duty political speech.

(1) The First Amendment protects public employees against retaliation for engaging in constitutionally protected expression.

The First Amendment guarantees freedom of speech and expression. U.S. Const. amend. I. "The Free Speech Clause exists principally to protect discourse on public matters." *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 790 (2011). It reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). It embraces an "open marketplace of ideas," ensuring access to a wide range of "social, political, esthetic, moral, and other ideas and experiences." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 354 (2010); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). It is "[p]remised on mistrust of governmental power," and "stands against attempts to disfavor certain subjects or viewpoints." *Citizens United*, 558 U.S. at 340. "[I]t furthers the search for truth," *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) (citation omitted), and "ensure[s]

that…individual citizen[s] can effectively participate in and contribute to our republican system of self-government," *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982).

"[T]he First Amendment protects a public employee's right…to speak as a citizen addressing matters of public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). "A public employee does not relinquish [his] First Amendment rights…by virtue of government employment." *Connick v. Myers*, 461 U.S. 138, 140 (1983). Nevertheless, the government "may impose certain restraints on the speech of its employees…that would be unconstitutional if applied to the general public." *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004). When the government is acting as an employer, it "is afforded greater leeway to control speech that threatens to undermine the state's ability to perform its legitimate functions." *Rodgers v. Banks*, 344 F.3d 587, 596 (6th Cir. 2003). But "a public employer contravenes a public employee's First Amendment rights when it discharges the employee based on the exercise of that employee's free speech rights." *Grutzmacher v. Howard Cnty.*, 851 F.3d 332, 342 (4th Cir. 2017) (citations omitted).

Courts employ a familiar test to distinguish permissible regulation from prohibited interference with constitutionally protected expression. A claim of First Amendment retaliation requires proof of three elements: first, that the plaintiff engaged in "constitutionally protected speech";

second, "an adverse action…that would deter a person of ordinary firmness from continuing to engage in that speech;" and third, "a causal connection…between the protected speech and the adverse employment action." *Buddenberg v. Weisdack*, 939 F.3d 732, 739 (6th Cir. 2019). The second and third elements are uncontested here.

The first element—whether the plaintiff engaged in constitutionally protected speech—itself embraces a three-step inquiry. *Id.* First, the Court must examine "whether the speech addressed a matter of public concern." *Id.* (citing *Connick*, 461 U.S. at 143). Second, the Court must "determine whether the employee spoke as a private citizen or as an employee pursuant to her official duties." *Id.* (citing *Garcetti*, 547 U.S. at 421). If these questions are resolved in the employee's favor, the Court then proceeds to the third and final step: "balanc[ing] the interests of the parties and determin[ing] if the employee's speech interest outweighs 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Id.* (quoting *Pickering*, 391 U.S. at 568). Here, MLGW concedes that Goza spoke as a private citizen. Nor does it contest that Goza addressed matters of public concern.

That puts this case squarely on *Pickering*'s scales. To justify a restriction on speech on a matter of public concern, the "speech must impair discipline by superiors, have a detrimental impact on close

working relationships, undermine a legitimate goal or mission of the employer, impede the performance of the speaker's duties, or impair harmony among co-workers." *Meyers v. City of Cincinnati*, 934 F.2d 726, 730 (6th Cir. 1991) (citing *Rankin v. McPherson*, 483 U.S. 378, 388 (1987)). "The [government employer] bears the burden of showing a legitimate justification for discipline." *Id.*

"[A] public employer need not show actual disruption of the public agency…in order to prevail under the *Pickering* balancing test." *Gillis v. Miller*, 845 F.3d 677, 687 (6th Cir. 2017). "Instead, when the employer does not offer such evidence, [the Court] must assess whether the employer could reasonably predict that the employee speech would cause disruption in light of the manner, time and place the speech was uttered, as well as the context in which the dispute arose." *Id.* (citations omitted). "[S]peculative concerns of [disruption] are insufficient to overcome [an employee's] interest in speaking as a private citizen on a matter of public concern." *Id.* at 685 (citing *Whitney v. City of Milan*, 677 F.3d 292, 298 (6th Cir. 2012)). This Court requires "evidence of the impact of the statement on the [employer]'s legitimate organizational interests." *Meyers*, 934 F.2d at 730 (citing *Rankin*, 483 U.S. at 388). Claims of disruption that are pretextual or not genuinely held are entitled to no weight in the analysis. *Miller v. City of Canton*, 319 F. App'x 411, 421

(6th Cir. 2009); *Harnishfeger v. United States*, 943 F.3d 1105, 1118-19 (7th Cir. 2019).

Identifying actual or reasonably anticipated disruption is *necessary*, although not necessarily *sufficient*, for an employer to prevail in the *Pickering* analysis. The employer's interest still must "outweigh" the employee's speech interest. *Pickering*, 391 U.S. at 568.

"The degree of disruption or potential disruption necessary to justify the restriction" on an employee's speech "varies depending on a number of factors." *Craig v. Rich Tp. High Sch. Dist. 227*, 736 F.3d 1110, 1119 (7th Cir. 2013). "[I]f an employee's speech substantially involve[s] matters of public concern, an employer may be required to make a particularly strong showing that the employee's speech interfered with workplace functioning before taking action." *Leary*, 228 F.3d at 737-38 (citing *Connick*, 461 U.S. at 152). Likewise, "[t]he level of protection afforded to an employee's activities will vary" depending on the nature of the employee's position and the "amount of authority and public accountability the employee's position entails." *Melzer v. Bd. of Educ. of City Sch. Dist. of N.Y.*, 336 F.3d 185, 197 (2d Cir. 2003) (citing *Rankin*, 483 U.S. at 390-91). "A position requiring confidentiality, policymaking, or public contact lessens the public employer's burden in" proving actual or reasonably anticipated disruption. *Id.* (citations omitted). "The manner, time, and place of the employee's speech are also relevant to the

analysis." *Craig*, 736 F.3d at 1119. "[W]hen government employees speak or write on their own time on topics unrelated to their employment," their speech is protected "absent some governmental justification 'far stronger than mere speculation' in regulating it." *City of San Diego*, 543 U.S. at 80 (quoting *United States v. Treasury Emps.*, 513 U.S. 454, 465 (1995)).

