



*Judges Act, R.S.C., 1985, c. J-1*  
*Canadian Judicial Council*  
*Inquiries and Investigations By-laws,*  
SOR/2015-203

**REPORT OF THE REVIEW PANEL  
CONSTITUTED BY THE  
CANADIAN JUDICIAL COUNCIL  
REGARDING THE HONOURABLE D.E. SPIRO**

## I. Overview

[1] In reasons dated 5 January 2021, Associate Chief Justice K.G. Nielsen, as Vice-Chair of the Judicial Conduct Committee of the Canadian Judicial Council (“CJC”) referred a complaint concerning Justice D.E. Spiro of the Tax Court of Canada to a Judicial Conduct Review Panel (the “Panel”). The Panel was constituted under the CJC’s *Inquiries and Investigations By-Laws 2015* (“By-Laws”).

[2] The referral was based on a number of distinct complaints concerning the alleged conduct of the judge in respect of the potential appointment of Dr. Valentina Azarova to the position of Director of the University of Toronto Faculty of Law’s International Human Rights Program (“IHRP”).

[3] The task of the Panel is to determine whether an Inquiry Committee is to be constituted to inquire into the conduct of the judge. By s. 2(4) of the By-Laws, the Panel may do so:

only if it determines that the matter might be serious enough to warrant the removal of the judge.

[4] The test for removal of a judge from office is properly a stringent one. It has been articulated in a number of cases. The Supreme Court of Canada’s formulation of the test in *Therrien (Re)*, 2001 SCC 35 at para. 147, is often cited:

before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office.

[5] Based on the record before the Panel, which we detail below, we cannot conclude that the judge’s conduct in this matter “might be serious enough to warrant” his removal from office.

[6] The judge, as we will relate, has properly recognized the mistakes he has made in this matter. These errors are serious but in the end do not, in our view, warrant the imposition of the ultimate penalty for judicial misconduct.

[7] These are our reasons for so concluding.

## **II. Detailed Background**

[8] Before turning to the background, it is important to discuss the process undertaken by a Judicial Conduct Review Panel under the By-Laws. It begins with the consideration of a complaint or allegation concerning the conduct of a federally appointed judge by the Chairperson or Vice-Chairperson of the CJC's Judicial Conduct Committee.

[9] By s. 2(1) of the By-Laws, they may constitute a Judicial Conduct Review Panel if they determine that the complaint or allegation "on its face might be serious enough to warrant the removal of a judge".

[10] The Chairperson or Vice-Chairperson is primarily concerned with a facial inquiry based on the complaint before them. It is informed by the particulars of the complaint or allegation and any response received from the judge and their Chief Justice. But it is not a reflection of any fact-finding by the Chairperson or Vice-Chairperson. That individual is concerned with determining only if "on its face" the matter "might be" serious enough to warrant removal of the judge.

[11] The Judicial Conduct Review Panel in turn is also concerned with the threshold that the matter "might be serious enough" to warrant removal of a judge. However, under s. 2(4) of the By-Laws, the Judicial Conduct Review Panel may only direct an inquiry committee if it so "determines".

[12] The Chairperson or Vice-Chairperson is concerned with reviewing the matter "on its face"; the Judicial Conduct Review Panel must go further and make a determination that the matter "might be" serious enough to warrant removal.

[13] This suggests a more searching inquiry by the Judicial Conduct Review Panel into the matter. However, even here the Judicial Conduct Review Panel is constrained by the record placed before it. It does not hold a hearing, witnesses are not examined or cross-examined before it; it may not undertake investigations or gather new information: *In the Matter of the Honourable Gérard Dugré of the Superior Court of Québec*, CJC File 18-0318, 30 August 2019; *In the Matter of the Honourable F.J.C. Newbould*, CJC File 2015-203, 8 February 2017.

