UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORRIS D. DAVIS, Plaintiff, v. JAMES H. BILLINGTON, in his official capacity as the Librarian of Congress, and DANIEL P. MULHOLLAN, in his individual capacity, Defendants.	No. 1:10-CV-36-RBW

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Introduction

Plaintiff Morris D. Davis opposes Defendant's Motion to Dismiss for Lack of Subject-Matter Jurisdiction or, in the Alternative, for Summary Judgment, and cross-moves for summary judgment on his constitutional claims. Col. Davis was unconstitutionally removed from his position at the Library of Congress' Congressional Research Service for writing opinion pieces in the *Wall Street Journal* and the *Washington Post* expressing his nonpartisan, personal views on the failures of the American military commissions established to try detainees at Guantánamo Bay, Cuba. His speech lies at the very core of the First Amendment and exemplifies the kind of speech that federal courts have been most vigilant in protecting from government retaliation.

Defendant Library of Congress ("Library") successfully opposed a temporary restraining order or preliminary injunction in this case by insisting to this Court that Plaintiff had meaningful remedies available to make him whole. Now, it argues that no such remedies exist, depriving this Court of jurisdiction. As a litigation strategy, the Library's argument amounts to: "Heads we win; tails you lose." As a legal matter, the Library's arguments are wholly unpersuasive.

First, this Court retains jurisdiction over this case. The Civil Service Reform Act ("CSRA") does not deprive Col. Davis of his fundamental right to have constitutional harms addressed by this Court. Nor has any Supreme Court opinion suggested the contrary. Denying Plaintiff judicial review of a violation of his First Amendment rights would be an affront to our constitutional democracy. *See Webster v. Doe*, 486 U.S. 592, 603, 108 S. Ct. 2047, 2053 (1988) (interpreting statute to avoid "the serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim") (internal citations omitted).

Second, the Library argues that the alleged inappropriateness of reinstatement deprives this Court of jurisdiction. That is incorrect as a matter of law. The appropriateness of reinstatement as a remedy is a merits question, not a jurisdictional bar. Col. Davis is entitled to challenge the Library's self-serving statements about the lack of available reinstatement positions—which even if true today may be untrue tomorrow—and its factual claims, based on cherry-picked evidence, that he is disqualified from employment with the Library.

At stake in this case is nothing less than the principle that drives the Supreme Court's analysis of public employee speech cases: that high-value speech on matters of public concern cannot lightly be muzzled by the government. Daniel Mulhollan, the former Director of CRS and the person responsible for terminating Col. Davis, has stated that *all* "issue advocacy" by employees is improper and harmful to the Library's mission. But under the Constitution, the Library lacks the power to impose such a ban. Conscious of the societal harms of silencing meaningful speech on issues of public concern, the courts have rightly required a close nexus between a public employee's official responsibilities and speech an employer seeks to curtail.

In this case, Col. Davis' speech involved public policy issues of the highest value under the First Amendment: the military commissions held at Guantánamo Bay. Furthermore, as the former Chief Prosecutor at the Office of Military Commissions, he is among a handful of people who have the richest knowledge of these issues. He expressed his opinions as a private citizen drawing on his prior role as Chief Prosecutor, rather than pursuant to his job duties. His speech can therefore be curtailed only for the most compelling reasons, which the Library has utterly failed to provide. Moreover, in the face of a vague policy on outside speech governed by "good judgment" and lacking any specifics, there is the real threat that other employees who have witnessed Col. Davis' unlawful termination have self-censored fully protected speech to avoid

the broad and uncertain application of the Library's policy. Silencing well-informed government analysts on matters of public concern runs squarely against the public interest.

The undisputed evidence establishes that the Library terminated Col. Davis in response to his exercise of protected free speech, even though he and other Library employees had repeatedly engaged in opinionated speech without harm to the Library. The Court should deny the Library's motion to dismiss or for summary judgment, grant summary judgment to Col. Davis on his constitutional claims, and order limited discovery for the purpose of ascertaining the most appropriate remedies. Alternatively, should the Court find that material facts are at issue, both motions for summary judgment should be denied and a discovery schedule entered.

Statement of Material Facts

Plaintiff Morris Davis is a twenty-five-year veteran of the U.S. Air Force who has received numerous awards and recognition, including the Legion of Merit. Declaration of Morris Davis, June 28, 2013 ("Davis Decl.") ¶¶ 3–4. Col. Davis was appointed Chief Prosecutor for the Department of Defense's Office of Military Commissions in 2005, a position accompanied by enormous responsibilities and intense public interest. *Id.* ¶ 5. He was responsible for overseeing the military commissions created to prosecute suspected terrorists held at Guantánamo Bay, Cuba. Although initially a firm supporter of the military commissions, Col. Davis resigned his position in October 2007 because he believed that they had become fundamentally flawed and politically tainted. *Id.* After his resignation, Col. Davis became a vocal critic of the military commissions system. He wrote opinion pieces for major newspapers like the *New York Times* and the *Los Angeles Times*, published a law review article, and spoke about his experiences concerning the military commissions to various legal audiences. *Id.* ¶ 6. Due to his unique

experience and his ongoing participation in the public debate over the military commissions, Col. Davis was asked to testify before Congress in July 2008. *Id.* ¶ 9.

In December 2008, Col. Davis began work at the Congressional Research Service ("CRS"), a unit of the Library, as Assistant Director of its Foreign Affairs, Defense, and Trade Division ("FDT"). *Id*. ¶ 16. FDT has official responsibilities for matters including foreign affairs and the Defense Department, but not issues related to military commissions, which are handled by legislative attorneys in CRS' American Law Division ("ALD"). *Id.* ¶ 13–15; Declaration of Richard Grimmett, June 28, 2013 ("Grimmett Decl.") ¶ 5; Memorandum from Daniel Mulhollan to Morris Davis (Nov. 13, 2009) ("Admonishment Letter"), attached as Exhibit A to the Declaration of Lee Rowland, June 28, 2013 ("Rowland Decl."), at 4. Col. Davis continued to speak publicly about military commissions during his employment at CRS, with explicit approval from CRS management. Davis Decl. ¶¶ 26–28.

For example, Mr. Mulhollan approved his participation in a conference at Case Western Reserve Law School concerning military commissions; CRS' attorneys also approved his participation without an explicit disclaimer disassociating himself from CRS. Rowland Decl. Ex. B (Email from Kent Ronhovde to Morris Davis (Sept. 10, 2009)). Mr. Mulhollan also approved his acceptance of an award from the Lawyers Association of Kansas City honoring him for speaking out against the "politicization of the military commissions." *Id.* Ex. C (Email from Daniel Mulhollan to Morris Davis et al. (Aug. 24, 2009)). Although Col. Davis was more hesitant to speak at the beginning of his employment, these approvals gave him confidence that his speech activities did not violate any Library policies, which regulate speech related to the topic area for which an employee has responsibility at CRS, and which note that employees are not required to submit personal writings for prior review. Davis Decl. ¶ 29; Rowland Decl. Ex. D

(Library of Congress Regulation 2023-3 ("LCR 2023-3")); *Id.* Ex. E (CRS, Policy on Outside Speaking and Writing (Jan. 23, 2004)). Col. Davis' six-month review reflected positive feedback. *Id.* Ex. F (Six Months Qualifying Period Performance and Conduct Evaluation ("Performance Review")). Through November 10, 2009, he consistently received positive feedback on his performance. Davis Decl. ¶¶ 30–33; Grimmett Decl. ¶ 14.

In November 2009, U.S. Attorney General Eric Holder announced that some Guantánamo detainees would be tried in federal court, while others would continue to be prosecuted in military commissions. Over the weekend of November 7–8, Col. Davis wrote and submitted two opinion pieces: (1) an op-ed to the *Wall Street Journal* about Attorney General Holder's decision, Rowland Decl. Ex. G (Morris Davis, Op-Ed., *Justice and Guantánamo Bay*, Wall St. J., Nov. 10, 2009); and (2) a letter to the editor of the *Washington Post* on the use of federal courts to try some of the individuals being held at Guantánamo, *id.* Ex. H (Morris Davis, Letter to the Editor, Wash. Post, Nov. 11, 2009) (the "opinion pieces"). Col. Davis' principal point in these pieces was that, in his view, there should only be one judicial system for all of the Guantánamo detainees. Davis Decl. ¶ 36. His conclusions were based on knowledge gained from his prior role as Chief Prosecutor, not as a result of his employment with CRS. *Id.* ¶ 37. Neither of the opinion pieces referenced CRS or the Library, and the bylines made clear that Col. Davis was writing in his personal capacity. *Id.* There was no explicit disclaimer. *Id.*

On November 12, the day after the opinion pieces were published, Col. Davis was summoned to a meeting with Mr. Mulhollan and Richard Ehlke, the acting Deputy Director of CRS. *Id.* ¶ 43. During this meeting, Mr. Mulhollan told Col. Davis that he could not believe that Col. Davis had written these pieces, which caused him to doubt Col. Davis' suitability to serve as Assistant Director, and that Col. Davis would not be converted to permanent status. *Id.* The next

day, Mr. Mulhollan again called Col. Davis into a meeting with Mr. Ehlke. *Id.* ¶ 44. When Col. Davis refused to acknowledge that it was impermissible for him to have written the opinion pieces, Mr. Mulhollan handed him a formal letter of admonishment. Admonishment Letter. On November 20, Mr. Mulhollan informed Col. Davis that he would be terminated as of December 21, 2009, and thereafter be given a thirty-day temporary position as Mr. Mulhollan's Special Advisor. Mr. Mulhollan's assistant then delivered a formal notice of termination to Col. Davis. Davis Decl. ¶ 45; Rowland Decl. Ex. I (Letter from Daniel Mulhollan to Morris Davis (Nov. 20, 2009) ("Termination Letter")).

Argument

I. Relevant Legal Standards

When defendants move to dismiss, a plaintiff's claims "must be taken as true." *Nader v. Democratic Nat'l Comm.*, 567 F.3d 692, 694 (D.C. Cir. 2009) (quoting *Chalabi v. Hashemite Kingdom of Jordan*, 543 F.3d 725, 726 (D.C. Cir. 2008)) (internal quotation marks omitted). Motions "that would summarily extinguish litigation at the threshold and foreclose the opportunity for discovery" may be granted only where no set of possible facts could justify relief for the plaintiff. *Baumann v. Dist. of Columbia*, 744 F. Supp. 2d 216, 221 (D.D.C. 2010) (quoting *Haynesworth v. Miller*, 820 F.2d 1245, 1254 (D.C. Cir. 1987)) (internal quotation marks omitted).