"The balancing [courts] must undertake is a fact-intensive inquiry that requires consideration of the entire record, and must yield different results depending on the relative strengths of the issue of public concern and the employer's interest." *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 472 (3d Cir. 2015) (citations omitted). "[T]he greater the speech's relationship to a matter of public concern and the more minimal the effect on office efficiency[,] the more likely…the employer's actions violated the Constitution." *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 263 (6th Cir. 2006). "In short, the inquiry 'involves a sliding scale,' in which 'the amount of disruption a public employer has to tolerate is directly proportional to the importance of the disputed speech to the public.'" *Munroe*, 805 F.3d at 472 (citations omitted); *Dougherty v. Sch. Dist. of Phila.*, 772 F.3d 979, 991 (3d Cir. 2014) ("The more tightly the First Amendment embraces the employee's speech, the more vigorous a showing of disruption must be made by the employer.").

The government "has the burden of showing…that th[e *Pickering*] balance weighs in its favor." *Harnishfeger*, 943 F.3d at 1115. "[T]he

proper balance of the[] competing interests is a question of law" reviewed de novo. *Craig*, 736 F.3d at 1118. "[U]nderlying factual questions," however, are committed to the fact finder and reviewed on appeal for clear error. *See v. City of Elyria*, 502 F.3d 484, 494 (6th Cir. 2007); *Belk v. City of Eldon*, 228 F.3d 872, 881 (8th Cir. 2000); *Ezekwo v. New York City Health & Hosps. Corp.*, 940 F.2d 775, 780 (2d Cir. 1991); *Eng v. Cooley*, 552 F.3d 1062, 1071 (9th Cir. 2009); *cf. Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984). These factual questions include "the degree to which the employee's speech could reasonably have been deemed to impede the employer's efficient operation," and the employer's "motivations in suspending and terminating [the] plaintiff." *Johnson v. Ganim*, 342 F.3d 105, 114-15 (2d Cir. 2003); *Weaver v. Chavez*, 458 F.3d 1096, 1102 (10th Cir. 2006).

(2) The district court did not require MLGW to show actual disruption.

MLGW claims that the district court impermissibly "require[ed] MLGW to show actual disruption." MLGW Br. at 36. The district court did no such thing.

As a starting point, the district correctly stated the law in its opinion: "[A] public employer need not show actual disruption of the public agency in all cases in order to prevail under the *Pickering*

balancing test." Order and Opinion, R.122, PageID.2298 (quoting *Gillis*, 845 F.3d at 687).

And nothing in the court's analysis suggests that the court deviated from that standard. The court found that Goza's termination was "not actually motivated by liability, safety, or operational concerns." *Id.* at 2300. The court then held that "[a] concern about MLGW's brand or reputation is not sufficient to outweigh Goza's rights." *Id.* at 2301. That holding was based, in part, on the court's conclusion that "[t]he evidence d[id] not support a finding that MLGW reasonably feared that Goza's continued employment would have adversely affected the MLGW brand or the ability of Tech III's generally to do their jobs." *Id.* at 2303. Last, the court concluded that MLGW's alternative claims of disruption, even if believed, "were too speculative to pass Constitutional muster." *Id.* at 2304.

Far from requiring actual disruption, the district court carefully considered each and every one of MLGW's claims of *predicted* disruption. *Id.* at 2300-04. It found these claims of potential disruption to be not genuinely held, too speculative to be reasonable, and insufficiently substantial to outweigh Goza's right to engage in free speech. *Id.* Nothing in the court's analysis suggests it required proof of actual disruption.

(3) The district court correctly found that Goza's interest in free speech outweighed MLGW's interest in promoting the efficiency of the public services it performs.

The district court correctly found that Goza's interest in free expression outweighed MLGW's interest in avoiding any claimed disruption.

(a) MLGW failed to demonstrate any actual or reasonably anticipated disruption.

Substantial evidence supports the district court's conclusion that MLGW's decisionmakers were not genuinely "motivated by liability, safety, or operational concerns." *Id.* at 2300. The same evidence supports the court's alternative conclusion that these claims of potential disruption "were too speculative to pass Constitutional muster." *Id.* at 2304. These factual findings are not clearly erroneous and should not be disturbed.

MLGW's claims of disruption were not raised until trial. Transcript, R.114, PageID.1893, Transcript, R.116, PageID.2203. "First Amendment rights cannot be trampled based on hypothetical concerns that a governmental employer never expressed." *Gustafson v. Jones*, 290 F.3d 895, 906, 910 (7th Cir. 2002). And when they were belatedly raised, MLGW's claims were contradicted by sworn testimony. For example, Leonard conceded that MLGW's claimed fear of Goza's bias towards customers was "just speculation." Transcript, R.114, PageID.1759.

Bieber testified that he "knew" that Goza "would not deliberately do anything…to harm customers." Transcript, R.116, PageID.2004; Transcript, R.114, PageID.1759. These same witnesses testified that there was no evidence that Goza's safety was compromised in any way, and denied that Goza's safety factored into their termination decision. Transcript, R.114, PageID.1757, 1891; Transcript, R.116, PageID.2025; *Gillis*, 845 F.3d at 687. MLGW's claims of disruption were also undermined by evidence showing that Goza had worked nearly 30 years without making any technical mistakes or receiving any complaints about bias. Transcript, R.114, PageID.1757-59; Transcript, R.116, PageID.2003-04. The same is true with respect to evidence showing that MLGW permitted Goza to continue working after receiving the initial complaint. Transcript, R.114, PageID.1820; Transcript, R.116, PageID.2149-50.

MLGW's claims of disruption were further undermined by MLGW's failure to engage in any investigation with Goza's co-workers, supervisors, customers, or character references. Transcript, R.114, PageID.1722-23, 1759, 1889; Transcript, R.116, PageID.2027, 2209. They were undermined further still by evidence showing that "MLGW…reacted more leniently to similarly inflammatory speech" by similarly situated employees. Order and Opinion, R.122, PageID.2300; *see supra* at 34-40. They were contradicted by witnesses who admitted

that Goza was fired because MLGW's "customers didn't find Mr. Goza's views acceptable." Transcript, R.114, PageID.1753-54. Last but not least, the "demeanor at trial" of MLGW's managers and executives demonstrated that MLGW's claims of potential disruption were pretextual. Order and Opinion, R.122, PageID.2300.