[14] The Judicial Conduct Review Panel does not make findings of fact. That said, in making a determination as to whether the matter might be serious enough to warrant the removal of the judge, it is necessary for the panel to weigh the evidence in the record before it to see if the case as presented reaches the “might be” threshold. How high a probability is “might be”? That is not stated anywhere but it surely reflects a threshold higher than “slim to none” but short of “on a balance of probabilities”. The “might be” threshold must reflect the very significant seriousness of the remedy of removal; the “crime” must fit the “punishment”.

[15] In addition to the various complaints we have received, we have reviewed submissions from the judge and a brief from his legal counsel and a submission from the judge’s Chief Justice (the latter is very favourable to the judge). The judge has also put before us the *Independent Review of the Search Process for the Directorship of the International Human Rights Program at the University of Toronto, Faculty of Law*, 15 March 2021, prepared by the Honourable Thomas A. Cromwell C.C. (“Cromwell Report”). The Panel specifically avoided reviewing the Cromwell Report and media articles concerning it until it was formally tendered to us by counsel for the judge.

[16] It is instructive to now relate the background of the matter in the context of the essential complaints received by the CJC.

### **The Essential Complaints**

[17] The various complaints received by the CJC were largely based on newspaper and media accounts surrounding the alleged withdrawal of an offer to appoint Dr. Azarova as Director of the IHRP. It was essentially said that the judge improperly interfered in the appointment process. In the words of one complainant:

An offer of employment in the Faculty’s International Human Rights Programme was made to Dr. Valentina Azarova and she accepted that offer in August. I understand that she was the unanimous choice of the academic members of the search committee.

The offer was later rescinded by Dean Iacobucci. I have been told that between the acceptance of the offer and its withdrawal, a sitting judge in the Tax Court made personal contact with the Faculty in respect of the wisdom of that offer.

The committee Chair was, I believe, advised that the Judge contacted the Faculty to express concern about Dr. Azarova’s academic research on the operation of international law in the context of Israel’s occupation of the Palestinian Territories. Shortly thereafter, Dr. Azarova’s offer was rescinded.

[18] This complainant further submitted:

The reports further allege that the interference may have been motivated by a judge's disapproval of Dr. Azarova's research on Israeli occupation of Palestinian lands. If that were so, it would be very troubling. It would put the integrity and impartiality of the Court in jeopardy. Any party or lawyer before it who is Palestinian, Arab, or Muslim could reasonably fear bias.

[19] These sentiments are reflective of the concerns expressed by other complainants.

### **The University of Toronto Appointment Process**

[20] The facts surrounding this process are somewhat complicated and detailed. Here we will endeavour to restrict our recital to the essential facts on the record before us necessary to give context for the determination we must make. A very comprehensive review of the process can be found in the Cromwell Report.

[21] In the summer of 2020 the Faculty of Law was in a search to fill the Director's position. The search committee had by late summer focussed on a preferred candidate – Dr. Valentina Azarova.

[22] Dr. Azarova is not a Canadian citizen herself although her spouse is. She currently lives and works in Germany and her ability to work for the University either remotely from Germany in the last quarter in 2020 and in person in Canada as of January 2021 became a central issue in the appointment process.

[23] We will restrict the background details to the involvement of the judge.

[24] The judge was a former student of the Faculty of Law. After graduation he has maintained a close relationship with the Faculty and has undertaken very significant fundraising efforts on behalf of the Faculty. By all accounts he is a very engaged alumnus and he has done much good work in supporting the law school financially and professionally. This financial support, both personally and through the judge's larger family, has been very significant. One could surmise that it was this background as distinct from the judge's judicial position that prompted the approach to him that we detail below.

[25] In this context through his work on funding campaigns, he became friends with Chantelle Courtney, the Assistant Vice-President Divisional Relations, Division of University Enhancement. Justice Spiro maintained contact from time to time with Ms. Courtney and on 30 August 2020 she emailed the judge asking for a social “catch up”.

[26] Prior to his appointment to the bench, Justice Spiro was on the Board of Directors of the Centre for Israel and Jewish Affairs (“CIJA”). According to its website CIJA is the “advocacy agent of Jewish federations across Canada” dedicated to “protecting Jewish life in Canada”. One of its priorities is “educating Canadians about the important role Israel plays in Jewish life”. The Vice-President, University and Local Partner Services for CIJA is Ms. Judy Zelikovitz. She of course came to know the judge through his work as a Director of CIJA.

