Morris Davis v. James Billington, et al Doc. 1207308259

[ORAL ARGUMENT SCHEDULED FOR NOVEMBER 10, 2011]

No. 11-5092

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MORRIS D. DAVIS,
Plaintiff-Appellee,

v.

JAMES H. BILLINGTON, in his official capacity as
the Librarian of Congress,
Defendant-Appellee,

DANIEL P. MULHOLLAN, in his individual capacity,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR DEFENDANT-APPELLANT

TONY WEST
Assistant Attorney General

RONALD C. MACHEN JR.
United States Attorney

THOMAS M. BONDY
(202) 514-4825
SHARON SWINGLE
(202) 353-2689
Attorneys, Appellate Staff
Civil Division, Room 7250
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

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GLOSSARY

CAA	Congressional Accountability Act of 1995
CRS	Congressional Research Service
CSRA	Civil Service Reform Act

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MORRIS D. DAVIS,
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JAMES H. BILLINGTON, in his official capacity as
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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REPLY BRIEF FOR DEFENDANT-APPELLANT

INTRODUCTION AND SUMMARY OF ARGUMENT

As Daniel Mulhollan showed in his opening brief, the district court erred in refusing to dismiss the claims against him on the basis of qualified immunity — a doctrine that is intended to protect all government officials but the "plainly incompetent and those who knowingly violate the law" from the threat of personal liability and the burdens of litigation. *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2085 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

A reasonable official in Mulhollan's position could conclude that it was lawful to terminate Morris Davis's probationary employment as head of the Foreign Affairs, Defense, and Trade Division of the Congressional Research Service (CRS), after Davis published pieces in national newspapers criticizing the current Attorney General's decision to try some Guantanamo detainees before military commissions and questioning the good faith and credibility of the former Attorney General and Vice President. The plaintiff's publications — submitted without the prior authorization or even knowledge of CRS officials, and lacking the disclaimer explicitly required by the applicable Library of Congress regulation — harmed his ability to lead his Division in providing objective advice on defense policy and foreign affairs and in maintaining good relations with the relevant congressional committees with jurisdiction over those areas. The plaintiff's conduct cast doubt on his ability to continue to enforce agency policies on outside speaking and writing on employees under his management and supervision, and to serve as an example of compliance for employees who looked to him for guidance and leadership. And the plaintiff's publications and his subsequent refusal to recognize the potential harm they could cause also damaged his working relationship with his direct supervisor, and raised doubts about his judgment.

The plaintiff argues that his publications did not harm CRS, yet essentially ignores CRS's statutory mission to provide objective, unbiased, and nonpartisan advice to Members of Congress and their staff. That mission was compromised when a senior official made controversial public statements about a policy issue pending before the same congressional committees that his Division served. The plaintiff also quotes from the Library of Congress regulation "encouraging" staff members to engage in public speech, without acknowledging the regulation's directive that employees shall "avoid sources of potential damage to their ability to perform official Library duties in an objective and nonpartisan manner," Library of Congress Regulation 2023-3, § 3(B), and the CRS policy's explicit warning that employees should not engage in speaking or writing that creates a perception that they have a personal agenda or cannot be trusted to provide objective research and analysis. The plaintiff also struggles unsuccessfully to characterize himself as a low-level manager without any substantive responsibility or authority, despite the fact that he led the Division's 95-member professional staff and was responsible for directing their research and analytic activities. Finally, the plaintiff alleges that he and other CRS employees engaged in controversial public speech in the past without evident harm to the agency, but he fails to allege that the statements were

similar to the publications here or that Mulhollan had knowledge of those prior statements.

The plaintiff labors to show that his complaint alleges a violation of the First Amendment, *see* Pl. Br. 13-26 — but government officials are permitted to "make reasonable but mistaken judgments about open legal questions" without losing the protection of qualified immunity. *Al-Kidd*, 131 S. Ct. at 2085. He also asserts that Mulhollan is not entitled to qualified immunity unless he proves that the plaintiff's speech caused CRS actual harm. Pl. Br. 11. But government officials are entitled to restrict employees' speech based on reasonable predictions of harm, without waiting for that harm to become manifest and disrupt the agency's operations. And the reasonableness of their actions can, in cases such as this one, be determined based on the pleadings.

The plaintiff also fails to show that Mulhollan's alleged conduct violated any clearly established due process right. The plaintiff does not dispute that he lacked a protected interest in his probationary employment. He claims that he was nevertheless entitled to prior notice before he could be fired, but the cases he cites do not support his argument — much less show that his asserted right was clearly established. Furthermore, Mulhollan may not be held liable for any lack of notice

resulting from the conduct of other government officials, simply because he made the ultimate decision to terminate the plaintiff.