Cumulatively, this evidence supports the district court's finding that MLGW's decisionmakers were not genuinely "motivated by liability, safety, or operational concerns." *Id.* at 2300, 2304; *Gillis*, 845 F.3d at 685; *Meyers*, 934 F.2d at 730; *Johnson*, 342 F.3d at 114-15; *Weaver*, 458 F.3d at 1102. And even if this Court were to take the extraordinary step of disregarding the district court's credibility determinations, the same evidence supports the court's alternative finding that MLGW's claims of potential disruption "were too speculative to pass Constitutional muster." Order and Opinion, R.122, PageID.2300, 2304; *Gillis*, 845 F.3d at 685; *Meyers*, 934 F.2d at 730; *Johnson*, 342 F.3d at 114-15; *Weaver*, 458 F.3d at 1102. Accordingly, these claims of potential disruption are entitled to no weight in the *Pickering* analysis.

The district court found that MLGW's decisionmakers genuinely believed that Goza's speech "threaten[ed] the Division's bonds with the public it serves." Order and Opinion, R.122, PageID.2301. But the court found this claim of potential disruption unreasonable as well: "[t]he evidence d[id] not support a finding that MLGW reasonably feared that

Goza's continued employment would have adversely affected the MLGW brand or the ability of Tech III's generally to do their jobs." *Id.* at 2303. This factual finding was also well supported. The paltry number of documented complaints, their limited duration, the complete absence of documented complaints from MLGW customers, and MLGW's persistent exaggerations regarding the source, number, timing, and content of the alleged complaints all support the district court's conclusion. *See supra* at 21-27. Much of the evidence already cited further supports the same finding. Most significantly, MLGW's more lenient response to similarly situated African American employees fatally undermines MLGW's claim. *See supra* at 34-40. If controversial expression by front-line MLGW employees threatened MLGW's bonds with the public, then there is no plausible explanation for why MLGW chose to keep employees like Deandre Stewart in their roles despite numerous instances of offensive and even threatening speech. Order and Opinion, R.122, PageID.2300; *see supra* at 39-40.

This evidence fully supports the district court's finding that "MLGW [did not] reasonably fear[] that Goza's continued employment would…adversely affect[] the MLGW brand or the ability of Tech III's generally to do their jobs." Order and Opinion, R.122, PageID.2303; *Gillis*, 845 F.3d at 685; *Meyers*, 934 F.2d at 730; *Johnson*, 342 F.3d at

114-15; *Weaver*, 458 F.3d at 1102. Accordingly, that claim of potential disruption is entitled to little or no weight in the *Pickering* balance.

(b) MLGW failed to demonstrate that any reasonably anticipated disruption outweighed Goza's right to engage in free speech.

In view of the district court's findings that MLGW identified no actual or reasonably anticipated disruption to its business, Goza's free speech interests must carry the day.

But even if this Court were to conclude that MLGW identified one or more valid claims of disruption, Goza's interest in free speech would *still* prevail in the *Pickering* analysis. Goza's political speech touched on matters of paramount public concern. He spoke entirely on his own time. Goza's speech did not concern his work. His position as a utility technician involved none of the sensitive functions that give employers relatively greater leeway when disciplining other kinds of employees—particularly, police officers and teachers. And Goza's position involved no confidentiality or policymaking function. These factors collectively weigh heavily in Goza's favor. MLGW would need to make a "particularly strong showing" to overcome them. *Leary*, 228 F.3d at 737-38. It has not done so.

(i) Goza's speech substantially involved matters of public concern.

Goza's political speech "substantially involve[d] matters of public concern." *Id.*

"Speech involves matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Lane v. Franks*, 573 U.S. 228, 241 (2014). "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick*, 461 U.S. at 145.

Goza's speech was quintessentially political. He attended a political protest to express his view that Confederate monuments should remain in public places. *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969) (public protests involve core political speech). He shared his views on the matter with a political reporter. *Sullivan*, 376 U.S. at 270 (political statements in the press afforded significant First Amendment protection). Goza's online statements spoke to the propriety of removing the monuments, political developments surrounding recent protests, and organizing strategy. Ex. 1, App.155; Ex. 2, App.20. His online exchange with Aaricka Hodge, in particular, was a digital paradigm of political debate. Ex. 1, App.155. Goza and Hodge discussed the fate of Confederate monuments, the legacy of the Civil War, the treatment of African

Americans by the federal government, crime and drug policies, education standards, and abortion, among other political subjects. Ex. 1, App.153-54.

The fact that Goza's political speech expressed ideas that would strike many as offensive does not diminish its quintessentially political character. "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592 (1969); *Texas v. Johnson*, 491 U.S. 397, 414 (1989). This bedrock free speech principle applies in full measure in the context of public employment. "The First Amendment protects the speech…of an [employee] like [Goza], no matter how different, unpopular or morally repugnant [some] may find [it]." *Melzer*, 336 F.3d at 192.

Because MLGW seeks to sanction Goza's core political expression, "a particularly strong showing" of workplace disruption is required. *Leary*, 228 F.3d at 737-38.

(ii) The manner, time, and place of Goza's speech favors Goza.

"The manner, time, and place" of Goza's speech also favors him in the *Pickering* analysis. *Craig*, 736 F.3d at 1119.

Where, as here, "government employees speak or write on their own time on topics unrelated to their employment," their speech is protected

"absent some governmental justification 'far stronger than mere speculation' in regulating it." *City of San Diego*, 543 U.S. at 80 (quoting *Treasury Emps.*, 513 U.S. at 465).

Goza spoke entirely on his own time. He attended the August 15 rally on his day off work. Transcript, R.114, PageID.1746; Ex. 9, App.181. All of his relevant Facebook posts were made while he was off duty. Transcript, R.114, PageID.1746.

The place and manner of his speech also strongly favors Goza.

"[A] park is a quintessential forum for the exercise of First Amendment rights." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (citations omitted). "Even in the modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire." *Id.* Goza's participation in the protest at Memphis Park fits comfortably within that tradition.

So does Goza's online speech. "While in the past there may have been difficulty in identifying the most important places…for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular." *Id.* (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868 (1997)). Social media functions as "the modern public square." *Id.* at 1737. Goza's online speech warrants the strongest measure of protection.

(iii) Goza's speech was unrelated to his employment.

Not only did Goza engage in core political speech entirely outside of work, but the content of his speech bore no relationship to his employer or his work duties. This factor also strongly favors Goza.