Summary judgment is appropriate only where there are no genuine disputes of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511 (1986). All reasonable factual inferences must be made in the light most favorable to the non-moving party, *id.*, and if undisputed facts are susceptible to different inferences, summary judgment is not appropriate. *See Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994).

Construing the facts in the light most favorable to Plaintiff, the Library's motion must be denied. Even construing the facts in the light most favorable to Defendant, Col. Davis has established violations of his rights to free speech and due process.[1]

II. The Court Retains Jurisdiction Over Colonel Davis' Constitutional Claims

After three years of litigation, the Library now contends that the Court lacks jurisdiction to hear Col. Davis' claims. Its argument rests on two pillars, neither of which withstands scrutiny. First, according the Library, the Supreme Court held in *Elgin v. Dep't of Treasury*, 132 S. Ct. 2126 (2012), that CSRA precludes constitutional claims for equitable relief. The Library, however, misreads *Elgin*, which merely determined the appropriate forum for review of the plaintiff's constitutional claim. Second, the Library asserts that there is no remedy for Col. Davis' claims, because all forms of equitable relief are unavailable. In doing so, the Library miscasts a merits-based factual inquiry as a jurisdictional bar. The Court should therefore deny the Library's latest attempt to derail this litigation.

[1] The Library again argues that it is entitled to sanctions or adverse inferences due to the absence of certain emails sent from Plaintiff's CRS email account from the set of materials turned over to the Library pursuant to this Court's Order of May 6, 2013. *See* MTD at 24. An adverse instruction would be premature because it is not yet clear that the e-mails are irretrievably lost. *See D'Onofrio v. SFX Sports Gr., Inc.*, Civil Action No. 06–687 (JDB/JMF), 2010 WL 3324964, at *10 (D.D.C. Aug. 24, 2010). As Plaintiff has testified under oath in the past, and repeats in the attached Declaration, he was unaware that his deletion of emails on his hard drive would or could destroy the Library's only copy of emails sent and received on their email server. He has also sworn that he does not know why certain emails are missing; that he followed standard email deletion procedures he repeated throughout his government career, and that he never acted in bad faith or intentionally deleted evidence relevant to this case. Because Col. Davis did not act in bad faith, "the logical premise of the instruction—that the spoiliator must have destroyed the evidence to keep any one from seeing it—is not there." *Id.* Accordingly, the Court should decline to revisit the question of sanctions or adverse inference. Furthermore, given that the Library has a standing duty as a public agency to maintain records and permitted the apparently permanent deletion of CRS emails, the Court should decline to reward the Library with sanctions or adverse inferences given its failure to fulfill its responsibility to ensure such files were maintained.

a. Colonel Davis' constitutional claims are not precluded by CSRA.

Congress may "prescribe the procedures and conditions under which" judicial review may be available. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336, 78 S. Ct. 1209, 1218 (1958). However, "[w]here Congress intends to *preclude* judicial review of constitutional claims its intent to do so must be clear." *Webster*, 486 U.S. at 603, 108 S. Ct. at 2053 (emphasis added). Courts "require this heightened showing in part to avoid 'the serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.* (citing *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681, n.12, 106 S. Ct. 2133, 2141–42 n.12 (1986)). Here, CSRA does not clearly express Congress' intent to preclude all judicial review of civil servants' constitutional claims. The Court therefore retains jurisdiction to hear this case.

In CSRA, Congress divided the civil service into three categories: the Senior Executive Service, which includes certain high-level positions; the competitive service, which includes most Executive Branch civil service positions, as well as a few categories specifically designated by Congress; and the excepted service, which covers the remainder of the civil-service positions, including most Library employees. *See Davis v. Billington*, 681 F.3d 377, 384 (D.C. Cir. 2012) (citing 5 U.S.C. §§ 2101–03; *id.* §3132(a)(2)). Chapter 75 of CSRA further distinguishes between permanent employees, who enjoy most of the Act's protections against arbitrary adverse employment actions, and probationary employees, who do not. 681 F.3d at 384. As a probationary member of the excepted service, Col. Davis is "without recourse under the CSRA for adverse actions taken against him." *Id.*

Had Col. Davis challenged his termination on statutory or regulatory grounds, the Library might well be correct in asserting that judicial review is unavailable. As the Supreme Court held

in *United States v. Fausto*, 484 U.S. 439, 447, 108 S. Ct. 668, 673 (1988), CSRA generally precludes excepted service employees from obtaining judicial review for statutory or regulatory claims related to adverse employment actions otherwise covered by the Act. *See id.* at 448–49, 108 S. Ct. at 674. But while *Fausto* involved a statutory claim, *see id.* at 443, 108 S. Ct. at 671, Col. Davis is challenging his termination on constitutional grounds. Because there is no clear evidence that Congress intended CSRA to prevent federal employees from obtaining judicial review for their constitutional claims, the D.C. Circuit has repeatedly "held that district courts are open to challenges seeking equitable relief on *constitutional* grounds, at least when the CSRA does not provide an adequate alternative route to judicial review." *Suzal v. Dir., U.S. Info. Agency*, 32 F.3d 574, 586 (D.C. Cir. 1994) (emphasis in original) (collecting D.C. Circuit cases); *cf. Am. Fed'n of Gov't Emps. Local 1 v. Stone*, 502 F.3d 1027, 1036 (9th Cir. 2007) ("When Congress decides to exclude an employee from the protections of the CSRA or an analogous scheme . . . *Fausto* precludes the employee from obtaining judicial review of statutory or regulatory claims. However, under *Webster*, the employee may still obtain judicial review of constitutional claims unless Congress, in addition to excluding the employee from the protections of the CSRA or an analogous scheme, has also expressly declared its intention to preclude review of constitutional claims.").

The Library argues that the Supreme Court's recent decision in *Elgin* effectively abrogates the D.C. Circuit's prior case law on this issue, because the Court stated that CSRA's "exclusivity does not turn on the constitutional nature of an employee's claim." Defendant's Motion to Dismiss ("MTD") at 8–9 & n.1 (quoting *Elgin*, 132 S. Ct. at 2136). The *Elgin* plaintiffs, however, were former federal *competitive* service employees, entitled by CSRA to administrative process and, ultimately, judicial review of their constitutional claims in the

Federal Circuit. *Elgin*, 132 S. Ct. at 2130–31. Thus, the Court held that *Webster*'s heightened congressional intent standard for statutes that preclude judicial review of constitutional claims did not apply, because CSRA "[did] not foreclose all judicial review of [the *Elgin* plaintiffs'] constitutional claims, but merely direct[ed] that judicial review shall occur in the Federal Circuit." *Id.* at 2132. Applying a lesser standard of congressional intent, the Court found it "fairly discernible" that Congress intended to preclude "an *additional* avenue of review in district court." *Id.* at 2134 (emphasis added). In other words, *Elgin* is a decision about the proper forum for review, not about whether all judicial review may be foreclosed. Nothing in *Elgin* abrogates the D.C. Circuit's well-established rule allowing district courts to hear employees' constitutional claims where CSRA provides no route to review.

The Library also suggests that the D.C. Circuit has determined, in this very case, that CSRA precludes judicial review of Col. Davis' constitutional claims. *See* MTD at 7 (citing *Davis*, 681 F.3d at 383–88). But the Circuit held only that the courts should not here imply a new form of *Bivens* action, because CSRA's remedial scheme qualifies as a special factor counseling hesitation against the creation of a non-statutory cause of action for damages. *Davis*, 681 F.3d at 387–88. A decision declining to infer a *Bivens* remedy reflects merely "the courts' general reluctance to allow damages as a judicially created remedy for constitutional torts." *Stone*, 502 F.3d at 1036. It has no bearing on the availability of equitable relief. *Id.*; *see also, e.g.*, *Spagnola v. Mathis*, 859 F.2d 223, 229–30 (D.C. Cir. 1988) (en banc) ("While we decline to extend *Bivens* remedies to Hubbard and Spagnola, we do not suggest that the CSRA precludes the exercise of federal jurisdiction over the constitutional claims of federal employees and job applicants altogether. On the contrary, time and again this court has affirmed the right of civil servants to seek equitable relief against their supervisors, and the agency itself, in vindication of their

constitutional rights.") (citations and footnote omitted) (collecting cases); *Davis*, 681 F.3d at 388 n.1 (expressly declining to state a view on the validity of Col. Davis' claim for injunctive relief (citing *Spagnola*, 859 F.2d at 229–30)). The Court therefore retains jurisdiction.

b. Equitable relief remains available.

i. The Library has not shown as a matter of law that reinstatement would be inappropriate.

Once a plaintiff establishes an unconstitutional discharge, "he is presumed to be entitled to reinstatement." *Prof'l Ass'n of Coll. Educs. v. El Paso Cnty. Comm. Coll. Dist.*, 730 F.2d 258, 268 (5th Cir. 1984); *see also, e.g.*, *Hubbard v. EPA*, 809 F.2d 1, 11–12 (D.C. Cir. 1986) [*Hubbard* I]. The court "should deny reinstatement in a first amendment wrongful discharge case on the basis of equity only in exceptional circumstances." *Professional Ass'n of Coll. Educs.*, 730 F.2d at 269. "That reinstatement might have disturbing consequences, revive old antagonisms, or breed difficult working circumstances usually is not enough, nor specific enough, to outweigh the important first amendment policies that reinstatement serves." *Id.* (citations and internal quotation marks omitted) (collecting cases).