Finally, the plaintiff's claims against Mulhollan should have been dismissed in any event, because the district court erred in implying a claim against Mulhollan for money damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In enacting the Civil Service Reform Act (CSRA), Congress intentionally denied federal employees the right to judicial review of the termination of probationary employment. Furthermore, although Congress gave certain rights to employees of the Library of Congress in the CSRA and the Congressional Accountability Act of 1995, Pub. L. No. 104-1, 109 Stat. 3 (CAA), including a right of judicial review of certain adverse employment actions, Congress did not create a judicial remedy for Library of Congress employees to challenge the termination of probationary employment in alleged violation of the First Amendment. In these circumstances, the exclusive judicial remedy available to the plaintiff is an action for injunctive relief brought directly against the Library of Congress.

The plaintiff asserts that an implied claim for money damages must be available because otherwise his harm might not be fully remedied. As this Court has repeatedly held, however, the fact that a plaintiff might not have a complete

remedy does not show that a *Bivens* claim is valid. The creation of a money damages remedy for the harm that the plaintiff alleges is a matter for Congress, not the district court.

ARGUMENT

I. THE PLAINTIFF HAS NOT SHOWN THAT MULHOLLAN VIOLATED A CLEARLY ESTABLISHED FIRST AMENDMENT RIGHT.

A. A Reasonable Officer In Mulhollan's Position Could Conclude That The Plaintiff's Publications Damaged His Ability To Perform His Job Effectively.

As we showed in the opening brief, the plaintiff's publications called into question his objectivity and lack of bias on a key policy issue pending before the congressional committee members and staff for whom the Foreign Affairs, Defense, and Trade Division provided research and analysis. Furthermore, Davis's failure to seek advance approval from CRS before submitting his writing for publication, as he had previously done, or to include the disclaimer required by the Library of Congress regulation, cast doubt on his ability to enforce the CRS policy and Library of Congress regulation among his staff and to serve as an example of compliance. Davis's conduct, as well as the tone of his publications, also cast doubt on his professional judgment. And the publications fractured the relationship between the plaintiff and his direct supervisor, Director Mulhollan.

Because a reasonable official in Mulhollan's position could have determined that it was lawful in those circumstances to terminate the plaintiff's probationary employment, Mulhollan was legally entitled to qualified immunity.

The plaintiff raises a number of interrelated arguments about why his speech was unlikely to harm CRS, his Division, or his ability to successfully serve as Assistant Director. None of them is persuasive.

1. The Fact That The Plaintiff's Speech Was Outside Of The Workplace And Did Not Involve A Work-Related Issue Does Not Establish That It Was Harmless.

The plaintiff argues that his publications could not have harmed CRS because they were written and published in his private time, and were not focused on his agency, supervisors, or a work-related issue. Pl. Br. 18. His arguments are premised on an erroneously restrictive view of the government's interests.

The Supreme Court has made clear that employee speech can harm a government employer even if does not directly criticize the employer or relate to the employer's policies. In *Rankin v. McPherson*, 483 U.S. 378 (1987), the Court recognized that the government employer may be harmed by an employee's public statements that "discredit[]" the employer. *Id.* at 388-389. Similarly, the Court recognized in *City of San Diego v. Roe*, 543 U.S. 77 (2004), that employee speech

can be "detrimental" to the employer and "harmful to [its] proper functioning even if it had nothing to do with the employer's workings or functionings." *Id.* at 81.

The basic premise of the balancing test set forth in *Pickering v. Board of Education of Township High*, 391 U.S. 563 (1968), is that, in appropriate circumstances, an employee's private speech may sufficiently implicate the government's interests as an employer that it may be restricted without violating the First Amendment. Thus, a governor may consider the political views of a candidate for confidential assistant even if they do not relate directly to the assistant's official responsibilities. *See Branti v. Finkel*, 445 U.S. 507, 518 (1980). Likewise, an employee in the sheriff's office can be lawfully dismissed because of his service as a Klux Klan recruiter in his private time. S*ee McMullen v. Carson*, 754 F.2d 936, 939-940 (11th Cir. 1985) (cited with approval in *Rankin*, 483 U.S. at 391 n.18). Here, a reasonable official in Mulhollan's position could have concluded that the balance of relative interests weighed in favor of CRS.

The plaintiff also relies on the fact that the publications were circulated outside of the workplace in arguing that they caused no harm. If anything, however, the fact that the publications were in major newspapers with broad national and international circulation simply increases their potential damage to CRS's interests. *Cf. Rankin*, 483 U.S. at 390 (relying on the fact that employee's

speech was private in concluding that any harm to the employer was minimal). Notably, the plaintiff does not contest our showing that the key constituents of his Division — members of Congress and their staff with responsibility for Foreign Affairs, Defense, and Trade issues — would likely have identified him as the author of the publications.

2. The Plaintiff's Publications Were Particularly Harmful Given CRS's Unique Role To Provide Objective, Unbiased, And Non-Partisan Analysis And Research To Congress.

