[ORAL ARGUMENT SCHEDULED FOR NOVEMBER 10, 2011]

No. 11-5092

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

MORRIS D. DAVIS,

Plaintiff–Appellee,

v.

JAMES H. BILLINGTON, Librarian of Congress
in his official capacity,

Defendant,

DANIEL P. MULHOLLAN in his individual capacity,

Defendant–Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
No. 1:10-cv-00036-RBW
(Reggie B. Walton, J.)

Brief for Plaintiff–Appellee

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September 2, 2011

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties.

Col. Morris D. Davis is the Plaintiff-Appellee in this matter. The Defendant-Appellant is Daniel P. Mulhollan. Dr. James H. Billington is a Defendant in the case before the district court; he was sued in his official capacity, and he is not a party to this appeal.

(B) Ruling Under Review.

The ruling under review is an Order denying Defendant-Appellant Mulhollan's motion to dismiss based on qualified immunity, which was issued by District Judge Reggie B. Walton on March 30, 2011 and entered as Docket Number 34. A Memorandum Opinion explaining the Order was issued the same day and entered as Docket Number 35. It is available at No. 1:10-cv-00036-RBW, 2011 WL 1237919 (D.D.C. Mar. 30, 2011).

(C) Related Cases

This case has not previously been before this Court or any other court. Counsel is not aware of any related cases.

/s/ Aden J. Fine
Aden J. Fine
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TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes

GLOSSARY

ALD	American Law Division of the Congressional Research Service
CAA	Congressional Accountability Act
CRS	Congressional Research Service
CSRA	Civil Service Reform Act
FDT	Foreign Affairs, Defense, and Trade Division of the Congressional Research Service
JA	Joint Appendix
LCR	Library of Congress Regulation
OSC	Office of Special Counsel

ISSUES PRESENTED

1. Is Mulhollan entitled to qualified immunity on Col. Davis's First Amendment claim where the Complaint shows that he terminated Davis for speaking on a matter of immense public concern and that the speech caused no harm to the Library or CRS?

2. Is Mulhollan entitled to qualified immunity on Col. Davis's due process claim where the Complaint shows that Mulhollan terminated Davis without providing fair warning that his speech was prohibited?

3. Is Col. Davis entitled to bring a *Bivens* claim because there are no statutory remedies or procedures to redress his termination and hence no special factors counseling hesitation against implying a remedy?

STATUTES AND REGULATIONS

Relevant regulations are attached as an addendum to this brief.

STATEMENT OF THE CASE

Col. Morris Davis was terminated from his employment at the Congressional Research Service ("CRS"), an arm of the Library of Congress ("Library"), for writing an Op-Ed in the *Wall Street Journal* and a Letter to the Editor of the *Washington Post* expressing his views about the Obama Administration's decision to prosecute some Guantanamo detainees in federal court and some in military commissions—a topic of immense public concern. Col. Davis alleges that the

termination violated his First and Fifth Amendment rights. He sued Daniel Mulhollan, who fired him, in his individual capacity, and Dr. James Billington, the Librarian of Congress, in his official capacity.

Both defendants moved to dismiss the case on the ground that Col. Davis had not stated a claim. Mulhollan also argued that he is entitled to qualified immunity and that Davis is precluded from bringing a *Bivens* claim. The district court (Walton, J.) denied the motions to dismiss, and Mulhollan filed this interlocutory appeal.

STATEMENT OF FACTS

On December 21, 2009, Mulhollan terminated Col. Davis from his position as the Assistant Director of the Foreign Affairs, Defense, and Trade ("FDT") Division of CRS. JA 23-24 (Compl. ¶¶ 55, 58). Mulhollan terminated him because of the views Davis expressed in an Op-Ed in the *Wall Street Journal* and a Letter to the Editor of the *Washington Post* (the "opinion pieces") regarding the Obama Administration's decision to prosecute some Guantanamo detainees in federal court and some in military commissions—a topic of great public concern related to Col. Davis's former position as the Chief Prosecutor for the military commissions at Guantanamo Bay. JA 21-24 (Compl. ¶¶ 43-59).

The opinion pieces are reproduced at JA 85-86 and JA 87. Col. Davis wrote them after the Obama Administration announced its decision in November 2009 to

try some of the Guantanamo detainees in federal court and others in military commissions. JA 21 (Compl. ¶¶ 43-44). He wrote them in his personal capacity, on his home computer, during non-work hours, based on his pre-CRS experiences. JA 22 (Compl. ¶ 48). Neither of the pieces criticized CRS, the Library, Mulhollan, or any of their employees or policies. JA 22-23 (Compl. ¶ 50). Nor did they criticize Congress, any Member of Congress, any political party, or positions associated with one party. JA 22 (Compl. ¶ 47). In fact, the pieces did not even mention CRS, the Library, or Col. Davis's current employment; Davis was identified only in his individual capacity as the former Chief Prosecutor living in Gainesville, Virginia. JA 22-23 (Compl. ¶¶ 50-51); JA 85-86; JA 87.

Col. Davis is a twenty-five year, decorated veteran of the United States Air Force. JA 13-14 (Compl. ¶¶ 12, 16). He entered active duty in 1983 after graduating from Appalachian State University and receiving his law degree from North Carolina Central University Law School. JA 62-63. From 2005 to 2007, he served as the Chief Prosecutor for the Department of Defense's Office of Military Commissions, which was created to prosecute suspected terrorists being held at Guantanamo. JA 13, 15 (Compl. ¶¶ 12, 18). Although he supported the military commissions, he resigned in October 2007 because he came to believe that the system then in place had become fundamentally flawed. JA 15 (Compl. ¶ 19). After his resignation, he became a vocal critic of the system, speaking, writing, and

testifying before Congress about his view of the system's flaws. JA 15-16 (Compl. ¶¶ 20-22).

Col. Davis was subsequently hired as the Assistant Director of the FDT Division of CRS in December 2008. JA 16-17 (Compl. ¶¶ 25-26). Mulhollan, the Director of CRS, was personally involved in his hiring. JA 16 (Compl. ¶ 25). Although the Library and Mulhollan were aware of Davis's background and his prior public writing and speaking about Guantanamo and the military commissions, they never told him that he could not continue that public writing or speaking or that doing so could harm CRS or imperil his ability to serve as a CRS employee. JA 16-17 (Compl. ¶¶ 25, 27).

Col. Davis's primary responsibility was to supervise the research and analysis of the employees within FDT. JA 17 (Compl. ¶ 29). He had no authority to establish substantive policy and little opportunity for significant contact with the public. *Id.* He was not expected to, and did not, author any reports or analyses on behalf of CRS. Nor were any congressional inquiries or requests for information directed to him. *Id.*

The FDT Division has responsibilities for foreign affairs, the Defense Department, and international trade and finance matters. JA 17-18 (Compl. ¶¶ 29-30). It does not have any responsibility for issues related to the military commissions. *Id.* Employees within the American Law Division ("ALD"), which

has a separate Assistant Director, have sole responsibility for military commissions issues. JA 18 (Compl. ¶ 31). Every congressional inquiry and all CRS reports and analyses related to the military commissions during Col. Davis's time at CRS were handled by ALD, not FDT, and Members of Congress and their staffs know that ALD is responsible for those issues. JA 18 (Compl. ¶¶ 31-32). ALD staff—not FDT employees or Col. Davis—have conducted CRS's seminars for congressional staff on the military commissions and related issues since 2001. JA 18 (Compl. ¶ 31).

During his tenure at CRS, Col. Davis often spoke publicly about his views on policy issues relating to the military commissions. JA 18-20, 22 (Compl. ¶¶ 33-39, 46). That speaking was consistent with the Library's regulation on outside speaking and writing, which "encourage[s]" Library employees to engage in outside speaking and writing. JA 97 (Addendum 3); JA 25 (Compl. ¶ 65). It was also consistent with decades of past practice by CRS employees, who, because of their expertise, regularly express their personal opinions in public on policy matters, including controversial issues. JA 28 (Compl. ¶ 77). This established tradition of outside writing and speaking has not harmed CRS or compromised its mission. *Id*.

CRS and Mulhollan knew about and permitted Col. Davis's outside speaking regarding the military commissions while he was Assistant Director. JA

18-20 (Compl. ¶¶ 33-40). For example, Davis spoke at a Human Rights Watch dinner, gave an interview for a BBC documentary, participated in a conference at Case Western Reserve University Law School, published a law review article in connection with that conference, and gave a speech at the Lawyers Association of Kansas City, all related to the military commissions. JA 18-20 (Compl. ¶¶ 33-38). Indeed, two months before the publication of the opinion pieces, a CRS attorney expressly informed Col. Davis that he could speak at the Case Western conference and publish the law review article concerning the military commissions. JA 19 (Compl. ¶ 35). Mulhollan also expressly approved his participation at that conference, so long as Davis participated during his personal time, because the subject of the conference—Guantanamo and the military commissions—had nothing to do with his CRS responsibilities. *Id.* Mulhollan similarly personally approved Col. Davis's participation at the Kansas City event which occurred one week before the opinion pieces were published. JA 20 (Compl. ¶ 38).

Col. Davis expressed views consistent with those published in the opinion pieces during these and other outside speaking engagements, but he was never disciplined or warned in any manner for publicly expressing those views, even though Mulhollan and CRS knew that he was speaking about the military commissions. JA 19-20 (Compl. ¶¶ 36, 38, 40). Indeed, at the Case Western conference, Davis made the same point that he later made in the opinion pieces—

that there should only be one system of justice, military commissions or federal trials, for all of the detainees facing prosecution. JA 19 (Compl. ¶ 36). His comments at the Case Western conference were published on the Internet via a webcast. JA 20 (Compl. ¶ 37). Media coverage of the Kansas City event similarly made clear that he had expressed views critical of both the Obama and Bush Administrations' policies relating to military commissions. JA 20 (Compl. ¶ 38). CRS routinely monitors all public appearances and publications of its employees, but neither Mulhollan nor anyone else ever informed Col. Davis that his speech at the Case Western conference or Kansas City event was harmful to CRS or to his effectiveness as a CRS employee. JA 20 (Compl. ¶ 37-38).

Col. Davis's public statements did not harm his effectiveness as a CRS employee. Indeed, on numerous occasions—including on November 10, 2009, the day before the opinion pieces were published in print— Mulhollan and others told Davis that he was doing a very good job, that he was well-liked and respected by his CRS colleagues, and that he was a good fit for CRS. JA 20-21 (Compl. ¶¶ 41-42). Consistent with that assessment, Mulhollan had repeatedly assured Davis that he was satisfactorily completing his one-year probationary period. JA 20-21 (Compl. ¶ 41).

That all changed after the opinion pieces were published. The following day, Mulhollan summoned Col. Davis to a meeting and expressed his disapproval

of the pieces, asking Davis to acknowledge that he was wrong to have published them and that First Amendment protections did not apply. JA 23-24 (Compl. ¶ 55). When Davis declined, Mulhollan told him that he would not be converted to permanent status because the opinion pieces had caused Mulhollan to doubt his judgment and his suitability. *Id.* The next day, Col. Davis was given a memorandum of admonishment that focused entirely on the opinion pieces. JA 24 (Compl. ¶¶ 56-57); JA 88-91 (memorandum of admonishment). One week later, Mulhollan notified Davis that he would be terminated and would thereafter be given a thirty-day temporary position as Mulhollan's Special Advisor. JA 24 (Compl. ¶¶ 58-59); JA 92-93 (notice of termination). Like the memorandum of admonishment, the notice of termination focused on Col. Davis's decision to publish the opinion pieces; unlike the memorandum of admonishment, the termination notice included purported additional reasons for Col. Davis's termination, none of which had previously ever been mentioned as an issue with Col. Davis's performance. JA 20-21, 24 (Compl. ¶¶ 41-42, 59); JA 93.