[27] Rumours were apparently surfacing in at least Israel that Dr. Azarova was imminently to be appointed as Director of the IHRP. Dr. Azarova’s professional work and scholarly writing is felt by some in the larger community to be that of a “major anti-Israeli activist”. This possibility prompted Professor Gerald M. Steinberg, the President Institute for NGO Research (centred in Jerusalem) to start an email thread with a number of CIJA officials in Toronto including Ms. Zelikovitz.

[28] Professor Steinberg’s first email to, among others, Ms. Zelikovitz was sent on 2 September 2020 at 1:24 p.m. (we presume if it matters that these are Toronto times).

[29] Professor Steinberg noted his view that Dr. Azarova was “anti-Israel” whose academic work “is almost entirely focussed on promoting the Palestinian narrative, the Israel “apartheid” theme, war crimes, etc.” Professor Steinberg suggested a course of action in this email:

If someone could quietly find out the current status and confirm Azarova’s pending appointment, that would be very helpful.

The hope is that through quiet discussions, top university officials will realize that this appointment is academically unworthy, and that a public protest campaign will do major damage to the university, including in fund-raising.

I am preparing a short briefing sheet and would be happy to talk about this.

[30] At 1:44 p.m. on 2 September 2020, Ms. Zelikovitz emailed two other recipients of the Steinberg initiating email inquiring:

Is this something we can ask David Spiro about?

[31] At 10:41 a.m. the next day, one of the recipients of the Steinberg email and the Zelikovitz email responded:

I think you can approach him. He is friends with the Dean, Ed Iacobucci. I a [sic] copying him on this, as I don't think his reaching out to Ed compromises his judicial position. If I am wrong, David will so advise.

[32] Because the entire email thread was included in Justice Spiro's brief filed with the Panel by his counsel and because each email, including that culminating in the "cc: David Spiro" of 3 September 2020, included Professor Steinberg's original subject line "re: U of T pending appointment of major anti-Israeli activist to important law school position", we assume that Justice Spiro received the entire thread including Professor Steinberg's originating email outlining his proposed strategy for dealing with the matter – "The hope is that through quiet discussions, top university officials will realize that this appointment is academically unworthy, and that a public protest campaign will do major damage to the university, including in fund-raising."

[33] We also assume that Ms. Zelikovitz provided the judge with the memo Professor Steinberg promised in his originating email describing the objections to Dr. Azarova's appointment. A draft of what we would assume to be that memorandum is attached as the last page to Appendix "A" to the judge's brief filed with the Panel. It very critically reviews Dr. Azarova's professional background in some depth and it states:

Dr. Azarova's career is clearly devoted to anti-Israel advocacy, and the evidence indicates that she will use the position to promote her political agendas and a discriminatory focus on Israel, while ignoring other human rights concerns.

[34] Coincidentally, Ms. Courtney and the judge had arranged their "telephone catch-up" for 4 September 2020. That call was made and the parties apparently chatted about various matters affecting the faculty.

[35] According to Justice Spiro in his written response to the complaints dated 26 October 2020, he turned the conversation to the Azarova matter. In his words:

I did not tell Ms. Courtney, or anyone else at the University, that the candidate, Dr. Valentina Azarova, should not be appointed. I expressed no opinion, political or otherwise, on the merits of her scholarship or the political positions she had advocated. I did express the hope that sufficient due diligence would be done in advance of any such appointment to enable the University of Toronto and the Faculty of Law to respond effectively if and when criticism arose as a result of the candidate's appointment. I mentioned the matter to Ms. Courtney, at the end of a personal telephone conversation that she had scheduled with me, because I cared deeply about the University and its law school.

[36] Justice Spiro continued later in his response:

At no time during our conversation did I express any personal complaint, concern, disapproval, or displeasure in respect of Dr. Azarova's scholarship. My only concern was that the University and Faculty of Law should be prepared for what I had been told by Ms. Zelikovitz would likely be an adverse and highly public reaction.