In weighing the harm threatened by the plaintiff's publications, it is critical to give weight to CRS's statutory mission to provide objective, unbiased, and non-partisan analysis and advice to Congress. This Court recognized in *Navab-Safavi v. Glassman*, 637 F.3d 311 (D.C. Cir. 2011), that a government employer may have a weighty interest in protecting its reputation for objectivity. *Id.* at 316-317. Here, CRS's basic mission was compromised when its senior official made controversial public statements about a policy issue pending before the very congressional committees that his Division served.

In challenging the government's showing of harm, the plaintiff relies heavily on a Library of Congress regulation that "encourage[s]" staff members "to engage in teaching, lecturing, or writing that is not prohibited by law." Pl. Br. 15. This same regulation, however expressly cautions staff members to "avoid sources

of potential damage to their ability to perform official Library duties in an objective and nonpartisan manner." Library of Congress Regulation 2023-3, § 3(B), JA 97.

Furthermore, CRS's policy on outside speaking and writing specifically recognizes that the statutory mission to provide "balanced, objective, and non-partisan support to Congress places a challenging responsibility on all CRS staff that is of critical importance." CRS policy 2, JA 102. The CRS policy warns employees that their outside speech and writing, particularly on controversial matters, can compromise the ability of the agency to serve Congress by creating the "appearance that the Service has its own agenda," or that its analysts are "so set in their personal views" that they cannot provide objective analysis and research. CRS policy 2, JA 102. The controversial content and charged rhetoric of the plaintiff's publications could cause a reasonable official to conclude that they undermined the plaintiff's appearance of objectivity, as well as the reputation of his Division and CRS as a whole.

The plaintiff also argues that his speech could not have harmed CRS's operations because neither he nor his Division was responsible for the issue whether Guantanamo detainees should be prosecuted before military commissions. Pl. Br. 20, 24-25. Even accepting the plaintiff's assertion as true at this stage of

the proceedings,[1] his conclusion does not follow. The plaintiff led the CRS Division responsible for Foreign Affairs, Defense, and Trade, including maintaining strong relationships with the congressional committees with responsibility for those areas. He does not contest that the same congressional committees responsible for defense matters also had jurisdiction over Guantanamo military commissions. A reasonable official could conclude that the plaintiff's controversial and intemperate publications undermined his perceived objectivity before the key constituents of his Division. And, of course, the fact that a high-level CRS official spoke out on this issue undermined CRS's own reputation for providing objective, unbiased, and non-partisan research and analysis, and cast doubt on the plaintiff's professional judgment. *Cf. Bonds v. Milwaukee County*, 207 F.3d 969, 981-982 (7th Cir.) (holding that employee's critical remarks about his current employer's policy cast doubt on his loyalty and trustworthiness, and justified the withdrawal of an offer of employment by a different government employer), *cert. denied*, 531 U.S. 944 (2000).

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[1] As noted in the opening brief, Mulhullan Br. 4 n.1, it is evident from even the limited evidentiary record before the district court in connection with the motion for a preliminary injunction that many of the plaintiff's factual allegations are inaccurate.

3. <u>The Plaintiff's High-Level Position As CRS Assistant Director And The Nature Of His Responsibilities Increased The Harm From His Publications</u>.

The Supreme Court recognized in *Rankin* that "[t]he burden of caution employees bear with respect to the words they speak will vary with the extent of authority * * * the employee's role entails." 483 U.S. at 390; *see also O'Donnell v. Barry*, 148 F.3d 1126, 1135-1136 (D.C. Cir. 1998); *Hall v. Ford*, 856 F.2d 255, 263 (D.C. Cir. 1988). The fact that the plaintiff was a CRS Division head who directed and supervised the activities of 95 researchers and analysts, and reported directly to the head of the agency, further compounded the potential harm caused by his publications.

The plaintiff cites this Court's decision in *O'Donnell* for the proposition that even a high-level official may have an interest in speaking that outweighs the interest of the government employer. Pl. Br. 20-21. That holding, however, simply underscores the context-specific nature of the *Pickering* balancing test. Furthermore, and as *O'Donnell* held, the fact that the lawfulness of an employee's termination is not necessarily apparent under *Pickering* does not establish that the individual defendant is not entitled to qualified immunity. 148 F.3d at 288.

The plaintiff also challenges his characterization as a high-level official, arguing that he had no responsibility for formulating, implementing, or

articulating agency policy. Pl. Br. 24-26. But the plaintiff's complaint and the documents incorporated by reference show that the plaintiff led all operations of his Division, managed 95 professional employees, and reported directly to the Director of CRS. Complaint 8, JA 17; Memorandum of admonishment 2, JA 89. He was clearly one of the senior officials at CRS. And although CRS does not establish substantive government policy, the agency identifies critical areas for research and analysis, and develops and implements programs to carry out its functions — tasks for which the plaintiff had ultimate responsibility on behalf of his Division.