The First Amendment affords strong protection to an employee's speech on matters of public concern made on her own time. *Leary*, 228 F.3d at 737-38; *Craig*, 736 F.3d at 1119. But an employer's interest in regulating the expression increases when the employee's speech directly relates to the work itself. The Supreme Court's decision in *City of San Diego*, 543 U.S. 77, best illustrates this principle in action. In that case, the employee, a "police officer, made a video showing himself stripping off a police uniform and masturbating" in the course of issuing a traffic citation. *Id.* at 78. He "sold the video on the adults-only section of eBay, the popular online auction site." *Id.* The employee's user profile included his photograph and "identified him as employed in the field of law enforcement." *Id.* As the Supreme Court observed, "[f]ar from confining his activities to speech unrelated to his employment, [the plaintiff] took deliberate steps to link his videos and other wares to his police work, all in a way injurious to his employer." *Id.* at 81. "The use of the uniform, the law enforcement reference in the Web site, the listing of the speaker as 'in the field of law enforcement,' and the debased parody of an officer performing indecent acts while in the course of official duties brought the

mission of the employer and the professionalism of its officers into serious disrepute." *Id.*

Other cases upholding employee discipline have similarly emphasized the importance of the speech's nexus with the job. *See, e.g.*, *Munroe*, 805 F.3d at 459-60, 473 (where a teacher wrote blog posts calling her students "[l]azy asshole[s]," "[d]underhead[s], "complete and utter jerk[s]," "[f]rightfully dim," and "[u]tterly loathsome in all imaginable ways," among other names, the court concluded that such "invective directed against the very persons that the governmental agency is meant to serve could be expected to have serious consequences for the performance of the speaker's duties and the agency's regular operations."); *Craig*, 736 F.3d at 1118-19 (a high school guidance counselor who authored a "hypersexualized" book about relationship advice took "deliberate steps to link" his book with his work as a guidance counselor).

Goza's political speech did not relate to his employment in any way. He made no comment about MLGW customers, his co-workers, or his job duties. An employer's interest in regulating employee speech is at its lowest ebb in such circumstances. *City of San Diego*, 543 U.S. at 80; *Treasury Emps.*, 513 U.S. at 465.

(iv) The nature of Goza's position favors Goza.

The nature of Goza's position also favors Goza's free speech interests. Goza's job as a Customer Service Technician 3 involves diagnosing and fixing problems with utility services. It does not present special circumstances justifying an extraordinary need to regulate employee speech.

Two categories of public employees loom large in the First Amendment arena. The first is law enforcement. This Court has "long recognized 'the importance of deference' to law enforcement officials when speech threatens to undermine the functions of organizations charged with maintaining public safety." *Gillis*, 845 F.3d at 684 (citations omitted). Public safety organizations have "a more significant interest than the typical government employer in regulating the speech activities of its employees in order 'to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence' in its ability." *Shands v. City of Kennett*, 993 F.2d 1337, 1344 (8th Cir. 1993) (citations omitted). "Thus, although it is not 'the rule of this Circuit[] that public safety employers have a greater weight placed on their interests in order and discipline than other employers have in their institutional interests,'" this Court has "nevertheless recognized that law enforcement officials often have legitimate and powerful

interests in regulating speech by their employees." *Gillis*, 845 F.3d at 684 (citations omitted).

These considerations do not apply to Goza's work at MLGW. Unlike in the law enforcement field, there is no heightened need for military-style discipline or esprit de corps among utility workers. MLGW's failure to mount an argument based on workplace disharmony shows as much. Nor is there any *exceptional* need for public confidence in MLGW's work above and beyond the needs of a garden variety public enterprise. Law enforcement officers are charged with the grave duty to take away people's liberties and even use deadly force when necessary. They are invested with nearly infinite discretion to investigate and thwart what they believe to be unlawful activities, often through split-second decisions. In light of their duties, instilling public confidence in law enforcement officers is a compelling, paramount concern. The same cannot be said of utility technicians. They enjoy little or no discretion. They go to homes and businesses as directed by MLGW and service utilities. Although there is an element to Goza's job involving safety, it cannot be fairly analogized to the safety-centric role of law enforcement officers. Injuries caused by technician mistakes are "exceedingly rare." Transcript, R.114, PageID.1758. Whatever extraordinary need exists to justify restrictions on the speech of law enforcement officers, it is not present here.

The second category of public employees warranting special mention is teachers. "The position of public school teacher requires a degree of public trust not found in many other positions of public employment." *Munroe*, 805 F.3d at 475 (citations omitted). "A teacher generally acts in loco parentis for his or her students." *Id.* (citations omitted). Teachers "work[] in a school, where students 'are impressionable and their attendance is involuntary.'" *Id.* (citations omitted). The role of teachers, along with that of school counselors, administrators, and others who "work[] closely with students," "confers upon [them] an inordinate amount of trust and authority." *Craig*, 736 F.3d at 1119. Given the "special (perhaps even unique) relationship that exists between a public school teacher…and his or her students and their parents," a school employer may be justified in restricting speech that would not be constitutionally permissible in other contexts. *Id.*

The concerns justifying greater restrictions on teachers are not present here either. Goza's customers are neither children nor uniquely impressionable. Goza's role does not cast him in a position of unique trust, influence, or authority. Goza in no way seeks to diminish the trust his customers place in him. But a customer's trust in a utility worker is narrowly focused on servicing utilities. Teachers, by contrast, interact with students along several important dimensions. They impart knowledge on a wide range of subjects. They offer advice on sensitive

topics. They model discipline, fairness, judgment, good citizenship, and morality. The sheer breadth of these important duties necessarily means that a broader range of expression may affect the teacher's ability to function effectively. *E.g.*, *Melzer*, 336 F.3d at 236-37; *Munroe*, 805 F.3d 454; *Craig*, 736 F.3d at 1119. Society does not place these same expectations on utility workers. The unique justifications for regulating teachers' speech are inapplicable here.

(v) Goza did not work in a position requiring confidentiality or policymaking.

Finally, Goza's job as a utility technician does not require confidentiality or policymaking—two duties that provide greater leeway to restrict employee speech. *Melzer*, 336 F.3d at 197 (citations omitted).

Betraying confidences can undermine the trust necessary for the employer to carry out its mission. *Gillis*, 845 F.3d at 688. It can "disrupt[] co-worker relations," and "erode[]…close working relationship[s] premised on personal loyalty." *Richerson v. Beckon*, 337 F. App'x 637, 638 (9th Cir. 2009) (citations omitted).