The memorandum of admonishment discusses the Library's regulation on outside speaking, LCR 2023-3, and CRS's policy purporting to clarify it. JA 89-90. The regulation expressly "encourage[s]" Library employees to engage in outside speech and does not prohibit employees from speaking or writing about any issues. JA 25 (Compl. ¶ 65); JA 97 (Addendum 3). It likewise states that

personal writings are not subject to prior review. JA 26 (Compl. ¶ 66); JA 97 (Addendum 3). CRS's policy similarly does not expressly prohibit employees from engaging in any outside speech or require prior approval. JA 26 (Compl. ¶¶ 68-69); JA 101-103 (Addendum 6-8). Instead, it advises employees to exercise "sound judgment" and "caution," but it does not discuss or define those terms. JA 27 (Compl. ¶ 71); JA 101-103 (Addendum 6-8).

Because Col. Davis had no statutory or administrative remedies, on January 8, 2010, he filed this lawsuit alleging that his discharge violated his First and Fifth Amendment and due process rights. He simultaneously filed a motion for immediate injunctive relief, which was supported by eight declarations from current and former CRS employees and others, and numerous exhibits, including a letter from Senator Lindsey Graham to Dr. Billington questioning the Library's decision to terminate Col. Davis for expressing his valuable views to the public. JA 3 (Dkt. No. 2-2 to 2-4). The district court (Walton, J.) found that Col. Davis was likely to succeed on the merits, but denied preliminary relief on the ground that he had not shown irreparable injury. JA 33-34, 35-39 (Order at 2-3, 4-8, Jan. 20, 2010).

Mulhollan subsequently moved to dismiss the claims against him on the grounds that Col. Davis had not stated a claim, that he was entitled to qualified immunity, and that the *Bivens* claims were precluded by the existence of a

statutory scheme. JA 40. Dr. Billington also moved to dismiss. JA 6 (Dkt. No. 27).

On March 30, 2011, the district court denied both motions. JA 106-146. The court first rejected Mulhollan's argument that Col. Davis's *Bivens* claims were precluded, reasoning that because Davis had no alternative statutory remedy or right to review, there were no special factors counseling hesitation against providing a *Bivens* remedy for these serious alleged constitutional violations. JA 122-26. It then held that Col. Davis had stated claims for violation of his First Amendment and due process rights. JA 126-36 (First Amendment); JA 140-42 (due process). Finally, the court rejected Mulhollan's claim of qualified immunity, holding that the rights he violated were clearly established. JA 144-46.

This interlocutory appeal followed.

SUMMARY OF ARGUMENT

Defendant Mulhollan is not entitled to qualified immunity because any reasonable government official would have known that terminating Davis for writing the opinion pieces and firing him without fair warning was not permissible. As the district court correctly held, Davis's factual allegations establish that his dismissal violated the First Amendment because he spoke about a matter of significant public concern, his speech did not criticize or even relate to CRS, and it did not harm CRS. Accepting the allegations as true, as this Court must on a

motion to dismiss, Mulhollan violated the clearly established constitutional principle that a public employer cannot dismiss an employee, regardless of that employee's status or position, on the basis of speech of significant public interest, where the speech caused no harm to the employer.

The Court should also reject Mulhollan's argument that he did not violate Col. Davis's clearly established right not to be dismissed without fair notice that his speech was prohibited. Because the Library's regulation on public speaking "encourage[s]" employees to engage in outside speaking, and because the Complaint establishes that Col. Davis and other CRS employees had previously been permitted to speak on similar topics without suffering any repercussions, well-established caselaw makes clear that Col. Davis did not have fair warning that his opinion pieces violated any policy.

Finally, the Court should reject Mulhollan's contention that the Civil Service Reform Act ("CSRA") precludes Col. Davis from bringing a *Bivens* claim. Such a result would be unwarranted, unjust, and at odds with the caselaw. Because CSRA's remedial scheme does not cover Library of Congress employees at all, there are no special factors counseling hesitation in the recognition of a judicial remedy. This is not a situation where the judiciary is being asked to second-guess Congress's determination as to which remedies or administrative procedures should be available. Other than this damages action, Col. Davis has no remedy or

review mechanism to right these constitutional wrongs. The district court was therefore correct to permit his *Bivens* claims to proceed.

STANDARD OF REVIEW

The district court's decision denying the motion to dismiss is reviewed *de novo*. *Estate of Phillips v. Dist. of Columbia*, 455 F.3d 397, 402-03 (D.C. Cir. 2006).

ARGUMENT

I. MULHOLLAN IS NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE HE VIOLATED COL. DAVIS'S CLEARLY ESTABLISHED FIRST AMENDMENT RIGHTS.

The district court correctly concluded that qualified immunity was not appropriate on the First Amendment claim because the allegations in the Complaint, accepted as true, establish that Col. Davis's dismissal violated his First Amendment rights, and because these rights were clearly established. JA 145-46. On appeal, Mulhollan challenges only the latter determination. Because the analysis of whether Davis has stated a valid claim for violation of his constitutional rights demonstrates that those rights were clearly established, this brief first discusses the district court's conclusion that his constitutional rights were violated to demonstrate why any reasonable official would have known that terminating Davis for his speech was not permissible.

A. Col. Davis Stated A Valid Claim For Violation Of His First Amendment Rights.

As the district court correctly concluded, Col. Davis stated a First Amendment claim under *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968), and its progeny, because the Complaint alleges that he was terminated for speech on a matter of significant public concern and that his speech did not harm CRS. *See O'Donnell v. Barry*, 148 F.3d 1126, 1133 (D.C. Cir. 1998).[2]

1. Col. Davis Spoke On A Matter Of Great Public Concern.

The district court found that "the plaintiff here engaged in speech pertaining to matters of immense public concern." JA 131. Mulhollan does not dispute this. Nor could he. Col. Davis sought to contribute as a citizen to one of the most important public debates of our time: the debate about the appropriate response of our democracy and our judicial system to the threats posed by international terrorism. JA 21-23 (Compl. ¶¶ 45-51). "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special

[2] To state a claim under *Pickering*, a complaint must establish that: (1) the speech was on a matter of public concern; (2) the speech was a substantial factor in the termination; (3) the employee would not have been terminated but for the speech; and (4) the value of the speech outweighed any possible harm to the employer. *O'Donnell*, 148 F.3d at 1133. Mulhollan does not dispute that the Complaint adequately pleads the first three prongs. This discussion therefore focuses on the fourth prong.

protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted); *see also Sanjour v. EPA*, 56 F.3d 85, 91 (D.C. Cir. 1995) (en banc) ("[C]urrent government policies" are "the paradigmatic 'matter[] of public concern.'" (alteration in original)).

2. Col. Davis's Speech Caused No Harm To CRS.

The burden is on Mulhollan to justify Davis's termination and to demonstrate that the harm to the government outweighs the First Amendment values underlying Davis's speech. *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). Where, as here, the speech "more substantially involve[s] matters of public concern," the government must make "a stronger showing" of disruption to its interests as an employer to overcome an employee's First Amendment rights. *Connick*, 461 U.S. at 152; *see Waters v. Churchill*, 511 U.S. 661, 674 (1994) (where an employee has "a strong, legitimate interest in speaking out on public matters . . . the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished"); *Eberhardt v. O'Malley*, 17 F.3d 1023, 1026 (7th Cir. 1994) (Posner, J.) ("The greater the potential social, as distinct from purely private, significance of the employee's speech, the less likely is the employer to be justified in seeking to punish or suppress it.").

Based on the allegations in the Complaint, the district court correctly held that Mulhollan could not make this "stronger showing" of harm, much less any showing of harm, sufficient to outweigh the significant First Amendment interests at stake. There is nothing in the Complaint that reasonably supports the conclusion that Col. Davis's speech caused or was likely to cause any harm to CRS or to the Library. To the contrary, the allegations in the Complaint establish that no such harm occurred and that any anticipation of harm was unfounded and unreasonable.

Specifically, the Complaint alleges that:

- The Library's regulation on speech "encourage[s]" outside speech, and no Library or CRS policy expressly prohibits any speech. JA 25-26 (Compl. ¶¶ 65, 68-69); JA 97 (Addendum 3) (LCR 2023-3); JA 101-103 (Addendum 6-8) (CRS Policy).

- The opinion pieces did not denigrate or criticize CRS, the Library, Mulhollan, or any of their employees or policies. JA 22-23 (Compl. ¶ 50).

- The pieces did not criticize Congress, any member of Congress, any political party, or any position associated with one party. JA 22 (Compl. ¶ 47).

- The opinion pieces were written in Col. Davis's personal capacity, on his own time, and with his own resources, based on his experience with the military commissions from his prior position, not on his work at CRS. JA 22-23 (Compl. ¶¶ 48-49, 51).

- The views expressed in the opinion pieces were similar to and consistent with views Col. Davis regularly expressed publicly before being hired to work at CRS. JA 15-16, 22 (Compl. ¶¶ 19-24, 46).

- Although the Library and Mulhollan were aware of Col. Davis's prior public writing and speaking about the military commissions, they did not tell him during the application process or at any time that continuing such expression could imperil his ability to serve as a CRS employee or harm CRS. JA 16-17 (Compl. ¶¶ 25, 27).

- Col. Davis had spoken publicly on this precise topic during his employment with CRS, without any repercussions or any indication that such speech was harming CRS, and with CRS's and Mulhollan's express approval. JA 18-22 (Compl. ¶¶ 33-42, 46).

- For decades, other CRS employees have regularly expressed their opinions on policy matters of public concern, including on controversial and high-profile issues, without compromising CRS's mission or otherwise harming it. JA 28 (Compl. ¶ 77).

As it was required to do, the district court accepted as true the factual allegations in the Complaint, *see Navab-Safavi v. Glassman*, 637 F.3d 311, 318 (D.C. Cir. 2011), and correctly concluded that they established that the value of Col. Davis's speech outweighed any possible harm to CRS.

Despite these allegations, Mulhollan contends that Col. Davis's speech harmed CRS by casting doubt on his commitment to agency policies, threatening to compromise the agency's ability to function, compromising Davis's effectiveness as the head of his division, raising questions about his impartiality, objectivity, and professional judgment, and harming his working relationship with Mulhollan. Def.'s Br. 28-32. These conclusory assertions are contradicted by the allegations in the Complaint, and Mulhollan has not countered those allegations by offering any evidence of harm or actual disruption. *See Navab-Safavi*, 637 F.3d at

318 ("[Q]ualified immunity cannot be based on a simple assertion by appellants without supporting evidence of the adverse effect of the speech on the governmental function." (internal quotation marks and alterations omitted)). In any event, such evidence would not be admissible on a motion to dismiss. *See id.* (holding that "where the interests underlying the *Pickering* balancing" are "fact-dependent" and not "evident from the pleadings," a claim of qualified immunity cannot be upheld "at the 12(b)(6) stage and should properly await some evidentiary development"). Mulhollan's speculative assertions of harm are therefore insufficient to meet his heightened burden of making a "stronger showing" of disruption sufficient to outweigh the significant public interest in Col. Davis's speech, especially in view of the specific allegations in the Complaint demonstrating that no such harm occurred. *See, e.g.*, *Navab-Safavi,* 637 F.3d at 318; *Am. Postal Workers Union v. U.S. Postal Serv.*, 830 F.2d 294, 303-04 (D.C. Cir. 1987) (rejecting claims of speculative harm to the "public's confidence" in government where there was "no evidence whatsoever, apart from a[n] [employer's] opinion, that [the employee's] speech interfered with a legitimate government interest"); *Am. Fed'n of Gov't Emps. v. Loy*, 332 F. Supp. 2d 218, 230-31 (D.D.C. 2004) (holding that a motion to dismiss should be denied where the government "speculatively assert[s] that [its] interest . . . [is] endangered" without

showing that the speech actually interfered with the efficient functioning of the office or discredited the employer).