Furthermore, the plaintiff was responsible for enforcing the CRS policy on outside speaking and writing within his Division. *See* Memorandum of admonishment 2, JA 89. The fact that the plaintiff submitted his writings for publication without seeking advance approval could lead a reasonable supervisor to question his ability effectively to enforce the CRS policy in his Division, and to serve as an example of compliance to his staff. The plaintiff argues that there is no categorical requirement of pre-approval and that any such requirement would be unconstitutional. Pl. Br. 31. But CRS policy "strongly encourages" employees to submit publications for clearance, CRS policy 1, JA 101, and the agency head is entitled to conclude that a senior official who refuses to do so lacks judgment or is

unsuited for leadership. And the plaintiff does not dispute that his publications failed to include a disclaimer, as explicitly required by the Library of Congress regulation. Library of Congress Regulation 2023-3, § 3(B), JA 97.

The plaintiff also argues that a reviewing court should not give any weight to his direct supervisor's view that his publications caused harm to the agency and fractured their working relationship. Pl. Br. 18, 32. The argument is flatly contrary to governing precedent, which recognizes that the government has an interest in regulating employee speech that harms relationships among employees, particularly "close working relationships for which personal loyalty and confidence are necessary," such as among high-level officials. *See Rankin*, 483 U.S. at 388, 390; *see also, e.g., O'Donnell*, 148 F.3d at 1138; *Hall*, 856 F.2d at 263-264. It does not "eviscerate public employee First Amendment protections" (Pl. Br. 32) to recognize that, where a high-level official publishes controversial and highly charged pieces in the national media, in violation of the letter and spirit of the policy on outside speaking drafted by his direct supervisor, that supervisor could reasonably conclude that trust in the employee's judgment is no longer warranted.

4. The Plaintiff's Assertions That He And Other CRS Employees Previously Spoke Publicly On Controversial Subjects Do Not Undermine Our Showing Of Harm.

Finally, the plaintiff argues that his speech could not have caused harm to CRS because he previously engaged in similar speech before and after starting work at CRS, and other CRS employees also engaged in public speech on controversial matters, without demonstrated harm to the agency. Pl. Br. 15-16, 19. As we have already shown (Mulhollan Br. 37-38), however, the plaintiff has not alleged that Mulhollan himself knew of past instances of similar speech. Because the qualified immunity analysis turns on what a reasonable official in Mulhollan's shoes would have thought, *see, e.g., Anderson v. Creighton*, 483 U.S. 635, 641 (1987), these past instances are not relevant to the issue before the Court.

Furthermore, although the plaintiff claims to have engaged in similar speech after beginning his employment with CRS, he specifically sought advance approval from CRS officials before speaking or writing publicly — something he failed to do before submitting his publications to the Washington Post and the Wall Street Journal. Indeed, the very fact that he previously sought advance approval suggests his awareness that such speech could threaten the interests of CRS as an employer. And whatever the content of the plaintiff's pre-employment

speech, CRS officials were entitled to assume that he would comply with the CRS policy on outside speaking and writing once he started his employment.

As for the speech of other employees, the plaintiff does not allege that the employees were high-level CRS officials, that their speech was likely to be read by the same people with whom they dealt in their official capacity, that the speakers violated the Library of Congress Regulation or CRS policy, or other facts showing that they were similarly situated to the plaintiff. Nor is it clear that this alleged outside speaking and writing occurred after the adoption of CRS's current policy on outside speaking and writing. *Cf.* Complaint ¶¶ 72-77, JA 27-28. The plaintiff's bare assertion that prior speech took place does not undermine Mulhollan's showing that a reasonable government official in his circumstances could have believed that the plaintiff's speech threatened harm to the agency and warranted termination of his probationary employment.

B. The Plaintiff's Arguments Against Qualified Immunity Are Without Merit.

1. <u>Mulhollan Is Not Required To Show Actual Harm To CRS To Demonstrate His Entitlement To Qualified Immunity</u>.

The plaintiff argues that the claims against Mulhollan cannot be dismissed on the basis of qualified immunity unless Mulhollan establishes that the plaintiff's publications caused actual harm to CRS. But Mulhollan was entitled to terminate

the plaintiff's probationary employment based on reasonable predictions that the publications damaged the plaintiff's ability to perform his job effectively. Mulhollan was not required to wait for that harm to became full-blown and to undermine CRS's reputation for objectivity and balance, as well as damage working relationships within CRS.

In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Supreme Court recognized that restrictions on the speech of government employees can be "directed at speech that has *some potential* to affect the entity's operations." *Id.* at 418 (emphasis added). *Connick v. Myers*, 461 U.S. 138, 151-152 (1983), similarly holds that a government employer is not required to wait until "disruption of the office and the destructions of working relationships is manifest" before it may take action in response to an employee's speech. And the plurality in *Waters v. Churchill*, 511 U.S. 661 (1994), considered at length the necessary showing of harm that must be made in this context, emphasizing that the Supreme Court has "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large," and has upheld restrictions even where the danger sought to be avoided "is mostly speculative." *Id.* at 673.