Goza's role has no confidential function. His political speech in no way breached any duty to maintain confidential information. None of the justifications for abridging speech based on a breach of confidentiality apply here.

In a similar vein, public employers retain much wider authority to regulate speech by high-level, policymaking employees. *Scarbrough*, 470 F.3d at 258. Because it is reasonable to assume that these employees speak for their employer, their speech can be subject to greater regulation and control. *Harnishfeger*, 943 F.3d at 1119.

Goza obviously does not serve in a high-level, policymaking role. No reasonable observer would think he spoke for MLGW through his political activities. *Id.* True enough: Goza's job involves public contact. That factor, standing alone, slightly benefits MLGW in the analysis. But it proves too much to suggest, as MLGW does, that public contact alone suffices to punish off-duty political speech. The First Amendment certainly protects more than the rare employee who has no public interactions—provided that the balance of factors tips in his favor. *Treasury Emps.*, 513 U.S. at 465; *Pickering*, 391 U.S. at 564.

(vi) Held in balance, the factors show that MLGW must tolerate some modest anticipated disruption in the name of protecting free speech.

In light of the district court's finding that MLGW failed to identify any genuinely held concerns of reasonably anticipated disruption, "the employer's side of the *Pickering* scale is entirely empty." *Lane*, 573 U.S. at 243. Goza wins at the opening bell.

However, *even if* this Court chooses to substitute its own assessment of MLGW's claims of disruption, Goza still prevails. This Court's precedents make clear that where an employee's interest in free speech is substantial, a public employer must *tolerate*—as opposed to merely *identify*—some measure of disruption or potential disruption.

Hardy v. Jefferson Community College, 260 F.3d 671 (6th Cir. 2001), makes this point explicit. In that case, a college professor used offensive language in his class as part of a lecture on "language and social constructivism." *Id.* at 674. The lecture led to complaints. In one instance, a local civil rights activist told the college president he would not "allow our kids to come to" the college unless the offending professor was terminated. *Id.* at 675. This Court readily acknowledged that the professor's speech caused genuine "disharmony" and "potential disruption in school operations and enrollment." *Id.* at 681. The Court nevertheless concluded that the professor's "rights to free speech and academic freedom outweigh[ed] the College's interest in limiting that speech." *Id.* at 682.

Cockrel v. Shelby County School District, 270 F.3d 1036 (6th Cir. 2001), provides a second example. There, a teacher provoked a controversy by "invit[ing] speakers to her class who advocated the use of industrial hemp." *Id.* at 1054. "Many parents and members of the school community…expressed great concern over" the teacher's curriculum. *Id.*

Parents wrote letters to the principal and superintendent voicing their opposition. *Id.* Some parents even physically protested at the school. *Id.* This Court accepted that "there is evidence that plaintiff's speech has led to problems" in the "efficient operation of the school." *Id.* Despite this evidence of disruption, the Court held that the teacher's speech interests prevailed in light of the speech "substantially involv[ing] matters of public concern." *Id.* at 1053.

Other cases follow this same basic pattern. In each of them, this Court found that the interest in avoiding real and genuine disruption was outweighed by free speech rights. *See, e.g.*, *Devlin v. Kalm*, 630 F. App'x 534 (2015); *Stinebaugh v. City of Wapakoneta*, 630 F. App'x 522 (2015); *Pucci v. Nineteenth Dist. Court*, 628 F.3d 752 (6th Cir. 2010); *Mosholder v. Barnhardt*, 679 F.3d 443 (6th Cir. 2012); *Whitney*, 677 F.3d 292; *Miller*, 319 F. App'x 411; *Murphy v. Cockrell*, 505 F.3d 446 (6th Cir. 2007); *See*, 502 F.3d 484; *Rodgers*, 344 F.3d 587.

The same holds true here. Goza engaged in core political speech on his own time and on matters unrelated to work. MLGW, in turn, showed no genuine disruption to its business or damage to its brand. But even if MLGW had endured some measure of potential disruption, the interest in free speech was sufficiently substantial to outweigh MLGW's competing interests.

(4) Striking the *Pickering* balance in favor of Goza vindicates important First Amendment values.

Striking the *Pickering* balance in Goza's favor also vindicates important values animating the First Amendment.

This case is unlike the majority of First Amendment employment disputes, which tend to involve "speech directed at an employer, made at the place of employment or directly concerning the employer in some way." *Melzer*, 336 F.3d at 193. Here, by contrast, the Court is confronted with an instance of off-duty speech unrelated to the employer, followed by a short public backlash, leading to an employer's sanction. MLGW's executives early on recognized that the reaction to Goza's speech was part of a "vibrant movement" among activists to identify people engaging in disfavored speech and "out" them at work. Transcript, R.114, PageID.1677, 1702; Ex. 43, App.402. They weren't wrong in that assessment. "[L]ow cost, anonymous, instant, and easy access to the Internet has eviscerated whatever…limits there were to public shaming and has served to amplify its effects." Kate Klonick, *Re-Shaming the Debate: Social Norms, Shame, and Regulation in the Internet Age*, 75 Md. L. Rev. 1029, 1031 (2016). "Today, it is easier than ever to use shaming to enforce…social norms." *Id.* And using digital tools to target people at their work has become an increasingly common strategy. *Id.*

As the district court recognized, cases fitting this general pattern implicate First Amendment concerns in important ways that the more familiar retaliation cases do not.

The most significant is the danger posed by the "heckler's veto." "The First Amendment generally does not permit the so-called 'heckler's veto,' i.e., 'allowing the public, with the government's help, to shout down unpopular ideas that stir anger.'" *Munroe*, 805 F.3d 475 (citations omitted); *Craig*, 736 F.3d at 1121. The heckler's veto, this Court has held, is "[a]n especially 'egregious' form of content-based discrimination...that…is designed to exclude a particular point of view from the marketplace of ideas." *Bible Believers*, 805 F.3d at 248. Even in the context of public employment, courts acknowledge that "community reaction cannot dictate whether an employee's constitutional rights are protected." *Munroe*, 805 F.3d 475 (citations omitted).