In cases where courts have inferred harm, the speech directly involved a work-related dispute, and the likely harm was obvious. *See, e.g.*, *Connick*, 461 U.S. at 141, 151-52 (disruption could be inferred because plaintiff's speech took place in the office, was directed at superior's actions, and was a "mini-insurrection"); *Waters*, 511 U.S. at 664-66, 680-81 (speech was at work and criticized employer's practices). That is not the case here, where the speech did not occur at work, was not directed at co-workers, was not critical of the employers or supervisors, and did not even concern Col. Davis's employment at CRS. JA 22-23 (Compl. ¶¶ 47-51). As a result, the alleged harm from the opinion pieces cannot rest on an inference of significant disruption to CRS sufficient to overcome the high public interest in the speech.

Nor do the self-serving assertions of potential harm in the letters of admonishment and termination qualify as "evidence" of harm; they merely reflect Mulhollan's personal opinions and conjecture, and his attempt to justify the termination. *See Am. Postal Workers Union*, 830 F.2d at 303-04 (holding that an employer's "opinion" that "speech interfered with a legitimate government interest" is not sufficient to justify termination). Moreover, the concerns articulated in the letters are contradicted by the Library's own regulation which

"encourage[s]" public speaking by its employees and does not require advance approval. JA 25-26 (Compl. ¶¶ 65, 68-69); JA 97 (Addendum 3). As the Complaint alleges, CRS employees have engaged for decades in high-profile, often controversial, outside speech on public policy matters, similar to Col. Davis's, without harming the Library or CRS. JA 28 (Compl. ¶ 77). Indeed, Col. Davis had previously spoken about the same subject matter on several prior occasions while employed at CRS, with CRS and Mulhollan's explicit approval, and without any sign of harm to CRS. JA 18-22 (Compl. ¶¶ 33-42, 46). The district court therefore correctly concluded on this record that there can be no inference of harm from the opinion pieces. JA 133; *see O'Donnell*, 148 F.3d at 1138 (holding that government's claim that speech "could not safely be left unpunished" was weakened by fact that similar, prior statements by others had gone unpunished).

The district court also concluded that the allegations in the Complaint establish that the opinion pieces had nothing to do with Col. Davis's work at CRS and, thus, that Davis was not "required to use any extra degree of caution in the exercise of his speech." JA 131; *see, e.g.*, *Eberhardt*, 17 F.3d at 1027 ("The less [a public employee's] speech has to do with the office, the less justification the office is likely to have to regulate it."); *Navab-Safavi v. Broad. Bd. of Governors* (*Navab-Safavi I*), 650 F. Supp. 2d 40, 57-58 (D.D.C. 2009) (holding that where speech does not relate to the employment and takes place outside the workplace, the

government cannot justify an adverse action based upon potential disruption of the workplace), *aff'd*, *Navab-Safavi v. Glassman* (*Navab-Safavi II*), 637 F.3d 311 (D.C. Cir. 2011).

The district court was correct. The Complaint alleges specific facts demonstrating that military commissions issues were not within Col. Davis's or FDT's province, and that another division had sole responsibility for those issues. JA 17-18 (Compl. ¶¶ 29-32). Mulhollan disputes these allegations, *see, e.g.*, Def.'s Br. 35, but his assertions are contradicted by the facts alleged in the Complaint, and therefore must be rejected at this stage. *See Navab-Safavi II*, 637 F.3d at 318.

The district court therefore correctly held that Col. Davis has stated a valid First Amendment claim based on clearly established law.

3. The District Court Correctly Concluded That Col. Davis's Position Did Not Alter The Analysis.

In the district court, Mulhollan argued that Davis's position as a purported policymaker was dispositive of the *Pickering* balance. The district court therefore extensively analyzed the caselaw regarding speech by policymakers, correctly holding that Davis's speech was entitled to protection even if he were a policymaker, because his speech caused no harm to CRS. JA 128-136. Although Mulhollan now criticizes the district court for focusing on the policymaker issue, *see* Def.'s Br. 34-36, he nevertheless continues to contend that he could not have

known that it was improper to terminate a purportedly high-level employee like Col. Davis. That position was squarely rejected by this Court in *O'Donnell*.

Regardless of what position an employee occupies, he or she retains First Amendment rights, and courts must apply the *Pickering* balancing test to determine whether the value of the employee's speech is outweighed by harm to the employer. *O'Donnell*, 148 F.3d at 1136-39 (applying the *Pickering* test in a policymaker situation); *see also Rankin*, 483 U.S. at 390 (stating that "the responsibilities of the employee within the agency" is only a part of the *Pickering* balance). Thus, although the law "gives employers considerable leeway to ensure that high-level officials toe the party line . . . it does not give them unchecked power to silence them." *O'Donnell*, 148 F.3d at 1137. "In some cases, the public interest in a high-level official's speech will outweigh any interest in that official's bureaucratic loyalty." *Id.*; *see also McEvoy v. Spencer*, 124 F.3d 92, 103 (2d Cir. 1997) (holding that the policymaking status of a discharged employee is not conclusive in the *Pickering* balance).[3]

Where, as here, the Complaint adequately alleges that an employee's speech is on a matter of significant public concern and did not harm or even potentially

[3] In *Navab-Safavi II*, this Court commented that an issue not before it was whether a First Amendment claim would have been stated if the plaintiff there had been a publicly-recognized top executive. 637 F.3d at 317. *O'Donnell* makes clear that the status of the employee is not dispositive; rather, as always, the question turns on the four prongs of the *Pickering* test.

harm the employer's interests, the government cannot, on a motion to dismiss, meet its burden of proving an interference with its interests that outweighs the value of the employee's speech, even if the employee is a policymaker. *Am. Postal Workers Union*, 830 F.2d at 303; *see also Navab-Safavi II*, 637 F.3d at 318; *Catletti ex rel. Estate of Catletti v. Rampe*, 334 F.3d 225, 231 (2d Cir. 2003) (reversing summary judgment because "[e]ven if Catletti is considered a policymaker . . . [defendants] have presented no evidence of . . . potential disruption"); *Barker v. City of Del City*, 215 F.3d 1134, 1140 (10th Cir. 2000) (reversing summary judgment against policymaker where defendant "never articulated . . . how that speech actually, or even potentially, disrupted its governmental functions"); *Vojvodich v. Lopez*, 48 F.3d 879, 887 (5th Cir. 1995) ("[A] public employer cannot retaliate against an employee for expression protected by the First Amendment merely because of that employee's status as a policymaker.").

This case is not analogous to cases which have found that the harm stemming from a high-level employee's speech outweighs the employee's right to speak. In those cases, the speech involved criticism of the employer or the employee's superiors. For example, in *Hall v. Ford*, this Court found that a university's Athletic Director could be dismissed for publicly criticizing the Athletic Department and commenting on its possible violations of NCAA rules.

856 F.2d 255, 265 (D.C. Cir. 1988). In those circumstances, the employee's speech "reflected *a policy disagreement with his superiors* such that they could not expect him to carry out their policy choices vigorously." *Id*. (emphasis added). Similarly, in *McEvoy v. Spencer*, 124 F.3d 92 (2d Cir. 1997), an adverse employment action was justified because the "tremendous disruption to the public workplace likely to result from the *critical speech* of [a policy-level] employee would in most cases outweigh any First Amendment interests possessed by that employee." *Id*. at 103 (emphasis added). Indeed, *Pickering* itself emphasizes that criticism of the employer or one's superiors could be a factor justifying termination. *See Pickering*, 391 U.S. at 570 n.3 (contemplating situations in which "the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of *public criticism of the superior by the subordinate* would seriously undermine the effectiveness of the working relationship between them" (emphasis added)); *see also O'Donnell*, 148 F.3d at 1135 (holding that "it is especially disruptive for the high-level employees of a governmental agency to express public disagreement *with the agency's policies*" (emphasis added)).

By contrast, where, as here, the employee's speech is not critical of the employer or its policies, JA 22-23 (Compl. ¶ 50), and has nothing to do with the employer or the subject matter of the employee's employment, JA 18, 22-23

(Compl. ¶¶ 30-32, 50-51), there is no reasonable inference of disruption regardless of the employee's position. *See, e.g.*, *Hall*, 856 F.2d at 263 (justifying the policy-level employee doctrine by explaining that it makes sense to permit the President to discharge a policymaker "for a public expression of policy *contrary to his own*" (emphasis added) (internal quotation marks omitted)); *Bonds v. Milwaukee Cnty.*, 207 F.3d 969, 973 (7th Cir. 2000) ("The policymaking employee exception does not cover a government entity's refusal to hire based on the prospective employee's criticism of a different government entity for whom he had worked."); *Watters v. City of Philadelphia*, 55 F.3d 886, 898 (3d Cir. 1995) (rejecting policymaker argument where nothing plaintiff said "impugn[ed] the integrity of his superiors" and there was no evidence that he engaged in "complaining and negative criticism of his superiors" (internal quotation marks omitted)).

As *Hall* expressly states, an employee's policy-level status matters only if "the government interest in accomplishing its organizational objectives through compatible policy level deputies is implicated by the employee's speech," a requirement that is met only if, "[a]t a minimum, the employee's speech . . . relate[s] to policy areas for which he is responsible." 856 F.2d at 264. That is not the case here. Unlike in *Hall*, Col. Davis did not "express[] views on matters within the core of his responsibilities that reflected a policy disagreement with his superiors." *Id.* at 265. Davis's speech had nothing to do with the Library, CRS,

Mulhollan, their policy choices, his job responsibilities, or any policy areas for which Col. Davis was responsible. *See* JA 17-18 (Compl. ¶¶ 29-32). Instead, the opinion pieces related solely to his prior job, JA 22-23 (Compl. ¶¶ 50-51), and to his opinions about the military commissions—issues on which CRS (and Mulhollan) do not have a policy direction, and that, in any event, were not FDT's responsibility, JA 18 (Compl. ¶¶ 30-32).[4] Col. Davis's speech on military commissions policy, thus, does not even implicate the caselaw regarding policymakers. *Hall*, 856 F.2d at 264.

