COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No.

SHANNON O'BRIEN, Chair of the
Massachusetts Cannabis Control Commission

Plaintiff-Appellant,

v.

DEBORAH GOLDBERG, Treasurer
and Receiver General of the Commonwealth of Massachusetts
(in her official capacity)

Defendant-Appellee.

Suffolk County Superior Court
Civil Action No. 2384 CV 02183

PLAINTIFF-APPELLANT CHAIR SHANNON O'BRIEN'S MEMORANDUM OF LAW IN SUPPORT OF HER PETITION FOR INTERLOCUTORY REVIEW PURSUANT TO M.G.L. C. 231, § 118

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Dated: January 19, 2024

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I. Introduction

The fundamental purpose of procedural due process is to the protect the individual from abuse of power by a government official. In this case the Treasurer of the Commonwealth, Deborah Goldberg, is attempting to remove Shannon O'Brien (herself a previous Treasurer of the Commonwealth), from her position as Chair of the Cannabis Control Commission ("CCC" or the "Commission"). Since the Commission is an independent agency, the Treasurer has only limited powers, as deliberately designed by the legislature. She may not interfere with the internal operations and personnel policies and decisions of the agency. Other than the Treasurer's power to appoint, her sole control over the Commission is remove a commissioner if, but only if, (as here alleged), the commissioner has committed "gross misconduct" or has a disability making her unable to conduct the powers and duties of the office.

Frustrated in her effort to prevent the termination by the Commission of its Executive Director—a protégé of both her and her Deputy Treasurer—the Treasurer is now seeking O'Brien's removal based upon pretextual accusations of misconduct, and in the process is causing devastating and irreparable harm to Chair O'Brien's reputation and her prospects of ever securing employment again. In order to accomplish this result, Treasurer Goldberg has devised a procedure in which she herself will decide all the facts, doing so outside of public view, after

refusing to produce needed evidence that is within her power to provide.

The questions raised by this petition concern what are the essential procedures which must be followed in the circumstances. All parties agree that the issues presented are matters of first impression. *See Record Appendix_400* ("this case presents an issue of first impression concerning the procedural protections required under G. L. c. 10, § 76(d)[.]).[1] Under the statute, "[b]efore removal the commissioner shall be provided with a written statement of the reason for removal and an opportunity to be heard." It does not otherwise define what elements are required for a hearing. Petitioner is more than happy to defend herself against the Treasurer's accusations in a fair hearing, but as currently structured the process virtually guarantees a miscarriage of justice. Petitioner is seeking only these fundamental measures which will lay the foundation for a hearing that is fair to both sides: In particular she seeks: (a) to have Treasurer Goldberg recuse herself as a finder of fact;[2] (b) to have a public hearing; (c) to receive the suppressed report of an "independent investigator;" and (d) to receive complete and proper notice of the charges, including the identities of complaining persons. The Superior Court judge

[1] The Record Appendix will be abbreviated as "*RA*_" throughout.

[2] Petitioner has asked for Treasurer Goldberg's recusal from the fact-finding role. She has not objected to Treasurer Goldberg acting as the ultimate decision-maker so long as she bases her conclusions on facts found by a neutral. *See Commonwealth v. Cousins*, 484 Mass. 1042, 1046, n. 4 (2020) (recusal only required with respect to a single motion).

declined to order the requested procedures. The right to due process would be an empty promise if this proceeding were allowed to go forward as fashioned to bring about the Treasurer's foreordained result.

II. Relevant Procedural History

On September 28, 2023, Chair Shannon O'Brien ("Chair O'Brien") filed her verified complaint alleging Treasurer Goldberg violated Chair O'Brien's rights under M.G.L. c. 10, § 76 and violated her due process rights under the United States and Massachusetts' Constitutions. On December 1, 2023, after Treasurer Goldberg denied her request to postpone a December 5 hearing date and also refused to implement various procedures necessary, in O'Brien's view, for a fair proceeding, she sought a temporary restraining order and a preliminary injunction. The Court (Squires-Lee, J.) issued an order on December 5, 2023 temporarily postponing the hearing and scheduling a preliminary injunction hearing on December 14 to consider Petitioner's procedural arguments. Thereafter, on December 22, 2023, the Court (Squires-Lee, J.) denied the motion for a preliminary injunction. This appeal follows.

III. Background and Statement of Facts

The Cannabis Control Commission Statute

M.G.L. c. 10, § 76, the CCC's enabling statute, lays out the structure of the CCC including the powers and duties of the Appointing authorities, the Chair, Commissioners and Executive Director. The first version was enacted in 2016 and

was subsequently amended the next year. Among other amendments, including removing many of the Treasurer's powers under the original version, § (d) of M.G.L. c. 10, § 76 was amended and narrowed in 2017 to include five (5) specified reasons for a commissioner's removal and that they would be provided, before removal, "with a written statement of the reason for removal."

The relevant provisions of M.G.L. c. 10, § 76 are as follows: (1) the Treasurer solely appoints one commissioner as well as jointly appoints two commissioners with the Governor and Attorney General;[3] (2) the Treasurer designates the Chair;[4] (3) each commissioner serves a 5 year term;[5] (4) the Treasurer "may" remove a commissioner for five enumerated reasons and "shall" provide the commissioner "a written statement of the reason for removal and an opportunity to be heard" "before" removal;[6] (5) the five reasons for removal are "if the commissioner: (i) is guilty of malfeasance in office; (ii) substantially neglects the duties of a commissioner; (iii) is unable to discharge the powers and duties of the office; (iv) commits gross misconduct; or (v) is convicted of a felony[,] "(6) the

[3] M.G.L. c. 10, § 76(a).

[4] M.G.L. c. 10, §76(j).

[5] M.G.L. c. 10, § 76(b).

[6] M.G.L. c. 10, § 76(d).

Chair "shall have and exercise supervision and control over all the affairs of the commission… [and] shall make such division or re-division of the work of the commission among the commissioners as the chair deems expedient;"[7] and, (7) "[t]he commission shall appoint the executive director . . . [who] shall serve at the pleasure of the commission."

The statute does not provide for the Treasurer to oversee or have any involvement with the day-to-day operations of the CCC. Prior to this case, no court has construed the removal provisions of the statute.

Chair O'Brien's Appointment and Arrival at the CCC

Pursuant to M.G.L. c. 10, § 76, Treasurer Goldberg appointed Chair O'Brien in August 2022 as Chair of the CCC and she was sworn in on September 1, 2022 for a five-year term.[8] Chair O'Brien's service as Chair during the first year was met with significant hostility internally at the CCC. Staff were openly insubordinate.

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[7] M.G.L. c. 10, § 76(h).

[8] Treasurer Goldberg did so after informing Chair O'Brien that she was not going to choose a new Chair from the pool of applicants she had received (including Commissioner Nurys Camargo ("Commissioner Camargo")) and asked Chair O'Brien to apply for the Chair position after extending the application period specifically for Chair O'Brien. *RA_064*, ¶ 2. O'Brien was skeptical about the potential opportunity—particularly after the previous CCC Chair resigned under publicly unknown circumstances—but she determined that filling this role would be consistent with her decades long record of public service and expanding economic opportunities for all citizens of the Commonwealth and, in particular, provide Chair O'Brien the opportunity to leverage her experience to make improvements in an obviously troubled state agency. *RA_007*, ¶ 13.

The Executive Director Shawn Collins ("Collins") refused to meet with her on a regular basis and repeatedly undermined her authority. *RA_ 008-009*, ¶¶ 18-23. Chair O'Brien soon learned that CCC employees would weaponize human resources ("HR") and file meritless complaints against other employees and commissioners to force their foes to resign or be terminated based on false charges.[9] *RA_010*, ¶¶ 24-32. Less than six months into her tenure, Chair O'Brien met the same fate.

The First Investigation

On February 10, 2023, Justin Shrader ("Shrader"), the CCC's acting CPO (Chief People Officer, i.e. HR director) at the time (who has since been suspended and resigned), informed Chair O'Brien that a HR complaint had been filed against her and that it was being confidentially investigated. *RA_065-066*, ¶ 9. On February 22, 2023, Shrader informed Chair O'Brien that the CCC was hiring an independent investigator ("Investigator 1") to investigate the complaint against her. *RA_066*, ¶ 12. O'Brien was interviewed by Investigator 1 on March 17, 2023. *RA_066*, ¶ 13. She was not permitted to have her attorney present or to record the interview. *Id.* Treasurer Goldberg even blocked one of her employees from being

[9] The CCC's internal dysfunction and inability to govern itself resulted in a series of executive session mediations commencing in March 2022 (before Chair O'Brien was appointed) that continued on into Chair O'Brien's tenure. *RA_009-010*, ¶ 23.

interviewed by Investigator 1. *RA_067*, ¶ 21. Months passed with no updates on the status of the HR complaint. Then on May 26, Shrader informed her that a new HR complaint had been filed. *RA_066*, ¶ 14. Now the original investigation had been concluded, finding no wrongdoing. However, there was not yet a report. This time the complaint was from a fellow commissioner (Commissioner Camargo) alleging that she had made improper comments with "racial undertones." *RA_066*, ¶¶ 14-15. Shrader then informed O'Brien that this new complaint would be forwarded to Investigator 1, *id*., ¶¶ 14-15, who interviewed by O'Brien again on July 26, 2023. *RA_066*, ¶¶ 16-17.

