IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEONARD MAZZOLA, *Plaintiff*, vs. **ANTHONY TOGLIATTI**, *et al.* *Defendants.*	Case No. 1:19-CV-02519 Judge James S. Gwin Magistrate Judge David A. Ruiz

PLAINTIFF LEONARD MAZZOLA'S MOTION FOR RECONSIDERATION OF QUALIFIED IMMUNITY GRANTED TO DEFENDANT GREGORY O'BRIEN

Plaintiff Leonard Mazzola respectfully requests that the Court reconsider its October 15, 2020 Order (Doc. 147) only to the extent that it found Defendant Gregory O'Brien entitled to qualified immunity and dismissed the 42 U.S.C. § 1983 claim against him for First Amendment retaliation. After the Court granted Defendant O'Brien qualified immunity, Defendants produced new evidence on October 19 and 20, 2020 under the Court's order compelling production of documents and testimony previously withheld as privileged (Doc. 162), and this new evidence revealed that Defendant O'Brien exercised discretion and decisionmaking authority to retaliate against Mr. Mazzola.

A memorandum in support follows.

EXHIBIT 1

ISSUE PRESENTED

District courts may reconsider judgments based on new evidence. The Court granted qualified immunity to O'Brien, finding that the evidence didn't show he acted in a discretionary, decision-making capacity. But new evidence shows that O'Brien wasn't sure what discipline the City was planning but still chose to tell the union lawyer the City "would" demote Mazzola and, for purported dishonesty, seek to disqualify him from testifying—and consider firing him. Should the Court reconsider qualified immunity?

FACTUAL AND PROCEDURAL BACKGROUND

I. The Court ordered Defendants to produce evidence that was not available to the Court when it decided Defendant O'Brien was entitled to qualified immunity.

On October 14, 2020, the Court, through the Magistrate Judge, granted Mr. Mazzola's Motion to Compel Testimony of Defendant Gregory O'Brien on Specific Subject Matters or, Alternatively, Determine His Legal Unavailability and to Compel Production of Sufficient Privilege Log with In Camera Review of Emails Withheld as Privileged.[1] The order held that attorney-client privilege didn't apply to five specific subject areas and that Mazzola was entitled to additional deposition testimony and documents from Defendant O'Brien within these areas.[2] Before O'Brien had produced any new evidence or testimony, the Court entered an order granting qualified immunity to him the next day, October 15, 2020, because his "involvement was largely limited to relaying information."[3]

The Court explained that "Defendant O'Brien, Defendant City's law director, testified that he told union lawyer Phillips that the City planned to punish Mazzola and 'expected Phillips' to relay that information."[4] The Court noted that "[t]he record does not show that Mr. Mazzola ever saw" Defendant O'Brien's March 28, 2019 email to union attorney Robert Phillips "outlin[ing] the City's potential charges against Mazzola."[5] The Court ruled that this evidence was insufficient to prove that

[1] Ord., Doc. 146.
[2] Ord. 6, Doc. 146.
[3] Ord. 16, Doc. 147.
[4] *Id.*
[5] *Id.*

Defendant O'Brien "was acting in a 'discretionary' capacity to violate Mazzola's First Amendment rights" or that he "clearly violated Mazzola's rights" or "had any decision-making input into the alleged retaliation scheme."[6]

At the October 15, 2020 pretrial conference, shortly after the Court had entered its summary-judgment order, the Court orally ordered Defendants to submit the documents identified in the privilege log for *in camera* review and to produce Defendant O'Brien for deposition on October 20, 2020. After filing a notice of interlocutory appeal on the Court's denial of qualified immunity to Defendant Kilbane[7] on October 16, 2020, Defendants City of Independence, Kilbane, and O'Brien filed a notice advising that they had produced the documents to the Court.[8]

On October 19, 2020, the Court compelled these Defendants to produce, by 4:00 p.m. that day, 41 previously withheld documents in their entirety, 6 previously withheld documents with redactions for privileged portions, and 9 previously produced but redacted documents with redactions removed.[9] Defendants timely produced the documents,[10] and Defendant O'Brien gave deposition testimony as scheduled on October 20, 2020.[11]

II. The documents produced October 19, 2020 and Defendant O'Brien's testimony of October 20, 2020 revealed new evidence of his involvement in Defendants' adverse actions against Mr. Mazzola.