In any event, as the district court recognized, Davis was not a policymaker. Because Col. Davis did not have "broad responsibilities with respect to policy formulation, implementation, or enunciation," JA 17 (Compl. ¶ 19), and because he was not "a highly visible spokesman" for CRS, *id*., he was not a "policymaker" for purposes of the policymaker exception. *Hall*, 856 F.2d at 264-65; *see also O'Donnell*, 148 F.3d at 1136 & n.1 (requiring a "functional analysis of the

[4] Mulhollan seeks to link Col. Davis's opinion pieces to his job responsibilities and CRS policy by arguing that they cast doubt on his ability to uphold CRS's values of "impartiality" and "objectivity." Def.'s Br. 36. But by that reasoning, any expression of opinion on any subject could be labeled "subjective," that is, non-"objective," and, thus, a basis for termination as a violation of CRS values. That reasoning is flatly inconsistent with the Library's regulation "encourag[ing]" such speech, not to mention the First Amendment. In any event, CRS's statute only requires that employees act "without partisan bias," *see* 2 U.S.C. § 166(d), which means something far different than "objective" or "impartial." The opinion pieces were "without partisan bias"—they criticized the actions of both political parties.

employee's responsibilities," rather than an examination of rank, practical influence, or length of service); JA 130-31 (Mem. Op. at 25-26). While Col. Davis supervised approximately 95 employees and directed their research and analytical activities, JA 17 (Compl. ¶ 29), that alone does not mean that he was a substantive policymaker; it simply shows that he was a manager. That he had "some policy responsibilities" and was in charge of some issues relating to "policies" is not enough to include him as part of the "narrow band" of policymakers for *Pickering* purposes. *O'Donnell*, 148 F.3d at 1136 (holding that plaintiff was not a policymaker for *Pickering* purposes even though he was in charge of a number of Police Department facilities and instituted several reforms in their operations). The district court therefore correctly concluded that Col. Davis was not required to use any extra degree of caution in the exercise of his speech. JA 131.

Mulhollan's argument essentially boils down to the sweeping assertion that he reasonably believed that high-level officials at CRS can never publicly opine on controversial issues of national policy, even if their speech has nothing to do with their job duties and is not critical of CRS or a superior. *See* Def.'s Br. 30-32, 35-36. That assertion contradicts the Library's regulation "encourag[ing]" outside speech by *all* its employees, JA 97 (Addendum 3) (LCR 2023-3, § 3(A)), as well as this Court's caselaw, *see O'Donnell*, 148 F.3d at 1137.

B. Col. Davis's First Amendment Rights Were Clearly Established.

"For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (internal quotation marks omitted). Contrary to Mulhollan's assertions, *see* Def.'s Br. 33-34, there is no need for earlier decisions on "materially similar" facts, *id.* at 741. "[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and . . . a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question . . . ." *Id.* (internal quotation marks omitted).

Mulhollan frames the inquiry as whether it was clearly established that "the head of a division responsible for Defense Policy and Foreign Affairs, in a government agency charged with providing Congress with objective and impartial advice, had a constitutionally protected right to criticize publicly the Attorney General's policy . . . and to accuse the former Attorney General and former Vice President of 'fear-mongering.'" Def.'s Br. 26. That framing is excessively narrow. In *Navab-Safavi II*, this Court rejected a similar argument by the government that qualified immunity should apply because no court had considered the precise circumstances presented by that case: "It cannot be gainsaid that a person expressing her viewpoint is exercising an established constitutional right."

637 F.3d at 317. As in *Navab-Safavi II*, any reasonable official would have known that an employee's public expression of a viewpoint on a subject of broad public debate is protected by the First Amendment.

Mulhollan argues that he should be shielded from liability because it is allegedly "rare" for plaintiffs in *Pickering* cases to overcome a qualified immunity defense. Def.'s Br. 33. This Court rejected that argument in *Navab-Safavi*, coming to the opposite conclusion: *granting* qualified immunity in *Pickering* cases is rare at the motion to dismiss stage. 637 F.3d at 318 (holding that "where the interests underlying the *Pickering* balancing" are "fact-dependent" and not "evident from the pleadings," a claim of qualified immunity cannot be upheld "at the 12(b)(6) stage and should properly await some evidentiary development"); *see also Gustafson v. Jones*, 117 F.3d 1015, 1019 (7th Cir. 1997) ("Normally, application of the *Pickering* balancing test will be possible only after the parties have had an opportunity to conduct some discovery.").

Regardless, this is the quintessential case in which the *Pickering* plaintiff overcomes qualified immunity: Mulhollan terminated Davis for speaking in his personal capacity on a matter of significant public concern, despite the lack of any actual or reasonably likely harm to CRS. Taking those allegations as true, any reasonable official would have known that it was impermissible to terminate Davis for the opinion pieces. *Pickering*, 391 U.S. at 568-69. As Judge Posner held at the

motion to dismiss stage in a case in which the plaintiff alleged that he was punished for writing a novel: "This is such an elementary violation of the First Amendment that the absence of a reported case with similar facts demonstrates nothing more than widespread compliance with well-recognized constitutional principles." *Eberhardt*, 17 F.3d at 1028, *quoted in Navab-Safavi I*, 650 F. Supp. 2d at 63.

That Col. Davis was allegedly a policymaker does not change matters. When Mulhollan terminated Davis, it was binding First Amendment law in this Circuit that, regardless of an employee's position, a public employer cannot terminate him for speech on a matter of public concern unrelated to his job duties when the speech has not harmed the employer sufficiently to outweigh the First Amendment interests at stake. *O'Donnell*, 148 F.3d at 1137; *Hall*, 856 F.2d at 264; *see also Rankin*, 483 U.S. at 390 (stating that "the responsibilities of the employee within the agency" are only one part of the *Pickering* balance). Other circuits had come to the same conclusion. *See, e.g.*, *Vojvodich v. Lopez*, 48 F.3d 879, 887 (5th Cir. 1995) ("As far back as 1985, the established law in this circuit has been that a public employer cannot retaliate against an employee for expression protected by the First Amendment merely because of that employee's status as a policymaker."); *Catletti*, 334 F.3d at 231 (denying qualified immunity

because "[e]ven if Catletti is considered a policymaker, however, defendants' claim fails because they have presented no evidence of . . . potential disruption").[5]

Mulhollan also cannot argue that he was reasonably mistaken in his belief that the opinion pieces would harm CRS. As discussed earlier, Davis and other CRS employees have regularly engaged in similar outside speech for decades, without harming CRS. JA 18-22, 28 (Compl. ¶¶ 33-42, 46, 77).

Nor would a reasonable official have believed that terminating Davis was justified in the absence of harm on the ground that his supposedly "vehement opposition" to the Obama Administration's detainee prosecution policy and the "personal tone" of his speech impaired his effectiveness as a CRS supervisor and "called into question Davis's impartiality and objectivity generally." Def.'s Br. 31. As detailed above, the Complaint's allegations establish that Davis's speech was unrelated to his duties at CRS, and Mulhollan cannot create such a relationship by *ipse dixit*. There was therefore no reason to believe that the opinion pieces would affect Davis's effectiveness, especially given that his views on the military

[5] The qualified immunity result in *O'Donnell* cited by Mulhollan is inapposite, as the Court simply held that qualified immunity was appropriate there because it was unclear how valuable the employee's speech was to the public. *See O'Donnell*, 148 F.3d at 1138-39, 1142. Moreover, the speech at issue there was critical of the employee's superiors and, thus, had the potential to disrupt government interests. *Id.* at 1138. The opposite is true here—Col. Davis's speech was of significant public concern, and it was not critical of his employer or disruptive in any other manner.

commissions were well known before the pieces, and had never undermined his relationship with congressional committees, subordinates, Mulhollan, or anyone else, and had never caused Mulhollan to question his "impartiality and objectivity." Indeed, on the day before the opinion pieces' publication, Mulhollan told Davis, as he had on numerous prior occasions, that he was doing a very good job. JA 20-21 (Compl. ¶¶ 41-42).

Mulhollan also contends that a reasonable official would have considered it appropriate to terminate Davis because he failed to abide by his purported "responsibility to seek permission before" making such speech. Def.'s Br. 38. But Davis had no such responsibility. Both the Library regulation and the CRS Policy expressly state that advance approval is not required. JA 97 (Addendum 3); JA 101 (Addendum 6).[6] In any event, a policy requiring advance approval for all speech about matters on the congressional agenda—"paradigmatic 'matter[s] of public concern,'" *Sanjour*, 56 F.3d at 91—would almost certainly be unconstitutional under *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), and this Court's decision in *Sanjour*, 56 F.3d at 96 (invalidating a policy requiring advance approval of off-duty speech by government employees).

[6] Unlike the Library regulation, the CRS policy encourages pre-clearance of outside writings, but the CRS policy cannot contradict Library regulations. *See* 2 U.S.C. § 136.

It was also not reasonable for Mulhollan to believe that terminating Davis was permissible because publication of the opinion pieces allegedly fractured their relationship. Def.'s Br. 32. Permitting termination for protected speech based on a fractured relationship with a supervisor, even where the content of the employee's speech was unrelated to his job duties, would eviscerate public employee First Amendment protections. Anytime an employee engaged in outside speech, a supervisor could claim that the speech caused a fracture and then terminate the employee without consequence. In *Hall* and other decisions where termination was justified, in part, on the basis of a rift in the employer-employee relationship, that rift was caused by the plaintiff's direct criticism of the practices of his employer, *see Hall*, 856 F.2d at 265 (involving an Athletic Director publicly criticizing the practices and ethics of the Athletic Department), a situation not even remotely present here.

Finally, the Library's own regulation encouraging outside speaking was sufficient to provide Mulhollan with the requisite fair notice that terminating Col. Davis based on his speech was unconstitutional. *Hope*, 536 U.S. at 743-44 (holding that failure to follow employer's policy demonstrated that qualified immunity was not available).

Given this clearly established law, any reasonable official would have known that terminating Col. Davis based on his speech violated his First Amendment rights.

II. MULHOLLAN IS NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE HE VIOLATED COL. DAVIS'S CLEARLY ESTABLISHED RIGHT TO DUE PROCESS.

Mulhollan's termination of Col. Davis also violated Davis's clearly established right to due process. It is a basic principle of due process that "[a] statute or ordinance is vague either if it does not give fair warning of the proscribed conduct or if it is an unrestricted delegation of power that enables enforcement officials to act arbitrarily and with unchecked discretion." *Keeffe v. Library of Cong.*, 777 F.2d 1573, 1581 (D.C. Cir. 1985); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The requirement of clarity is especially stringent where the law interferes with the right of free speech. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). As the district court correctly held, Mulhollan's application of the Library's regulation and CRS's policy to Col. Davis was unconstitutionally vague because neither the policies nor past practice with respect to those policies gave Col. Davis fair warning that he could be terminated for expressing a public opinion on Guantanamo and the military commissions, matters on which he had previously

been permitted to speak with no repercussions. *See* JA 140-42, 145-46. This Court should affirm that decision.[7]

As the district court recognized, Col. Davis's claim is "strikingly similar" to the fair warning claim that prevailed in this Court's decision in *Keeffe v. Library of Congress*, 777 F.2d 1573 (D.C. Cir. 1985), and, for that reason, it states a clearly established violation. JA 145-46. In *Keeffe*, a CRS employee sought to become a delegate to the 1980 Democratic National Convention, an activity that had not previously been prohibited by CRS's policies or the Library's regulations. *Id*. at 1575-76. When the Library learned of Keeffe's intentions, it advised her that the conduct would violate the Library's regulations by creating "a potential conflict of interest with her official duty to render non-partisan advice." *Id.* at 1576. Keeffe challenged that advice internally. The Library's General Counsel rejected her challenge and upheld the advice, but failed to relay his decision to Keeffe prior to her departure for the convention. *Id.* at 1576, 1582. In the suit over Keeffe's subsequent discipline, this Court concluded that the Library's general policy about conflicts of interest had not given Keeffe fair warning of the new interpretation embodied in the General Counsel's decision. *Id.* at 1582. The Court noted, moreover, that CRS had previously countenanced nearly identical political participation by Keeffe and similar partisan political activity by other employees.