2. The Potential Harm To CRS Resulting From The Plaintiff's Publications Was Clear From The Complaint And The Documents Incorporated By Reference, And Mulhollan Did Not Need To Develop An Evidentiary Record.

Contrary to the plaintiff's suggestion, furthermore, Pl. Br. 16-17, there is no categorical rule that a case cannot be dismissed on qualified immunity grounds at the pleading stage where the claim challenges a government employee's termination for speaking on a matter of public concern.

In some cases, admittedly, the specific interests underlying the *Pickering* balancing test may be too uncertain for an official's entitlement to qualified immunity to be resolved at that stage. In *Navab-Safavi*, for example, this Court was unable to determine whether qualified immunity protected officials' termination of a contractor's employment with Voice of America after she appeared in a music video protesting the United States' involvement in the Iraq War, where the contractor alleged that her only duties were to provide translation and narration services, and she "exercised no editorial judgment, did not appear on camera," was never identified by name on the air, and "never purported to speak on behalf of the Board or the United States." 637 F.3d at 313, 317-318. Furthermore, the plaintiff in *Navab-Safavi* alleged that her direct supervisors praised her work and expressed no concerns that her appearance in the video

would compromise her effectiveness, *see* 650 F. Supp. 2d 40, 47-48 (D.D.C. 2009), but that other officials nevertheless terminated her contract because they perceived the music video as "anti-American." 637 F.3d at 314.

As this Court made clear in *Navab-Safavi*, however, the "relative weight of the governmental interest * * * may often be quite evident from the pleadings," 637 F.3d at 318, and a court may be able to determine that a defendant is entitled to qualified immunity without an evidentiary showing of harm. Indeed, this Court did precisely that in *Hall v. Ford*, affirming a dismissal on qualified immunity grounds at the pleading stage, based on the nature of the employee's job responsibilities and the content and context of his speech. 856 F.2d at 261. Here, as we have shown, the nature of the plaintiff's position and job responsibilities, the interest of CRS in maintaining its appearance of objectivity and lack of bias, and the content and tone of the publications, establish that a reasonable officer could think that the plaintiff's termination was lawful.

The plaintiff also relies on several cases from other circuits to argue that a defendant's entitlement to qualified immunity cannot be resolved at the pleading stage in a case involving the *Pickering* balancing test, Pl. Br. 22, 28, but each is readily distinguishable. In *Catletti ex rel. Estate of Catletti v. Rampe*, 334 F.3d 225 (2d Cir. 2003), the defendants conceded that the employee's testimony in a

judicial proceedings "did not adversely impact his [job] performance." *Id.* at 231. In *Barker v. City of Del City*, 215 F.3d 1134 (10th Cir. 2000), similarly, the defendant never identified a governmental interest implicated by the employee's speech. 215 F.3d at 1139, 1140. In *Vojvodich v. Lopez*, 48 F.3d 879 (5th Cir.), *cert. denied*, 516 U.S. 861 (1995), the defendant denied that the challenged employment action was caused by the employee's First Amendment activities, and there was "simply no countervailing state interest to weigh." *Id.* at 886. And in *Gustafson v. Jones*, 117 F.3d 1015 (7th Cir. 1997), neither the complaint itself nor the nature of the speech demonstrated any government interest. *Id.* at 1018-1019. No similar situation is presented here, where Mulhollan identified multiple government interests that were directly threatened by the plaintiff's speech and conduct.

The plaintiff asserts that Mulhollan's reasonable predictions of harm cannot be considered, because the plaintiff's complaint alleges that the publications did not harm CRS. Pl. Br. 16, 21-22. The plaintiff's conclusory allegations about the purported lack of harm are entitled to be credited only to the extent they are established through well-pled factual allegations. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009). Here, the complaint, as well as the documents incorporated by reference, establish the high-level nature of the plaintiff's position and

responsibilities; the CRS's special need to maintain its reputation for objectivity and impartiality, as manifested in part through its policy on outside speaking and writing; the plaintiff's responsibility as head of a Division for complying with and enforcing that policy; and the evident damage to working relationships caused by his publications. In the face of these facts, the plaintiff's assertion of a lack of harm cannot defeat dismissal.

3. The Plaintiff Has Not Shown That Mulhollan's Conduct Was Clearly Unlawful Under Existing Precedent.

As we explained in our opening brief, Mulhollan is entitled to qualified immunity unless the constitutionality of his conduct was "beyond debate." *Al-Kidd*, 131 S. Ct. at 2083. Citing *Hope v. Pelzer*, 536 U.S. 730 (2002), the plaintiff asserts that there is no need for earlier decisions on materially similar facts in order for qualified immunity to apply. Pl. Br. 27. That case, however, involved the intentional hitching of a prisoner to a post, shirtless and exposed to the sun, for seven hours, with no bathroom breaks and only limited water — conduct that the Court deemed "so obvious" a constitutional violation that prior precedent might not even be necessary, and that in any event was clearly unlawful under factually similar cases and a Department of Justice study and report on the specific practice. 536 U.S. at 741-745.