A. In his non-privileged March 25, 2019 call with union attorney Robert Phillips, Defendant O'Brien conveyed the exact threats Mr. Mazzola has alleged since filing his complaint.

Defendant O'Brien testified at his first deposition of July 30, 2020 that he did not remember the content of his non-privileged telephone call(s) with union attorney Robert Phillips about the

[6] *Id.*
[7] Defs.' Not. of appeal, Doc. 154.
[8] Defs.' Not. of prod. of emails to Court, Doc. 157.
[9] Opin. and Ord. 2–4, Doc. 162.
[10] Defs.' Not. of prod. of emails pursuant to Oct. 19, 2020 Ord., Doc. 163.
[11] Dep. of Gregory O'Brien, Oct. 20, 2020, Doc. 172-1 (cited excerpts attached as **Ex. 1**).

investigation of Mazzola.[12] He testified in July that he didn't remember if he spoke to Phillips about: whether the City considered demoting Mr. Mazzola,[13] whether the City was considering reporting Mazzola to the County prosecutor for addition to the *Brady/Giglio* list of dishonest officers,[14] nor whether then-Lieutenant Mazzola could avoid discipline by retiring.[15] The newly produced documents, along with Defendant O'Brien's new deposition testimony, show that he did, in fact, talk to Phillips about all three topics.

Defendant O'Brien "was summoned out to the Mayor's office" on Friday, March 22, 2019, where he learned "what the investigation of Mr. Mazzola entailed[,]"[16] and "agreed to approach Bob Phillips and see what he had to say about this whole matter."[17] Defendant O'Brien then spoke with Phillips on Monday, March 25, 2019, and he summarized that call in an email he sent that day to Defendants Kilbane and Togliatti and City Human Resources Director Leticia Linker.[18]

According to that email, Defendant O'Brien and Phillips "discussed the areas that a pre-disciplinary hearing would cover: (1) circumventing the chain of command, (2) overt disregard for directives of a superior officer; and (3) lying/dishonesty."[19] Defendant O'Brien "informed Bob the City would not be seeking [Mazzola's] termination and provided that we would demote Lenny to patrol officer."[20] They then "discussed the viable alternative of Lenny retiring at his current grade

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[12] Dep. of O'Brien 13:4–13, Jul. 30, 2020, Doc. 81 (excerpts at **Ex. 2**) ("Q: In general, what was—I guess how would you characterize the nature of the communications you had with Bob Phillips during the time period we've mentioned between when the investigation started and when Mr. Mazzola retired? A: Very limited. I don't recall more than, like I said, two or three phone calls with Bob, brief phone calls. Most of our communication was done via emails.")
[13] *Id.* at 19:24–21:12.
[14] *Id.* at 21:13–20.
[15] *Id.* at 40:3–21.
[16] O'Brien Dep. (Oct. 20, 2020) at 130:10–16.
[17] *Id.* at 130:17–20.
[18] Email from O'Brien to Kilbane, Linker, and Togliatti sent Mar. 25, 2019 at 2:41 p.m., Ex. 22 to O'Brien Dep. of Oct. 20, 2020 (included in **Ex. 1**).
[19] *Id.*
[20] *Id.*

without Bill Evans [*sic*] report being created."[21]

Defendant O'Brien and Phillips also talked about "an arbitration that included, in part, dishonesty disqualifiers[,]" and when Phillips took the position that "a '*Brady* disqualifier' only occurs when there has been an adjudication of the officer's deception[,]" O'Brien "reminded Bob that would include an arbitration in [O'Brien's] opinion."[22] Defendant O'Brien then went further and "informed Bob that the City would be left with whether Lenny could serve as a police officer if he was disqualified as a witness because of dishonesty."[23] He "told Bob if, after an arbitration, it was found that Lenny could not serve as a witness[,] then at that point the City may take the position he cannot serve an essential function of his position[,] which could affect Lenny's employment."[24]