As should be clear from the very cases relied on by the Library, the propriety of reinstatement may be determined only after a searching factual inquiry on the merits. *See, e.g.*, *Kapche v. Holder*, 677 F.3d 454, 466–69 (D.C. Cir. 2012) (extensive fact discovery); *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 355–56, 115 S. Ct. 879, 883 (1995) (misconduct revealed in deposition uncontested). That inquiry is not possible here, because discovery has not even commenced. Where "no discovery has been undertaken, it is premature for the Court to decide whether reinstatement is 'feasible.'" *Miller v. Kerry*, --- F. Supp. 2d ----, No. 10-cv-0512 (ESH), 2013 WL 617021, at *7 (D.D.C. Feb. 20, 2013); *see also Webb v. Dist. of Columbia*, 146 F.3d 964, 976–78 (D.C. Cir. 1998) (holding that the district court abused its discretion by

refusing to consider evidence relevant to whether reinstatement was an appropriate remedy, and stating that a plaintiff must be given an opportunity to contest the defendant's after-acquired evidence claim). The Library's fact-based arguments that reinstatement would be inappropriate—its confidence in Col. Davis is "irreconcilably shaken," their relationship is "fractured," the "only" equivalent position has been filled, *see* MTD at 10—simply do not support dismissal. Were it otherwise, federal defendants could always deprive courts of jurisdiction in employee speech cases merely by asserting "irreconcilable" differences with fired employees.[2]

Because the Library has not shown that reinstatement would be inappropriate, it has likewise failed to demonstrate that Col. Davis will not be able to obtain injunctive and declaratory relief against the Library's outside speaking policy. Were this court to find that reinstatement is an appropriate remedy, Col. Davis would be "likely to suffer future injury" under Library policies, *City of Los Angeles v. Lyons*, 461 U.S. 95, 105, 103 S. Ct. 1660, 1667 (1983), and would therefore be fully entitled to injunctive and declaratory relief.

ii. Sovereign immunity does not bar Colonel Davis from receiving back pay.

In his motion for a temporary restraining order and/or a preliminary injunction, Col. Davis argued that the failure to award preliminary relief might well result in irreparable harm because the Library would likely assert sovereign immunity as a bar to back pay and other monetary relief. *See* Pl.'s Mem. Supp. Mot. for PI (ECF No. 2-1) at 39–40. In response, the

[2] Even if it is true that all the Assistant Director positions are occupied as of June 2013, there may be vacant positions by the time this Court orders relief. Col. Davis is also flexible about possible options for reinstatement. Davis Decl. ¶ 51. Additionally, although it is premature to address the availability of reinstatement, the Court may be authorized to "bump" one of the Library's current employees. *See, e.g.*, *Lander v. Lujan*, 888 F.2d 153 (D.C. Cir. 1989) (holding that Title VII of the Civil Rights Act of 1964 authorizes the bumping of innocent incumbents, and noting that displaced incumbents can presumably be reassigned in the civil service system).

Library strenuously argued that the Back Pay Act functions as a waiver of sovereign immunity under these circumstances. *See* Def.'s Mem. Opp. Mot. for PI (ECF No. 6) at 22–24. This Court then denied Col. Davis' request for preliminary relief, on the ground that he had failed to demonstrate irreparable injury. Order (ECF No. 11) at 5–7. In a brazen reversal of its previous litigating position, the Library now asserts that sovereign immunity "plainly" bars Col. Davis from collecting back pay and any other form of monetary relief. MTD at 18.

The Library's earlier position was correct. "The doctrine of sovereign immunity shields the government from liability for such payments [of back pay], *except when waived by statute*." *Trout v. Sec'y of Navy*, 540 F.3d 442, 443 (D.C. Cir. 2008) (emphasis added). Here, the Back Pay Act supplies the requisite statutory waiver of sovereign immunity. Through the Act, Congress made back pay available to any "employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee." 5 U.S.C. § 5596(b)(1).

This language waives sovereign immunity for *all* causes of action, including those arising under other sources of law such as the Constitution, that satisfy the Back Pay Act's terms. *See Brown v. Sec'y of Army*, 918 F.2d 214, 216–17 (D.C. Cir. 1990) (R.B. Ginsburg, J.) (Back Pay Act waives sovereign immunity with respect to prejudgment interest in Title VII cases); *Social Sec. Admin. v. Fed. Labor Relations Auth.*, 201 F.3d 465, 468 (D.C. Cir. 2000) (Back Pay Act waives sovereign immunity with respect to awards under the Fair Labor Standards Act).

Col. Davis' constitutional claims for equitable relief, including back pay, satisfy the Back Pay Act's terms. First, he is as an "employee of an agency" because he was formerly employed by the Library of Congress. *See* 5 U.S.C. § 5596(a)(3); *id.* § 5102(a)(2). Second, his lawsuit raising constitutional claims against the Library qualifies as a "timely appeal" of his discharge, *see* 5 C.F.R. § 550.804(b), and the Court's favorable resolution of those claims would serve as an "administrative determination," *id.* § 550.804(c). Third, this Court (an "appropriate authority") may well find that Col. Davis has been affected by "unjustified" personnel action under the First Amendment ("applicable law"). *See Brown*, 918 F.2d at 216; *see also Hubbard v. EPA*, 949 F.2d 453 (D.C. Cir. 1991) [*Hubbard* II]. Finally, Col. Davis' termination is a covered personnel action under the Act because it resulted in the withdrawal of pay. *See, e.g.*, *Lee v. Brady*, 741 F. Supp. 990, 991 & n.1 (D.D.C. 1990). Thus, the Back Pay Act waives sovereign immunity with respect to Col. Davis' constitutional claims. *See Karahalios v. Def. League Inst. Foreign Language Ctr. Presidio of Monterey*, 534 F. Supp. 1202, 1212 (N.D. Cal. 1982) (Back Pay Act waives sovereign immunity with respect to federal employee's constitutional claim for back pay), *rev'd on other grounds*, 821 F.2d 1389 (9th Cir. 1987), *aff'd sub nom. Karahalios v. Nat'l Fed'n of Fed. Emp., Local 1263*, 489 U.S. 527, 109 S. Ct. 1282 (1989).

The Library now argues that the Back Pay Act does not waive sovereign immunity in this case, relying on *Fausto* for the proposition that this Court is not an "appropriate authority" within the meaning of the Act. This is clearly incorrect, as nothing in *Fausto* pertains to sovereign immunity and the court was explicit in noting that the holding did nothing to alter the legal analysis for claims not brought pursuant to CSRA.[3] Because Plaintiff's constitutional claims are

[3] According to the Library, *Fausto* held that the Back Pay Act applies only where "the agency itself, or the [Merit Systems Protection Board] or the Federal Circuit where those entities have the authority to review the agency's determination" determines that the employee's rights were

properly raised in federal court, *see, e.g.*, *Suzal*, 32 F.3d at 586, this Court is an "appropriate authority" for the Back Pay Act's waiver of sovereign immunity. *See Brown*, 918 F.2d at 216 (holding that a federal district court is an "appropriate authority" for purposes of applying the Back Pay Act's sovereign immunity waiver in a Title VII action). Thus, sovereign immunity does not bar Col. Davis from receiving back pay.

* * *

Because the Library has failed to demonstrate either that CSRA precludes judicial review or that equitable relief is unavailable as a matter of law, its motion to dismiss should be denied.

III. Colonel Davis Is Entitled to Summary Judgment on His Free Speech Claims

The undisputed facts show that Col. Davis was terminated for expressing personal views on a matter of paramount public interest and that the value of his speech outweighs any claimed harm to the Library. He is entitled to summary judgment on his First Amendment claim.

a. The *Pickering* test protects Colonel Davis' speech on a matter of public concern.

The speech of public employees enjoys "considerable First Amendment protection." *O'Donnell v. Barry*, 148 F.3d 1126, 1133 (D.C. Cir. 1998); *see also Wilburn v. Robinson*, 480 F.3d 1140, 1149 (D.C. Cir. 2007). In evaluating a claim that a public employer has violated an

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violated. MTD at 18–19 & n.8 (quoting *Fausto*, 484 U.S. at 454, 108 S. Ct. at 677). Not so. *Fausto* held only that judicial review of federal employees' statutory and regulatory claims, including claims for relief under the Back Pay Act itself, is largely precluded by CSRA's comprehensive administrative scheme. *Fausto*, 484 U.S. at 455, 108 S. Ct. at 677. When the Court stated that an "appropriate authority" to award back pay under the Back Pay Act is the employee's agency, the Merit Systems Protection Board, or the Federal Circuit, it meant only that those are the bodies authorized *by CSRA* to review Back Pay Act claims. *See id.* at 454, 108 S. Ct. at 677. Here, by contrast, Col. Davis seeks relief from this Court under the Constitution; in such a case, this Court is an appropriate authority. *See Hubbard* II, 949 F.2d at 469 (distinguishing the right to back pay under the Back Pay Act, which did not apply to the plaintiff, from the right to back pay as relief for a First Amendment violation), *rev'd en banc in part on other grounds*, 982 F.2d 531 (D.C. Cir. 1992) (holding that 5 U.S.C. § 702 does not waive sovereign immunity with respect to claims for back pay).

employee's free speech rights, courts in the District of Columbia Circuit employ a four-factor analysis. *See LeFande v. Dist. of Columbia*, 613 F.3d 1155, 1158–59 (D.C. Cir. 2010); *Wilburn*, 480 F.3d at 1149; *Hall v. Ford*, 856 F.2d 255, 258 (D.C. Cir. 1988). Although this four-part analysis appears nowhere in the Library's motion, it is crucial to the proper balancing of the individual, societal, and governmental interests at play in public employee speech cases.

First, to receive First Amendment protection, an employee must be speaking as a citizen on a matter of public concern. *See Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S. Ct. 1951, 1958 (2006); *Tao*, 27 F.3d at 638–39. Second, the court must consider whether the governmental interest in workplace efficiency outweighs both the employee's interest as a citizen in commenting upon matters of public concern, and the public's interest in hearing what the employee has to say. *See O'Donnell*, 148 F.3d at 1133 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734 (1968)). Third, the employee must demonstrate that the speech was a "motivating factor" in the retaliatory action. *Id.* Finally, the employer has an opportunity to prove by a preponderance of evidence that it "would have reached the same decision . . . even in the absence of the protected conduct." *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 576 (1977). "The first two factors . . . are questions of law for the court to resolve, while the latter are questions of fact ordinarily for the jury." *Tao*, 27 F.3d at 639.

Thus, once a public employee establishes that he spoke as a citizen on matters of public concern, and that this protected speech was a "motivating factor" in the decision to terminate him, the burden shifts to the government to justify the discharge by showing harm to its interest "in promoting the efficiency of the public services it performs" that outweighs the employee's First Amendment rights. *Rankin v. McPherson*, 483 U.S. 378, 388, 107 S. Ct. 2891, 2899 (1987) (internal quotation marks omitted). Here, there is no dispute that Plaintiff's speech involved a

matter of consummate public concern and that it was the motivating factor in his dismissal. The Library has failed to provide evidence that his speech harmed the functioning of CRS.

i. Colonel Davis spoke as a citizen on a matter of paramount public concern.