[7] The district court's dismissal of the facial challenge is not now on appeal.

Id. For that reason, Keeffe "knew only of the Library's permissiveness toward employee political activities, including her own." *Id.* Focusing on this past practice, this Court concluded that the Library's "course of dealing with [Keeffe] . . . was insufficient to place Keeffe on notice that the prior interpretation [of its conflict-of-interest policy] had changed." *Id.* Accordingly, the Court held that the Library and CRS's adverse action against Keeffe was unconstitutional, and it rebuked their conduct with these prescient words:

> We do not require that CRS announce in advance, for every conceivable set of facts, whether permission will be granted or denied. The Library, of course, *may* spell out its interpretations in advance. What the Library *must* do is give loud and clear advance notice when it does decide to interpret a particular regulation as a prohibition or limitation on an employee's outside activity. Without this notice, an employee is entitled to read the Library's overly long silence as assent.

Id. at 1583; *see also Bynum v. U.S. Capitol Police Bd.*, 93 F. Supp. 2d 50, 59 (D.D.C. 2000) (holding that "an unwritten interpretation of [a] regulation . . . clearly fails to give fair notice as to what conduct is prohibited").

Col. Davis's fair warning claim is virtually identical to the claim in *Keeffe*. As a result, any reasonable official would have known that Davis could not be terminated in these circumstances. As set out in the Complaint, the Library's regulation on outside speech and CRS's related policy do not expressly prohibit any speech. JA 25-26 (Compl. ¶¶ 65-69). To the contrary, the Library's regulation "encourage[s]" outside speaking and writing, JA 97 (Addendum 3); JA 25 (Compl.

¶ 65), and CRS's policy very generally advises CRS employees only to "think carefully," exercise "sound judgment" and "caution," and maintain "objectivity" when engaging in outside speaking and writing, JA 101-03 (Addendum 6-8); JA 27 (Compl. ¶ 71). Mulhollan and CRS's past practice confirms that Mulhollan never previously interpreted the Library's regulation or CRS's policy to prohibit speech like Col. Davis's speech on the military commissions. *See* JA 16-21 (Compl. ¶¶ 25, 27, 33-42). Mulhollan and CRS approved Col. Davis's outside speaking and writing on the military commissions on numerous occasions, including one instance just days prior to the publication of the opinion pieces in which Mulhollan expressly approved Davis's speaking at an event where he was to accept an award for his outspoken opposition to the politicization of the military commissions. *Id.* On at least one of those occasions, Col. Davis made precisely the same argument as in the opinion pieces. JA 19 (Compl. ¶ 36). Although Mulhollan knew or had reason to know about the subject matter of Col. Davis's outside speaking, JA 18-20 (Compl. ¶ 33-34, 37), he never told Davis prior to his termination that his speech on the military commissions would harm CRS or that it was impermissible, JA 20 (Compl. ¶ 40). Moreover, other Library and CRS employees "regularly write and speak and express their opinions in public on policy matters of public concern, including on controversial and high-profile issues." JA 28 (Compl. ¶ 77). Finally, the confusion and uncertainty that CRS's policy and Mulhollan's termination of

Col. Davis have engendered among CRS employees, JA 25, 27 (Compl. ¶¶ 63, 72-74), evidence the policy's inherent vagueness to those governed by it.

In short, as in *Keeffe*, Mulhollan applied a novel interpretation of the Library's regulation and CRS's policy on outside speech, despite prior approval of virtually identical speech by Col. Davis and others on similar high-profile speech. As the district court recognized, JA 140-42, these allegations state a clearly established claim that Mulhollan deprived Davis of the constitutionally required fair warning that he could be terminated for publicly expressing his personal views on the military commissions. As in *Keeffe*, "[s]urprise, in this instance, was unpleasant, unfair, and unconstitutional." 777 F.2d at 1583; *see also Wolfel v. Morris*, 972 F.2d 712, 717 (6th Cir. 1992) (finding no fair notice where plaintiffs were punished for circulating petitions even though they had previously been allowed to do so, as the "conduct . . . was 'virtually identical to conduct previously tolerated'" (quoting *Waters v. Peterson*, 495 F.2d 91, 100 (D.C. Cir. 1973))); *Adams v. Gunnell*, 729 F.2d 362, 369 (5th Cir. 1984) (holding that there was no fair notice where "[t]here is no evidence that any inmate had ever before been punished in connection with a petition; quite to the contrary, Dancy testified that he had signed two petitions before at Texarkana without sanction or other adverse consequence" (footnote omitted)).

Mulhollan makes three arguments on appeal. None has merit. First, he argues that Davis's vagueness claim fails at the outset because, as a probationary employee, Davis had no "property interest in continued employment." Def.'s Br. 41. That fact is irrelevant. Davis's due process claim is not based on a property interest. It is grounded on his *liberty* interest in free speech. *See*, *e.g.*, *Procunier v. Martinez*, 416 U.S. 396, 418 (1974), *overruled on other grounds*, *Thornburgh v. Abbott*, 490 U.S. 401 (1989). Because it is undisputed that Davis was terminated for his speech pursuant to a policy regulating speech, he was entitled to fair warning of the scope of that policy so as to avoid the chill of protected speech, whether or not he had a property interest in his employment. *See Rankin*, 483 U.S. at 383-84 (holding that even probationary employees may not be terminated for their protected speech); *Keyishian v. Bd. of Regents of the Univ. of State of N.Y.*, 385 U.S. 589, 604 (1967) ("'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'" (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963))).[8]

[8] Because Col. Davis's due process claim rests on a liberty interest, the "property interest" cases cited by Mulhollan, Def.'s Br. 41, are irrelevant. Moreover, Davis need not ultimately prevail on his First Amendment claim to establish a due process violation. Government actions that "directly impinge upon interests in free speech or free press" must comply with the due process clause "whether or not the speech or press interest is clearly protected under substantive First Amendment standards." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 575 n.14 (1972). This principle and the requirements of due process apply when the government seeks to punish or restrain speech pursuant to a speech-related

Second, Mulhollan argues that an agency's discretion in enforcement somehow allows application of the Library and CRS's policies without fair warning. Def.'s Br. 43-45. That argument is flawed because it ignores this Court's holding in *Keeffe* that an employer is required to give prior warning of new interpretations of policies before applying them to employees. 777 F.2d at 1582. Here, Mulhollan failed to do so. Moreover, his failure is not one of selective enforcement. *See* Def.'s Br. 43 (citing cases). Mulhollan and CRS expressly approved Col. Davis's prior speech on the same subject matter and similarly controversial speech by other employees. JA 16-21, 28 (Compl. ¶¶ 25, 27, 33-42, 77). Before reversing that consistent past policy of approval by reinterpreting the Library regulation or the CRS policy to prohibit such speech, Mulhollan was required to give fair warning.[9]

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prohibition, such as an obscenity statute or, as here, an employee-speech policy. *See id.* (citing cases involving direct regulation of speech).

[9] Mulhollan suggests that Davis's alleged violation of CRS's policy was so "egregious" that fair warning was not required. Def.'s Br. 44-45. That assertion directly contradicts the allegations of the Complaint, JA 28 (Compl. ¶ 77) ("Library and CRS employees regularly write and speak and express their opinions in public on policy matters of public concern, including on controversial and high-profile issues."), which control here. Those allegations were amply supported in Col. Davis's preliminary-injunction motion by examples of highly controversial, but unpunished, public statements by CRS employees, including a letter to the *New York Times* thanking President Bush for "the widespread knowledge that the United States engages in torture," and another published letter calling for the prosecution or impeachment of a sitting Supreme Court Justice. *See* JA 3 (Dkt. No. 2-3 (Decl. of Frederick Mulhauser Exs. A, C)).

Mulhollan's passing suggestion that the district court's rejection of the facial vagueness challenge is inconsistent with its upholding of the fair warning claim is also mistaken. Def.'s Br. 43. As an initial matter, the Library's policies are unconstitutionally vague.[10] But even assuming the contrary, there is no inconsistency. A clear regulation does not provide fair warning of a novel agency interpretation that is at odds with the text of the regulation and past practice. Moreover, the district court upheld the facial validity of CRS's policy based on its disclaimer provision, *see* JA 139-40, whereas it denied Mulhollan's motion to dismiss based on his novel application of the policy to the *content* of Col. Davis's opinion pieces, *see* JA 140-42. Those two holdings are consistent.[11]

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[10] CRS's policy is impermissibly vague because, among other things, it relies upon inherently ambiguous terminology—like "sound judgment," "caution," and "objectivity"—that fails to give notice of its reach or meaningfully to curb the discretion it affords CRS in determining which speech violates the policy. JA 25-28 (Compl. ¶¶ 65-77); *see Grayned*, 408 U.S. at 108; *Vill. of Hoffman Estates*, 455 U.S. at 499. The availability of pre-publication review by CRS's review office does not cure the policy's vagueness because the policy contains no discernible standards or criteria that would allow non-arbitrary application by the reviewers. Nor does the purported clarity of the policy's disclaimer provision, *see* JA 139-40 (Mem. Op. 34-35), eliminate its vagueness, because even if that provision is clear, the policy's independent requirement that employees exercise "sound judgment" and "caution" is not. Moreover, as the district court recognized, JA 141-42, and as Mulhollan appears to concede, Def.'s Br. 20-21, 40, 43, the inference fairly implied from the Complaint is that Mulhollan terminated Col. Davis based on the *content* of his speech, not on an alleged violation of the disclaimer provision, *see* JA 23-24 (Compl. ¶¶ 54-59).

[11] Any contention that Col. Davis was terminated because of the disclaimer provision would be contradicted by the fair inference from the Complaint that he

Finally, Mulhollan makes the new argument that Col. Davis has not alleged his "personal involvement" in the approval of Davis's prior speaking engagements. Def.'s Br. 45-47. Mulhollan is raising this argument for the first time on appeal. The Court should therefore not consider it. *Potter v. Dist. of Columbia*, 558 F.3d 542, 550 (D.C. Cir. 2009). In any event, the argument is misguided. *Ashcroft v. Iqbal* forbids reliance on a theory of *respondeat superior*, 129 S. Ct. 1937, 1948-49 (2009), but Davis does not allege that Mulhollan is responsible for the actions of his subordinates. The unconstitutional action here was the termination of Col. Davis without fair warning, and there is no question that Mulhollan *himself* terminated Davis. JA 23-25 (Compl. ¶¶ 54-60). It is irrelevant that the lack of notice is demonstrated, in part, by the actions of others at CRS. It was Mulhollan's constitutional obligation to ensure that Davis had fair warning of the possibility of termination, either by demonstrating that the policies themselves, or CRS's past actions, provided such notice. As the district court held, neither did. JA 140-42. Mulhollan therefore violated Col. Davis's right to fair warning in terminating

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terminated Col. Davis based on the content of the opinion pieces. JA 23-24 (Compl. ¶¶ 54-59). Moreover, the Complaint establishes that disclaimers were not required by CRS in practice. Indeed, just two months before publication of the opinion pieces, a CRS attorney expressly approved Col. Davis's speaking and writing about the military commissions without the use of an express disclaimer. JA 19 (Compl. ¶ 35).

him.[12] Mulhollan's argument would paradoxically allow the existence of an unconstitutional action without an unconstitutional actor. If fair warning claims could somehow be partitioned as Mulhollan suggests, then no one would be "personally involve[d]" in Col. Davis's termination—not Mulhollan's subordinates, because they did not terminate Davis, and not Mulhollan because, although he terminated Davis and personally approved some of his outside speaking, he did not personally oversee every aspect of Davis's public speaking. The Court should reject this novel and overreaching interpretation of "personal involvement."