Chair O'Brien's April Meeting with Treasurer Goldberg and Deputy Treasurer Kim about Shawn Collins

Collins was the inaugural Executive Director of the CCC. Prior to his service at the CCC, he served as Legislative Director and Assistant Treasurer - Director of Policy and Legislative Affairs to Treasurer Goldberg. *RA_249-251*. While at that office he was given responsibility for developing the original CCC structure and policies, even before the marijuana referendum had passed. When he left to take over the Executive Director's post at the Commission, the Treasurer praised his talent and sent him off with a valedictory that "[y]ou are and will always be, part of our family." *RA_253*. During Collins' time at the Treasurer's office, he had also worked closely with Deputy Treasurer Kim and they developed a professional and personal friendship. *RA_068*, ¶ 30. Later, after the CCC's former Chair resigned in

the spring of 2022, Goldberg appointed Kim as Interim Chair of the CCC.[10] In that capacity Kim and Collins worked closely together until Chair O'Brien was appointed in September 2022 and Kim returned to the Treasurer's office. *RA_068*, ¶ 30.

In April 2023, Treasurer Goldberg and Deputy Treasurer Kim met with Chair O'Brien to discuss a number of serious management and operational issues at the CCC. *RA_068*, ¶ 27. Chair O'Brien informed Treasurer Goldberg and Deputy Treasurer Kim, among other issues at the CCC, that Collins may need to be replaced because he was an ineffective manager. *RA_068*, ¶ 28. Deputy Treasurer Kim became visibly upset and strongly defended Collins because of her and Collins' close relationship through their time working together both for the Treasurer and separately at the CCC. *RA_068*, ¶ 29. After this, the relationship between O'Brien and Collins' relationship further deteriorated. *RA_068*, ¶ 31.

Collins Informs Chair O'Brien In May 2023 That He Will Resign By the End of the Year

On May 22, 2023, Collins informed Chair O'Brien before a CCC public meeting that he was going to announce that day he was resigning as Executive Director after the CCC's regulatory writing was finalized, and that it would likely

[10] https://www.masstreasury.org/single-post/state-treasurer-goldberg-announces-interim-chairman-for-the-cannabis-control-commission (last accessed January 18, 2024).

be no later than December after exercising his right to take 10-weeks of paid leave starting in September. *RA_303*, ¶ 4. Chair O'Brien, surprised by this news, asked Collins to hold off due to the CCC's pending searches for the CCC's new Chief People Officer, General Counsel and Deputy Executive Director, as well as the ongoing regulatory writing process, and Collins agreed. *RA_303*, ¶¶ 5-6.

July 27-28 Public Meetings

By July, multiple critical stories appeared in the press, including significant management failures at the CCC.[11] The Legislature had passed important regulatory reforms in August of 2022. Regulatory writing was a special strong suit of Collins, yet the CCC was long overdue in delivering regulations in order to implement the directives within the statute. Internal governance squabbles, licensing delays, a revolving door of legal counsel and other staff plagued the CCC.[12]

The Commissioners held a public meeting on July 27. Just prior to the start of the meeting, Collins told Chair O'Brien, privately and for the first time, that he would "take his 10 weeks of leave" starting on the following Monday (July 31st). *RA_303*, ¶ 7. Chair O'Brien told Collins that it was vital that he let the other

[11] https://www.senatormikemoore.com/new-blog/2023/9/18/massachusetts-legislators-request-oversight-hearing-on-cannabis-control-commission-amid-mounting-dysfunction (last accessed January 18, 2024) (listing issues).

[12] *Id.*

Commissioners know of his plan to resign. *RA_303*, ¶ 8. Collins agreed that he would make an announcement at the end of the public meeting. *Id*. However, when the time came, he declined to make the announcement he promised.[13] *RA_303-304*, ¶¶ 8-9.

The CCC meeting continued the following day, Friday, July 28. *RA_304*, ¶ 9. Chair O'Brien believed that it was essential (and in no way improper) that the Commission be informed on that day, that its Executive Director was going on extended leave the following Monday, and then would be resigning.[14] *RA_304*, ¶¶ 9-10. So she made the announcement herself.

Treasurer Goldberg Immediately Summons Chair O'Brien to Complain About the July 27-28 Public Meetings

On Monday morning (July 31), Treasurer Goldberg summoned Chair O'Brien to a videoconference with instructions to appear immediately. By then, Collins had already made a written complaint against her, the substance of which was instantly forwarded to Deputy Treasurer Kim. *RA_304*, ¶ 12.[15] The atmosphere

[13] A link to this public meeting is found at https://www.youtube.com/watch?v=QlDn18oF7Dc&t=24979s (last accessed December 14, 2023).

[14] A link to this public meeting is found at https://www.youtube.com/watch?v=2K7YIzOjyok&t=9453s (last accessed December 14, 2023).

[15] Earlier, on July 28, 2023, Collins submitted a written complaint against Chair O'Brien to Justin Shrader, the CPO, who then emailed Deputy Treasurer

was very tense. Goldberg expressed her concern and anger about O'Brien's treatment of Collins[16] at the Friday meeting which, she said, she had watched on video. She was noticeably impatient and uncomfortable with her inability to affect decisions about Collins. She was especially put out by the Chair's announcement at the Commission meeting that Collins would be leaving the following Monday. She insisted that this was private and confidential information which should not have been disclosed in a public meeting. She added that the video showed that O'Brien had been "hysterical" and had lost the confidence of the CCC staff. *RA_305,* ¶ 13. Other than the Collins matter, no other issue was mentioned. *RA_305,* ¶ 14. Nothing about racially insensitive comments was raised. *Id.*, ¶ 14. Goldberg told O'Brien that she should resign, but O'Brien declined. *Id.*, ¶ 16. No mention was made that suspension or removal were then being considered. *Id.*, ¶¶ 15-16.

Shawn Collins' Demand Letter and The Second Investigation

On August 31, 2023, Collins had an attorney serve a letter on the CCC (with a copy to Sarah Kim and Collins) demanding, among other things, that O'Brien be

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Kim (Treasurer's office), Swee Lin Wong (Treasurer's office), four employees of the CCC (but no commissioners), two employees at the Office of the Attorney General, two employees at the Governor's office, and one employee at the Office of the Inspector General that Investigator 1's investigation into Chair O'Brien's conduct was "near completion" and relayed Collins' allegations against Chair O'Brien from that morning. *RA_304,* ¶ 11-12. Chair O'Brien was not cc'd on Shrader's correspondence.

[16] *RA_253*.

removed. *RA_067*, ¶ 23. This came after Shrader already initiated a second investigation—of Collins' allegations against O'Brien—with a new outside investigator (Investigator 2). *RA_067*, ¶ 22. Two days later, on September 2, 2023, Investigator 1 released her report. *RA_065*, ¶ 17. However, Chair O'Brien was not provided a copy of either the Collins' letter or Investigator 1's report until September 7, 2023, *id*., ¶ 23, when both were sent to her by Deputy Treasurer Kim. *RA_067*, ¶ 18. Nothing came from anyone at the CCC, to whom both documents were addressed. Following up the next week, Kim communicated with O'Brien's former attorney, relaying a message from Goldberg demanding that Chair O'Brien was to resign. *RA_305*, ¶ 19.

Treasurer Goldberg Suspends Chair O'Brien

Treasurer Goldberg suspended Chair O'Brien from her position as Chair of the CCC on September 14, 2023 with a one-page letter devoid of any reasons for suspension. *RA_020*.[17] The suspension letter made no reference to M.G.L. c. 10, § 76. *Id*. In addition to the suspension itself, Treasurer Goldberg released a statement that "serious allegations" had been lodged against Chair O'Brien -- by nothing less

[17] The CCC, contrary to M.G.L. c. 10, § 76(h), appointed Commissioner Ava Callender Concepcion as "Acting Chair" at the next public meeting following Chair O'Brien's suspension.

than a fellow Commissioner, and by staff members as well.[18] She stated that as a result of these accusations it had been necessary for the CCC to retain an outside law firm to investigate, that the firm had "returned with a report," and that this had led the Treasurer to suspend her. The suspension was widely publicized in print, radio, television and social media.[19]

Treasurer Goldberg's Notice of the Charges

Almost three weeks after Treasurer Goldberg suspended Chair O'Brien, after Treasurer Goldberg had made her public statement, and after being sued, Treasurer Goldberg finally revealed the putative basis under M.G.L. c. 10, § 76 for Chair O'Brien's suspension in an October 4 letter (the "October 4 Notice"). Treasurer Goldberg claimed, in part, that "under § 76(d), [Chair O'Brien] may: (1) be unable to discharge the powers and duties of the office, and (2) have committed gross

[18] https://www.wbur.org/news/2023/09/28/shannon-obrien-deb-goldberg-ccc-cannabis-commission-suspension (last accessed November 28, 2023).