In his second deposition, Defendant O'Brien confirmed that his March 25, 2019 email accurately described that conversation with Phillips.[25] He admitted talking to Phillips about how Mazzola could retire to avoid discipline,[26] how an arbitration in this disciplinary matter would include *Brady* dishonesty disqualifiers, and how (in his opinion) an arbitration would be sufficient "adjudication" to disqualify Mazzola from testifying.[27] O'Brien expected Phillips to talk to Mazzola about this information.[28]

But when asked about the truth of the *facts* in this email—as distinct from the truth of *what he told Phillips*—Defendant O'Brien revealed that *he* decided what information to communicate to Phillips. When asked if it was true that, as the email stated, the City intended to ("would") demote Mr. Mazzola to patrol officer, Defendant O'Brien claimed: "No. That is not true."[29] He claimed

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[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] O'Brien Dep. (Oct. 20, 2020) at 128:1–7.
[26] *Id.* at 133:1–6.
[27] *Id.* at 133:7–20.
[28] *Id.* at 138:8–18.
[29] *Id.* at 139:8–12.

ignorance about the City's plans: "I knew the City was contemplating disciplining Mr. Mazzola. I was not part of any discussion of what that discipline would look like or what was the result."[30] In other words, although O'Brien didn't know what discipline the City was planning, *he* nonetheless told Phillips that the City "would" demote Mazzola.

On the basis of that same professed ignorance about the City's plans (as of March 25, 2019, anyway), Defendant O'Brien denied the truth of other facts contained in the email—even though he represented those facts to Phillips. He denied that the City planned to have Mazzola added to the *Brady/Giglio* list and that the City planned to take the position that Mr. Mazzola should be terminated if demoted and added to the *Brady/Giglio* list.[31] Defendant O'Brien admitted ***he*** told Phillips that "If after an arbitration it was found that Lenny could not serve as a witness, then at that point the City may take the position he cannot serve an essential function of his position which could affect Lenny's employment[,]"[32] but clarified that he "didn't know what the City was contemplating or not."[33] So the City didn't instruct him to relay that message to Phillips—he, in a discretionary act, decided to convey that ominous "hypothetical" (as he termed it) on his own.[34]

B. Defendant O'Brien received feedback about the City's plans to discipline Mazzola from the Human Resources Director and Defendant Kilbane.

After sending out the March 25, 2019 email, Defendant O'Brien received information about the City's plan to discipline Mazzola from City officials.[35] Human Resources Director Letitia Linker emailed a draft predisciplinary notice to Defendants O'Brien and Kilbane at 12:25 p.m. UTC on March 27, 2019.[36] The notice stated: "As the result of Lt. Mazzola's performance and actions, a

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[30] *Id.* at 139:13–17.
[31] *Id.* at 140:16–141:8.
[32] *Id.* at 135:20–136:15.
[33] *Id.* 136:21–23.
[34] *Id.* 136:21–137:3.
[35] *Id.* at 155:11–25.
[36] Email from Linker to O'Brien and Kilbane, Mar. 27, 2019, Ex. 23 to O'Brien Dep. of Oct. 20, 2020 (included in **Ex. 1**).

predisciplinary conference is scheduled for _____." (Blank in the original.) The notice listed the specific charges the hearing would address: "The meeting will address charges under: GENERAL ORDER: 502 Uniform Standards of Conduct[:] 11. Dishonesty or Untruthfulness[;] 12. Displaying Competent Performance and Achieving Competent Performance Results[;] 16. Insubordination[;] 17. Knowing, Observing, and Obeying All Directives, Rules, Policies, Procedures, Practices and Traditions[;] GENERAL ORDER: 601: Records Security and Privacy[; and] GENERAL ORDER: 108: Media Relations[.]"

The email[37] also explained the issues underlying these charges were "Lt. Mazzola's repeated failure to follow departmental regulations as well as orders and direction of the Chief" including "creating and implementing performance standards inconsistent with the Chief's directive and without his knowledge or approval";[38] "communicating police operational matters not known to the Chief with City officials and department staff";[39] "violating order regarding communication of police matters";[40] "dishonesty while participating in an investigation conducted by a third party as evidenced by failure of a polygraph";[41] and "failure to follow operational directives."[42]

Defendant O'Brien testified that the facts contained in the draft notice from Linker were "not the facts that [he] used to formulate materially [his] response to Mr. Phillips"[43] because he received multiple emails from "various individuals" to help him prepare his bullet-point email to