To the extent that I described to Ms. Courtney the sources of such a reaction, it is possible that she understood me as expressing my own personal views. In retrospect, I should have made it clear to Ms. Courtney that I was not expressing my own personal views in describing the reaction that I feared might ensue.

[37] We consider this distinction between giving voice to a concern that a pending appointment might cause adverse publicity for the faculty, and active lobbying against the appointment based on a personal disapproval of the candidate, is of some importance. The former characterization suggests loyalty to the faculty and love of the institution as a motivation, the latter rather goes beyond that and suggests one immersing oneself in the political, social and cultural controversy. In drawing the distinction, we do not mean to suggest that while the latter characterization would clearly not be acceptable conduct, the former is. We will return to this point below.

[38] We have not had the benefit of any input from Chantelle Courtney. Mr. Cromwell did. We reproduce this substantial portion of the Cromwell Report (at p. 32) (the AVP is Ms. Courtney, the Alumnus is the judge):

As was previously mentioned, towards the end of the conversation on the stewardship call with the AVP, the Alumnus raised the appointment of a new IHRP Director. Their respective recollections of the conversation are consistent on the essential points.

The Alumnus asked the AVP whether she knew anything about the potential appointment, naming the Preferred Candidate and the position. The AVP replied that she did not. She remembered that the Alumnus indicated that as a judge he could not become involved but that he wanted to alert the University that if the appointment were made it would be controversial and could cause reputational harm to the University and particularly to the Faculty of Law. He wanted to ensure that the University did the necessary due diligence.



It is unclear to me exactly what was said about the reason for the controversy, but the AVP recalls that the Alumnus referred to the Preferred Candidate's published work on Israel. He did not provide the AVP with the source of his information or go into any further details about the nature of the concern.

[39] Justice Spiro did not have any contact with Dean Iacobucci. He specifically declined to approach the Dean. Justice Spiro at the same time as the Courtney conversation was speaking with another professor in the faculty with whom he had a close relationship. Justice Spiro raised the potential Azarova appointment and forwarded the Steinberg memorandum to this professor. This professor apparently did nothing with the information.

[40] Ms. Courtney learned that the Azarova appointment had not been finalized and so advised Justice Spiro. This appears to be the sum total of the judge's involvement in the matter. For her part, Ms. Courtney relayed the information from the judge to the dean of the faculty. The Cromwell Report suggests that the dean became more actively involved in the process thereafter.

[41] Of his conduct, the judge at his first opportunity in his letter to the CJC of 26 October 2020 acknowledged his mistakes and expressed his remorse. He said:

I begin by acknowledging that I raised a controversial matter with an official of the University of Toronto on September 4, 2020 in respect of an appointment, or prospective appointment, at the Faculty of Law. In doing so, I made a mistake. I deeply regret that mistake.

My contact with that official led to unintended consequences including raising a question about my absolute commitment to impartiality toward all litigants and counsel who appear before me in the Tax Court of Canada. I deeply regret that as well.

[42] On 6 September 2020 Dean Iacobucci advised the search committee that Dr. Azarova's appointment would not go ahead.

[43] The Cromwell Report concluded that on the basis of the materials Mr. Cromwell had reviewed and considered, he could not draw the inference that Justice Spiro's inquiry "factored into the decision to terminate the Preferred Candidate's candidacy" (p. 47).

[44] We said earlier that the distinction between actively campaigning against Dr. Azarova's appointment and on the contrary expressing concern that the appointment might subject the faculty to adverse criticism and publicity was of some importance. In confirming that the latter

characterization is the appropriate one on the facts here, the Cromwell Report is again useful. Mr. Cromwell stated (at p. 48) (the “Alumnus” is the judge, the “professor” is Professor Steinberg and the “Organization” is the CIJA):

Based on my view, it appears that the nature of the Alumnus’ inquiry has been misunderstood in much of the public discussion. It has at various points been described as an “objection” to the candidacy, as “external interference”, as a “complaint” about the candidacy, as “outside political pressure”, as an “attempt to block the appointment.”