[19] https://www.wgbh.org/news/politics/2023-09-28/mass-cannabis commission-chair-sues-state-treasurer-over-suspension (last accessed November 28, 2023); https://www.wbur.org/news/2023/09/28/shannon-obrien-deb-goldberg-ccc-cannabis-commission-suspension (last accessed November 28,2023); https://www.bostonglobe.com/2023/09/28/metro/deborah-goldberg-shannon-obrien-suspension-cannabis-control-commission/?p1=BGSearch_Advanced_Results (last accessed November 28, 2023).

misconduct in office[.]"[20] *RA_073*. There followed two general claims that O'Brien had committed "gross misconduct, to wit, (1) that Chair O'Brien had made statements that "are perceived to be race-based or, at a minimum, to be racially, ethnically, and culturally insensitive" (the "Racial Insensitivity charges"); and (2) that she had mistreated Shawn Collins, the Executive Director of the Commission on various occasions (the "Collins charges"). *RA_072-076*. No specific claim of any example or instance of inability to discharge the powers and duties of the office were made. Accordingly, it is apparent that the only charges in issue are those which related to the gross misconduct charge - that is, racial insensitivity or bad treatment of Collins.

Racial Insensitivity Charges

As to this category of accusations, the Notice contained one specific allegation[21], and a reference to certain pages of Investigator 1's report which included the accusations made by Commissioner Camargo which were credited the investigator. *RA_073-074*. The particular accusations are below. Chair O'Brien's responses are in the footnotes.

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[20] Treasurer Goldberg has not articulated any reason, nor can she, how Chair O'Brien is physically or mentally "unable to discharge the powers and duties of the office[.]"

[21] See *infra* at page 55 concerning Chair O'Brien's argument that she is entitled to specific notice.

(a) The "yellow" person comment

The only example of racially insensitive comment actually cited in the October 4 Notice states:

> The report concluded that you made "racially, ethnically, culturally insensitive statements, including "public statements that could reasonably be perceived as creating the impression that … diverse candidates were not qualified for the CCC Chair role." As just one example, in response to the allegation that in a meeting in the fall of 2022 you remarked, in reference to a person of Asian heritage, "I guess you're not allowed to say 'yellow' anymore," you did not deny doing so. You said, "I should have cleaned it up. It's difficult sometimes to know how to say the right thing." [22]

(b) The Camargo complaints

Although not contained in the October 4 Notice itself, Investigator 1's report, to which it refers, does contain complaints of purported racial insensitivity by fellow Commissioner Camargo three of which were examples of what the investigator characterized and credited as race-based comments:

[22] *RA_073.* **Chair O'Brien vehemently denies Investigator 1's account of her interview that was parroted by Treasurer Goldberg in the October 4 Notice.** These were the words of a well-known and respected African-American real estate developer, in which he was explaining how he organized a group of "black, brown and yellow" investors to create business opportunities for persons of color that Chair O'Brien relayed to CCC staff. Chair O'Brien acknowledged to Investigator 1 that she repeated what he had said, and acknowledged to Investigator 1 that she should have not have used the real estate developer's exact words despite the fact that there was no pernicious bias or intent on the part of either one.

(i) The "buddy" comment

Commissioner Camargo complained that Chair O'Brien on various occasions said that Cedric Sinclair[23] was Commissioner Camargo's "buddy" and that they had a close professional relationship. Camargo alleged, and the investigator agreed, that these statements were references to the fact that they are both persons of color.[24]

(ii) The Lydia Edwards comment

Commissioner Camargo complained that Chair O'Brien said that "I don't know [State Senator] Lydia Edwards, but you probably know her." Commissioner Camargo and the investigator inferred from this that she made the comment only because they are both people of color and that Chair O'Brien "assum[es] all people of color know one another."[25]

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[23] At all relevant times Mr. Sinclair has been employed as the CCC's Chief Communications Officer. His was the original complainant against O'Brien, but his charges were not substantiated by the investigator. Recently he was suspended from his position. *See* https://www.wbur.org/news/2023/12/11/massachusetts-legalized-pot-agency-susensions (last accessed January 16, 2024) ("2 top managers suspended at Cannabis Control Commission").

[24] There was no racial dimension to this comment whatsoever, as it is clear to all that Sinclair and Commissioner Camargo were professionally friendly.

[25] There is nothing that is racially insensitive about thinking that they might know each other politically and professionally. Senator Edwards and Commissioner Camargo are both women of color who are government officials in

(iii) The "not qualified" comment

Commissioner Camargo complained that in response to a question from a journalist as to why Chair O'Brien felt the other candidates that applied for Chair (including Commissioner Camargo) were not appointed to be Chair instead, Chair O'Brien purportedly replied with a statement that Commissioner Camargo was not qualified for the role.[26]

The Collins' Charges

As to the Collins charges, the October 4 Notice stated that the Treasurer "learned of various allegations concerning [Chair O'Brien's] conduct with regard

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the Boston area. There need not be any bias at play for someone to surmise that Commissioner Camargo, a well-connected community organizer and activist, and a politically appointed public servant, would know many prominent persons of color in the community.

[26] In fact, Chair O'Brien did not say anything about her colleagues' qualifications. It was ***Treasurer Goldberg*** who did. *RA_064-065*, ¶¶ 2-8. Chair O'Brien made no such statement at all. *RA_064*, ¶ 3. She actually evaded the journalist's question because she did not wish to embarrass either the Treasurer or the other candidates. *RA_065*, ¶¶ 7-8. Moreover, she had nothing to do with their applications and she did not believe it was her business to make public statements about whether her colleagues were qualified. *Id.* Instead, she responded only by saying what Treasurer Goldberg told her as to why ***she*** was chosen (to wit, that she fit all three statutory criteria – one who "shall have experience in corporate management, finance or securities") and not why Treasurer Goldberg did not choose others. *Id.* What's more, Investigator 1's conclusion is that it was "plausible" that ***Commissioner Camargo*** "perceived" Chair O'Brien as stating that she was not qualified for the role of CCC chair. If there was as a perception, however, it was a misperception.

to Shawn Collins" and that the Treasurer would need to "await the conclusions of the second independent investigator regarding these allegations to decide whether reasons exist warranting your removal[.]" *RA_074*. The Notice letter also directed that Chair O'Brien meet with Investigator 2 to be interviewed as soon as possible.

The Notice stated that Chair O'Brien's statements at the July 27th and July 28th public meetings were about Collins' "employment and highly personal matters," she said that were "not in dispute" and were part of "decision to suspend" Chair O'Brien. *See RA_074*. The October 4 Notice further stated that Chair O'Brien "interfere[ed] with Mr. Collins's leave rights," *id.*, even though she was "legally" and "ethically" bound not to make the comments that she made about Collins at the public meetings. *Id.*

Chair O'Brien's Interview with Investigator 2

Chair O'Brien was interviewed by the second investigator ("Investigator 2") on October 23, 2023. *RA_067*, ¶¶ 24; *see also October 4 Notice*. In contrast to the Investigator 1 interview, O'Brien was permitted to have counsel present, and at Chair O'Brien's request, the interview was recorded. *RA_067*, ¶¶ 25-26.

Negotiations Over Hearing Procedure

On October 25, the attorneys for both sides met to discuss a date for the hearing and how the hearing would be conducted, but no agreement was reached. Everyone agreed to extend the hearing date, in part, because the second investigator's report was not ready and the holidays were upcoming. *RA_080*, ¶

3.[27] On November 1, the parties agreed upon December 5 as a "target hearing date" but the Treasurer was not yet ready to propose how the hearing would unfold. *RA_081*, ¶ 6. Moreover, the second investigation was not yet complete and Treasurer Goldberg's counsel advised that the hearing date was dependent on receipt of Investigator 2's report in time. *Id.* On November 1 Treasurer Goldberg's attorney pointed out that the date could also be put off if Plaintiff needed more time to prepare. *Id.* On Friday, November 17, Investigator 2 informed counsel for Plaintiff that her fact investigation was "coming to an end point," that she had not yet been requested by the CCC to prepare a report and would check on the status that day. *RA_081*, ¶ 8. Investigator 2 said that she was aware of the December 5 hearing date and that she should be able to produce the report before the hearing date. *Id.*, ¶ 8.

Treasurer Goldberg Provides First "Protocol" For Hearing

Later that same day, at 5:20 pm, the Treasurer's counsel provided Chair O'Brien's with a long-awaited "protocol" about how the hearing would be conducted. *RA_082*, ¶ 11; *RA_091-092.* Virtually all of Petitioner's essential requests were rejected, such as the appointment of an impartial fact finder, specific

[27] Plaintiff's attorneys had previously presented a list of requested procedures for the hearing to the Treasurer's counsel on October 15, 2023. *RA_080*, ¶ 2. In her initial request, Chair O'Brien specifically requested an impartial finder of fact.

notice of the charges, and identification of all witnesses and complainants, among other things, and a set of deadlines for Plaintiff to provide advance notice of her case and all evidence were announced, with a compliance date in five business days. *See RA_091-092*. The "protocol" appointed Thomas Maffei as an "officiant" but left Treasurer Goldberg as the fact finder; permitted Chair O'Brien to cross-examine the investigators (though neither would be actually be present on December 5); allowed Chair O'Brien to present witnesses (but did not permit her any means to secure their attendance), and only allotted four hours for the hearing. *Id.*

Treasurer Goldberg Attempts to Sever Collins' Charges and Notifies Chair O'Brien That Neither Investigator Will Appear at the Hearing, Nor Investigator's Report, Which had Not Been Delivered.