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[37] Email from Linker to O'Brien and Kilbane, Mar. 27, 2019, Ex. 23 to O'Brien's Dep. of Oct. 20, 2020 (included in **Ex. 1**).
[38] Defendant O'Brien related this charge to "a conversation [Mr. Mazzola] had with Mayor Togliatti about [Mr. Mazzola's] point system versus the point system that the police department wanted to implement." O'Brien Dep. (Oct. 20, 2020) at 159:21–160:10; *see also, id.* at 164:10–23.
[39] When Mr. Mazzola's counsel asked whether this charge encompassed Mr. Mazzola speaking to then-Mayor Togliatti about the traffic-ticket quota. Defendant O'Brien testified: "I believe the issue was Lieutenant Mazzola's performance standard metrics policy versus the Chief's policy. Yes, I believe that was the purpose of him going to see Mayor Togliatti." *Id.* at 153:9–25.
[40] Defendant O'Brien claimed he did not remember the basis for this charge, but it appears intended to represent Mazzola's alleged "communication of police matters" with the media. *Id.* at 154:5–18.
[41] This charge is self-explanatory.
[42] Defendant O'Brien did not explain this charge.
[43] *Id.* at 161:4–14.

Phillips.[44] He chose to base his bullet-point response to Phillips—the email sent March 28, 2019 at 11:57 a.m.[45]—upon communications from Defendant Kilbane.[46]

C. Defendant O'Brien's March 28, 2019 email to Defendants Kilbane and Togliatti and the Human Resources Director showed that he participated in making decisions about Mazzola's retirement.

On March 28, 2019, Defendant O'Brien sent an email to Defendant Kilbane, copying Defendant Togliatti and Linker, advising that after he had hit "send" on "the email below" (which was fully redacted from production), Phillips called to advise that "he took good notes from our previous discussion [of March 25, 2019] and met with Mr. Mazzola"[47] and that "[b]ased upon that discussion…Lt. Mazzola has decided to retire."[48] Defendant O'Brien explained that he still needed to send the bullet-point email explaining the City's planned discipline to Phillips "as he wants to share the information with Lt. Mazzola to support their discussion and his decision to retire."[49] Defendant O'Brien took it upon himself to reassure Phillips that he would personally handle "the written resolution of finalizing of Lt. Mazzola's retirement[.]"[50]

When listing several of the "terms" Phillips requested, Defendant O'Brien gave his opinion that he believed it was important for the City to issue a communication "that Lt. Mazzola is retiring and that we wish him well."[51] He also stated that he believed it was important for the City Council and Mayor to provide a "retirement presentation" like they had done "for other retiring police officers" because that "will allow him to leave the City with his 'head held high'[.]"[52] (Defendant Kilbane never did this.)

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[44] *Id.* at 155:11–25.
[45] *See* Defs.' Dep. Ex. 56 to O'Brien Dep. (included in **Ex. 1**).
[46] O'Brien Dep. (Oct. 20, 2020) at 162:4–23.
[47] Email from Linker to O'Brien and Kilbane, Mar. 27, 2019, Ex. 23 to O'Brien Dep. of Oct. 20, 2020 (included in **Ex. 1**).
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*

D. Defendant O'Brien chose to enumerate potential charges for Mr. Mazzola's speech in his "bullet-point" email to Mr. Phillips.

Defendant O'Brien knew that several of the acts of alleged misconduct he listed in his March 28, 2019 bullet-point email to Phillips were based on Mazzola's speech. Defendant O'Brien admitted that the email's reference to "[l]ying to the Mayor regarding performance measurement standards allegedly approved by the Chief" referred to Mazzola talking to Mayor Togliatti about the performance standard for patrol officers.[53] He also admitted that his email's reference to Mazzola's alleged "insubordination" by way of "usurping his superiors to directly communicate with City officials and employees" involved "incidents where Mazzola was going around Chief Kilbane and speaking specifically to Letitia Linker and/or the Mayor."[54] Defendant O'Brien knew that this included discussions with the Mayor about the performance standard or quota.[55]

E. Defendant O'Brien's imposed the 5:00 p.m. Friday deadline for Mazzola's retirement, one of the specific acts of retaliation alleged in the complaint.