Making matters worse, public employers may act preemptively "based on a government official's speculation as to the public's eventual reaction." Order and Opinion, R.122, PageID.2302. "[T]he lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not." *Cox v. State of La.*, 379 U.S. 536, 557 (1965). "This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor." *Id.* Allowing such standardless discretion and arbitrary

power to censor speech would run contrary to the idea that the First Amendment is "[p]remised on mistrust of governmental power," and "stands against attempts to disfavor certain subjects or viewpoints." *Citizens United*, 558 U.S. at 340. These principles retain their force in the public employment realm. "The threat of dismissal from public employment is…a potent means of inhibiting speech." *Pickering*, 391 U.S. at 574.

Courts have invoked these principles in a variety of contexts to hold that negative community reaction to a public employee's speech—real or perceived—is not a constitutionally permissible ground to punish the employee. *See, e.g.*, *Berger v. Battaglia*, 779 F.2d 992, 1001-02 (4th Cir. 1985); *Battle v. Mulholland*, 439 F.2d 321, 324 (5th Cir. 1971); *Flanagan*, 890 F.2d at 1566-67; *Harnishfeger*, 943 F.3d at 1118.

There are ample reasons here to conclude that MLGW's decision to terminate Goza violated these important constitutional norms. Goza's trouble began at a public protest when protesters "shout[ed] down" his speech. Ex. 7, App.162; Ex. 9, App.182; *Munroe*, 805 F.3d 475. Rather than leaving things at that, however, the protesters simply moved online, registering complaints about Goza's expression with his employer. Ex. 1A, App.157; Ex. 5, App.26. The complaints focused on the content of Goza's expression rather than any specific allegation about MLGW's services. *Id.* And the documented complaints came from protesters—not

MLGW customers. *See supra* at 24-25. MLGW's decisionmakers conceded that they fired Goza not because of genuine disruption but because MLGW had concluded that its "customers didn't find Mr. Goza's views acceptable." Transcript, R.114, PageID.1753-54.

The district court may be right that the "rise of social media" suggests that "government officials may soon have to weigh the free-speech interests of their employees against a tsunami of public uproar." Order and Opinion, R.122, PageID.2302. But *Pickering* and its progeny provide all the tools this Court needs to confront such cases in the future. Courts must conduct the balancing inquiry with "vigilance" and care. *Rankin*, 483 U.S. at 384. They must accord significant weight to the interest in speech substantially touching on matters of public concern, speech made outside of work, and speech unrelated to an employee's duties. *Leary*, 228 F.3d at 737-38 (citing *Connick*, 461 U.S. at 152). They must gauge the community reaction and evaluate, based on all relevant circumstances, whether the reaction predominantly stems from genuine and reasonable concern about government services as opposed to community disapproval of the ideas expressed. *Berger*, 779 F.2d at 1001-02; *Battle*, 439 F.2d at 324; *Flanagan*, 890 F.2d at 1566-67; *Harnishfeger*, 943 F.3d at 1118; *Munroe*, 805 F.3d 475; *Melzer*, 336 F.3d at 199; *Craig*, 736 F.3d at 1121. They must require employers to show actual evidence demonstrating a genuinely held, reasonable basis for anticipating

disruption. *Gillis*, 845 F.3d at 687. Speculation and empty labels such as "brand" and "perception" are insufficient. *Id.* And they must require public employers to tolerate some measure of disruption in the name of protecting free speech. *Hardy*, 260 F.3d at 682; *Cockrel*, 270 F.3d at 1053.

A fair application of these criteria will strike the appropriate balance between free speech and the effective functioning of government employers. The application of these same standards in this case demonstrates that Goza's interests in free speech strongly outweighed MLGW's interests.

D. MLGW Discriminated Against Goza on Account of his Race.

At trial, Goza clearly established that MLGW discriminated against him on account of his race. MLGW terminated Goza after he spoke out on sensitive political and racial issues. MLGW treated African American employees who spoke out on similar issues—even in a much more offensive and threatening manner—far more favorably. MLGW's arguments amount to little more than a request that this Court reweigh the evidence in its favor.

(1) Section 1981 prohibits discrimination on the basis of race.

"Section 1981 prohibits intentional race discrimination in the making and enforcing of contracts involving both public and private actors." *Spokojny v. Hampton*, 589 F. App'x 774, 777 (6th Cir. 2014)

(citations omitted). Section 1981 claims are governed by the same standards as Title VII claims. *Id.* at 777.

Absent direct evidence of intentional discrimination, plaintiffs must use the *McDonnell-Douglas* framework for proving discrimination through circumstantial evidence. *See McDonnell-Douglas Corp. v. Greene*, 411 U.S. 792 (1973). The Sixth Circuit has modified the framework in cases of "reverse discrimination." *Arendale*, 519 F.3d at 603. Under this framework, the plaintiff must show that (1) the defendant "is that unusual employer who discriminates against the majority"; (2) he suffered an adverse employment action; (3) he was qualified for the position; and (4) he was replaced by someone outside the protected class or was treated differently than similarly-situated, non-protected employees. *Id.* at 603-04. The burden of establishing a prima facie case of discrimination is "not onerous," and is "easily met." *Provenzano v. LCI Holdings, Inc.*, 663 F.3d 806, 813 (6th Cir. 2011); *Wrenn v. Gould*, 808 F.2d 493, 500 (6th Cir. 1987).

Once the prima facie case is made, the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the termination. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 142-43 (2000). The burden then shifts back to the plaintiff to demonstrate that the defendant's proffered reason was a pretext for discrimination. *Id.* at 143. A plaintiff may establish pretext by showing that "(1) the

employer's stated reason for terminating the employee has no basis in fact, (2) the reason offered for terminating the employee was not the actual reason for the termination, or (3) the reason offered was insufficient to explain the employer's action." *Imwalle v. Reliance Med. Prods., Inc.*, 515 F.3d 531, 545 (6th Cir. 2008).

(2) Goza proved "background circumstances" showing MLGW's discriminatory animus.

The district court did not err in finding "background circumstances" demonstrating that MLGW "is that unusual employer who discriminates against the majority." *Arendale*, 519 F.3d at 603.

Contrary to MLGW's argument, there is no prescribed set of proof that a plaintiff must offer to meet his burden. MLGW insists that a plaintiff *must* "introduce (1) statistical evidence or employment policies demonstrating…a history of unlawfully considering race; (2) evidence the person(s) responsible for the employment decision was a minority; or (3) evidence of ongoing racial tension in the workplace." MLGW Br. at 50. No such requirement exists. This Court has merely identified these three examples as ways that past litigants "have met th[e] requirement." *Treadwell v. Am. Airlines, Inc.*, 447 F. App'x 676, 678 (6th Cir. 2011). The prima facie case is satisfied by introducing any competent evidence, whatever its source, "support[ing] the suspicion that the defendant is

that unusual employer who discriminates against the majority." *Leadbetter*, 385 F.3d at 690 (citations omitted).