Then on Wednesday, the day before Thanksgiving, the Treasurer delivered a letter to Plaintiff (the "November 22 Notice") informing Chair O'Brien that she had decided not to wait for Investigator 2's report. Instead, Treasurer Goldberg had decided to sever the Collins charges from the hearing. *RA_082*, ¶ 12; *RA_078-079*. The December 5 hearing would concentrate only on the Racial Insensitivity charges, and the Collins matter would be heard at some other unspecified time. However, in the same letter, Treasurer Goldberg informed the Plaintiff that Investigator 1, who had developed the race-based allegations, would likewise not attend the December 5 hearing but only be available at a later unknown date. *Id.*

Thus neither of the two investigators, nor the second report, would appear that day, and Chair O'Brien would have to testify before they do.

Chair O'Brien objected to the Treasurer's rejection of O'Brien's requests – especially her insistence that she would personally decide all of the facts herself. Petitioner also object to the surprise changes as to who and what would be produced and when, and the severance of the Collins case. *RA_083*, ¶ 17. Despite the previous reassurance as to time to prepare, Goldberg informed petitioner that the hearing would under no circumstances be postponed. *Id.*, ¶ 18. As a result, petitioner proceeded with her motion for a temporary restraining order and preliminary injunction. The judge postponed the hearing and scheduled a further hearing on the injunction request.

Treasurer Goldberg and CCC Play Hide and Seek with Investigator 2's Report

In the meantime, on Friday, November 17, Investigator 2 informed counsel for Plaintiff that her fact investigation was "coming to an end point"; that she had not yet been requested by the CCC to prepare a report and would check on the status that day. *RA_081*, ¶ 8. She also acknowledged that she was aware of the December 5 hearing date and that she should be able to produce the report before the hearing date. *Id.*, ¶ 8.

Once it emerged that the report of the second investigation would be abandoned, Chair O'Brien's attorneys requested from both the Treasurer and the

CCC—on multiple occasions—that it be produced. However, every inquiry was met with the same response no matter which party was asked: that whether and when the second investigator's report was unknown. *Id.*, ¶ 9. The CCC's outside counsel went so far as to forbid Chair O'Brien's attorneys from contacting the second investigator to find out. To this day, we have had no answer.

Treasurer Goldberg Provides Second "Protocol" For Hearing

After the Court allowed Chair O'Brien's motion for a temporary restraining order, and in response to infirmities the Court recognized in the first protocol, Treasurer Goldberg served a second "protocol" that slightly differed from the first "protocol" on December 12, 2023. The second "protocol" still did not provide certain essential protections such as an impartial factfinder, specific notice of all charges and a public hearing.

With the second "protocol" Treasurer Goldberg suggested that she might not even be able to even produce the investigators at the postponed at the hearing. *See RA_269* ("[a]dditionally, although the Treasurer believes that the investigators will voluntarily make themselves available for the removal proceeding, the Treasurer has no control over the actions of the investigators.").

IV. Argument

A. Overview of Applicable Law

Chair O'Brien has the right to due process of law in connection with her removal as Chair under two separate principles which protect different, but related and intertwined interests.

1. Petitioner's Property Interest

First, a person faced with loss of job enjoys the procedural protections of the Due Process clause of the 14th Amendment to the United States Constitution and Articles 10 and 29 of the Massachusetts Declaration of Rights if she has a "property interest" in that position. A property interest exists if the person has an expectation of continued employment by a public employer unless she fails to satisfy a condition of the job, as where a contract or statute specifies that she cannot be terminated unless there is "just cause." *See Hall-Brewster v. Bos. Police Dep't*, 96 Mass. App. Ct. 12, 20 (2019) ("[a] just cause standard creates a property interest in continued employment in cases where a public employee has been discharged."); *Bd. of Regents v. Roth*, 408 U.S. 564, 571, 576 (1972); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985). Here, per M.G.L. c. 10, § 76, Chair O'Brien has a continued expectation to serve her five-year term as Chair until 2027 unless she is removed by Treasurer Goldberg for one of the five reasons in the statute. There has been no disagreement in this case as to the existence of a property interest.

In a property interest case, due process requires a "limited" *pre*-deprivation hearing *before* the axe falls, which "should be an initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Loudermill*, 470 U.S. at 545-546. This "limited hearing" is then "to be followed by a more comprehensive *post*-termination hearing." *Gilbert v. Homar*, 520 U.S. 924, 929 (1997). Thus, petitioner was constitutionally entitled to a pre-deprivation hearing before she was suspended.[28] *Loudermill*, 470 U.S. at 532; *Cotnoir v. Univ. of Maine Sys.*, 35 F.3d 6, 11 (1st Cir. 1994), However, no notice of the pending suspension or offer of any hearing was provided prior to the September 14th suspension. It was only after Chair O'Brien filed her lawsuit that Treasurer Goldberg produced her October 4 Notice.

2. Petitioner's Liberty Interest

Petitioner also enjoys the protection of due process because she has a "liberty interest" at stake. A liberty interest is affected when an employment action itself sends a derogatory message likely to harm one's future ability to obtain employment. This is often referred to as "stigma-plus." *Bd. of Regents*, 408 U.S. at

[28] The only purported authority for suspension derives from the power to remove, which includes within it the authority to suspend. *See Tobin v. Sheriff of Suffolk County,* 377 Mass. 212, 214 (1979); *see also McGonigle v. Governor*, 418 Mass. 147, 151 (1994).

573; *Rodriguez de Quinonez*, 596 F.2d 486, 489 (1st Cir. 1979). When that happens, the person harmed is entitled to a so-called "name-clearing hearing." *Fontana v. Comm'r of Metro. Dist. Comm'n*, 34 Mass. App. Ct. 63, 67 (1993) (and cases cited); *Codd v. Velger*, 329 U.S. 624, 627-628 (1977). The public announcement of petitioner's suspension caused immediate and severe harm to her right to liberty, especially since it was accompanied by a negative and highly suggestive explanatory comment by the Treasurer.

The Treasurer contends that no liberty interest of the petitioner was infringed and therefore she has no right to a name-clearing hearing. She argues that her comment on the suspension was "innocuous;" and that petitioner's public disclosure of the particular charges against her shows that she is not at all concerned about irreparable harm.[29] But the statement, released in the interests of "transparency,"[30] was anything but innocuous. Not only was the suspension in and of itself a telling and foreboding message to the public, the statement implied that Investigator 1's report, produced by outside counsel, had revealed that petitioner had done terrible things to her own colleagues – misconduct so grave that urgent

[29] *See RA_263.*

[30] https://www.boston25news.com/news/local/mass-treasurer-breaks-silence-decision-suspend-chair-cannabis-control-commission/GXONZYXVOFC5NKSABFKW5ONXO4/ (last accessed January 9, 2024).

action was required. Petitioner had every right to put into her pleadings the evidence that shows just how flimsy the complaints really are, although without a public name-clearing hearing. This would hardly make a dent on the ruination of her reputation.[31] The fact is that Goldberg's action has caused harm far and away more devastating than that found in most typical name-clearing cases. What is at stake here is not only Chair O'Brien's job, but whether she will ever be able to get another one.

Importantly, the judge agreed with Petitioner that she had a liberty interest which entitled her to a name clearing hearing.

> O'Brien's argument is not merely about her reputation. It is that a negative decision by the Treasurer may impact her future employment options. I agree. Although O'Brien herself identified and publicly disclosed the potentially stigmatizing charges at issue (namely, the racially insensitive conduct), should a hearing go forward without adequate procedural protections, there is a significant risk that O'Brien would suffer irreparable harm to both her reputation and future employment.

[31] Nevertheless, it is worth noting that Petitioner did not decide to make her pleadings public or request a public hearing until just prior to the then-scheduled hearing when the Treasurer suddenly notified Petitioner's counsel that she would not appoint a neutral fact-finder; had decided not to seek or disclose Investigator 2's report (which she evidently believes is exculpatory); and insisted on a private hearing which could not possibly have the effect of clearing her name. At that point Petitioner realized just how determined the Treasurer was to produce a "guilty" finding despite the extremely disputable nature the charges. Petitioner felt that unless she made the accusations public herself, neither the court nor all but a few members of the public might never know how weak and pretextual the evidence really is and therefore how important it will be to have procedures which will provide Petitioner with a fair chance to be publicly exonerated.

RA_223.

3. The Functions of the Hearing in this Case

Most procedural due process cases involve either a property interest or a liberty interest. These can follow different routes. In a singular property interest case, where the employee has a legitimate expectation of continued employment, the employee stands to either save or lose her job, but there may be no effect on reputation.