Those descriptions adequately convey the intent of the professor’s approach to the Organization that led to the Alumnus being contacted by the Organization. However, having the benefit of a detailed account from both parties to the initial conversation, my conclusion is that the Alumnus simply shared the view that the appointment would be controversial with the Jewish community and cause reputational harm to the University.

This would hardly be news to anyone who had taken a moment or two to look on the Internet. As Selection Committee Member 1 pointed out in an email to the Assistant Dean, the controversial nature of the appointment would have been evidence “as soon as [the Preferred Candidate’s] name was announced.

### **III. Analysis**

[45] The complaints can be viewed as having at least two aspects. First it is felt to be serious misconduct for a judge to actively join with campaigners whose strategy is to prevent the appointment of a person to an influential position who is actively promoting interests at variance with those of the campaigners.

[46] Second, to the extent that joining such a campaign reflects on the personal beliefs of the judge, it encourages the view that the judge could not in the exercise of their judicial duties free themselves from the bias such personal views, it is argued, suggest.

[47] Dealing first with the issue of perceived bias, and to be specific it would be seen to be a bias against Palestinian, Arab or Muslim interests, nothing in the career of David Spiro or his work supports such a suggestion. The supporting letters we have received from persons of undoubted reputation and credibility speak of the judge as a highly ethical man of moderate views, of empathy for people of all backgrounds.

[48] One esteemed commentator said this of Justice Spiro:

I watched with admiration as his career developed and was delighted by his appointment to the Court. I knew he would be an excellent judge. He is a person of complete integrity with a powerful commitment to fairness. He is principled, thoughtful and committed to justice – just the sort of person we want on the bench. In the more than 30 years I have

known David, I have never heard a single ill-word about him in any context. He is widely respected and admired for his quiet, modest and principled approach to life.

[49] The finding of bias in the context of judging depends on this test:

... what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly

*Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at p. 394.

[50] In our view right thinking persons apprised of the conduct of Justice Spiro over his career and extending even to this affair – apprised in accurate terms, as opposed to the “facts” suggested in earlier media coverage of this matter, could not conclude that the case for the judge being biased as suggested has been made out. This is important because s. 65(2)(d) of the *Judges Act*, R.S.C. 1985, c. J-1, is forward looking. The subsection reads:

(2) Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of

...

(d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office,

...

the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.

[51] It will be seen that a judge’s current predicament may have a forward looking disability associated with it: where it has placed the judge in a position “incompatible with due execution of that office”. It is here where a current perception of bias may effectively prevent the judge from functioning in the future. Indeed that is a concern expressed by a number of the complainants. How can a Palestinian, Arab or Muslim have faith that the judge would deal with their issues free of bias?

[52] But that fear, we conclude, is based on misinformation and speculation that in fact is inaccurate as we have discussed. The conduct of Justice Spiro is not as originally characterized in the record before us.

[53] It is true that Justice Spiro held the position before his appointment as a Director of CIJA but most, if not all, appointees to judicial office have backgrounds that include similar associations or active community, religious or cultural involvement. How could it be otherwise?

[54] All judges carry the burdens of their past on appointment to office. We take a serious oath to effectively subordinate our personal views to the rule of law.

[55] *Yukon Francophone School Board Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, was a case involving French language education rights. The trial judge was involved as a governor of a philanthropic francophone community organization in Alberta. The Supreme Court of Canada did not view this fact by itself as contributing to a reasonable apprehension of bias:

[61] Membership in an association affiliated with the interests of a particular race, nationality, religion, or language is not, without more, a basis for concluding that a perception of bias can reasonably be said to arise. We expect a degree of mature judgment on the part of an informed public which recognizes that not everything a judge does or joins predetermines how he or she will judge a case. Canada has devoted a great deal of effort to creating a more diverse bench. That very diversity should not operate as a presumption that a judge's identity closes the judicial mind.