Plaintiff has demonstrated by uncontroverted evidence that he spoke as a citizen on an issue of immense public concern and that he was particularly qualified to inform public opinion. Both elements have been repeatedly cited in *Pickering* and its progeny as values worthy of protection. As the Supreme Court noted in *Connick v. Myers*, any analysis of public employee speech must include "our long-standing recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern." 461 U.S. 138, 154, 103 S. Ct. 1684, 1694 (1983); *see also Pickering*, 391 U.S. at 573, 88 S. Ct. at 1737 ("The public interest in having free and unhindered debate on matters of public importance" is the "core value of the Free Speech Clause of the First Amendment.").

There can be no dispute that the subject of Col. Davis' opinion pieces—the government's decision about how to prosecute suspected terrorists—is of the highest public interest. *See* Rowland Decl. Ex. J (Letter from Lindsey O. Graham, U.S. Senator, to Dr. James Billington, Librarian of Congress (Dec. 15, 2009) ("Graham Letter")). "[C]urrent government policies" are "the paradigmatic 'matter[] of public concern.'" *Sanjour v. EPA*, 56 F.3d 85, 91 (D.C. Cir. 1995) (alteration in original) (en banc). Indeed, few reported cases grapple with matters of public concern as weighty as those in this case. A highly decorated twenty-five-year veteran of the U.S. Air Force, Col. Davis resigned from his position as Chief Prosecutor for the Office of Military Commissions because he came to believe that the commissions system had become fundamentally flawed and politically tainted. Davis Decl. ¶ 5. *See McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983) (allowing the public "to make informed decisions about the

operation of their government merits the highest degree of first amendment protection"); *Tao*, 27 F.3d at 640 (collecting cases).

Recognizing the importance of an informed body politic, courts also weigh the particular *speaker's* ability to offer information about government policy. In *Pickering*, the court noted that protecting the ability of teachers to speak freely on matters of educational policy was "essential" because public employees are often "the members of a community most likely to have informed and definite opinions" on issues requiring "informed decision-making by the electorate." *Pickering*, 391 U.S. at 572, 88 S. Ct. at 1736; *see also Waters v. Churchill*, 511 U.S. 661, 674, 114 S. Ct. 1878, 1887 (1994) ("Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions."); *Wright v. FBI*, Nos. 02-915, 03-226, 2006 WL 2587630, at *7 (D.D.C. July 31, 2006) (views of "knowledgeable, informed, experienced 'insiders' are of particular utility").

In this case, few people could rival Plaintiff in his expertise about the workings and policies of the military commissions system. *See* Davis Decl. ¶ 5; Grimmett Decl. ¶ 17; Graham Letter. After his resignation, Col. Davis became a vocal critic of the military commissions, writing opinion pieces for major newspapers like the *New York Times* and the *Los Angeles Times*, publishing a law review article, and speaking to various legal audiences. Davis Decl. ¶ 6. Because of his extensive experience and his high profile in the public debate over the military commissions, Col. Davis was asked to testify before Congress in July 2008. *Id*. ¶ 9. Col. Davis' unparalleled ability to contribute to this national debate is precisely why both the *Wall Street Journal* and the *Washington Post* ran his two opinion pieces. *See Tao*, 27 F.3d at 640 (media coverage "indicates the issue was one of public concern").

Furthermore, unlike in many public employee speech cases, Col. Davis' speech in no way related to a dispute over his *employer*'s internal politics. *See, e.g.*, *Navab-Safavi v. Broad. Bd. of Governors*, 650 F. Supp. 2d 40, 56 (D.D.C. 2009), *aff'd sub nom. Navab-Safavi v. Glassman*, 637 F.3d 311 (D.C. Cir. 2011) ("*Rankin* is the only Supreme Court case to have 'directly applied the *Pickering* balancing test to speech whose content had nothing to do with the workplace.'" (citing *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 466 n.10, 115 S. Ct. 1003, 1013 n.10 (1995) [*NTEU*])). Courts have been hesitant to elevate internal grievances to constitutional status. *See LeFande*, 613 F.3d at 1159 (speech may not be of "public concern" when it involves "individual personnel disputes and grievances") (quoting *Hall*, 856 F.2d at 259) (internal quotation marks omitted); *see also Connick*, 461 U.S. at 154, 103 S. Ct. at 1694 (cautioning against "attempt to constitutionalize the employee grievance"). An employee's speech "interest is entitled to more weight" when he is not "merely trying to advance his own interests as an employee." *Foster v. Ripley*, 645 F.2d 1142, 1148 (D.C. Cir. 1981).

Col. Davis had no personal interests at stake here. He spoke only to inform the debate on a matter of great public concern, and was uniquely qualified to do so. His speech therefore lies at the apex of the "public concern" test, which weighs heavily in his favor in the *Pickering* balance. *See Connick*, 461 U.S. at 152, 103 S. Ct. at 1692–93 ("a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern"); *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."). The Court should therefore begin the *Pickering* balance with the First Amendment scales tilted significantly in Plaintiff's favor.

ii. Colonel Davis' right to speak on matters of public concern outweighs speculative predictions of harm to the Library.

After establishing the value of an employee's speech, courts weigh that value against the employer's interest in operating as an enterprise. As shown above, Col. Davis' speech is of extraordinary public value and should be fully protected absent demonstrable harm to the Library's operations. "As the magnitude of intrusion on employees' interests rises, so does the Government's burden of justification." *Navab-Safavi*, 650 F. Supp. 2d at 57 (quoting *NTEU*, 513 U.S. at 483, 115 S. Ct. at 1021) (internal quotation marks omitted). The Library cannot meet this heightened burden; its own policies foreclose any finding of harm from speech unrelated to Plaintiff's areas of official specialization, and the harm asserted by the Library is entirely speculative.

1. Colonel Davis was not speaking pursuant to his official job duties.

Col. Davis engaged in his high-value speech as a retired military prosecutor and a private citizen—not as an employee of the Library. The opinion pieces were not directed at or written pursuant to his employment with CRS and did not rely on any information obtained there; they were based exclusively on knowledge and experience he acquired well before coming to work for CRS. *See* Davis Decl. ¶ 36. But even if his speech had *related to* his work responsibilities, such a relationship would not demonstrate that Col. Davis' spoke *pursuant to* his official duties, which is the test that determines whether the First Amendment protects citizen speech.[4]

As the Court of Appeals has noted, a government employer may not simply censor all speech related to the general topics of an employee's work. *Winder v. Erste*, 566 F.3d 209, 216 (D.C. Cir. 2009) ("Speech can be covered by the First Amendment even if it is related to one's job function. *See, e.g.*, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734–35

[4] Adverse inferences against Plaintiff are not warranted on Defendant's motion. However, even if this Court were to grant the Library's request for an adverse inference that Plaintiff had "involvement with military commissions or detainee issues," MTD at 25, that does not meet the nexus required by case law, as discussed below.

(1968) (holding that the First Amendment protects a school teacher's speech about the school district's use of taxpayer revenue)."); *see also Payne v. Dist. of Columbia*, 741 F. Supp. 2d 196, 217 (D.D.C. 2010) ("[T]he question is whether the employee's speech can be properly characterized as part of the employee's official duties."). The D.C. Circuit applies this analysis even where the plaintiff is a high-level government employee. *See, e.g.*, *Hall*, 856 F.2d at 264 (for employer to receive greater deference, high-level "employee's speech must relate to policy areas for which he is responsible").

Nothing in the record contradicts the fact that Col. Davis' official responsibilities did not include military commissions. *See* Rowland Decl. Ex. C (Email from Daniel Mulhollan to Morris Davis, et al. (Aug. 24, 2009)). The Library's extensive reliance on individual emails where Plaintiff mentioned that his colleagues worked on those issues, *see* MTD at 36–38, does not assist the Court in its analysis of whether the opinion pieces were drafted pursuant to *Col. Davis'* official duties.[5] Plaintiff and numerous other employees of CRS have stated under oath that Plaintiff's Division did not handle issues related to Guantánamo Bay; they were legal matters handled by ALD. Davis Decl. ¶¶ 13–15; Grimmett Decl. ¶ 5; *see also* Rowland Decl. Ex. P (Mercury Database Search Results for "Military Commissions"). Mr. Mulhollan's own words foreclose any doubt about this fact. In his letter of admonishment, Mulhollan acknowledges "that the Assistant Director for Foreign Affairs, Defense and Trade has little to do with military

[5] Col. Davis does not believe that his emails support the Library's contention that his official job duties included work on military commissions. Even assuming they do, however, Col. Davis' view of both his job responsibilities and CRS' policies evolved over time. During his tenure at CRS, Col. Davis learned that his Division had no formal authority over military commissions issues. *See* Davis Decl. ¶ 29. This Court should evaluate Plaintiff's job duties as they were when the speech at issue occurred. *See O'Donnell*, 148 F.3d at 1136.

commissions." Admonishment Letter at 3.[6] He describes Col. Davis, in assisting his coworkers on matters relating to his expertise on Guantánamo, as a "collegial resource." *Id.* It is plain that Col. Davis' opinions on the matter did not flow from his official duties.[7] The Library cannot cite a case where a court found speech outside of the core of an employee's *official* responsibilities unprotected by the First Amendment. This Court should decline to be the first.

2. Even high-level policymakers retain the right to speak on matters outside of their official responsibilities.

Courts may grant greater deference to the actions of employers when they curtail the speech of "key deputies." *Hall*, 856 F.2d at 263. The Library relies heavily on *Hall* to conclude that it need not offer any real evidence of disruption because Col. Davis occupied a policy-making position, giving the Library "wide latitude to control [his] speech." MTD at 39. This argument is incorrect as a factual matter. But even taking the Library's claim as true, it does not tip the *Pickering* balance in its favor.

First, in cases where the courts grant the government wider latitude in controlling high-level employees' speech, that analysis remains entirely tethered to the employee's official job duties. *See Hall*, 856 F.2d at 264 ("[W]e ask whether the government interest in accomplishing its organizational objectives through compatible policy level deputies is implicated by the employee's speech. At a minimum, the employee's speech must relate to policy areas for which he is responsible.") (citation omitted); *O'Donnell*, 148 F.3d at 1136 (policy-level employee's

[6] Director Mulhollan's statement that Members of Congress may be *confused* about Col. Davis' responsibilities cannot substitute for Col. Davis' actual job duties. Admonishment Letter at 3. Such a rule would permit employers to penalize an unlimited scope of employee speech, based on unfounded speculations about confused listeners. *Cf. Garcetti*, 547 U.S. at 424, 126 S. Ct. at 1961 (cautioning against permitting employers from "restrict[ing] employees' rights by creating excessively broad job descriptions").