On the other hand, a liberty interest case typically involves an employee who is "at will;" thus has no property interest and therefore can assert only the liberty-based right to clear her name. Such an interest, by itself, can only support restoration of the employee's name, but not the job itself. Accordingly, name clearing hearings typically take place after the negative employment action is already complete. *Fontana*, 34 Mass. App. Ct. at 67 (and cases cited)

This case, however, is neither a property or liberty case – it is both. It will entail a highly unusual hybrid hearing which will address both the losses already experienced by the Petitioner and, as well, the future potential loss of both property and liberty. It will be a combination pre-deprivation (never held so far), post-deprivation and name-clearing hearing all in one. It will include an inquiry into

two sets of allegations, and two investigations.[32] Instead of a pre-deprivation hearing at the outset, or a post-deprivation notice and hearing about the job, and then a separate name-clearing hearing, all of her rights will be adjudicated in a single combination proceeding.

4. Determining the Necessary Procedure

Matthews v. Eldridge, 424 U.S. 319, 333 (1976) is the seminal case which originally articulated the now universally accepted formula for determining what process is due in a given situation. Its overriding principle is that a person with a property or liberty interest is entitled to a hearing "at a meaningful time and in a meaningful manner[,]" 424 U.S. at 333 (internal citations omitted) -- a standard deliberately designed to be flexible. The underlying premise is that there is no black letter rule which defines a set of procedures which are right for every situation. "[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v.*

[32] As the judge noted, the Petitioner needs to know "the results of the lengthy investigation detailing the facts as determined by Investigator 2, some of which may impact, contradict, or overlap with the results of Investigator 1's investigation. Presumably, for example, Commissioners and Commission staff were interviewed by both investigators." *RA_220.*

Brewer, 408 U.S. 471, 481 (1972); *see also Mathews*, 424 U.S. at 334 (internal citations omitted).

In order to apply the meaningful time and manner standard, the Court laid down a set of three factors: "[1] the private interest that will be affected by the *official* action; [2] the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, [3] the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 334–35.

B. Due Process Requires Recusal of the Treasurer as Finder of Fact.

1. The Judge Erred by Relying Wholly Upon Justice Greaney's Single Justice Order in *Levy, et al v. The Acting Governor*

The Superior Court judge rejected all of Petitioner's arguments that the Treasurer needs to be disqualified as finder or fact. Despite recognizing that the issue here is one of first impression, and instead of applying the *Mathews v. Eldrige* analytical mode or looking to other sources of law concerning recusal, she simply chose to adopt the rulings made by Justice Greaney as Single Justice in his December 19, 2001 unpublished Memorandum and Order in *Levy, et al v. The Acting Governor of the Commonwealth*, et al, SJC-2001-0531, Docket No. 42 (December 19, 2001) (Greaney, J.) (in which two members of the Massachusetts

Turnpike Authority were removed and later reinstated).[33] She did so because she felt that the decision contained "a clear analysis" and "exceedingly persuasive guidance." *RA_398*. The decision, however, was nothing more than a three-page order containing a list of rulings on procedures requested by the plaintiffs in a two-page motion.[34] The judge heard and decided the motion the very next day after it was filed. The Greaney decision contained *no* analysis to speak of; the totality of the discussion on disqualification was as follows:

> The motion to disqualify the Acting Governor as the hearing's officer and decision maker is denied. It is to be assumed that she will act impartially and with an open mind.

Levy, et al v. The Acting Governor of the Commonwealth, et al, SJC-2001-0531, Docket No. 42 (December 19, 2001) (Greaney, J.). This can hardly qualify as precedent, much less persuasive authority.

Moreover, although the judge pointed out some ways in which the *Levy* case was analogous to this one—both involved removal of officials appointed by constitutional officers—the court ignored critical differences. Given these differences and the absence of direct precedent, the judge should have gone to basic constitutional principles to determine the appropriate procedure. *Levy* did not

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[33] *See Levy v. Acting Governor*, 435 Mass. 697 (2002); *Levy v. Acting Governor*, 436 Mass. 746 (2002).

[34] *See Levy, et al v. The Acting Governor of the Commonwealth, et al*, SJC-2001-0531, Docket No. 27.

involve a liberty interest, since the basis for removal was a "difference of opinion" as to how the authority should be run, *see Levy v. Acting Governor*, 436 Mass. at 737, not a charge of gross misconduct alleging that the official had abused or offended any person. There was no contention that the governor's action had caused devastating and permanent injury to the person to be removed. There was no issue of the governor's personal connection to an alleged "victim" of misconduct. Nor did it involve the type of fraught question of alleged personal and racial affronts at the core of this case.

Another reason that Justice Greaney's *Levy* Single Justice order should not have been followed is that Justice Greaney rested his denial of disqualification of the Governor solely on the ground that "it is to be assumed that she (the Acting Governor) will act impartially and with an open mind." *Levy, et al v. The Acting Governor of the Commonwealth*, et al, SJC-2001-0531, Docket No. 42, p. 2 (December 19, 2001) (Greaney, J.). The Treasurer has advanced the same argument here: "A court should presume that her actions are valid and undertaken in good faith." *RA_115*. Indeed, she asserts that her decisions are "presumed valid." *RA_115*; *see also RA_261-262*. The judge below also seems to have accepted that idea since she stated that "I am persuaded that the Treasurer understands her obligations[,]" even though Goldberg never made any kind of attestation or argument rebutting O'Brien's claims of bias. *RA_399*. There is no legal basis for

the proposition that the Treasurer is presumed to be impartial. None of the cases relied upon by Goldberg, *RA_114-115*, establish that there is anything remotely like a presumption of validity as she claims.[35] Indeed, the idea conflicts directly with the obligation to consider whether the Treasurer's impartiality can reasonably be questioned.

2. Application of *Mathews v. Eldridge*

If the judge had applied the *Matthews* factors, the balance would have clearly called for recusal since: (1) the private interest (i.e. the Chair's) will obviously be deeply affected; (2) the risk of erroneous outcome would be substantial, and disqualification could only enhance the likelihood of getting to the truth; and (3) there is no legitimate government interest or undue burden on the government. There is no downside to employing fair procedures. They could only help to find the truth. And as the judge recognized, "there is a strong public interest in ensuring due process and fairness." *RA_224*. The Treasurer has appointed an "officiant" to make evidentiary rulings—an experienced lawyer and arbitrator who

[35] *See Prescott v. Sec'y of Commonwealth*, 299 Mass. 191, 204 (1938) (court only gave presumption in Governor's favor after the Governor declared an emergency, the court did not set a broad proposition that all actions taken by a constitutional officer are "valid and undertaken in good faith" as the Treasurer argues); *Rice v. The Governor*, 207 Mass. 577, 579 (1911) (dealing with general rule of gubernatorial immunity).

is respected by both sides—who could easily step into the fact-finding role. Nothing in the statute, which states only that "the commissioner shall be *provided* with . . . an opportunity to be heard[,]" requires that the Treasurer personally decide the facts, or prevents her from deputizing a neutral person to perform that role.[36]

3. The Standards for Recusal

The Petitioner is entitled to an impartial finder of fact under both general principles of due process and the specific mandate of Article 29, which declares the "right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit."[37] The judge ruled that recusal of the Treasurer from the role of finder of fact was not warranted because, in her view, there was no

[36] It bears noting that although the Petitioner could have made a constitutional argument for full recusal, she has not asked that the Treasurer be disqualified from making the ultimate decision on whether to remove so long as the decision is made on the basis of findings made by a neutral finder of fact. *See Commonwealth v. Cousins*, 484 Mass. 1042, 1046, n. 4 (2020) (recusal can be granted with respect to a single issue leaving the decisionmaker responsible for other matters).

[37] "It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws."

evidence that Goldberg was biased, that her professional relationship with Mr. Collins was six years ago; that there was "no non-speculative evidence… that the Treasurer had or has a personal relationship with him;" and that as the Treasurer has the authority to remove, "it is to be expected that she would want to be given or be made aware of any information that might bear on that potentiality[.]" *RA_403*. Thus, the court concluded that it was perfectly appropriate for Treasurer Goldberg to have "received the investigator's report from the Commission directly and before O'Brien did, was kept abreast of the work of the second investigator, and ha[d] some personal knowledge of the underlying facts," all not amounting to evidence of any actual bias.

The flaw in this analysis is that actual bias is only half the inquiry. The court must also determine if "a disinterested observer, informed of all the circumstances, [would] reasonably believe that the judge's impartiality may have been compromised?" *Commonwealth v. Cousins*, 484 Mass. 1042, 1046 (2020):

> "[A]ctual impartiality alone is not enough .... In order to preserve and protect the integrity of the judiciary and the judicial process, and the necessary public confidence in both, **even the appearance of partiality must be avoided**." Commonwealth v. Morgan RV Resorts, LLC, 84 Mass. App. Ct. 1, 9, 992 N.E.2d 369 (2013), and cases cited. See also S.J.C. Rule 3.09, Canon 2, Rule 2.11 (2016) ("A judge shall disqualify himself or herself in any proceeding in which the judge cannot be impartial or the judge's impartiality might reasonably be questioned ...").