Defendant O'Brien's second deposition revealed that he, individually, decided to impose the 5:00 p.m. deadline for Mazzola to submit his official notice of retirement to the mayor.[56] Mazzola alleged in his complaint that this arbitrary and sudden deadline, which interfered with the normal course of an officer's retirement, was one of the acts of retaliation Defendants took against him.[57]

F. Defendant O'Brien knowingly attempted to restrain Mr. Mazzola's speech after his retirement.

The new documents produced also included an email Defendant O'Brien sent to Defendant Kilbane and Human Resources Director Letitia Linker, copying Defendant Togliatti, on March 29, 2019 at 7:19 p.m.—two hours and 20 minutes ***after*** Mazzola emailed his official notice of retirement

[53] O'Brien Dep. (Oct. 20, 2020) at 164:10–23.
[54] *Id.* at 165:4–19.
[55] *Id.* at 165:20–166:5.
[56] *Id.* at 186:7–19.
[57] *See* First. Am. Compl. ¶¶ 129(e), 86–89, Doc. 7.

to Defendant Togliatti.[58] The subject line of the email was "Robert Phillips," and the email comprised two sentences: "Message delivered to Bob. He will mention it to Lenny about going quietly into the night."[59]

Defendant O'Brien testified that he communicated to Phillips "a concern that Lenny would actively—after his retirement actively go out of his way to contact police officers to disrupt the organization and procedures of the City. And what he does as a private citizen is fine, but wanted to make sure he didn't actively try to have the officers in the police department, you know, cause a ruckus."[60] (Defendant O'Brien did not describe the ruckus he feared.)

LAW AND ARGUMENT

I. The Court can and should reconsider its order granting qualified immunity to Defendant O'Brien.

The Court has discretion to reconsider its own judgments and orders under Fed. R. Civ. P. 59(e).[61] District courts entertain Rule 59(e) motions to reconsider when there is: "(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) to prevent manifest injustice."[62] This Court has often granted motions for reconsideration based on newly discovered evidence.[63] Here, as explained below, the Court should reconsider Defendant O'Brien's

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[58] Email from L. Mazzola to A. Togliatti sent 4:59 p.m. on Mar. 29, 2019, Doc. 93-1 ¶13, DFNTS_0000873–74 (included as **Ex. 3**).

[59] Email from O'Brien to Kilbane, Linker, and Togliatti, Mar. 29, 2019, Ex. 29 to O'Brien Dep. of Oct. 20, 2020 (included in **Ex. 1**).

[60] O'Brien Dep. at 177:12–20.

[61] *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 808-09 (N.D. Ohio 2010) ("The grant or denial of a Rule 59(e) motion is within the informed discretion of the district court, reversible only for abuse.") (quoting *Betts v. Costco Wholesale Corp.*, 558 F.3d 461, 467 (6th Cir. 2009)). *See also Santiago v. Ringle*, Case. No. 3:10-CV-173, 2012 WL 3263114 at *1 (N.D. Ohio Aug. 9, 2012), citing *Mallory v. Eyrich*, 922 F.2d 1273, 1282 (6th Cir. 1991) (District courts possess "inherent power to reconsider interlocutory orders and reopen any part of a case before entry of a final judgment").

[62] *Lonardo*, 706 F.Supp 2d at 808-09 (citing *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005)) (granting motion to reconsider where an affidavit provided information that the Court had not previously considered). *See also Boone v. Lazaroff*, 2020 WL 2711403, at *2 (S.D. Ohio May 26, 2020) *report and rec. adopted sub nom.* (citing *United States v. Reyes*, 307 F.3d 451, 455 (6th Cir. 2002)).

[63] *Younglove Const., LLC v. PSD Dev., LLC*, 767 F. Supp. 2d 820, 825 (N.D. Ohio Jan. 31, 2011) (granting motion for reconsideration of judge's order that insurance company must defend its client in a third-party claim because new evidence had become available regarding the claim); *Shearson v. U.S. Dep't of Homeland Sec.*,

qualified immunity with the benefit of this newly produced evidence for two reasons: First, the evidence directly contradicts the facts on which the Court relied to grant qualified immunity. Second, reconsideration is necessary to prevent the manifest injustice that would result if Defendant O'Brien retained qualified immunity after purposely withholding key evidence.