Goza easily met his evidentiary burden of proving discriminatory background circumstances. As the district court found, Gale Carson, an African American and MLGW's Vice President of Corporate Communications, exerted significant influence over the ultimate decision to demote and terminate Goza. *See Zabetti v. Cuyahoga Cmty. Coll.*, 314 F.3d 249, 257 (6th Cir. 2002); *Arendale*, 519 F.3d at 603-04; Ex. 43, App.400; Transcript, R.116, PageID.1997.

The district court also found that MLGW's decision was made in the context of perceived "ongoing racial tension in the workplace." *Treadwell*, 447 F. App'x at 678; *Boger v. Wayne Cnty.*, 950 F.2d 316, 325 (6th Cir. 1991). MLGW's decisionmakers believed that, because of this tension, Goza's statements and beliefs were "no longer acceptable." Transcript, R.114, PageID.1753.

MLGW claims that the district court's basis for establishing "background circumstances" was misplaced because "a plaintiff's own situation cannot provide the requisite 'background circumstances.'" MLGW Br. at 51-52. This claim of error, however, rests on a misunderstanding of this Court's unpublished opinion in *Treadwell*. *Treadwell* observed that a plaintiff must provide some "indication of impermissible discrimination in addition to the plaintiff's own poor

treatment." 447 F. App'x at 679. Goza has unquestionably done so, establishing both a sense of ongoing racial tension in the workplace as well as a pattern of speech restrictions applied in a discriminatory fashion.

(3) MLGW treated similarly situated African American employees more favorably than Goza.

MLGW next contends that Goza failed to establish that similarly situated non-white employees were treated more favorably than Goza. The district court correctly found, however, that Deandre Stewart, an African American employee, was a proper comparator who was treated more favorably than Goza.

In determining whether an employee is "similarly-situated," the "plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered 'similarly-situated.'" *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998) (citations omitted). Rather, "the plaintiff and employee with whom the plaintiff seeks to compare himself or herself must be similar in 'all relevant aspects.'" *Id.*

Goza and Stewart are similarly situated in all relevant respects. First, MLGW claims that Stewart had less customer contact than Goza. The district court correctly deemed this distinction irrelevant. Stewart's position put him on residential streets throughout Memphis and in a

position where he had the potential for customer contact. Transcript, R.114, PageID.1760. In demoting Goza, MLGW disqualified Goza from holding any position with customer contact—including Stewart's. *Id.*, PageID.1718-19. Thus, the district court properly found Goza and Stewart similarly situated on this point.

MLGW next contends that Stewart is not similarly situated to Goza because Stewart reported to a different supervisor and a different management team made the decision to suspend Stewart. The identity of Goza's or Stewart's supervisors is irrelevant; their supervisors did not participate in the investigations or discipline for either individual. *Seay v. TVA*, 339 F.3d 454, 479 (6th Cir. 2003). And the "investigations"—if they can be called that—and discipline were both conducted by Employment Services, MLGW's human resources group. Leonard and MLGW's other managers were aware of Stewart's actions prior to the issuance of Goza's discipline and considered Stewart's case when disciplining Goza. Transcript R.114, PageID.1763-72; Transcript, R.116, PageID.2077-78, 2086-87. Individuals are similarly situated when "all of the people involved in the decision-making process" were aware of the discipline that had been issued. *Seay*, 339 F.3d at 480. The district court properly declined to find Goza and Stewart dissimilar on these bases.

MLGW next contends that different company standards applied to Goza and Stewart. But MLGW's witnesses conceded that the same claims

of potential disruption used to fire Goza would apply in equal—if not greater measure—to Stewart. Transcript R.114, PageID.1778, 1863.

Next, MLGW claims that Stewart's social media accounts did not identify him as an MLGW employee. This claim is refuted by the evidence. Stewart posted multiple photos on his Facebook page identifying himself as an MLGW employee. R.114, PageID.1767; Transcript, R.116, PageID.1967, 1975-76, 2090. His profanity-laden Facebook Live video was broadcast from his MLGW truck while on duty. Transcript, R.114, PageID.1767; Transcript, R.116, PageID.1983, 2078; Ex. 18, App.299; Ex. 19, App.300-25. The district court correctly found Goza and Stewart to be similarly situated in this respect.

Last, MLGW claims that the district court improperly discounted its argument that Goza and Stewart were not similarly situated because Stewart's social media posts did not generate customer complaints. This distinction was both factually and legally misplaced. MLGW justified the decision to fire Goza on the claim that in the *future* customers would see Goza's speech and take offense to it. Transcript, R.114, PageID.1863. The same reasoning would have applied to Stewart as well. *Id.* at 1778, 1863-67. Moreover, early documents regarding the reasons for Goza's termination make no reference to complaints from the public. Transcript R.114, PageID.1727-30; Ex. 14, App.207-08. And in any event, the district court correctly concluded that allowing an employer to simply "rubber-

stamp the racial prejudices of members of the public" would fatally undermine laws prohibiting discrimination. Order and Opinion, R.122, PageID.2316 (*citing Doe v. Columbia Univ.*, 831 F.3d 46, 58 n.11 (2d Cir. 2016); *Doe v. Baum*, 903 F.3d 575, 586 (6th Cir. 2018)).

The district court, sitting in its role as fact finder, properly rejected MLGW's attempts to characterize Goza's co-workers as differently situated.

(4) MLGW's justifications for terminating Goza were pretextual.

Relying largely on the same arguments challenging the fourth prong of the prima facie case, MLGW claims that the district court erred in finding that MLGW's actions were a pretext for racial discrimination. But here, too, the district court's findings are well supported.

MLGW's primary objection is that it disagrees with the district court's characterization of MLGW's report comparing Stewart and Goza and the court's conclusion that the report was created "to exonerate Stewart, rather than provide a fair and honest assessment of his actions." Order and Opinion, R.122, PageID.2317. The district court, acting as the finder of fact, properly discounted the testimony of MLGW's witnesses—specifically, the incredible testimony that they did not believe Stewart's posts demonstrated any racial animus or violated any MLGW policies. *Id.* MLGW's report claiming to exonerate Stewart only reinforced that

"employees [outside of the racial class were] involved in acts…of comparable seriousness" and were treated more favorably. *McDonnell-Douglas*, 411 U.S. at 804.