(emphasis added). This is an "objective" standard "which avoids having to determine whether actual bias is present." Its twofold purpose is to avert an unacceptable risk" of bias, *Williams v. Pennsylvania*, 579 U.S. 1, *14 (2016) -- a bias which "*might*" exist, *Commonwealth v. Cousins*, 484 Mass. at 1046, -- and to eliminate even the "appearance of partiality" in order to preserve the integrity of the process and the confidence of the public in the outcome. It is essential that all parties who have a stake in this young industry and its regulation—the government, the Commission's public servants, the licensees, customers, and the public at large—can trust that the Commission is being run with fairness, integrity, honesty and transparency.[38]

In *Commonwealth v. Morgan RV Resorts*, 84 Mass. App. Ct. 1, 9 (2013) the court confronted the issue of 'whether a judge who sued her former law firm for unpaid compensation should have recused herself from cases involving that firm" four years after her own lawsuit had been concluded. *Id*. at 2. The judge had

[38] To the point here, Massachusetts courts have held on multiple occasions that Article 29 "extends beyond judges 'to all persons authorized to decide the rights of litigants,'" which includes administrative hearing officers. *Doe v. Sex Offender Registry Bd*., 84 Mass. App. Ct. 537, 541 (2013) ("The Supreme Judicial Court has also made clear that hearing officers, like judges, are held to 'high standards [which] are reflective of the constitutional rights of litigants to a fair hearing, as established in art. 29 of the Declaration of Rights of the Constitution of this Commonwealth[.]'") (*quoting Police Commr. of Boston v. Municipal Ct. of the W. Roxbury Dist.*, 368 Mass. 501, 507(1975), *quoting from Beauregard v. Dailey*, 294 Mass. 315, 324 (1936)).

maintained that she had no actual bias, and this was accepted as fact. But the Court framed the question as whether "the facts provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality." *Morgan*, 84 Mass. App. Ct. at * 10 (*quoting In re United States*, 666 F.2d 690, 695 (1st Cir. 1981)). Applying that standard, recusal was granted.

In *Williams*, the issue was whether the circumstances objectively amounted to an unconstitutional "risk" of bias. 579 U.S. at *8, *14. The court held that "there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." *Id*. at 2, 8. In his opinion, Justice Kennedy rehearsed the various ways in which a prosecutor with prior involvement might, whether consciously or unconsciously, feel pressed to confirm what he started, and concluded that "[a]n unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case." *Id*. at 2, 8 (*citing In re Murchison*, 349 U.S. 133, 136-37 (1955)). The First Circuit, in *In re Bulger*, 710 F.3d 42, 45–49 (1st Cir. 2013) reached a similar result in ordering the disqualification of Judge Stearns in the *Bulger* case because he had been a supervisor in the United States Attorney's office when the office had questionable dealings with the defendant, even though he had no personal involvement.

4. The Appearance of and Unacceptable Risk of Bias in this Case

Applying these standards here, the dispositive inquiry should not have been whether the Petitioner has proven that Treasurer Goldberg is actually and subjectively biased, but whether, based upon the objective circumstances, there is an *appearance* of bias which would lead a knowledgeable person to question her impartiality. The judge never made this assessment or even recognized the applicable legal principle.

The judge also erroneously concluded that the *Williams* doctrine—that an "accuser" should not also be the "adjudicator"—is inapplicable because the Treasurer "is not the 'accuser' and 'adjudicator'" here. Goldberg is as much or more of an accuser than the prosecutor/judge was in *Williams*, who gave his approval to the sentencing decision[39] but was not involved in either the underlying events or the ongoing litigation. As for adjudicator, that is precisely the role that Goldberg insists on taking on.[40]

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[39] The judge also rejected the precedent because it was a death penalty case. But the decision did not turn on the extent of the punishment. Rather it was a based upon a principal of impartiality which is applicable to any proceeding in which protected interest is threatened.

[40] The definition of "adjudicatory proceeding" in c. 30A, s. 1 is:

> a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by

There are many indicators here which raise both the appearance and the possibility of bias. In the first place, the critical features here are not merely that Collins formerly worked for the Treasurer, or that she and her Deputy Treasurer acquired awareness of the facts before the removal process started. Rather, it is that they were coordinating the events which led to the removal effort.

Since the CCC is an independent entity, appointing authorities have highly limited powers – to appoint or remove (and then only for specific cause). As Goldberg has conceded, "the CCC [i]s an independent entity… the Treasurer has no other authority, oversight, management, or influence over the [CCC]." She is not authorized to intrude into the internal operations of the Commission, especially not personnel decisions -- including those concerning who shall be Executive

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> constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing. Without enlarging the scope of this definition, adjudicatory proceeding does not include (a) proceedings solely to determine whether the agency shall institute or recommend institution of proceedings in a court; or (b) proceedings for the arbitration of labor disputes voluntarily submitted by the parties to such disputes; or (c) proceedings for the disposition of grievances of employees of the commonwealth; or (d) proceedings to classify or reclassify, or to allocate or reallocate, appointive offices and positions in the government of the commonwealth; or (e) proceedings to determine the equalized valuations of the several cities and towns; or (f) proceedings for the determination of wages under section twenty-six T of chapter one hundred and twenty-one.

Director, who serves "at the pleasure of the commission[.]" M.G.L. c. 10, § 76(j), not the Treasurer. On the contrary, it is the Chair of the Commission, O'Brien, who is to "have and exercise supervision and control over all the affairs of the commission." M.G.L. c. 10, § 76(h); *RA_400* (Legislature protected commissioners from removal for poor performance or differences over policy)[41]; *RA_399-403*; *Levy*, 436 Mass. at 746-47. Indeed, a central purpose of the legislature in imposing limitations on the powers of officials with appointing and removal authority was to

[41] The judge held that the description of the relationship between the Governor and the Turnpike Authority applies as well to the powers of the Treasurer in respect to the CCC. *RA_394-398*. In *Levy v. Acting Governor*, the Supreme Judicial Court wrote:

> What constitutes "cause" to remove a member of the Authority should be determined in the context of the power of the Authority to act in the circumstances here as an independent corporate body. As noted above, *the Governor has no supervisory, managerial, or proprietary interest in the Authority*, except in limited circumstances not relevant here. It follows that the Governor's powers over the Authority do not include the power to remove its members for any reason advanced in "good faith and honest judgment," *Amoco Oil Co. v. Dickson*, *supra* at 45, 389 N.E.2d 406, or an honest dispute over policy. See *Rinaldo v. School Comm. of Revere*, *supra*. The Governor's good faith and honest judgment play no part in the instant matters affecting the Authority. The more flexible definition of "cause" that we apply in cases involving executive oversight of a governmental or corporate body is not appropriate where broad oversight is absent. (emphasis added).

436 Mass. 736, 749 (2002).

discourage or prevent political influence and interference in the affairs of the Commission. *RA_400.* Consistent with this policy, the existence and contents of investigations into CCC personnel matters were considered to be confidential and open only to Commissioners, CCC counsel and the HR director.

Nevertheless, intrusion into a personnel issue within the scope of the Chair's authority was precisely what Goldberg and Kim did to protect Collins once they learned their the fate of their friend's employment was in Chair O'Brien's hands. When Goldberg and Kim confronted O'Brien in their July meeting and sought her resignation, there was as yet no issue of racial insensitivity on Goldberg's agenda. The discussion was all about, and only about, Collins. And it is that intercession for Collins which became the genesis of and central motivator for the attempt to remove O'Brien. This alone leaves one with the *appearance* of bias.

Whether the Collins relationship is defined as "professional" or "personal," Goldberg was Collins' political sponsor and Collins was her man in the Commission and she even referred to him as a member of her "family" when he left her employ and started at the CCC.[42] The salient fact is not how long ago he worked directly for Goldberg,[43] but the fact that she and Kim, her General Counsel,

[42] *RA_253.*

[43] "The passage of time certainly can be a factor leading to a conclusion that any concerns about a judge's impartiality would be unreasonable. But while time

Deputy Treasurer, right-hand lieutenant, and close friend of Collins, worked together to protect him when his job was in jeopardy. Getting rid of O'Brien was an effective way to accomplish that objective. The point is not just that Goldberg had personal knowledge of the facts; it was that she had a motive to find a pretext which would achieve the Chair's removal.

Treasurer Goldberg and Kim are key witnesses for Chair O'Brien's defense, and therefore Treasurer Goldberg cannot act as the fact finder. They have first-hand personal knowledge of all these events, including Goldberg's comments to Chair O'Brien about the lack of qualifications of Chair candidates (including Commissioner Camargo) that Chair O'Brien later attempted to protect Goldberg from (*RA_064*, ¶¶ 2-3) that formed the basis of at least one of Commissioner Camargo's complaints. Treasurer Goldberg criticized Commissioner Camargo's qualifications, not Chair O'Brien. *See* footnote 26. Also, Treasurer Goldberg and Kim were at the private meetings with Chair O'Brien where she first informed them that Collins may need to be replaced and Kim became visibly upset. *RA_068*, ¶¶ 27-30.

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may heal all wounds, some wounds may take longer to heal, or may at least appear to, because of their severity… [T]he passage of time must be considered along with the other relevant circumstances in analyzing whether an appearance of partiality exists." *Com. v. Morgan RV Resorts, LLC*, 84 Mass. App. Ct. at 12-13 (internal citations omitted).