II. The Court should reconsider its order granting qualified immunity to Defendant O'Brien because the recently produced evidence directly contradicts the Court's factual premises for granting qualified immunity.

The Court granted qualified immunity to Defendant O'Brien based on the belief that his role was generally limited to that of "a conduit not a decisionmaker."[64] But attorneys who actively participate in retaliation aren't entitled to qualified immunity,[65] and the new evidence showed that Defendant O'Brien participated in the disciplinary-planning process and made decisions in Defendants' retaliation scheme. Just as the Court found that Kilbane and Togliatti "each participated in hiring, firing, and oversight of the police department in different ways and should have known that retaliation for First Amendment speech in the form of constructive discharge is not permitted[,]" because the new evidence showed that O'Brien participated in crafting strategic communications and deciding what threats to convey to Mazzola, and because he is law director, he should have known that First Amendment retaliation is unlawful.

A. Defendant O'Brien acted as a decisionmaker by choosing what disciplinary threats to communicate to Phillips in their March 25, 2019 call.

Defendant O'Brien's second deposition established that he made decisions about what to say

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Case No. 1:06-CV-1478, 2008 WL 928487, at *4 (N.D. Ohio Apr. 4, 2008) (granting Plaintiff's motion for reconsideration of summary judgment based on new evidence, where evidence was discovered after government admitted that plaintiff's request was broader than the search it initially conducted); *Berger v. Cleveland Clinic Found.*, Case No. 1:05-CV-1508, 2007 WL 9697535, at *2 (N.D. Ohio Nov. 6, 2007) (granting motion for reconsideration on "seminal issue" of class-action certification that was "neither briefed by the parties nor addressed by [the] Court" previously).

[64] Ord. 16, Doc. 147.

[65] *Buddenberg v. Weisdack*, 939 F.3d 732, 740–42 (6th Cir. 2019) (denying qualified immunity to attorney who participated in retaliation against plaintiff, including drafting notice of disciplinary action that included false statements, formulating unfounded disciplinary charges, and trying to intimidate employee into accepting a demotion; *id.*, 939 F.3d at 740).

to Phillips during the March 25, 2019 call. Although Defendant O'Brien's email memorializing the call said he "[i]nform[ed] Bob the City would not be seeking Mr. Mazzola's termination and provided that we *would* demote Lenny to patrol officer,"[66] Defendant O'Brien testified that they "talked about demotion, amongst other things"[67] but that—to his knowledge—it wasn't actually true that the City planned to demote Mazzola.[68] O'Brien testified that he knew the City planned to discipline Mazzola, but he didn't know how.[69] Similarly, although he wrote in his email that if Mazzola were added to the *Brady-Giglio* list, "the City may take the position he cannot serve an essential function of his position which could affect Lenny's employment[,]" if Mazzola were found dishonest during disciplinary proceedings—and admitted that he told Phillips that[70]—Defendant O'Brien testified that he didn't actually know if that's what the City planned to do.[71] But he did expect Phillips to relay what he said to Mazzola.[72]

If Defendant O'Brien's testimony was truthful (and he wasn't falling on his sword to protect his clients), it means that—by necessity—he exercised discretion to decide what to tell Phillips. Defendant O'Brien *independently* decided to tell Phillips that the City "would" demote Mazzola and subject him to an arbitration that included dishonesty qualifiers *and maybe even terminate him* without knowing if the City actually planned to do any of these things. The Court's factual finding on summary judgment that it's undisputed that O'Brien served as an "interlocutor" between the City and Phillips and not as a decisionmaker is therefore incorrect. Any inferences should be resolved in Mazzola's favor.

B. Defendant O'Brien acted as a decisionmaker by choosing what information to provide in his March 28, 2019 "bullet-point" email to Phillips about the City's plans

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[66] O'Brien Dep. (Oct. 20, 2020) at 129:17–131:12 (Emphasis supplied.)
[67] *Id.*
[68] *Id.* at 139:8–22.
[69] *Id.* at 139:13–17.
[70] *Id.* at 135:20–136:15.
[71] *Id.* 136:21–23.
[72] *Id.* at 138:8–18.

to discipline Mazzola.