For these reasons, the Court should affirm the district court's decision that qualified immunity is not available here because Col. Davis adequately alleged a violation of his clearly established due process right to fair warning.

III. CSRA DOES NOT PRECLUDE COL. DAVIS'S *BIVENS* CLAIMS BECAUSE IT PROVIDES NO ADMINISTRATIVE REVIEW OR REMEDY TO LIBRARY OF CONGRESS EMPLOYEES.

Col. Davis is precisely the type of plaintiff who should be entitled to a damages remedy for the violation of his constitutional rights under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[12] Mulhollan asserts that his "alleged silence" was not a clear enough violation of Davis's rights to overcome qualified immunity. Def.'s Br. 47. *Keeffe* rejected that precise argument: without "loud and clear advance notice . . . an employee is entitled to read the Library's overly long silence as assent." 777 F.2d at 1583.

"Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Id*. at 395. *Bivens* gives plaintiffs like Col. Davis—whose constitutional rights were violated, but who have no other forum to address that wrong—the right to recover damages from federal officials, unless there are "special factors counseling hesitation" or there is an "explicit congressional declaration that persons injured . . . may not recover money damages from the [federal] agents, but must instead be remitted to another remedy, equally effective in the view of Congress." *Id.* at 396-97; *see also Carlson v. Green*, 446 U.S. 14, 18-23 (1980) (recognizing a *Bivens* remedy for the violation of Eighth Amendment rights, despite the availability of the Federal Tort Claims Act, because there were no special factors counseling hesitation and no congressional declaration denying the remedy); *Davis v. Passman*, 442 U.S. 228, 245-48 (1979) (recognizing a *Bivens* remedy for a congressional employee's allegedly discriminatory termination because of no "equally effective alternative remedies" or congressional declaration to the contrary).

Mulhollan concedes that Library of Congress employees are not covered by the remedial scheme of CSRA. Def.'s Br. 53-54 & n.7.[13] He nevertheless

[13] Because the Library of Congress is not an Executive agency or another agency specifically listed, its employees are not covered by the protections afforded to Executive agency employees by Chapters 23 and 43 of CSRA. *See* 5 U.S.C. §§ 2301(a), 2302(a)(2)(C), 3132(a), 4301. Similarly, Library employees are not protected by Chapter 75 of CSRA, which covers only "competitive service"

contends that CSRA is a comprehensive remedial statute governing Col. Davis's termination and that CSRA is therefore a "special factor[] counseling hesitation" against permitting a *Bivens* remedy. *Id.* at 55-58. Such a result would be unwarranted, unjust, and at odds with the caselaw. Although some of this Court's cases contain general language arguably supportive of that view with respect to employees who are covered by a statutory remedial scheme, *see, e.g.*, *Wilson v. Libby*, 535 F.3d 697 (D.C. Cir. 2008); *Spagnola v. Mathis*, 859 F.2d 223 (D.C. Cir. 1988) (en banc), neither the Supreme Court nor this Court has ever held that a statutory remedial scheme precludes a *Bivens* claim when it does not cover the plaintiff and provides no administrative review or remedy to address the violation of the plaintiff's constitutional rights. *See Wilson*, 535 F.3d at 714-15 (Rogers, J., concurring in part and dissenting in part) ("[E]xcept possibly in a military context, neither the Supreme Court nor this court has denied a *Bivens* remedy where a plaintiff had no alternative remedy at all." (footnote omitted)). As the district court recognized, because CSRA does not discuss challenges to adverse employment actions by Library employees, it cannot be considered a "comprehensive remedial scheme" governing Col. Davis's allegations. *See* JA 125 ("[T]he Court cannot accept the proposition that a system affording absolutely no review for the

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employees, employees pending conversion to the competitive service, and certain employees of an "Executive agency" or the U.S. Postal Service or Postal Regulatory Commission. *See* 5 U.S.C. §§ 7511(a)(1), 2102(a)(2).

plaintiff's alleged constitutional violations can fairly or accurately be deemed 'comprehensive.'" (quoting *Navab-Safavi I*, 650 F. Supp. 2d at 71)).

Neither of the Supreme Court cases principally relied upon by Mulhollan, *Bush v. Lucas*, 462 U.S. 367 (1983), and *Schweiker v. Chilicky*, 487 U.S. 412 (1988), precluded a *Bivens* remedy for plaintiffs who had no access to an alternative administrative scheme. In both cases, the plaintiffs filed their *Bivens* actions *after* pursuing and recovering remedies under the applicable administrative schemes. *See Chilicky*, 487 U.S. at 417-18; *Bush*, 462 U.S. at 369-71. The question before the Court in those cases was whether it should *supplement* the existing administrative remedies with *additional* relief, namely, a damages suit, to make the remedy more complete. *See Chilicky*, 487 U.S. at 425; *Bush*, 462 U.S. at 388.

The Supreme Court answered that question in the negative. In *Bush*, the Court held that additional remedies were not necessary for an executive branch plaintiff covered by CSRA because CSRA's remedial scheme recognizes "[c]onstitutional challenges to agency action, such as the First Amendment claim raised by [plaintiff]," and "provides meaningful remedies for employees who may have been unfairly disciplined for making critical comments about their agencies." 462 U.S. at 386. Of particular importance to this case, the Court noted that certain personnel actions are not covered by CSRA, *id.* at 385 n.28, and it explicitly left

open the question of whether "the Constitution itself requires a judicially-fashioned damages remedy in the absence of any other remedy to vindicate the underlying right, unless there is an express textual command to the contrary," *id.* at 378 n.14. Thus, "there [was] nothing in [the] decision to foreclose a federal employee from pursuing a *Bivens* remedy where his injury is not attributable to personnel actions which may be remedied under the federal statutory scheme." *Id.* at 391 (Marshall, J., concurring); *cf. Stewart v. Evans*, 275 F.3d 1126, 1130 (D.C. Cir. 2002) (holding that "*Bush* virtually compels the conclusion that the Act does not preclude a *Bivens* action for a warrantless search," a claim not covered by CSRA).

Chilicky is no different from *Bush*. *See Chilicky*, 487 U.S. at 425 ("The case before us cannot reasonably be distinguished from *Bush v. Lucas*."); *id.* (stating that "Congress . . . ha[d] not failed to provide meaningful safeguards or remedies for the rights of persons situated as [the plaintiffs] were"). Relying on its holding in *Bush*, the Court reiterated that "additional *Bivens* remedies" are not necessary "[w]hen the design of the Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration." *Id*. at 423. Although *Chilicky* noted that the lack of a statutory remedy for particular claims "does not by any means necessarily imply that courts should award money damages," that statement was made not in the context of discussing or extending *Bush*, but in

discussing the *Bivens* claims brought by military personnel, where the special nature of military life was itself considered a "special factor counseling hesitation." *Id*. at 421. Thus, "[n]o Supreme Court opinion holds squarely that the CSRA always prevents federal employees from bringing *Bivens* actions to right job-related wrongs." *Saul v. United States*, 928 F.2d 829, 837 (9th Cir. 1991).

Nor has this Court so held. The precise question before the Court in *Spagnola* was "[w]hether the Court intended *Bush* to bar damages actions for those employees or applicants for whom the CSRA remedies are *not so complete*," 859 F.2d at 226 (emphasis added)—not for those for whom they are non-existent. Although the Court stated in dicta that a reference in *Chilicky* implicitly suggests that the availability of specific alternative remedies does not matter even as to plaintiffs with "no remedy whatsoever," *id.* at 227-28 (internal citation and footnote omitted), the availability of some review or some remedy to a particular plaintiff plainly mattered to the Court's determination of the "outer boundaries for inclusion in 'comprehensive systems,'" *id*. at 229. If the "particular claimant—and his underlying claim—[is] *included in a given congressional 'comprehensive system'* for purposes of applying 'special factors' analysis," *id.* at 229 (emphasis added), and Congress has not plainly expressed an intention to preserve the *Bivens* remedy, then the remedy is not available because Congress has "'not inadvertently' omitted damages remedies for him," *id.* at 228. The *Spagnola* court therefore

denied a *Bivens* remedy to the plaintiffs because CSRA "at least technically accommodates [those plaintiffs'] constitutional challenges" by permitting them to file a petition to the Office of Special Counsel ("OSC"), thus "including" the plaintiffs and their claims within the comprehensive system. *Id.* But like all Library employees, Col. Davis did not have access to even the limited remedy of an OSC petition, *id.* at 228 n.9, which is limited to employees of an "an Executive agency and the Government Printing Office." 5 U.S.C. § 2302(a)(2)(A), (C). As a result, as the district court recognized, because no right to review or remedies were available to him under the statute, Col. Davis is not included within CSRA's otherwise comprehensive remedial scheme. JA 122-25; *see* JA 123 ("[U]nlike the plaintiffs in *Bush*, *Chilicky*, and *Spagnola*, the plaintiff here faces a 'complete unavailability of review.' Because the issue here is not simply one of remedy, but also of meaningful review, this case is distinguishable from *Spagnola* and this Circuit's application of *Chilicky*, to *Spagnola*." (internal citation omitted)).[14]

Because statutory schemes that do not cover certain categories of employees or provide them with any remedies or administrative process are not "comprehensive remedial schemes" as to those categories of employees, courts have not hesitated to imply a *Bivens* remedy for claims by such employees. In

[14] That Col. Davis was a probationary employee, *see* Def.'s Br. 57-58, is irrelevant to this analysis. CSRA's remedial scheme does not cover any Library employees, probationary or otherwise.

Davis, for example, the Supreme Court allowed a congressional employee to bring a due process *Bivens* action to redress her allegedly gender-based termination, even though Congress had exempted its Members from liability under Title VII, an otherwise comprehensive statutory scheme covering employment discrimination for most other federal employees. 442 U.S. at 245-48. Similarly, in *Stewart v. Evans*, this Court held that a federal employee could bring a *Bivens* action to redress the warrantless search of her private papers notwithstanding CSRA, and notwithstanding that the plaintiff, an executive branch employee, was included within CSRA's remedial scheme, because a warrantless search was not a "personnel action" covered by CSRA. 275 F.3d at 1130. *See also Ethnic Emps. of Library of Cong. v. Boorstin*, 751 F.2d 1405, 1415 (D.C. Cir. 1985) (holding that Title VII does not preclude a remedy for First Amendment claims of Library employees that fall outside the scope of Title VII because "[n]othing in [the legislative] history even remotely suggests that Congress intended to prevent federal employees from suing their employers for constitutional violations against which Title VII provides no protection at all"); *Navab-Safavi I*, 650 F. Supp. 2d at 67 (permitting government employee's First Amendment *Bivens* claim, and noting that "[e]ven if it is assumed that the [Contract Disputes Act] is a comprehensive regulatory scheme that could preclude certain *Bivens* claims, this does not mean that it necessarily precludes plaintiff's particular claim"). These cases make clear

that even where Congress has set up comprehensive remedial schemes, such as CSRA and Title VII, that address certain unconstitutional conduct in certain circumstances, the existence of some remedies within those schemes should not be read as an intent to preclude *Bivens* remedies for those persons whose claims are not contemplated or covered by the remedial scheme.