[7] Alternatively, should the Court find that Col. Davis' job duties are a matter of contested fact, it should deny both parties' motions for summary judgment.

"views on matters within the core of his responsibilities" is unprotected speech). It is not in dispute that Col. Davis' official job duties excluded military commissions, and the Library's arguments therefore fare no better under the "policymaker" analysis.

Second, and critically, the rationale behind the courts' grant of wider latitude to employers when disciplining high-level employees is that a high-level employee's public disagreement *with the employer's policies* will make him unable to carry out his duties effectively. *See Hall*, 856 F.2d at 265 (deference to university that fired athletic coach for espousing "contrary views . . . . as to how the [athletic] department should have been run" appropriate because school "could not expect him to carry out their policy choices vigorously"); *O'Donnell*, 148 F.3d at 1135 ("especially disruptive for the high-level employees of a governmental agency to express public disagreement with the agency's policies"). Those concerns are completely absent here. Unlike any case cited by the Library, Col. Davis was not speaking out against his employer, his boss, or any Library policies. There was no threat in this case that Col. Davis' views would have been "perceived by the public as [not] sharing [his] superiors' aims." *Hall*, 856 F.2d at 263. It would therefore be inappropriate to grant the Library greater leeway in suppressing speech on matters of public concern when it in no way risks publicly airing an internal "policy disagreement." *Id*. at 265.

3. The Library has provided no evidence that Colonel Davis' speech was actually disruptive to the operation of the Library.

In evaluating an employer's interests, courts should take into account whether the speech at issue "impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin*, 483 U.S. at 388, 107 S. Ct. at 2899.

The Library claims it need not present evidence of actual disruption to CRS' operation. MTD at 23 (citing *Hall*, 856 F.2d at 261 (court may make "reasonable inferences of harm from the employee's speech, his position, and his working relationship with his superior")). However, "unadorned speculation" about potential harm to an agency is inadequate to overcome an employee's free speech interest. *Hubbard* II, 949 F.2d at 460 (citing *Hall,* 856 F.2d at 261). Furthermore, courts require evidence of actual disruption when the speech concerns weighty matters of public interest. *See, e.g.*, *Connick*, 461 U.S. at 152, 103 S. Ct. at 1692–93 ("[A] stronger showing may be necessary if the employee's speech more substantially involved matters of public concern."); *id.* at 150, 103 S. Ct. at 1692 ("[T]he State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression"). The D.C. Circuit has reiterated this principle even where a case involves a "key deputy." *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."). The Library's claims of harm are speculative and cannot meet this standard, particularly considering the uniquely high value of Plaintiff's speech.

The Library's own policies make clear that outside writing like Col. Davis' opinion pieces is to be "encouraged," not penalized. LCR 2023-3 (staff members are "encouraged to engage in . . . writing that is not prohibited by law"). Although the policies require employees to take precautions if speech relates to "a field of a staff member's *official specialization*," LCR 2023-3, § 3(B) (emphasis added), the regulation does not express concern with speech—like Col. Davis'—outside the official subject matter of the employee's work. Similarly, the CRS policy on outside speaking is focused on "preserving the appearance of objectivity when addressing the

very issues for which [the employees] have responsibility at CRS." Rowland Decl. Ex. E (CRS, Policy on Outside Speaking and Writing (Jan. 23, 2004)) (emphasis added).

As discussed above, it is uncontested that military commissions were not Col. Davis' area of "official specialization."[8] The fact that Col. Davis' speech does not fall under the Library's outside speech rules evidences Defendant's view that it does not harm its effective operation.[9]

Nonetheless, the Library argues that Col. Davis' actions impaired office discipline because his speech undermined his authority to serve as a supervisor and role model for the employees in the FDT Division. MTD at 27–31. This sentiment is also reflected in Mr. Mulhollan's letter of admonishment. Admonishment Letter at 2 ("I seriously question the model you are setting"); Rowland Decl. Ex. K (Email from Daniel Mulhollan to Morris Davis (Nov. 10, 2009, 10:17 PM)) ("I am worried by what our CRS colleagues will now feel they can model after you"). However, Mr. Mulhollan made no effort to assess whether FDT employees' discipline was actually harmed by Col. Davis' speech; instead, he relied on his own "'concern for how others would react to what [Davis] had said' rather than any actual disruption." *See Robinson v. Dist. of Columbia Gov't*, No. Civ. A. 97-787 (GK), 1997 WL 607450 (D.D.C. July 17, 1997) (quoting *Tygrett v. Barry*, 627 F.2d 1279, 1285 (D.C. Cir. 1980)); *see also Rankin*, 483 U.S. at 389, 107 S. Ct. at 2899 (no disruption where supervisor "did not even inquire whether the remark

[8] Although the Library fails to provide any record evidence or argument that military commissions were within Col. Davis' "official specialization," it nonetheless appears to argue that these policies apply to Plaintiff's opinion pieces. *See* MTD at 28–29. This should not be considered a contested issue of fact, given Defendant's failure to point to the policies' nexus language or supply relevant evidence. However, even if it were true that Col. Davis' speech was covered or prohibited by CRS' outside speech policy, the Library cannot meet the heavy burden of justifying its broad ban on employee speech under the *Pickering* analysis. Plaintiff's facial challenge to the Library's speech rules is discussed *infra* at III(c).

[9] Even if the Court should find that Plaintiff's speech violated standing regulations, this would not change the application of the *Pickering* analysis. *See McGehee v. Casey*, 718 F.2d 1137 (D.C. Cir. 1983) (conducting review of the CIA's decision, pursuant to regulations, to censor agent's writings).

had disrupted the work of the office"). Col. Davis has offered testimony from FDT employees that his speech was not, in fact, disruptive. That is the only evidence in the record of the *actual* effect of his speech. If anything disrupted the work of Col. Davis' colleagues, it was Mr. Mulhollan's overreaction to Col. Davis' protected speech. Grimmett Decl. ¶ 20.

The Library also claims Col. Davis' speech impaired "harmony among his coworkers." MTD at 33. But even accepting the Library's declarations as true, they do not change the legal balance when the record demonstrates that numerous CRS employees had engaged in similar speech without consequence. Grimmett Decl. ¶¶ 20–22; Davis Decl. ¶¶ 41, 48–49; *infra* note 10. *See Robinson*, 1997 WL 607450, at *6 ("First, the declarations submitted by Defendants citing the need for uniformity and esprit de corps are unconvincing, given that other officers with similar hair styles have not been treated in the same manner as Plaintiff.").

In addition, Defendant's new declarations focus on the bad blood that developed in the events leading to Col. Davis' termination. Declaration of Richard Ehkle, May 10, 2013, ECF No. 89-12 ("Ehlke Decl.") ¶ 17; Declaration of Karen Lewis, May 10, 2013, ECF No. 89-11 ("Lewis Decl."). But courts resist giving weight to employers' claims of hardship that flow from their own negative reactions to First Amendment activity, as doing so would allow employers to bootstrap grounds for discharge where none existed from the speech itself. *Cf. Prof'l Ass'n of Coll. Educs.*, 730 F.2d at 269 (noting that only in "extraordinary" circumstances should reinstatement be denied as a remedy for a First Amendment violation, even where it "breed[s] difficult working conditions").

The meat of the Library's disruption argument, and one that is foundational to all of their other claims of harm, is that Col. Davis' speech impaired the effective functioning of CRS as an institution by failing to uphold "objectivity and partisanship." MTD at 27, 27–32;

Admonishment Letter at 4. But any assertion of harm by the Library to its interests in this regard is the very definition of "unadorned speculation." This hypothetical claimed harm is contrary to Library and CRS rules, past practice, prior approvals of similar speech, and reason.

The Library's claim that Col. Davis' speech has undermined its interest in non-partisanship is utterly without foundation. Although CRS' statutory authorization requires the agency to perform its work "without partisan bias," 2 U.S.C. § 166(d), the term "partisan" has a limited meaning: "related to a political party." 5 C.F.R. § 734.101; *see Keeffe v. Library of Cong.*, 777 F.2d 1573, 1580–81 (D.C. Cir. 1985) (holding that a rule prohibiting *political party activities*, such as attendance at political conventions, implements the congressional mandate that the CRS render advice "without partisan bias"). Col. Davis' speech had nothing whatsoever to do with political parties or campaigns. His views in the opinion pieces, in fact, are critical of decisions and positions taken by officials from *both* major parties. *See* Rowland Decl. Ex. G (Morris Davis, Op-Ed., *Justice and Guantánamo Bay*, Wall St. J., Nov. 10, 2009 (criticizing Obama administration's decision); *id.* Ex. H (Morris Davis, Letter to the Editor, Wash. Post, Nov. 11, 2009) (criticizing former Attorney General Mukasey's opinions); Grimmett Decl. ¶ 18. Nor was Col. Davis' criticism of former Vice President Cheney partisan—it was directed at his policy positions, not his party affiliation. Col. Davis' letter of commendation from Senator Graham, a prominent Republican, makes that clear. Graham Letter. An expression of opinion on a matter of public policy without reference to party politics simply does not violate the principle of non-partisanship; this material fact is not at issue.

As to "objectivity," the Library has provided nothing beyond pure speculation that Col. Davis' speech could threaten CRS' mission, while the existing record exposes this speculation as flatly incorrect. Most fundamentally, as discussed above, the Library's own policies apply these

values *only in the context of speech directly within an employee's area of official specialization.* The Library has already made a judgment that there is no blanket requirement for objectivity.

Moreover, it cannot be that every time a CRS employee expresses a position on a policy issue the speech threatens CRS' institutional reputation for "objectivity" and "balance." Circuit precedent makes clear that the Library cannot, consistent with the Constitution, apply so broad a ban on speech. As set out above, Supreme Court and Circuit precedent limit government control over employee speech to areas within their job duties. *See Hubbard* II, 949 F.2d at 459 ("[T]he Government now asserts that law enforcement agencies are entitled to something approaching an irrebuttable presumption that their efficiency is compromised whenever their employees speak publicly. This position is baseless.").