The plaintiff also asserts that it is clearly established that "a public employer cannot terminate [an employee] 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." Pl. Br. 29. The Supreme Court has repeatedly held that it is erroneous to define "clearly established law" for purposes of qualified immunity at that high level of generality. *See Al-Kidd*, 131 S. Ct. at 2084; *Saucier v. Katz*, 533 U.S. 194, 201-202 (2001); *Wilson v. Layne*, 526 U.S. 603, 615 (1999); *Anderson*, 483 U.S. at 639-640. The plaintiff cites *Navab-Safavi*, but this Court had not yet issued its decision at the time Mulhollan terminated his employment. The district court decision in *Navab-Safavi* is not sufficient to establish "a robust consensus of cases of persuasive authority." *Al-Kidd*, 131 S. Ct. at 2084 (quotation marks and citation omitted). And in any event, both the district court and this Court in *Navab-Safavi* recognized that the government employer has an interest in restricting employee speech that damages its reputation for objectivity. *Navab-Safavi v. Broadcasting Board of Governors*, 650 F. Supp. 2d 40, 60 (D.D.C. 2009); 637 F.3d at 317. The other cases relied on by the plaintiff recite general legal principles in cases governed by the *Pickering* balancing test, but fail to provide sufficient guidance about the application of

those principles to the facts of this case to support the conclusion that the plaintiff's claimed right was "clearly established."

Finally, it is notable that the plaintiff does not even attempt to defend part of the district court's rationale for denying qualified immunity. Our opening brief showed that the district court erred in relying on the plaintiff's short-term appointment as a special adviser to conclude that his publications did not damage his relationship with Mulhollan. Mulhollan Br. 38-39. The district court also erred in giving weight to the fact that Mulhollan asked the plaintiff to acknowledge that his publications were not protected by the First Amendment. Mulhollan Br. 39-40. By failing to respond to our arguments, the plaintiff effectively concedes the district court's error.

II. THE PLAINTIFF HAS NOT SHOWN THAT MULHOLLAN VIOLATED ANY CLEARLY ESTABLISHED DUE PROCESS RIGHT.

We showed in the opening brief that the plaintiff has not shown that Mulhollan violated any clearly established due process right. The plaintiff did not have any protected interest in his probationary employment to support a due process claim. Any alleged failure by CRS officials to enforce CRS's policy in the past did not bar the agency from sanctioning a particularly egregious subsequent violation. And in any event, the plaintiff has not alleged sufficient personal

involvement by Mulhollan in the conduct that was alleged to give the plaintiff inadequate notice to support personal liability.

The plaintiff challenges the well-established proposition that employees must have a protected interest in continued employment in order to have a right to prior notice before termination, but the cases he relies on do not support his argument. In *Keeffe v. Library of Congress*, 777 F.2d 1573 (D.C. Cir. 1985), it was undisputed that the employee had a protected property interest in continued employment. *See* Mulhollan Br. 42. Most of the other cases involve restrictions on liberty interests, such as criminal statutes or restrictions imposed on incarcerated prisoners. *See Bynum v. Capitol Police Bd.*, 93 F. Supp.2d 50, 58-59 (D.D.C. 2000); *Wolfel v. Morris*, 972 F.2d 712, 717 (6th Cir. 1992); *Adams v. Gunnell*, 729 F.2d 362, 369 (5th Cir. 1984); *see also Procunier v. Martinez*, 416 U.S. 396, 418 (1974) (holding that prisoners have protected liberty interest in receiving correspondence). *Rankin*, which the plaintiff also cites, did not involve a due process challenge or recognize any due process rights. And *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967), involved only a facial challenge to a statute and regulations, which were alleged to chill speech. Here, the argument is not that the plaintiff's speech was chilled, but that he engaged in speech and was terminated from his probationary employment as a result. No case holds that an

employee in those circumstances has a protected interest in prior notice, or would put a reasonable official on notice that the termination of the plaintiff's probationary employment could violate the Due Process Clause.

Furthermore, the district court specifically held — and the plaintiff has not preserved a challenge to this holding on appeal, *cf.* Pl. Br. 40 n.10 (raising argument only in a footnote) — that the CRS policy and the Library of Congress regulation gave adequate notice to employees about their requirements and were not unconstitutionally vague. Any unconstitutional lack of notice, therefore, would have to arise from the conduct of officials in applying the policies. Apart from the fact that officials' failure to enforce a restriction in the past does not estop them from doing so in the future, virtually none of the challenged conduct involves Mulhollan himself.