At the beginning of September, the first investigation report was released, to the Treasurer, but not to O'Brien, and around the same time, Collins' letter urging removal was delivered to Sarah Kim, but not O'Brien. The documents were finally disclosed to the Chair days later, but not by CCC counsel or it's HR director, who were the persons responsible for initiating and managing all "independent" investigations, but rather by Kim. When CCC outside counsel retained Investigator 2 to examine the Collins matter, the Treasurer's office was informed, briefed on her progress and told to expect the investigator's report which, the Treasurer assumed, would be used to support the removal proceedings. Here was another *appearance* that the Treasurer's office was involved in managing the investigative process.

On September 14, Goldberg issued the suspension, instantly banishing O'Brien from her own office and cutting her off from her own communications and files. But the order included neither a written notice of reasons nor that there would be a hearing. *Apparently,* Goldberg believed that she could avoid due process altogether. It was not until Chair O'Brien filed this lawsuit that the Treasurer agreed to a hearing and to issue written, although deficient, charges.

The Treasurer's Notice letter finally arrived on October 4. The language reads as if it contained findings, not just allegations.[44] Goldberg's letter accepts

[44] Indeed, the metadata from the October 4 Notice indicates it was authored by Deputy Treasurer Kim.

Investigator 1's claim that O'Brien had "acknowledged or volunteered details" of her racial insensitivity (**all denied by O'Brien**), characterizing her conduct as "shocking, deeply disappointing, and unacceptable." She called attention to O'Brien's reference to "yellow" people without mentioning the pivotal fact—which the investigator had reported—that O'Brien was only repeating a statement made by another person and in an innocent context. As for the Collins matter, despite stating that she would wait for the second investigation report—evidently expecting it to be damning—she wrote that the "principal" facts were "not in dispute." (Again, not so.) *Apparently*—indeed, *obviously*—Goldberg had already concluded that the facts were already proven.

As the process moved forward, it became even clearer that the Treasurer was in no way engaged in a careful examination of the evidence, but had embarked on an unambiguous "take no prisoners" adversarial campaign to achieve a pre-determined result. On the eve of the hearing, despite having encouraged the Petitioner to believe that a fair procedure would be negotiated and that O'Brien would be given the time she needed to prepare, Goldberg announced that she would go forward as scheduled even though the awaited second investigation report had yet to be produced. Further, no time for preparation would be entertained; she, Goldberg, would be sole decider of the facts; and the hearing would be private. Moreover, neither investigator would be available to be cross-

examined, and the schedule completely overhauled, with the Collins matter severed and postponed to some undefined date, if ever. No explanation was given.

Inferring that the second report was not favorable to the Treasurer, Petitioner's attorneys sought to learn its fate—but no one would enlighten us. Instead, the Treasurer's attorney maintained that only the CCC knew, and the CCC said it did not know when "the results of the investigation" would be ready, and Petitioner's attorneys were forbidden to inquire directly of Investigator 2 - a shell game if there ever was one. To this day, Petitioner has been told nothing about what the second so-called "independent" investigation unearthed and why it was abandoned. In her last filing, the Treasurer went so far as to state that she could not guarantee the appearance of either investigator; a proposition that the judge found to be highly dubious. *RA_391* n. 4.

Finally, there is the matter of the substance of the allegations, which the court below declined to evaluate. Of course, factual determinations are generally to be made in the administrative process, not by the court. Still, some assessment must be made since, if the accusations are *apparently* or *possibly* pretextual, the question of their truth and the Treasurer's good faith can hardly be left entirely to

her. As we show above, even a cursory review of the accusations and their circumstances should cause serious doubt about the bona fides of the inquiry.[45]

C. The Petitioner is Entitled to a Public Hearing

The court below also denied Petitioner's request that the hearing be public. Once again the judge relied on Justice Greaney's Single Justice ruling, which likewise was decided without discussion or authority, but stated that it was within both parties discretion to "decide whether the hearing should be public." *Levy, et al v. The Acting Governor of the Commonwealth*, et al, SJC-2001-0531, Docket No. 42, p. 3 (December 19, 2001) (Greaney, J.). Treasurer Goldberg has not articulated any meritorious reason why the hearing should not be held publicly. Application of the *Matthews* test—literally was ignored by Justice Greaney, the Treasurer and the judge—would clearly follow Justice Brandeis' famous dictum that "sunlight is the best disinfectant."[46]

There are two important reasons why a public hearing is essential in this case. In the first place, as the judge agreed (and as discussed above), the Petitioner is entitled to a name-clearing hearing. Courts which have applied the *Mathews*

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[45] The question of Treasurer Goldberg's impartiality, or lack thereof, was enough of an issue for the Boston Globe to call attention to it in a recent editorial. https://www.bostonglobe.com/2023/12/22/opinion/obrien-goldberg-cannabis-commission-ccc/?p1=BGSearch_Overlay_Results (last accessed January 16, 2024)

[46] "What Publicity Can Do," Harper's Weekly (December 20, 1913), Brandeis, Louis.

factors have concluded that a name-clearing hearing *must* be public, because where "the employer has inflicted a public stigma on an employee, the only way that an employee can clear his name is though publicity." *Gunasekera v. Irwin*, 551 F.2d 461, 470 (6th Cir. 2009). "A name-clearing hearing with no public component would not address this harm[.]" *Id*.; *see also Patterson v. City of Utica*, 370 F.3d 322, 337(2004) ("Requiring the City to address such a risk by offering plaintiff the opportunity to publicly refute the charges made against him… does not place an undue burden upon the government's interest.).

A second reason is that since the days of the Star Chamber, a public hearing has always been seen as a vital safeguard against injustice. The Treasurer argues that Petitioner "will not be harmed by a nonpublic meeting…because the ultimate decision by the Treasurer, identifying reasons for her decision, will be available to the public[.]" *RA_264*. This argument turns logic on its head, by elevating the greatest defect of the procedure into a supposed strong point. But O'Brien's well-founded fear is that Goldberg's findings will in no way represent an honest or complete reflection of what the evidence actually is. It will not clear Petitioner's name; but will result in an even greater destruction of her reputation.

Both the judge and the Treasurer have ended their arguments with a comment on a supposed need to avoid "political theater[,]" (*RA_264*; *RA_405*) a phrase found in Justice Greaney's order, suggesting that publicity is to be

prevented. Whether that idea might have been appropriate the *Levy* case, where there was no issue of reputational harm or name-clearing, it is wholly ill-suited to one where a central purpose of the hearing is to allow the Petitioner to undo the public harm to her reputation. The judge below incongruously observed that "[p]ublic interest in this matter is high." *RA_405*. This is true, but it is a reason to have a public hearing, not to prevent one.

D. Petitioner Is Entitled to the Investigator 2 Report

Chair O'Brien cannot meaningfully be heard if she is not provided with Investigator 2's report, and well in advance of her hearing. Although Treasurer Goldberg was clear in her October 4 Notice that it would be "prudent to consider the findings of the second investigation in deciding whether reasons exist to remove[,]" that position has been abandoned.

Despite Treasurer Goldberg's change in position, Chair O'Brien should be provided with Investigator 2's report and to do so before the hearing is held. After the hearing on the temporary restraining order, the court held below, in part, that:

> [W]ithout Investigator 2's report, O'Brien cannot meaningfully present her case or meaningfully challenge the allegations about her conduct toward and concerning the Executive Director, a wholly separate basis for her suspension. Absent the report, O'Brien does not have the requisite explanation of the evidence against her as gathered by the investigator.
>
> …

> [T]he results of the lengthy investigation detailing the facts as determined by Investigator 2, some of which may impact, contradict, or overlap with the results of Investigator 1's investigation. Presumably, for example, Commissioners and Commission staff were interviewed by both investigators. Put simply, a meaningful opportunity to be heard requires understanding the full extent of the allegations you face and their factual underpinning. Being forced to defend oneself with partial information does not comport with basic due process.

RA_220-221 (internal citations omitted). Later, the court appeared to change course when stating:

> To the extent the results or report of the second investigation is not provided to the Treasurer or is no longer a basis on which the Treasurer relies for O'Brien's suspension or potential removal, then notice of the results of that investigation is not required. Thus, I agree that the hearing may be scheduled at least fifteen business days after (i) production of the second investigative report and an updated statement of reasons for suspension and termination; or (ii) an updated statement of reasons for suspension and termination indicating that the second basis [the subject of the second investigation]outlined in the October 4 Notice is no longer at issue.

RA_392-393 n. 5.

Allowing Treasurer Goldberg to shield Investigator 2's findings and report from Chair O'Brien—even if Treasurer Goldberg does not intend to rely on Investigation 2 in seeking to remove Chair O'Brien—violates Chair O'Brien's due process rights.[47] The overlap between Investigation 1 and Investigation 2 is

[47] As of the date of this filing, Treasurer Goldberg (or the CCC) has not produced Investigator 2's report and an updated statement of reasons for

undeniable. While Chair O'Brien does not know the full roster of purported witnesses Investigator 1 interviewed, let alone Investigator 2, it is more than likely that witnesses would be interviewed in both investigations. If Investigator 2 finds that certain witnesses Investigator 1 interviewed are not credible, then Chair O'Brien must be provided with Investigator 2's report so she can meaningfully cross-examine Investigator 1 and those she interviewed.