Like the decisions in *Bush*, *Chilicky*, and *Spagnola*, this Court's decision in *Wilson* involved a situation where the comprehensive statutory scheme at issue (the Privacy Act) provided some remedies to the plaintiffs for the unconstitutional actions alleged. *See* 535 F.3d at 709 (denying *Bivens* claim, and noting that the plaintiffs, "unlike the plaintiffs in *Davis* and *Bivens*, can seek at least some remedy under the Privacy Act"). As the Court explained, although it was true that the plaintiffs had no remedy against some of the defendants, the legislative history established that Congress had made an affirmative decision to permit claims under the Privacy Act against certain individuals, but not against others, such as the Offices of the President and Vice President. *Id.* at 707-08. The Court rejected the plaintiffs' argument that a *Bivens* action should fill the gap with respect to the claims against those defendants for whom there was no statutory remedy. *Id.* In addition, because the plaintiffs had some statutory remedies, the Court emphasized that limiting them to those remedies would not leave them without relief, even if the available relief was incomplete. *Id*. at 709.

That is very different from this case. Unlike in *Wilson*, Col. Davis is not "included within" CSRA's remedial scheme because CSRA does not provide Library employees with a remedy against anyone for anything. Thus, unlike in *Wilson*, permitting a *Bivens* claim here would not be tantamount to second-guessing Congress's decisions about *which* remedies are appropriate for a plaintiff or *which* individuals can be held liable. *See id.* at 709-10. Instead, as in *Davis* and *Stewart*, this case involves a situation where Congress has not spoken on a subject and has therefore not provided a "comprehensive remedial scheme" dictating which remedies should be provided to individuals like Col. Davis.[15]

Bivens preclusion cases from other circuits have similarly involved situations where alternative statutory remedies were available to the plaintiffs. In *Kotarski v. Cooper*, 866 F.2d 311 (9th Cir. 1989), for example, the court expressly noted the availability of alternative remedies in denying a *Bivens* action, stating that "[b]ecause Congress provided some mechanism for appealing adverse personnel actions, it cannot be said that the failure to provide damages, or complete relief, was 'inadvertent.'" *Id.* at 312. Similarly, in *Dotson v. Griesa*, 398 F.3d 156 (2d Cir. 2005), in reaching the conclusion that a judicial branch employee could be

[15] The Court's decision not to permit a *Bivens* action in *Wilson* was also influenced by its concerns that allowing the litigation to proceed would "inevitably require judicial intrusion into matters of national security and sensitive intelligence information." *Wilson*, 535 F.3d at 710. Those additional concerns are not present here.

precluded from a *Bivens* remedy, the court emphasized that "the judiciary's administrative procedures . . . have always included review by a judicial officer," *id.* at 160-61, and that the administrative scheme was therefore tantamount to a form of judicial review involving "specific procedures available" to judicial employees "at all times," *id.* at 176. That was a unique byproduct of the fact that administrative review within the judiciary involves actual Article III judges, which was a factor "undoubtedly considered" by Congress in not creating other remedies for judicial employees, *id.* at 160-61, 176 & n.14, as was Congress's clear concern with "the importance of judicial autonomy," *id*. at 173. Those factors are not present here.

Like CSRA, the Congressional Accountability Act ("CAA") is similarly not a comprehensive statutory scheme covering Col. Davis's constitutional claims. That statute makes certain labor and anti-discrimination statutes applicable to certain congressional employees, *see* 2 U.S.C. § 1302, *et seq.*, but it does not address constitutional violations or establish any procedures or remedies for such matters. It therefore cannot preclude Col. Davis's claims. *See, e.g.*, *Davis*, 442 U.S. at 246-47; *Stewart*, 275 F.3d at 1130; *Ethnic Emps.*, 751 F.2d at 1415.

In essence, Mulhollan's submission is that *no* federal employee—including the thousands who work for non-executive branch employers and who are not covered under CSRA's remedial scheme, such as the 3,900 Library employees—

should ever be able to bring an employment-related *Bivens* claim because of CSRA. That argument conflicts with *Spagnola*'s emphasis on the "outer boundaries for inclusion in 'comprehensive systems,'" 859 F.2d at 229, as well as the Supreme Court's and this Court's repeated recognition of *Bivens* remedies for federal employees who fall outside those boundaries. *See, e.g.*, *Davis*, 442 U.S. at 246-47; *Stewart*, 275 F.3d at 1130; *Ethnic Emps.*, 751 F.2d at 1415. *Spagnola*'s analysis simply cannot be squared with Mulhollan's view that no federal employee can ever have a *Bivens* remedy for an employment-related claim.

The implications of Mulhollan's argument are chilling. Under his view of the law, individuals who are not covered by CSRA would be left with no remedy for even the clearest constitutional violations, including major personnel actions such as termination, despite the Supreme Court's recognition of *Bivens* remedies precisely in these circumstances where it is "damages or nothing." *Davis*, 442 U.S. at 245 (internal citation omitted); *see also Bagola v. Kindt*, 131 F.3d 632, 644 (7th Cir. 1997) ("If an administrative scheme that did not safeguard a claimant's constitutional rights precluded a *Bivens* claim, unconstitutional conduct would be insulated from review by any adjudicatory forum."); *Smith v. United States*, 561 F.3d 1090, 1102-03 (10th Cir. 2009) (same). It would thereby undermine the well-established right of all public employees to speak without fear of retaliation on matters of public concern when the value of the speech outweighs any possible

harm to the government. *See Rankin*, 483 U.S. at 383-84 (recognizing First Amendment rights of even probationary employees). That cannot be the law.

Indeed, as the district court recognized, "a serious constitutional question would arise if the CRSA were construed to deny any judicial forum for the plaintiff's colorable constitutional claim." JA 37 (Order at 6, Jan. 20, 2010) (internal quotation marks and alterations omitted); *see also Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986) ("[A]ll agree that Congress cannot bar all remedies for enforcing constitutional rights." (internal quotation marks omitted)). In other words, although Congress may have the authority to determine which remedies are available for constitutional violations and against whom, it cannot preclude them entirely. At a minimum, in the absence of an explicit statement to that effect, this Court should not infer that Congress has implicitly attempted to preclude all constitutional claims. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) (requiring clear congressional intent to preclude judicial review of constitutional claims).

These constitutional considerations make inapposite *United States v. Fausto*, 484 U.S. 439 (1988), a case regarding CSRA's preclusion of *statutory* remedies. Justice Blackmun suggested as much, pointing out that the majority's holding that CSRA precludes plaintiff's use of the Back Pay Act was not inconsistent with the common-law power of courts to recognize *Bivens* actions for the vindication of

constitutional rights. *Id*. at 455 (Blackmun, J., concurring). *Fausto* is also inapposite for an additional reason: *Fausto* involved an executive branch employee, who was covered by Chapters 23 and 43 of CSRA, and therefore had remedies under CSRA. *See* 5 U.S.C. §§ 2301(a), 2302(a)(2)(C), 3132(a), 4301.

Recognizing the lack of any administrative remedies for Col. Davis, Mulhollan raises the availability of injunctive relief in the form of potential reinstatement as a reason for denying a *Bivens* remedy. Def.'s Br. 48, 55, 60. That argument should be rejected. "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens*, 403 U.S. at 395. Injunctive relief alone is "useless to a person who has already been injured," *Butz v. Economou*, 438 U.S. 478, 504 (1978), and cannot serve *Bivens*' purpose of deterring the official or similar officials from again violating constitutional rights, *see Carlson*, 446 U.S. at 21. That is because injunctive relief merely stops ongoing constitutional harm; it does nothing to redress past harm.

The Supreme Court has never denied a *Bivens* remedy based on the availability of injunctive relief. To the contrary, it has routinely recognized *Bivens* actions against officials also subject to injunctive or declaratory relief. *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825 (1994) (plaintiff seeking *Bivens* damages and an injunction); *Cleavinger v. Saxner*, 474 U.S. 193 (1985) (same).

In any event, it is not certain that the district court here will exercise its discretion to award reinstatement, as the position Col. Davis held has long since been filled. Thus, if Col. Davis does not end up with damages, he may very well have no remedy at all. For that reason, the Court should reject Mulhollan's attempt to distinguish *Davis* on the ground that there, the Court implied a *Bivens* remedy because "equitable relief in the form of reinstatement would be unavailing and no other remedy was available." Def.'s Br. 60 (internal citation omitted). Col. Davis may unfortunately find himself in the same situation.

Where, as here, Congress has completely omitted any administrative procedure for the constitutional claims of Library employees, "the public interest that there be a reasonably spacious approach to a fair compensatory award for denial or curtailment of the [First Amendment] right," *Tatum v. Morton*, 562 F.2d 1279, 1282 (D.C. Cir. 1977), compels the conclusion that Col. Davis's constitutional claims should be permitted to proceed.

CONCLUSION

For the foregoing reasons, this Court should affirm the order of the district court and remand the case for further proceedings.

Respectfully submitted,

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September 2, 2011

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,568 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ Aden J. Fine
Counsel for Plaintiff-Appellee Morris D. Davis
Dated: September 2, 2011

CERTIFICATE OF SERVICE

On September 2, 2011, I served upon counsel for defendant-appellant one copy of plaintiff-appellee's BRIEF FOR PLAINTIFF-APPELLEE via this Court's electronic filing system.

/s/ Aden J. Fine

Executed on September 2, 2011

ADDENDUM

TABLE OF CONTENTS

Important Notice: **To ensure that you are viewing the most recent version of a Library regulation or other material on the OGC Web site, Internet Explorer users should click the "Refresh" button. Netscape, Firefox, and Safari users should click the "Reload" button.**

LIBRARY OF CONGRESS REGULATIONS

THE LIBRARY OF CONGRESS

LCR 2023-3

SUBJECT: Outside Employment and Activities

SERIES: 2023 Personal Conduct and Personal Activities of Staff	STATUTORY AUTHORITY: 2 U.S.C. §136	RESPONSIBLE OFFICE: Office of the Librarian
ISSUE DATE: March 23, 1998	REVIEW DATE:	SUPERSEDES: April 3, 1991, issuance of LCR 2023-3

Contents:

Section 1. Purpose

This policy concerns the outside employment and other outside activities of staff members, including outside activities that draw upon staff members' skills that reflect Library training or experience, that make use of knowledge or information gained on the job, or that are the result of work performed in whole or in part during official duty hours.

Section 2. Outside Employment

A. Generally, staff members shall not engage in outside employment or other outside activities not compatible with the full and proper discharge of the duties and responsibilities of their Library employment. Incompatible activities of staff members include, but are not limited to,

1. acceptance of a fee, compensation, gift, payment of expense, or any other thing of substantial monetary value in circumstances in which acceptance may result in or create the appearance of conflict of interest;

2. outside employment of such a nature as to impair their mental or physical capacity to perform their Library duties and responsibilities in an acceptable manner;

3. activities that may reasonably be construed by the public to be official acts of the Library of Congress;

4. activities that establish relationships or property interests that may result in a conflict between their private interests and their official duties;

5. employment that may involve the use of information, secured as a result of employment by the Library, to the detriment of the Library or the public interest or to the preferential advantage of any person, corporation, public agency, or group; or

6. employment with any person, firm, or other private organization having business either directly or indirectly with the Library, when such employment might result in or give the appearance of a conflict of interest or otherwise be incompatible with law.