Nor would such a position comport with the reasons CRS employees are so highly regarded. One cannot gain the stature of "nationally recognized expert" by being neutral and descriptive. Declaration of Louis Fisher, Jan. 8, 2010 ("Fisher Decl."), ECF No. 2-4 ¶ 10; Grimmett Decl. ¶ 9; Declaration of Dennis Roth, Jan. 8, 2010 ("Roth Decl."), ECF No. 2-3 ¶ 5; *cf. NTEU*, 513 U.S. at 464, 115 S. Ct. at 1012 ("Federal employees who write for publication in their spare time have made great contributions to the marketplace of ideas."). The Library and Director Mulhollan knew when they hired Col. Davis not only that he held views critical of the use of military commissions, but that he had been extremely outspoken about those views. *See* Davis Decl. ¶ 10; Ehlke Decl. ¶ 17; Rowland Decl. Ex. C (Email from Daniel Mulhollan to Morris Davis (Aug. 24, 2009)) ("your principles were not without cost"). Mr. Mulhollan and the Library must have believed that Col. Davis' well-established policy position on the use of military commissions would not interfere with his ability to lead the FDT Division, or they would not have hired him in the first place. Regardless, silencing Col. Davis could not have

achieved anything because Members of Congress already knew about his policy opinions related to military commissions. Graham Letter. Stifling his views therefore did nothing to further the appearance of objectivity.

The record also demonstrates, without question or contest, that numerous CRS employees, including Col. Davis, have expressed strong personal opinions on many controversial issues over the years.[10] These opinions, like many official CRS reports, have drawn criticism and disagreement from individual Members of Congress, but that speech has not undermined Congress' perception of CRS as a highly respected, nonpartisan, and objective entity.[11] CRS

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[10] *See* Grimmett Decl. ¶ 22; Fisher Decl. ¶¶ 28–30; *see also, e.g.*, Rowland Decl., Ex. L (Henry Cohen, Letter to the Editor, *Truth, Confessions and Torture*, N.Y. Times, Mar. 16, 2007 ("The widespread knowledge that the United States engages in torture constitutes an implicit threat against all detainees, and it is impossible to know if their confessions or any information they provide is true. Thank you, President Bush.")); *Id.* Ex. M (Henry Cohen, Letter to the Editor, *Silent Justice Screams for Thomas to Step Down*, Legal Times, Oct. 15, 2001 ("If this biography presents strong evidence of [Justice Clarence] Thomas' lying under oath (even once), then the executive branch should prosecute (if the statute of limitations has not run) and the legislative branch should impeach. These two venerable institutions, of course, will not, because they put politics ahead of law and ethics.")); *Id.* Ex. N (Pamela A. Hairston, Letter to the Editor, *'D' for the District*, Wash. Times, Dec. 13, 2003 (criticizing Laura Bush's educational policy in the District of Columbia: "Did she forget that she also lives in this great city? Doesn't she care about the children who live in her own back yard?")). Notably, none of these pieces carry an explicit disclaimer. The Library's attempt to repackage Col. Davis' speech as an improper "tone" that can be punished without First Amendment protection—*see* MTD at 30 ("personal tone"); Ehlke Decl., ¶ 38 ("vehemence"); Lewis Decl. ¶ 32 ("tone")—should be given no weight. First and foremost, tone and vehemence are fully-protected elements of Plaintiff's freedom of speech. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 721 (1964) (debate on matters of public concern "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"); *Tygrett v. Washington*, 543 F.2d 840, 845 (D.C. Cir. 1974) ("The First Amendment's Free Speech Clause cannot be laid aside simply on the basis that the speaker was penalized not for his speech but for a state of mind manifested thereby.") (footnote omitted). Other employees' public speech, including in the pieces cited here, has included passionate, colorful, or sarcastic language and criticism of officials.

[11] *See* Fisher Decl. ¶ 34, 3 (stating that "it is not uncommon for Members to complain when they disapprove [] policy opinions made by CRS employees," but explaining that "[l]awmakers and staff are accustomed to hearing a variety of viewpoints" and that in his four decades at CRS, his expression of views on high profile, contentious issues never caused any "lawmaker or legislative staffer to decline my analytical assistance"); Grimmett Decl. ¶ 12.

employees who have expressed their views on controversial topics have successfully continued working with Members of both parties. *See, e.g.*, Fisher Decl. ¶¶ 28–30; Grimmett Decl. ¶ 12.

Indeed, the fact that opinionated speech does no inherent harm to CRS as an institution is evident in this very case, for despite the Library's claimed fears, Congress has not stopped calling CRS *on this very issue*. After Col. Davis published the opinion pieces, no fewer than eight requests for CRS' assistance on military commissions issues arrived within the following two months, five from Republican Members and three from Democrats. Davis Decl. ¶ 23; Rowland Decl. Ex. P (Mercury Database Search Results for "Military Commissions"). Thus, the Library's projections of harm are unreasonable and purely speculative. At a minimum, the existence of other CRS employees' outside publications including equally advocative language should defeat the Library's motion for summary judgment. *See Robinson*, 1997 WL 607450 at *6 (D.D.C. 1997) (failure to discipline other employees for similar conduct prevents a finding of disruption, even where defendants' declarations claimed disruption occurred).

Finally, the lack of an explicit disclaimer in the opinion pieces does not support the Library's claims of harm. In fact, any reference to CRS or the Library in the opinion pieces would have served only to highlight Col. Davis' employment. *See* Davis Decl. ¶ 37; Grimmett Decl. ¶ 23. Both Plaintiff and other Library employees frequently engaged in personal speech without an explicit disclaimer. *See* all pieces cited in *supra* note 10; Davis Decl. ¶¶ 28, 41, 50; Grimmett Decl. ¶ 22; Fisher Decl. ¶¶ 18, 24; Roth Decl. ¶ 17; Declaration of Kerry Dumbaugh, Jan. 8, 2010, ECF No. 2-3("Dumbaugh Decl.") ¶ 7. And given that CRS attorneys previously approved Col. Davis' outside speaking without an explicit disclaimer, *see* Rowland Decl. Ex. B (Email from Kent Ronhovde to Morris Davis (Sept. 10, 2009)); *Id.* Ex. O (Email from Morris Davis to Kent Ronhovde and Lizanne Kelley (Aug. 17, 2009)), the Library's argument that the

lack of disclaimer caused harm to its operations is speculative and contrary to the undisputed evidence in the record. Despite the fact that outside speaking and writing without a disclaimer was widespread, the Library and CRS have continued to maintain their nonpartisan and objective status. Their claimed harm from Col. Davis' lack of an express disclaimer is, accordingly, nothing more than baseless speculation.

4. Colonel Davis' minimal use of Library resources in finalizing his opinion pieces does not affect the *Pickering* balance.

The Library's focus on the fact that Col. Davis spent a few minutes of his time at work signing off on final versions of the opinion pieces, *see* MTD at 41–43, is similarly irrelevant. That Col. Davis, on a tight print deadline, finalized a paragraph in a piece already accepted for publication contradicts nothing in his prior testimony or argument, and does not alter the disruption analysis. The cases cited by the Library, MTD at 42–43, explore whether the speech *was delivered* in the workplace before an audience of coworkers, leading to a greater likelihood of disruption. *See, e.g.*, *Garcetti*, 547 U.S. at 420, 126 S. Ct. at 1959 (employee exercised his rights to speech "inside his office"); *compare NTEU*, 513 U.S. at 466, 115 S. Ct. at 1013 (that speech was "made outside the workplace" weighed in employees' favor). That concern is not present here. The Library cannot contend otherwise given that the speech was "addressed to a public audience . . . made outside the workplace, and involved content largely unrelated to . . . government employment." *Id.* The opinion pieces are classic examples of speech addressed to a public audience. *See, e.g., Garcetti,* 547 U.S. at 423, 126 S. Ct. at 1961; *Pickering*, 391 U.S. at 569–70, 88 S. Ct. at 1735. Even taking the Library's claims as true, minimal work time used on the opinion pieces does not support a claim of disruption.[12]

[12] The fact that Plaintiff sent a final sign-off email with his official CRS signature block, *see* MTD at 43, also does not raise any significant concerns, because he had already had thorough

In sum, the Library cannot show any harm to its interests arising from Col. Davis' opinion pieces, much less harm that outweighs Col. Davis' and the public's significant interest in his contribution to the historic debate on the prosecution of Guantánamo detainees

iii. Colonel Davis' speech was the motivating factor in his termination.

The events surrounding Col. Davis' termination establish that the publication of the opinion pieces was *the* "motivating factor" in his dismissal. *Mt. Healthy*, 429 U.S. at 287, 97 S. Ct. at 576. It is uncontradicted that on November 10, 2009—the day before the opinion pieces were published—Mulhollan praised Col. Davis for his job performance and his reputation among his colleagues. Davis Decl. ¶ 33. This was consistent with Mr. Mulhollan's previous praise and his six-month formal written review of Col. Davis' work. *Id.* ¶¶ 31–33; Performance Review.

Mr. Mulhollan's attitude towards Col. Davis changed abruptly after reading the pieces. He gave Col. Davis a formal letter of admonishment the next day, stating that "[t]hese recent events"— the publication of the opinion pieces—had caused him to lose confidence in Col. Davis' judgment. Admonishment Letter at 4. The next week, Col. Davis received a letter of termination focusing on the opinion pieces. Davis Decl. ¶ 45; Termination Letter. Mr. Mulhollan expressly told Col. Davis that he would not be converted to permanent status because of the opinion pieces. Davis Decl. ¶ 43.

The letters of admonishment and termination, as well as other statements made by Mr. Mulhollan, establish that the opinion pieces are what motivated Col. Davis' termination. *See Jones v. Bernanke*, 557 F.3d 670, 678–79 (D.C. Cir. 2009) (employer's knowledge of the

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discussions with both editors about the personal nature of his speech and talked with them about how best to avoid any association with CRS. Davis Decl. ¶¶ 37–38. Nor did Col. Davis violate CRS policies by taking minimal personal time at work. *Id.* at ¶35; *cf. Connick*, 461 U.S. at 153, 103 S. Ct. at 1693 ("some latitude in when official work is performed is to be allowed when professional employees are involved").

employee's protected activity, combined with personnel action immediately thereafter, permits inference of retaliatory motive); *Robinson*, 1997 WL 607450, at *6 (retaliatory discharge where plaintiff was fired shortly after filing an internal discrimination complaint and was quoted in a newspaper gave rise to "the obvious inference" that "there was some causal nexus between Plaintiff's protected speech and [the adverse employment action]"). In short, the Library's termination of Col. Davis undoubtedly occurred because of Col. Davis' protected speech.

iv. The Library cannot meet its burden of demonstrating that Colonel Davis would have been terminated absent his protected speech.