The plaintiff argues that, so long as Mulhollan makes the final termination decision, he is liable for any confusion or lack of clarity caused by other CRS officials' past conduct. Pl. Br. 41. But Mulhollan is entitled to qualified immunity unless a reasonable officer in his circumstances — knowing only what he knows — would understand that his decision to terminate the plaintiff was clearly unlawful. *See Anderson*, 483 U.S. at 641. We argued in the district court that Mulhollan had only limited involvement in the conduct that was alleged to give

rise to inadequate notice, and also argued that the plaintiff was improperly seeking to hold Mulhollan liable for conduct that was attributable to CRS or the Library of Congress as a whole. *See* Reply Memorandum 24-25, Dkt. 24 (filed Apr. 26, 2010). In denying qualified immunity on the due process claim, the district court failed to distinguish between Mulhollan's own conduct and that of other CRS officials. Regardless of whether CRS could be found to have violated the Due Process Clause through the collective conduct of its employees, Mulhollan may not be held personally liable for an allegedly unconstitutional lack of prior notice arising out of the conduct of third parties of which he is not even alleged to have been aware. *See Iqbal*, 129 S. Ct. at 1948-1949.

III. THE DISTRICT COURT ERRED IN RECOGNIZING AN IMPLIED *BIVENS* CLAIM FOR THE PLAINTIFF TO CHALLENGE MULHOLLAN'S TERMINATION OF HIS PROBATIONARY EMPLOYMENT.

The plaintiff also fails to show that his claims against Mulhollan should be recognized as valid under *Bivens*. Reduced to its essence, the plaintiff's argument is that he should have a right to challenge the termination of his probationary employment in a claim for money damages, despite the fact that Congress has denied that right to virtually all other federal employees under the CSRA, and has specifically and repeatedly considered what rights of judicial review should be

available to Library of Congress employees to challenge adverse employment actions but has chosen not to provide a statutory remedy for the type of harm asserted here.

The plaintiff argues that, unless he can bring a *Bivens* claim against Mulhollan, he will not have any judicial or administrative forum in which to challenge the termination of his probationary employment. Pl. Br. 43, 48, 53-54. It is undisputed, however, that the plaintiff may bring a constitutional claim for injunctive relief against the Library of Congress. Indeed, he brought such a claim in this case. The plaintiff is wrong to suggest that his only avenue for relief is a damages action, and that "constitutional considerations" therefore require an implied remedy. Pl. Br. 54. We are aware of no case holding that the Constitution must be vindicated not only through an injunctive action, but also through an action against an individual defendant for retrospective money damages.

Furthermore, in arguing for a *Bivens* remedy, the plaintiff essentially ignores the fact that he seeks a right that Congress has specifically denied to other federal employees under the CSRA — *i.e.*, relief for the assertedly unlawful termination of probationary employment. *Cf.* Pl. Br. 48 n.14 (arguing in a footnote that the plaintiff's probationary status is "irrelevant"). The plaintiff asks this Court to hold that, although Congress explicitly denied a right of review under the

CSRA to employees terminated within their initial one-year period of appointment, *see* 5 U.S.C. §§ 4303(f)(3), 7511(a)(1), Congress nevertheless intended for courts to create a common-law damages remedy for the employees of some federal agencies to challenge the same type of employment action. That inference is implausible.

As for the plaintiff's argument that employees of the Library of Congress are outside the scope of the CSRA altogether, it is erroneous. Library of Congress employees are within the statutory class of "excepted service" employees, and they also have certain collective bargaining rights under the statute. *See* 5 U.S.C. §§ 2101(1), 7103(a)(3). Furthermore, Congress subsequently considered what rights of review to challenge adverse employment actions should be available to Library of Congress employees, and provided for expanded remedies for certain types of employment-related harms in the CAA. Congress did not, however, create a right of judicial review for Library of Congress employees who challenged the termination of their employment in alleged violation of the First Amendment or Due Process Clause. Instead, Congress left Library of Congress employees to the review rights afforded by governing regulations — regulations that, like the CSRA, do not permit probationary employees to challenge their termination. *See* Mulhollan Br. 58.

Ultimately, the plaintiff's argument is that, because any relief he may seek in an injunctive action will not compensate him fully for his past harm, and because no additional relief is available to him under the CSRA or the CAA, he must be entitled to bring a *Bivens* action. Pl. Br. 55-56. As this Court held *en banc* in *Spagnola v. Mathis*, 859 F.2d 223 (D.C. Cir. 1988), the fact that possible remedies may not be available to a plaintiff or may not fully compensate the plaintiff for his injury does not demonstrate than an implied *Bivens* remedy is appropriate. *See id.* at 225, 228-29. "The special factors analysis does not turn on whether the statute provides a remedy to the particular plaintiff for the particular claim he or she wishes to pursue." *Wilson v. Libby*, 535 F.3d 697, 709-710 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 2825 (2009); *see also United States v. Fausto*, 484 U.S. 439, 454-455 (1988) (applying similar analysis to conclude that Congress' decision not to provide a remedy for wrongful suspension in the CSRA precludes a Back Pay Act claim for that relief). The plaintiff is simply wrong to assert that those decisions are limited to instances where the statutory scheme at issue provides at least some remedy to the plaintiff for the harm alleged. *See, e.g., Wilson*, 535 F.3d at 701-702 (holding that *Bivens* claim was not valid despite the fact that one plaintiff had no valid claim under the Privacy Act and the second plaintiff could seek relief for only one of four allegedly wrongful disclosures);