Chair O'Brien has a right to prove that the Collins charges were pretextual and that Investigator 2's report will be essential in order to show that there was never a good faith basis for the Collins' charges.

E. Chair O'Brien Should Be Provided With the Identities of the Unidentified Complainants

The lower court erred in declining to order Treasurer Goldberg to identify all persons whose complaints were relied upon by Investigator 1 and will be relied upon by the Treasurer at the hearing. This court has previously crystallized that "[i]f the plaintiff establishes that he has a constitutional right to a hearing, he should have notice of the specific charges, an opportunity to present witnesses, and, barring special considerations, an opportunity to cross-examine those who charge him with any wrongdoing on which the selectmen relied in discharging

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suspension and removal or an updated statement of reasons for suspension and removal that indicates Investigator 2's report and the Collins' charges are not part of the basis for removal.

him." *Stetson v. Bd. of Selectmen of Carlisle*, 369 Mass. 755, 765 (1976) (internal citations omitted). Without notice of the identity of the complainant(s), the right to specific notice will be illusory. How does one defend against a faceless informant? The court's substitute, that Petitioner can cross-examine to find out, it will then be too little, too late.

Shielding these supposed witnesses from Chair O'Brien serves no purpose. There are no "special considerations" here. That is not what due process means. Petitioner has no intention of retaliating against anyone who testifies, just as she expects that the Treasurer will act the same way toward her witnesses. In any event there are ample protections for government employees seeking to protect themselves from feared retaliation when filing complaints. *See* M.G.L. c. 151B; M.G.L. c. 149, § 185.

Although in a different context but comparable here, the 4th Amendment of the United States Constitution and the body of law interpreting it calls for the identification of witnesses in order to a fair hearing. When the unknown witnesses' testimony "may be relevant and helpful to the accused's defense[,]" then identification must be disclosed. *See Roviaro v. United States*, 353 U.S. 53, 62 (1957) (internal footnotes omitted). When there is an issue of who is telling the truth, i.e. Investigator 1 or Chair O'Brien, "disclosure of [the unknown witness] is

important to a fair determination of the case." *Com. v. Ennis*, 1 Mass. App. Ct. 499, 503 (1973).[48]

F. Irreparable Harm

For the reasons set forth above, the Petitioner has a likelihood of success on the merits her claim that she is entitled to the requested procedures. And, she will

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[48] Justice Douglas' enduring concurring opinion in *Peters v. Hobby*, 349 U.S. 331, 351 (1955) in which he condemned the then-practice of taking people's jobs on the basis of "faceless informers" has resonance here:

> Dr. Peters was condemned by faceless informers, some of whom were not known even to the Board that condemned him. Some of these informers were not even under oath. None of them had to submit to cross-examination. None had to face Dr. Peters. So far as we or the Board know, they may be psychopaths or venal people, like Titus Oates, who revel in being informers. They may bear old grudges. Under cross-examination their stories might disappear like bubbles. Their whispered confidences might turn out to be yarns conceived by twisted minds or by people who, though sincere, have poor faculties of observation and memory.
> Confrontation and cross-examination under oath are essential, if the American ideal of due process is to remain a vital force in our public life. We deal here with the reputation of men and their right to work—things more precious than property itself. We have here a system where government with all its power and authority condemns a man to a suspect class and the outer darkness, without the rudiments of a fair trial. The practice of using faceless informers has apparently spread through a vast domain. . . . It has touched countless hundreds of men and women and ruined many. It is an un-American practice which we should condemn. It deprives men of 'liberty' within the meaning of the Fifth Amendment, for one of man's most precious liberties is his right to work. When a man is deprived of that 'liberty' without a fair trial, he is denied due process.

face a substantial risk of irreparable harm in that she will "suffer a loss of rights that cannot be vindicated should [she] prevail after a full hearing on the merits." *Packaging Industries Group v. Cheney*, 380 Mass. 609, 617 (1980). The court below ruled that there will be no irreparable harm by proceeding with the hearing as now planned, because, "if dissatisfied, she can seek[] judicial review" afterwards. *RA_404-405*. However, this was in error for several reasons.

In the first place, she will lose any realistic opportunity to clear her name. As the court below opined in her first decision, "should a hearing go forward without adequate procedural protections, there is a significant risk that O'Brien would suffer irreparable harm to both her reputation and future employment." TRO Opp. That observation is still correct. *RA_222-223*[49]; *compare with RA_404*. The

[49] Where the court wrote:

> Goldberg argues that O'Brien cannot establish any irreparable harm where she has an adequate remedy at law, namely, she can seek review in the nature of certiorari in Superior Court pursuant to G. L. c. 249, § 4, and obtain orders vacating her removal and reinstating her as Chair. See Amorello v. Romney, 2006 Mass. LEXIS 857, *1, No. SJ-2006-0311 (July 26, 2006). However, Goldberg does not adequately address O'Brien's "stigma"-based liberty argument. The Appeals Court has recognized that "[a] liberty interest arises where . . . a public employee is discharged because of stigmatizing charges alleged by the employee to be false and which are disseminated to the public or are likely to be communicated to prospective employers." Fontana v. Comm'r of Metro. Dist. Comm'n, 34 Mass. App. Ct. 63, 67 (1993). **O'Brien's argument is not**

court has not explained her subsequent reversal of course, other than citing the one-page order by Justice Spina in *Amorello v. Romney*, SJ-2006-0311, Docket No. 21 (July 26, 2006), which relied upon the fact that the *Levy* plaintiffs ultimately achieved reinstatement and back pay. But as we have noted above, *Levy* was not a liberty interest/name-clearing case. Here, since the Treasurer has already vilified O'Brien once; O'Brien is entitled to correct the record, before Goldberg is allowed to make that remedy impossible by attacking her reputation again.

Judicial review after the fact would be an inadequate remedy in any event. Whether it is reviewed under M.G.L. c. 30A, § 14 (review of agency adjudicatory proceeding) or c. 249, § 4 (certiorari) there will be no de novo evidentiary hearing and O'Brien would then have the burden of proof, as opposed to now when that burden is held by the Treasurer. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 49 (2005) ("burden of persuasion in an administrative hearing challenging an IEP is properly placed upon the party seeking relief"); *Dir., Off. of Workers' Comp.*

> **merely about her reputation. It is that a negative decision by the Treasurer may impact her future employment options. I agree.** Although O'Brien herself identified and publicly disclosed the potentially stigmatizing charges at issue (namely, the racially insensitive conduct), should a hearing go forward without adequate procedural protections, there is a significant risk that O'Brien would suffer irreparable harm to both her reputation and future employment.

(emphasis added).

Programs, Dep't of Lab. v. Greenwich Collieries, 512 U.S. 267, 275 (1994), *citing Webre Steib Co. v. Commissioner*, 324 U.S. 164, 171, 65 S.Ct. 578, 582, 89 L.Ed. 819 (1945) ("claimant bears a 'burden of going forward with evidence ... as well as the burden of proof'").

Finally, there is no countervailing interest on the part of the Treasurer. A realistically fair proceeding cannot possibly harm any legitimate concern of the Treasurer or the public. It is easily arranged, is likely to produce the truth, and will avoid years of litigation to the benefit of no one.

V. Conclusion

For the reasons set forth above, Petitioner respectfully requests that the Single Justice issue the following relief:

a. Vacate the Decision;

b. Issue a preliminary injunction:

   i. Enjoining Treasurer Goldberg from acting as the finder of fact in any proceeding seeking to remove Chair O'Brien pursuant to M.G.L. c. 10, § 76;

   ii. Ordering Treasurer Goldberg to publicly hold any proceeding seeking to remove Chair O'Brien pursuant to M.G.L. c. 10, § 76 hearing;

   iii. Order Treasurer Goldberg to provide Chair O'Brien with the report of Investigator 2; and

   iv. Order Treasurer Goldberg to provide Chair O'Brien a complete and proper notice of all charges, including the identities of all complainants that form the basis of Treasurer Goldberg's decision to initiate removal proceedings under M.G.L. c. 10, § 76.

c. Alternatively, given that this petition presents a pure question of law to which there is no appellate authority, Plaintiff is amenable to the Single Justice exercising its "broad discretion" to report the propriety of the Decision to a full appellate panel. *Ashford v. Massachusetts Bay Transp. Auth.*, 421 Mass. 563, 566 (1995) (internal quotations omitted); *see also Packaging Indus. Grp., Inc. v. Cheney*, 380 Mass. 609, 613 (1980). This process was recently used in *Frechette v. Dennis Brown*, et al, 2023-J-0273 (June 29, 2023) (Rubin, J.).

d. Award such other and further relief as this Court deems equitable and just.

Respectfully submitted,
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Dated: January 19, 2024

CERTIFICATE OF SERVICE

Pursuant to Rule 20.0(d) of the Appeals Court Rules, I, William E. Gildea, hereby certify that, on January 19, 2024, I caused a copy of the foregoing to be filed in the Civil Clerk's Office for the Suffolk County Superior Court by electronic filing through service provider eFileMA, and served by email on opposing counsel as follows:

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