Under the final prong of *Pickering*, an employer may sustain a discharge by showing, by a preponderance of evidence, that it would have reached the same decision even absent the protected conduct. *Mt. Healthy*, 429 U.S. at 287, 97 S. Ct. at 576 (cited in *Hubbard* II, 949 F.2d at 460). The D.C. Circuit looks only at reasons given contemporaneously by the employer for the discharge, and has cautioned against any "reconstruction of the reasoning behind the discharge that provides the employer with a post hoc justification." *Tygrett v. Barry*, 627 F.2d 1279, 1286 (D.C. Cir. 1980). A post hoc justification is precisely what the Library offers here.

The Library now argues that four additional reasons for Col. Davis' termination, taken together with the publication of the opinion pieces, indicate a "cumulative failure of professional judgment." MTD at 28–26.[13] But an examination of the Library's enumerated reasons lays bare that each flows directly from the First Amendment dispute underlying this case. The Library presents no evidence of *any* lawful ground for termination "in the absence of the protected conduct." *Mt. Healthy*, 429 U.S. at 287, 97 S. Ct at 576.

[13] The Termination Letter refers to two additional "incidents," both of which Plaintiff disputes. These incidents are so minor that they could not conceivably have resulted in dismissal. The Library appears to recognize that in its motion, as they are no longer listed as part of Col. Davis "cumulative failure of professional judgment," MTD at 25–26, and thus are no longer material.

First, the Library cites Col. Davis' failure to notify Mr. Mulhollan about the opinion pieces in advance of their publication. MTD at 25–26. This is an odd justification, given that the Library regulations explicitly note that "[p]ersonal writings . . . shall not be subject to prior review," LCR 2023-3 at 3, and neither the Library nor CRS policy requires pre-notification. But even assuming that Col. Davis' *was* required to notify Mr. Mulhollan before publishing the opinion pieces—which the Library avoids stating directly—the Library does not offer any evidence that outside speech made without preapproval or notice is grounds for termination.

Second, the Library focuses on the fact that Col. Davis, in notifying Mr. Mulhollan about the pieces by email, noted that neither had "any connection to CRS." MTD at 26. This truism was simply a recognition that neither CRS nor the Library was mentioned in the opinion pieces, and that Plaintiff had exercised his right to speak as a citizen rather than as an employee. *See* Davis Decl. at ¶ 39. That undisputed fact lies at the heart of this case. However, even if it were a disputed fact, the intent of Col. Davis' statement is not material, as the Library has not provided even minimal evidence that this email itself was a disciplinary matter of any consequence.

Third, the Library cites Col. Davis' "unprofessional manner" in responding to Mr. Mulhollan's anger over the publication of the opinion pieces by 1) stating he did not want to get into a debate over his free speech rights and 2) expressing his belief that Mr. Mulhollan was overly restrictive of speech. MTD at 26. These statements again flow from the core legal question in the case. They are not unprofessional on their face, nor does the Library provide evidence that their tone or content was a disciplinary matter.

Fourth, the Library faults Col. Davis' lack of repentance for his actions and refusal to acknowledge that his speech harmed the Library. MTD at 26. The Library cites a meeting where Mr. Mulhollan chastised Col. Davis for being "focused on [his] rights" and showing "no remorse

for [his] actions." Admonishment Letter at 4. But Col. Davis' failure to express remorse for exercising his constitutional rights can provide no independent justification for termination. *See Tygrett*, 543 F.2d at 845 (First Amendment does not permit disciplinary action taken not "for [employee's] speech but for a state of mind manifested thereby.").

Most importantly, the Library presents no evidence that any element of this "entire course of conduct," MTD at 26, provided an independent ground for terminating Col. Davis. Mr. Mulhollan's real concern, as is evident from the Admonishment Letter, the Termination Letter, and the Library's brief, *see* MTD at 22–26, was his belief that Col. Davis had exhibited poor judgment in writing the opinion pieces. Even giving credence to the Library's repackaging of the opinion pieces as a "cumulative failure of professional judgment," MTD at 25, there is nothing in the record to rebut the fact that Col. Davis' speech was the *sine qua non* of his dismissal.

b. The Library's outside speech policies are facially unconstitutional.

Even if the Court should find that material facts are at issue regarding the balance of harms relating to Col. Davis' termination, he is still entitled to a judgment as a matter of law that the Library's policies governing employee speech are unconstitutional. In *NTEU*, the Supreme Court held that the *Pickering* balancing test applies to a challenge to regulations that suppress the prospective speech of a broad category of public employees, 513 U.S. at 467, 115 S. Ct. at 1013, and that in such challenges, the "Government's burden is greater . . . than with respect to an isolated disciplinary action," *id.* at 468, 115 S. Ct. at 1014. The Library cannot meet this heavier burden of justifying a policy that prohibits CRS employees from speaking about controversial matters of public concern.

In his correspondence, Mr. Mulhollan contended that expressing "any opinion" on an issue "on Congress' legislative agenda" was problematic. Rowland Decl. Ex. R (Email from Daniel Mulhollan to Morris Davis (Nov. 10, 2009, 7:56 PM)); Admonishment Letter at 2; *see*

also MTD at 32 (Library is harmed by critical speech about an issue on "Congress' legislative agenda"). This unwritten rule, which Mulhollan apparently attempted to impose and continues to be defended by the Library, prohibits every CRS employee from commenting on any public policy matter in an opinionated manner. Speech about issues on the congressional agenda is, by definition, of vital interest to the public. Such speech "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick*, 461 U.S. at 145 (internal quotation marks and citation omitted). The Library's position appears to be that such high-value speech is entitled to no protection whatsoever when made by CRS employees.

Moreover, Mr. Mulhollan stated that employees have a "responsibility to inform" CRS about speech before it happens. Admonishment Letter at 3. Here, because neither the Library regulations nor the CRS policies anywhere establish a standard for which writing must be preapproved, the CRS leadership would have unfettered discretion over which speech is permitted and which is not. That is constitutionally impermissible. *See Sanjour*, 56 F.3d at 96–97 (holding that regulation permitting official approval only for speech "within the mission of the agency" gives the agency unbridled discretion); *Fire Fighters Ass'n v. Barry*, 742 F. Supp. 1182, 1194 (D.D.C. 1990) (where pre-approval process contains no standards to guide the granting or denial of a request, the unbridled discretion constitutes an unconstitutional prior restraint); *Am. Fed'n of Gov't Emps. v. Dist. of Columbia*, No. 05-cv-0472, 2005 WL 1017877, at *8 (D.D.C. May 2, 2005) ("[T]he detriments of [such] prior restraints"—including the danger of self-censorship—weigh in the *Pickering* balancing test against the employer.). Because Col. Davis was terminated under a facially unconstitutional policy, he is entitled to summary judgment on his free speech claim. *See Fire Fighters Ass'n*, 742 F. Supp. at 1198.

* * *

Because Plaintiff was terminated in response to fully protected speech on a matter of the utmost public concern and the Library has failed to provide any non-speculative evidence of harm to its operations, this Court should grant Plaintiff's motion for summary judgment on his *Pickering* claim. Alternatively, the Court should grant Plaintiff's motion for summary judgment on the ground that the Library's policies governing employee speech are unconstitutionally overbroad and Col. Davis was terminated in violation of his First Amendment rights.

IV. Colonel Davis Is Entitled to Summary Judgment on His Due Process Claim

Regardless of whether the Library's termination of Col. Davis violated his free speech rights, it violated his entitlement to due process. The Library hired Col. Davis knowing full well about his principled speech about his experiences as Chief Prosecutor at Guantánamo Bay. Davis Decl. ¶ 10; Rowland Decl. Ex. C (Email from Daniel Mulhollan to Morris Davis (Aug. 24, 2009)); Ehlke Decl. ¶ 17; Mulhollan Decl. ¶ 22. Col. Davis' opinionated advocacy relating to military commissions continued when he was employed at CRS, and was acknowledged by his supervisor and the Library's general counsel. Rowland Decl. Ex. C (Email from Daniel Mulhollan to Morris Davis (Aug. 24, 2009)); *Id*. Ex. B (Email from Kent Ronhovde to Morris Davis (Sept. 10, 2009)). Yet, the Library argues that Plaintiff's due process claim must fail because "CRS did not know of prior advocacy by Davis about Guantanamo while he was a CRS employee." MTD at 45. This position is contradicted by undisputed evidence; it is also immaterial to a violation of Plaintiff's due process rights.[14]

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298 (1972). The requirement of clarity is especially stringent when the law interferes with

[14] Alternatively, should the Court find that the material facts are disputed, Defendant's motion for summary judgment on Col. Davis' due process claim must be denied.

First Amendment rights. *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499, 102 S. Ct. 1186, 1193–94 (1982). Here, the application of the Library rules to Col. Davis was unconstitutionally vague because nothing in the policies or their past enforcement gave Col. Davis "fair warning" that CRS might interpret them to apply to his outside speech about the military commissions system—on which he had previously been permitted to speak.[15]

First, as set out above, the Library's and CRS' policies do not prohibit Col. Davis' speech here. *See supra* 24–25. Rather, they generally encourage speech—particularly speech unrelated to an employee's duties—requiring only that employees exercise "sound judgment" to avoid "the appearance of a conflict of interest." Rowland Decl. Ex. E (CRS, Policy on Outside Speaking and Writing (Jan. 23, 2004)) at 1–3.