[56] The following observations by the court are apposite here:

[33] Judicial impartiality and neutrality do not mean that a judge must have no prior conceptions, opinions or sensibilities. Rather, they require that the judge's identity and experiences not close his or her mind to the evidence and issues. There is, in other words, a crucial difference between an open mind and empty one. Bora Laskin noted that the strength of the common law lies in part in the fact that

the judges who administer it represent in themselves and in their work a mix of attitudes and a mix of opinions about the world in which they live and about the society in which they carry on their judicial duties. It is salutary that this is so, and eminently desirable that it should continue to be so.

("The Common Law is Alive and Well — And, Well?" (1975), 9 *L. Soc'y Gaz.* 92, at p. 99)

[34] The reasonable apprehension of bias test recognizes that while judges "must strive for impartiality", they are not required to abandon who they are or what they know: *S. (R.D.)*, at para. 29, per L'Heureux-Dubé and McLachlin JJ.; see also *S. (R.D.)*, at para. 119, per Cory J. A judge's identity and experiences are an important part of who he or she is, and neither neutrality nor impartiality is inherently compromised by them. Justice is the aspirational application of law to life. Judges should be encouraged to experience, learn and understand "life" — their own and those whose lives reflect different realities. As Martha Minow elegantly noted, the ability to be open-minded is enhanced by such knowledge and understanding:

None of us can know anything except by building upon, challenging, responding to what we already have known, what we see from where we stand. But we can insist on seeing what we are used to seeing, or else we can try to see something new and fresh. The latter is the open mind we hope for from those who judge, but not the mind as a sieve without prior reference points and commitments. We want judges and juries to be objective about the facts and the questions of guilt and innocence but committed to building upon what they already know about the world, human beings, and each person's own implication in the lives of others. Pretending not to know risks leaving unexamined the very assumptions that deserve reconsideration.

(“Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors” (1992), 33 *Wm. & Mary L. Rev.* 1201, at p. 1217)

[57] In our view, the future fear of bias concern is not well-founded and cannot form the basis for directing the constitution of an Inquiry Committee in this matter.

[58] Turning to the first aspect, the spectre of misconduct associated with actively taking part in a campaign whose strategy was to prevent the appointment of Dr. Azarova, it is based on the inaccurate premise that Justice Spiro did so and indeed did so in direct contact with Dean Iacobucci. That did not occur on the record before us, a record again made much stronger and definitive with the addition of the Cromwell Report.

[59] What instead we have is an active, generous alumnus who has historically and admirably supported his law school, expressing concern that a potential faculty appointment will subject the institution to unwanted controversy and harsh publicity. It was, however, a serious mistake for the judge to pursue this course and he has admitted that in the strongest possible terms. In our view, however, it does not represent misconduct justifying the constitution of an Inquiry Committee.

[60] The CJC has provided guidance for Judicial Conduct Review Panels in *Judicial Conduct: A Reference Guide for Chief Justices*.

[61] In declining to send a matter to an Inquiry Committee, the Guide suggests (at 16):

Panels have also considered absence of bad faith as a key factor. Other relevant factors have included: an expression of confidence on the part of the judge's Chief Justice; a long and distinguished career; the absence of any similar conduct in the past.

[62] All of these factors favour the judge before us. In our view, it cannot be said on the record before us that, in the language of *Therrien*, the judge's conduct was:

... so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office...

[63] More to the point, in the words of s. 2(4) of the By-Laws, we cannot conclude:

that the matter might be serious enough to warrant the removal of the judge.

[64] We believe that the judge's acknowledgment of his mistakes and his sincere expression of remorse mean that further remedial action by the CJC or his Chief Justice is not required. We so advise the Vice-Chairperson.

Dated this 13th day of April, 2021

*Original signed*

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The Honourable R.J. Bauman, Chief Justice of British Columbia

*Original signed*

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The Honourable M.D. Popescul, Chief Justice of the Court of Queen's Bench for Saskatchewan

*Original signed*

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L'honorable Manon Savard, Juge en chef du Québec

*Original signed*

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L'honorable Denis Jacques, Cour supérieure du Québec

*Original signed*

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Dr. Jennifer N. Davis, Ph.D.