According to Defendant O'Brien, after he received from "various individuals" information about the City's plans for Mazzola, he decided to compose his March 28, 2019 "bullet-point" email[73] to Phillips based on information from Defendant Kilbane.[74] Although O'Brien received Linker's March 27, 2019 email with the draft pre-disciplinary hearing notice, he claimed he did not use these facts "materially" to craft his email detailing the planned discipline.[75] This means that O'Brien exercised independent discretion in selecting content to include in the email that Phillips explicitly requested to share with Mazzola to support his "decision" to retire early in lieu of discipline.[76] This email provides another instance in which O'Brien's role was not limited to that of mere messenger.

C. Defendant O'Brien acted as a decisionmaker by unilaterally commanding Mazzola to submit his retirement notice by 5:00 p.m. on Friday, March 29, 2020.

Defendant O'Brien personally demanded that Mazzola submit his retirement notice by 5:00 p.m. on March 29, 2019 to secure the City's agreement to forego discipline.[77] This "limited time offer" to accept the City's terms subjected Mazzola to duress to make a hurried decision. This lightning-speed deadline forms part of the evidentiary basis proving constructive discharge.

Defendant O'Brien's weak justification that they were approaching the end of the month—apparently referring to Defendants' desire to cut off his salary and benefits as soon as possible[78]—only further demonstrates his retaliatory intent. If Defendant O'Brien genuinely "had no reason to believe that this was anything other than a retirement," as he claimed,[79] he would not have forced a longtime officer to make a last-minute decision to save the City a few bucks. He would have allowed

[73] Defs.' Dep. Ex. 56 (included in **Ex. 1**).
[74] O'Brien Dep. (Oct. 20, 2020) at 162:4–23.
[75] *Id.* at 161:4–14.
[76] *Id.* at 174:12–175:18.
[77] *Id.* at 186:7–19.
[78] *Id.* at 186:16–17; email from Linker to O'Brien, Kilbane, and Togliatti, Mar. 28, 2019, Ex. 29 to O'Brien Dep. of Oct. 20, 2020 (included in **Ex. 1**). ("Our benefits terminate at the end of the month, so if the termination date were April 1, for example, coverage extends through April 30.")
[79] *Id.* at 170:10–11.

Mazzola to choose his retirement date and would have allowed him at least 30 days to obtain coverage under his wife's health insurance, as Mazzola had requested.[80]

III. The Court should reconsider Defendant O'Brien's qualified immunity because the new evidence shows that that Phillips did, in fact, relay information from Defendant O'Brien about the City's planned discipline to Mazzola—so Defendant O'Brien's threats were effective.

The new evidence corroborates Mazzola's testimony by demonstrating that Defendant O'Brien did, in fact, convey the threats of demotion and the *Brady/Giglio* list through Phillips—the precise threats Mazzola testified he received.[81] The Court's order noted that no evidence in the record showed that Mazzola received Defendant O'Brien's March 28, 2019 bullet-point email to Phillips detailing the planned discipline, but the newly produced evidence showed that Phillips told Mazzola about the same planned discipline reflected in the March 28, 2019 email, plus O'Brien's specific threats of demotion and the *Brady/Giglio* list, just as Mazzola has alleged since filing his the complaint.[82]

That's no coincidence. Defendant O'Brien successfully conveyed these threats of discipline through Phillips, inducing Mazzola to accept the only "viable alternative" to career-destroying punishment: premature retirement.

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[80] Email from O'Brien to Kilbane, Togliatti, and Linker, Mar. 28, 2019, Ex. 25 to O'Brien Dep. of Oct. 20, 2020 (included in **Ex. 1**).

[81] *See* Dep. of Leonard Mazzola 304:21–306:3, 307:19–310:17, 312:1–8, Jul. 20, 2020, Doc. 67 (excerpts at **Ex. 4**) ("Bob contacted me on that Wednesday, and then, yeah, I believe this was Thursday. These things were going on. And he was, I believe, just talking to Greg O'Brien…Facing an option of being demoted down to patrolman and placed on a Brady/Giglio list was no choice at all." *Id.* at 304:16–24; "And at that point, facing the demotion down to a patrolman and placed on a Brady/Giglio list, I had to make the best decision for my family, for my pension, for my kids' future at that point. So there was really no option at all." *Id.* at 305:10–15); Mazzola Am. Decl. ¶¶ 7, 12, 13.