Spagnola, 859 F.2d at 228-289 (rejecting *Bivens* claim to challenge failure to hire and promote the plaintiffs in alleged retaliation for their speech, for which no right of judicial review was available); *Kotarski v. Cooper*, 866 F.3d 311, 312 (9th Cir. 1989).

The nature of the statutory scheme in this case, and the evidence that Congress intentionally excluded Library of Congress employees from the remedial provisions of the CSRA and provided only limited additional remedies under the CAA, distinguish this case from the decisions that the plaintiff relies upon. In *Davis v. Passman*, 442 U.S. 228 (1979), no equitable, administrative, or other relief was available to the plaintiff, and there was also no evidence that, in enacting Title VII to provide a mechanism by which some government employees could challenge discriminatory employment actions, Congress intended to foreclose other remedies. *Id.* at 245, 247. Here, in contrast, the CSRA and CAA provide clear evidence of Congress' intent to foreclose other remedies for adverse employment actions, and a suit for injunctive relief is available directly against the Library of Congress.

Similarly, in *Ethnic Employees of Library of Congress v. Boorstin*, 751 F.2d 1405 (D.C. Cir. 1985), this Court held that constitutional claims brought by an employee organization, which alleged that the Library of Congress had punished

the organization and its members for constitutionally protected criticisms of agency policy, were not barred by Title VII. But the Library of Congress has conceded that a constitutional claim is available against it for injunctive relief, and *Ethnic Employees* did not address whether a supplemental damages remedy would also be available against individual officials. Furthermore, the harm in *Ethnic Employees*, alleged retaliation for protected speech in violation of the First Amendment, was unrelated to the unlawful discrimination governed by Title VII. Here, in contrast, the nature of the alleged wrongdoing — adverse employment action in response to an employee's public speech assertedly protected by the First Amendment — is among the types of harms intended by Congress to be governed by the CSRA. *See Bush v. Lucas*, 462 U.S. 367, 380-390 (1983).

Stewart v. Evans, 275 F.3d 1126 (D.C. Cir. 2002), also relied on by the plaintiff, is even further afield. The government action that gave rise to the claim in that case — the warrantless search of an employee's office — was not within the universe of "personnel actions" governed by the CSRA's remedial scheme. *See id.* at 1129-1130. And *Navab-Safavi*, 650 F. Supp. 2d 40, merely held that the exclusive statutory channeling provision for contract disputes, which was limited on its face to claims "relating to a contract," did not apply to a claim that did not seek enforcement of the contract but instead challenged its termination as

unconstitutionally motivated. *Id.* at 66-67. None of these decisions undermines the basic point that the district court erred in recognizing a *Bivens* claim to seek money damages for a type of adverse employment action for which Congress deliberately denied federal employees a right of judicial review.

CONCLUSION

For the foregoing reasons and the reasons set forth in our opening brief, this Court should vacate the order of the district court and should remand the case with instructions to dismiss the claims against the individual defendant, Daniel P. Mulhollan.

Respectfully submitted,

TONY WEST
Assistant Attorney General

RONALD C. MACHEN JR.
United States Attorney

THOMAS M. BONDY
(202) 514-4825
/s/ Sharon Swingle
SHARON SWINGLE
(202) 353-2689
Attorneys, Appellate Staff
Civil Division, Room 7250
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

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**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)**

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,819 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared with Word Perfect 12 in a proportional typeface with 14 characters per inch in Times New Roman.

/s/ Sharon Swingle
Sharon Swingle
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Reply Brief for Defendant-Appellant were filed on the following counsel by electronic service through the CM/ECF system and by regular mail, postage prepaid, on September 16, 2011:

Frederick V. Mulhauser
American Civil Liberties Union of the National Capital Area
1400 20th Street, NW
Suite 119
Washington, DC 20036-5920
Direct: 202-457-0800
Email: fmulhauser@aol.com

Arthur Barry Spitzer
American Civil Liberties Union of the National Capital Area
1400 20th Street, NW
Suite 119
Washington, DC 20036-5920
Firm: 202-457-0800
Email: artspitzer@aol.com

Aden J. Fine
American Civil Liberties Union
125 Broad Street
18th Floor
New York, NY 10004-2400
Firm: 212-549-2607
Direct: 212-549-2693
Email: afine@aclu.org

/s/ Sharon Swingle
Sharon Swingle
Counsel for Defendant-Appellant