MLGW next rehashes the arguments previously addressed under the fourth prong of Goza's prima facie case. Those claims are meritless for the reasons already discussed. MLGW's contention that its managers were not aware of Stewart's actions until after MLGW had terminated Goza should, however, be addressed. The proof shows otherwise. Leonard testified at trial that she was aware of Stewart as a comparator and had viewed his Facebook Live video prior to Goza's termination on October 3, 2017. Transcript R.114, PageID.1763.

Other evidence in the record demonstrates that MLGW was genuinely motivated by race. The evidence at trial showed that, far beyond Stewart, MLGW consistently took a hands-off approach to African American employees who engaged in controversial speech. *See supra* at 38-39.

Moreover, MLGW's ever-shifting rationales for taking action against Goza are a classic hallmark of pretext. *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1167 (6th Cir. 1996); *Asmo v. Keane, Inc.*, 471 F.3d 588, 596 (6th Cir. 2006); *see supra* at 29-34.

MLGW's granular, fact-based arguments attacking the district court's findings should be rejected. Ample evidence supported the district

court's conclusion that MLGW enforced a more restrictive employee speech policy against white employees like Goza.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING MLGW'S UNTIMELY JURY DEMAND.

MLGW failed to make a timely demand for a jury trial. The district court did not abuse its discretion in refusing to excuse that lapse.

The Federal Rules provide: "On any issue triable of right by a jury, a party may demand a jury trial by: (1) serving the other parties with a written demand—which may be included in a pleading—no later than 14 days after the last pleading directed to the issue is served; and (2) filing the demand in accordance with Rule 5(d)." Fed. R. Civ. P. 38(b). "A party waives a jury trial unless its demand is properly served and filed." Fed. R. Civ. P. 38(d). "Issues on which a jury trial is not properly demanded are to be tried by the court." Fed. R. Civ. P. 39(b). "But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded." *Id.*

On appeal, the "party seeking a jury trial bears a heavy burden in attempting to show an abuse of discretion." *Local 783, Allied Indus. Workers of Am., AFL-CIO v. Gen. Elec. Co.*, 471 F.2d 751, 754 (6th Cir. 1973).

No abuse of discretion occurred here. MLGW effectively concedes that it never filed or served a timely written demand for a jury, as Rule

38(b) requires. Nor was any demand made in accordance with Local Rule 7.1(c). MLGW's counsel stated at the scheduling conference that he intended to demand a jury. But saying you intend to do something is not the same as actually doing it. And in any event, the statement of MLGW's counsel was not a "written demand" "fil[ed]" and "served" on Goza. *See U.S. Leather, Inc. v. Mitchell Mfg. Group, Inc.*, 276 F.3d 782, 790 (6th Cir. 2002) (oral demand not sufficient to satisfy the rules); 9 Wright & Miller, Federal Practice & Procedure, Civil §§ 2318, 2320.

MLGW asks this Court to treat the parties' joint Rule 26(f) report as a jury demand. MLGW Br. at 63. There are several problems with this request. Goza, not MLGW, filed and served the report. Rule 26(f) Report, R.17, PageID.61-66. More importantly, the report nowhere demanded a jury. It merely stated that "[t]his case will be ready for a jury trial by the Court by the end of 2018." Rule 26(f) Report, R.17, PageID.64. This is not a demand. The language was included based "on the assumption that MLGW would demand a jury," as MLGW said it would during the court's scheduling conference. Order Granting Motion to Strike, R.91, PageID.1376-77. But MLGW never did so. The lone case cited by MLGW, *Sewell v. Jefferson County Fiscal Court*, 863 F.2d 461, 465 (6th Cir. 1988), is inapplicable. MLGW Br. at 64. That case involved the standard applicable to *waiving* a jury trial that had already been demanded. That question is governed by different rules that do not apply here. The plain

text of Rule 38(b) forecloses MLGW's creative attempt to circumvent the rule.

The district court similarly did not abuse its discretion in refusing to grant a jury trial under Rule 39(b). The district court found that MLGW's failure was the result of inadvertence. Order Granting Motion to Strike, R.91, PageID.1378. This Court's precedents recognize inadvertence as a valid ground to deny an untimely jury demand. *See Kitchen*, 825 F.2d at 1013; *Misco, Inc. v. U.S. Steel Corp.*, 784 F.2d 198, 205 (6th Cir. 1986). The district court also cited the complexity of the case and the challenges arising from the publicity of this dispute in declining to order a jury. Order Granting Motion to Strike, R.91, PageID.1378-79. These additional reasons are similarly valid bases to deny a late jury demand. *Misco*, 784 F.2d at 205.

The district court's decision to try this case without a jury should not be disturbed.

CONCLUSION

The district court's judgment should be affirmed.

Date: May 21, 2020

Respectfully submitted,

s/Adam W. Hansen

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) and this Court's order granting leave to file an extra-length brief because the brief contains 19,982 words, as determined by the word-count function of Microsoft Word for Office 365, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and this Court's Rule 32(b)(1).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Century Schoolbook font.

Date: May 21, 2020

s/Adam W. Hansen
Adam W. Hansen

ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Dkt. No.	Description of Document	PageID
1	Complaint	1-7
17	Rule 26(f) Report	61-66
19	Notice of Setting	67-71
20	Scheduling Order	72-75
21	Answer	76-85
61	Motion to Strike	1043-1047
91	Order Granting Motion to Strike	1375-1379
112	MLGW's Trial Brief	1593-1617
122	Order and Opinion	2282-2320
137	Motion to Stay Execution of Judgment	2399-2404

98	Stipulations	1490-1526
114	Transcript	1632-1953
116	Transcript	1954-2233
120	Transcript	2242-2279

CERTIFICATE OF SERVICE

I hereby certify that, on this 21st day of May, 2020, I caused the foregoing brief and addendum to be filed electronically with the Court, where they are available for viewing and downloading from the Court's ECF system, and that such electronic filing automatically generates a notice of electronic filing constituting service. I certify that all parties required to be served have been served.

s/Adam W. Hansen
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