[82] According to Defendant O'Brien's March 28, 2019 email to his clients, Phillips told him he'd taken good notes on their March 25, 2019 conversation and provided that information to Mazzola in the interim. (Email from O'Brien to Kilbane, Togliatti, and Linker, Mar. 28, 2019, Ex. 25 to O'Brien Dep. of Oct. 20, 2020 (included in **Ex. 1**).) Mazzola testified and stated in his declaration that Phillips told him on March 27, 2019 that the City planned to demote him to patrolman and add him to the *Brady/Giglio* list for dishonesty—the same discipline O'Brien threatened to Phillips, according to O'Brien's own email of March 25, 2019. (Dep. of Leonard Mazzola 290:13–19, 304:16, 301:5–302:10; Am. Decl. of Leonard Mazzola ¶ 7.)

IV. The new evidence shows that Defendant O'Brien purposely threatened discipline for Mazzola's speech.

When Defendant O'Brien finally identified the factual bases for the City's planned discipline against Mazzola, he was forced to admit that many of the disciplinary considerations were predicated upon speech, specifically including Mazzola's protected speech to the Mayor and Human Resources Director about the quota. He even went so far as trying to impose a prior restraint on Mazzola's post-retirement speech by telling Phillips that Mazzola should "go quietly into the night" and refrain from talking to officers, even after he was a private citizen. Defendant O'Brien thus clearly violated Mazzola's rights by knowingly engaging in retaliation for protected speech.

V. The Court should reconsider Defendant O'Brien's qualified immunity to prevent manifest injustice.

When the Court decided qualified immunity, neither it nor Mr. Mazzola had access to the newly produced evidence. But Defendants did, and Defendant O'Brien shouldn't benefit from failing until October 1, 2020 to even produce the privilege log Fed. R. Civ. P. 26(b)(5) requires and knowingly withholding non-privileged information about his third-party communications with Phillips and the City's threats to Mazzola. O'Brien had ample notice before his July 30, 2020 deposition that he'd be asked about what he told Phillips and about the City's planned discipline.

But he inexplicably chose not to review the emails memorializing these conversations and facts because they were emails to his clients[83]—even though the *information* contained in the emails wasn't privileged. Defendant O'Brien could have and should have read those emails and testified about his conversations with Phillips and the City's plans at his first deposition—as distinct from confidential attorney-client communications regarding legal advice[84]—so the Court could consider

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[83] O'Brien Dep. (Oct. 20, 2020) at 126:3–18.

[84] *In re Grand Jury Subpoena (U.S. v. Doe)*, 886 F.2d 135, 137 (6th Cir. 1989) (quoting *In re Grand Jury Investigation*, 723 F.2d 447, 451 (6th Cir. 1983)); *In re OM Sec. Litig.*, 226 F.R.D. 579, 587 (N.D. Ohio 2005), citing *Reed v. Baxter*, 134 F.3d 351, 355–46 (6th Cir. 1998). The Court chose not to reach the crime-fraud exception to privilege. Doc. 146 at 5. But the newly disclosed emails show Defendants used O'Brien to further the crime of interference with civil rights under Ohio Rev. Code § 2921.45.

the information before ruling on summary-judgment motions. Instead he claimed memory loss regarding non-privileged communications. The interests of justice require reconsideration with the new evidence because this evidence was wrongfully withheld, and Defendants shouldn't benefit from their discovery shenanigans.

CONCLUSION

Plaintiff Mazzola respectfully requests that the Court reconsider its grant of qualified immunity to Defendant O'Brien. The Court's decision that O'Brien had no "decision-making input into the alleged retaliation scheme" and that O'Brien's "involvement was largely limited to relaying information" was based on false information. The newly discovered evidence that the Court ordered Defendants turn over disproves these premises: O'Brien was in the thick of it, making his own threats, including the threat that Mazzola would be jobless if he didn't retire. At a minimum, inferences on summary judgment should be drawn in Mr. Mazzola's favor. The Court should grant reconsideration and deny O'Brien summary judgment on the First Amendment–retaliation claim.

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Respectfully submitted,

/s/ Jessica S. Savoie

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