B. Except as provided by 2 U.S.C. §162 and 162a, staff members shall not receive any salary or anything of monetary value from a private source as compensation for their services to the Library. See also 18 U.S.C. §§201(c), 209.

C. Staff members may

1. engage in outside employment or other outside activities that are unrelated to their specific Library functions and that do not affect their ability to discharge the duties and responsibilities of their Library employment, but shall not carry on such outside activities during their official duty hours;

2. participate in the activities of national or state political parties not proscribed by law; and

3. participate in the affairs of or accept an award for a meritorious public contribution or achievement from a charitable, religious, professional, social, fraternal, nonprofit educational or recreational, public service, or civic organization.

D. Staff attorneys are encouraged, in off-duty hours and consistent with local court rules and official responsibilities, to participate in programs that provide legal assistance and representation to indigent persons. Such participation, however, shall not include representation precluded by the provisions of 18 U.S.C. §205.

E. The provisions of 18 U.S.C. §205 do not, nor shall this policy preclude staff attorneys, if consistent with the faithful performance of their Library duties, from acting without compensation as representatives or attorneys for staff members who are subjects of disciplinary, personnel security, or other personnel administrative proceedings within the Library. Staff attorneys who do perform in this capacity are subject to the limitations on the use of official time set out in LCR 2020-1, *Grievances, Adverse Actions, Appeals: Policy and General Provisions*; LCR 2010-3.1, *Resolution of Problems, Complaints, and Charges of Discrimination in Library Employment and Staff Relations under the Equal Employment Opportunity Program*; and the various collective bargaining agreements. Staff attorneys who are managers or supervisors or who are on the staff of the Office of the General Counsel, the Office of Counsel for Personnel, the Office of the Director of Personnel, or the Equal Employment Opportunity Complaints Office are excluded from

performing in this capacity.

Section 3. Teaching, Writing, and Lecturing

A. Staff members are encouraged to engage in teaching, lecturing, or writing that is not prohibited by law. Generally, personal writings and prepared or extemporaneous speeches that are on subjects unrelated to the Library and to staff members' official duties are not subject to review.

B. In speaking and writing on controversial matters, staff members are expected to disassociate themselves explicitly from the Library and from their official positions. Personal writings as well as prepared or extemporaneous speeches by staff members shall not be subject to prior review. Where, however, the subject matter of such writing relates to library science or the history, organization, administration, practices, policies, collections, buildings, or staff of the Library as well as matters relating to a field of a staff member's official specialization or the special clientele which a staff member serves, and where some association may be made with a staff member's official status, staff members shall: (1) assure accurate presentation of facts about the Library and Library-related matters; (2) avoid the misrepresentation of Library policies; (3) avoid sources of potential damage to their ability to perform official Library duties in an objective and nonpartisan manner; and (4) assure, when appropriate, that staff members' opinions clearly differentiate from Library policy.

Section 4. Copyright Claims

Staff members are advised that no copyright subsists in any work prepared by Federal employees pursuant to their employment. Accordingly, it is improper for staff members to claim copyright in any material prepared by them within the requirements of their duties or to authorize a publisher to do so.

Section 5. Book Endorsements

A. Staff members shall not endorse books. In rare instances in which staff members' opinions are requested for a special purpose because of their unusual competence in a particular field, an exception to this general policy may be requested. Such exceptions shall be made solely in the interest of the Library and shall be approved by the Librarian or his or her designee for this purpose.

B. Endorsement, as used herein, is defined as a statement prepared for use in the promotion of a publication. The term is not to be confused with book review, which is a statement prepared for publication in a recognized medium for the evaluation of publications.

Section 6. Evaluations of Library Materials

Requests for private evaluations of library material may be accepted by staff members as outside employment provided staff members do not undertake any part of this work during their duty hours and provided further that the results of their work are not associated directly or indirectly with their official duties or with the Library of Congress.

Section 7. Intermediaries and Product Recommendations

Except as required by their official duties, staff members shall not recommend or suggest the use of any particular or identified nongovernmental intermediary to deal with the Library nor shall they recommend

any device or product tested by or for or used by the Library.

Section 8. Memberships in Organizations

A. Staff members shall not, **in their official Library capacity**, serve as members of a business organization except where express statutory authority exists, where statutory language necessarily implies such authority, or where the Librarian of Congress has determined that such service would be beneficial to the Library and consistent with such staff members' service as Library employees. However, staff members may serve **in an individual capacity** as members of such an organization, provided that (1) such membership does not violate restrictions set out in this policy; and (2) their official titles or organizational connections are not shown on any listing or presented in any activity of the organization in such a manner as to imply that they are acting in their official Library capacity.

B. Staff members may be designated to serve as liaison representatives of the Library to a business organization provided that (1) the activity relates to the work of the Library; (2) the staff members do not participate in the policy determinations of the organization; and (3) the Library is in no way bound by any vote or action taken by the organization.

Section 9. Service as Officers or on Boards or Committees of Professional Associations

A. It is the policy of the Library to encourage staff members to participate actively in the work of professional groups when such activities will contribute to staff members' professional interests or to Library programs and when such participation will not materially interfere with staff members' official duties or involve extensive travel expense to the Library (see also LCR 2022-3, Attendance at Professional Meetings).

B. Staff members, invited or nominated to serve as officers or on boards or committees of professional groups, shall notify their immediate supervisor before accepting such nominations or making commitments to serve. Where circumstances do not permit an advance notification, the staff member shall report the matter to his or her supervisor as soon as possible.

Section 10. Post-Employment Restrictions

A. These restrictions only apply to acts by a former staff member who, for at least 60 days, in the aggregate, during the one-year period before that former staff member's service as such staff member terminated, was in a position for which the rate of basic pay, exclusive of any locality base pay adjustment, is equal to or greater than the basic rate of pay payable for Level 5 of the Senior Executive Service. 18 U.S.C. §207(e)(6).

B. For one year following termination of Library employment (retirement, resignation, or otherwise), affected staff members shall not (1) knowingly make, on behalf of any other person (except the United States) a communication or appearance before any Library staff member with the intent to influence him or her on any official matter; or (2) knowingly represent, aid, or advise any foreign entity (foreign government) on any U.S. Government matter before any U.S. Government department or agency. 18 U.S.C. §207(e)(5), (f).

C. The Director of Personnel shall take such steps as may be necessary to assure that affected staff members leaving Library employment are reminded of these restrictions.

Comments: lcweb@loc.gov

Policy

Outside Speaking and Writing

Effective date: Jan. 23, 2004. This policy, originally issued on Jan. 23, 2004, as Director's Statement, Outside Activities: Preserving Objectivity and Non-Partisanship, *has been edited and reformatted for the staff site.*

Statement

This statement outlines the policy for writing and speaking outside of work, including teaching or lecturing. For situations relating to the media, see the policy statement on Interacting with the Media.

Disclaimer

The obligation, set out in Library regulation, is to present a formal disclaimer regarding any personal views. Employees must make it clear that the views expressed are theirs and do not represent the views of the Service. Specifically, LCR 2023-3, Outside Employment and Activities, provides that when speaking and writing on "controversial" matters, "staff members are expected to disassociate themselves explicitly from the Library and from their official positions." In outside writings this is most commonly done by ensuring that a footnote appears at the outset making that clear. When speaking, the staff member may make the point on introduction to the audience, or before commencing substantive remarks. The obligation falls on the employee, whether as a presenter, as an author, or as a contributor in whatever form, to ensure that such a disclaimer is actually presented. A sample disclaimer for writings might read: "The views expressed herein are those of the author and are not presented as those of the Congressional Research Service or the Library of Congress." For in-person remarks, it is advisable to add "the speaker [I] am not here representing the Congressional Research Service, and the views expressed..."

Conflict of Interest

Library regulation 2023-3 also speaks to the obligation to avoid "the appearance of conflict of interest," especially when speaking or writing on controversial matters. For CRS, almost everything that staff say or write has the potential to be "controversial." It is therefore important to err on the side of caution, especially when addressing issues for which the individual has responsibility for the Service. It is therefore advisable, when writing or speaking on the subject for which the individual has responsibility at the Service, that the standard set for review of CRS written products be observed. While it is not a formal requirement, the Service strongly encourages all staff to submit draft outside writings to the Review Office, which welcomes the opportunity to provide input and advice.

Advocacy v. Research

When employees contemplate engaging in outside activities that involve any type of advocacy (e.g., associational affiliations and organization membership, political activities, and endorsements) or activities potentially compromising the appearance of independence or impartiality, they should strive to avoid even the appearance of a conflict of interest or engaging in an activity that would compromise one's ability to perform their responsibilities for CRS. See LCR 2023-1 and 2023-3. CRS examines such activities on a case-by-case basis to determine whether the conduct is problematic, and strongly urges individuals to make an inquiry before embarking on conduct that may present these issues.

Background

The CRS mission of providing balanced, objective, and non-partisan support to the Congress places a challenging responsibility on all CRS staff that is of critical importance to this agency. It is incumbent on everyone to ensure that the ability of CRS to serve the Congress is not compromised by even the appearance that the Service has its own agenda; that one or more analysts might be seen as so set in their personal views that they are no longer to be trusted to provide objective research and analysis; or that some have developed a reputation for supporting a position on an issue to the extent that CRS is rendered "suspect" to those of a different viewpoint.

When staff speak or write for the Congress within the scope of their duties here, the lines are very clear. CRS has designed all layers of review in the divisions, the Review Office, and elsewhere so that the work adheres to CRS obligations and congressional expectations. While CRS staff, like all citizens, are entitled to hold their own views on all matters of public policy, when staff speak or write in their private capacities they continue to carry with them related responsibilities.

Employees must exercise the greatest level of care for preserving the appearance of objectivity when addressing the very issues for which they have responsibility at CRS. LCR 2023-3 also provides that "[w]here...the subject matter of [personal writings as well as prepared or extemporaneous speeches by staff members] relates to... a field of a staff member's official specialization or the special clientele which a staff member serves, staff members shall ...avoid sources of potential damage to their ability to perform official Library duties in an objective and non-partisan manner..." Staff will likely have acquired much of their knowledge of this subject matter in the course of performing their duties as a public servant for the Congress and it may be seen as inappropriate for them to profit from that knowledge elsewhere. In addition, this is also the subject area that the individual will continue to be writing about for CRS and is the subject most likely to be the basis of a suspicion of failure to meet the obligatory standards of objectivity and balance.

Congress created CRS to provide an objective resource for the National Legislature, and it is frequently touted as the only agency in town that holds to that charge. And, failure to

do so carries the severe consequence of rendering the Service ineffective at best, and useless at worst. More importantly, to do so violates the trust that has been placed in CRS by the Congress to meet its statutory mission. Preserving that trust is the responsibility of all CRS staff.

Expectations

When considering engaging in outside activities, employees should think carefully before taking a public position on subject matters for which they are responsible at CRS. They are responsible at a minimum for providing a formal disclaimer, and for using sound judgment in deciding when engagement in an outside activity may place the reputation of CRS at risk. CRS has painstakingly built a reputation for excellence over the years, much of it tied to its unique role in the provision of objective, non-partisan, and confidential research and analysis to the Congress. CRS staff, both individually and collectively, must avoid engaging in activities that have a high risk of tarnishing that reputation. Everyone must make every effort to avoid presenting even the appearance that the Service is not true to the mandates given it to be objective, non-partisan, and confidential.

Contact:

Address questions regarding application of this policy to division or office management. Division and office heads should direct their questions to the Office of Congressional Affairs and Counselor to the Director.

Last reviewed July 2008