Second, CRS' past practice with respect to Col. Davis himself confirms that CRS has never applied or interpreted these vague references to actually prohibit speech on matters unrelated to an employee's obligations. For example, Col. Davis spoke and wrote publicly about Guantánamo Bay, the treatment of detainees, and the use of military commissions on at least six occasions while employed at CRS and prior to the two publications at issue here. *See* Davis Decl. ¶ 26–28. The opinions he expressed on these occasions were similar to, and consistent with, the views he articulated in the opinion pieces and in his extensive pre-CRS speaking and writing. *See id.* ¶ 36; Dumbaugh Decl. ¶ 6. In two recent and high-profile instances, CRS and Director Mulhollan specifically approved in advance of this outside speaking and writing. *See id.* ¶¶ 26–27. In earlier instances, CRS implicitly or explicitly gave its assent afterwards. *See, e.g.*, *id.* ¶¶ 26, 28. Although Col. Davis was somewhat hesitant to speak towards the beginning of his

[15] As explained in previous filings, CRS' policy on outside speaking is also facially vague. The Court previously rejected that claim, *Davis v. Billington*, 775 F. Supp. 2d 23, 43–45 (D.D.C. 2011), *vacated and remanded*, 681 F.3d 377 (D.C. Cir. 2012); Col. Davis raises it here to preserve it for appellate review.

employment at CRS, he became more confident with each approval that CRS had no interest in suppressing his speech on the issue of military commissions, which had nothing to do with his official responsibilities at CRS and the knowledge of which he had acquired prior to coming to work for CRS. *See id.* ¶ 29; Rowland Decl. Ex. Q. (Memorandum from Lizanne Kelley to Jeffrey Goode (Dec. 17, 2008)) (making clear that CRS' outside speaking rules cover only situations where the information discussed is acquired while at CRS, not instances where the subject of the speaking or writing is based on an employee's prior life experiences). Nothing in CRS' policies or their past application gave Col. Davis fair warning that CRS would treat his final two publications so differently.[16]

Finally, the history of CRS' application of the policies on outside speaking and writing to other employees confirms this conclusion. CRS does not appear to have previously terminated any employee for outside speaking, much less for outside speaking on matters unrelated to the employee's official duties, despite the vast amount of outside publication and speaking undertaken by CRS employees. *See, e.g.*, publications cited in supra note 10; Roth Decl. ¶ 4. That is true even where the outside speaking and writing involves controversial public policy matters. *See* Fisher Decl. ¶¶ 18–23, 27, 33–40, 44; Roth Decl. ¶ 4 ("CRS employees regularly engage in outside speaking and writing activities, including on controversial and high-profile policy matters . . . ."); *id.* ¶¶ 5–9, 18; Dumbaugh Decl. ¶¶ 3–6.; *see also supra* note 8.

[16] As explained above, Col. Davis' opinion pieces did not violate the Library regulations or the CRS policy on outside speaking and writing. In previous submissions, CRS has described its speech policy as prohibiting speech that expresses "any opinion" on an issue "on the congressional agenda," or speech on controversial or political matters. Rowland Decl. Ex. R (Email from Daniel Mulhollan to Morris Davis (Nov. 10, 2009, 7:56 PM)). In its most recent submission, CRS states that its policy prohibited Col. Davis from "publicly advocat[ing] positions on Guantánamo." MTD at 44. CRS' multiple and divergent explanations of its policy only underscore the policy's vagueness and the lack of fair warning.

For example, in a 2007 letter to the *New York Times*, one CRS employee in the ALD satirically "thanked" President Bush for the damage to our legal system caused by the "widespread knowledge that the United States engages in torture." Rowland Decl. Ex. L (Henry Cohen, Letter to the Editor, *Truth, Confessions and Torture*, N.Y. Times, Mar. 16, 2007). The same employee called upon Supreme Court Justice Thomas to resign or, alternatively, for the executive branch to prosecute or Congress to impeach him. *Id.* Ex. M (Henry Cohen, Letter to the Editor, *Silent Justice Screams for Thomas to Step Down*, Legal Times, Oct. 15, 2001). The employee concluded: "These two venerable institutions, of course, will not, because they put politics ahead of law and ethics." *Id.* Another CRS employee also routinely discusses controversial matters in opinion pieces. *See, e.g.*, Rowland Decl. Ex. N (Pamela A. Hairston, Letter to the Editor, *'D' for the District*, Wash. Times, Dec. 13, 2003). That neither of these employees was terminated confirms the lack of any CRS practice of punishing outside speech, and the lack of any fair warning to Col. Davis that a non-existent policy could be applied to him.

The declaration of Richard Grimmett, recently retired after 38 years of service at CRS, likewise confirms that Col. Davis' termination was inconsistent with CRS' past practice. Mr. Grimmett was "shocked" by Mulhollan's reaction to Col. Davis' opinion pieces. Grimmett Decl. ¶ 17. According to Mr. Grimmett, who worked at CRS from 1974 to 2012, Col. Davis' op-ed in the Wall Street Journal was "comparable to various congressional commentaries written by senior CRS analysts in published reports and memoranda during the course of their work at CRS," and Col. Davis' letter to the Washington Post was "consistent with letters written by private citizens to the editors of newspapers on significant matters of public policy on which they have strong personal views." *Id.* Overall, Mr. Grimmett concludes that "nothing [Col. Davis] had written was especially controversial, no more so than some high profile, publicly identified CRS

reports or memoranda, such as the January 2006 memorandum on warrantless surveillance." *Id.* ¶ 19.

In its failure to provide fair warning that Col. Davis' writings on the military commissions would result in sanction, CRS' actions here resemble its own previous actions, which were found similarly lacking by the D.C. Circuit in *Keeffe v. Library of Congress*, 777 F.2d 1573 (D.C. Cir. 1985). In *Keeffe*, a longtime CRS employee sought to become a delegate-at-large to the 1980 Democratic National Convention, an activity that had not previously been expressly prohibited by CRS or Library 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 presenting "a potential conflict of interest with her official duty to render non-partisan advice." *Id.* at 1576. Keeffe challenged that advice. In the days leading up to her departure to attend the convention, the Library's General Counsel rejected her challenge and upheld the original advice, but his decision was not timely relayed to Keeffe prior to her departure. *Id.* at 1576, 1582. In the suit over Keeffe's subsequent discipline, the D.C. Circuit 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 advice. *Id.* at 1582. The Court noted, moreover, that CRS had previously countenanced nearly identical political participation by Keeffe, as well as similar partisan political activity by other employees. *Id.* As a result, Keeffe "knew only of the Library's permissiveness toward employee political activities, including her own." *Id.* Focusing on this past practice by Keeffe and other employees, the D.C. Circuit 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 D.C. Circuit held that the Library's adverse action against Keeffe was unconstitutional:

> 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 (emphases in original); *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").

The same is true here. CRS seeks to apply a novel interpretation of its policy on outside speaking on matters unrelated to employees' official duties, notwithstanding its prior approval of virtually identical writing and speaking by Col. Davis on several occasions. CRS' actions failed to give Col. Davis fair warning and, as in *Keeffe*, "[s]urprise, in this instance, was unpleasant, unfair, and unconstitutional." 777 F.2d at 1583.

The Library makes three arguments respecting Col. Davis' vagueness claim. None has merit. The Library first argues that Col. Davis had no "property interest in continued employment" because he was a probationary employee. MTD at 44. This ignores the fact that Col. Davis' claim is grounded in his liberty interest in free speech. Because the Library's policies regulate the speech of federal employees, their prohibitions must be clear, regardless of whether Col. Davis has a separate property interest in his employment. *See Rankin*, 483 U.S. at 383–84, 107 S. Ct. at 2896 (holding that even probationary employees may not be terminated for unconstitutional reasons); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604, 87 S. Ct. 675, 684 (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, 83 S. Ct. 328, 338 (1963))); *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 288, 82 S. Ct. 275, 281 (1961) ("A statute which upon its face, and as authoritatively construed, is so vague and

indefinite as to permit the punishment of ['free political discussion'] is repugnant to the guaranty of liberty contained in the Fourteenth Amendment." (quoting *Stromberg v. California*, 283 U.S. 359, 369, 51 S. Ct. 532, 536 (1931)) (internal quotation marks omitted)).

Next, the Library argues that five emails sent early in Col. Davis' employment at CRS evidence a "consistent[] and repeated[]" understanding that he could not "publicly advocate as to military commissions issues." MTD at 44. But these early emails are immaterial in light of later developments. As Col. Davis has explained, he was "hesitant to speak toward the beginning of [his] employment at CRS because [he] was focusing on the requirements of [his] new job." Davis Decl. ¶ 29. As he "became more comfortable with the parameters" of his job responsibilities and the policy on outside speaking, however, Col. Davis began to speak publicly more often. *Id.* Indeed, virtually all of his public commentary on Guantánamo and the military commissions post-dated the handful of emails relied upon by the government. *See id.* ¶¶ 26–34. And CRS consistently and repeatedly approved of or failed to object to Col. Davis' commentary. CRS and then-Director Mulhollan's approval of Col. Davis' speech activities on Guantánamo and the military commissions "convinced [him] that they did not violate CRS policy and that CRS had little interest in suppressing [his] speaking and writing on Guantánamo and the military commissions." *Id.* ¶ 29.

Finally, the Library argues that "CRS did not know of prior advocacy by Davis about Guantánamo while he was a CRS employee." MTD at 45. However, it is undisputed that CRS had specifically approved of Col. Davis' outside speaking and writing on Guantánamo and the military commissions in a number of instances. Davis Decl. ¶ 26–28; Rowland Decl. Ex. B (Email from Kent Ronhovde to Morris Davis (Sept. 10, 2009)); *Id.* Ex. C (Email from Daniel Mulhollan to Morris Davis, et al. (Aug. 24, 2009)). The Library's argument that it had no

knowledge of Col. Davis' opinionated speech is not a genuine dispute of fact. But even if this fact is disputed, the dispute is immaterial, because Col. Davis "knew only of the Library's permissiveness." *Keeffe*, 777 F.2d at 1582. The Library therefore provided no "loud and clear advance notice when it [decided] to interpret a particular regulation as a prohibition," *id.* at 1583, and failed to provide Col. Davis with fair notice that the opinion pieces could lead to termination.

* * *

Because Plaintiff was terminated for speech in good faith reliance on the Library's official policy encouraging outside speech, and on prior permission for similar speech both by Plaintiff and other employees, this Court should grant Plaintiff's motion for summary judgment on his due process claim.

V. The Library's Motion for Summary Judgment Should Be Denied

The Library's Motion for Summary Judgment should be denied for the same reasons that Col. Davis' motion should be granted. But even if Plaintiff's motion is denied, the Library's motion should also fail, both because Col. Davis has not had any opportunity to conduct discovery and because he disputes facts that the Library claims are material to its motion.

Col. Davis disputes facts that the Library claims are material to its motion, including that: 1) either he or FDT had official responsibility for issues related to military commissions, 2) the Library had any support for his termination unrelated to his protected speech, and 3) the Library had no knowledge of the advocative nature of Col. Davis' other outside speech. *See* Plaintiff's Statement of Material Facts in Dispute. The Library's motion for summary judgment should therefore be denied.

Even should the Court conclude that no material issues of fact exist on the present record, it should deny the Library's motion for summary judgment because Plaintiff has not had any

opportunity to conduct discovery on facts material to the Library's motion. *See* Declaration of Lee Rowland pursuant to Fed. R. Civ. P. 56(f); *see also, e.g., Khan v. Parsons Global Servs., Ltd.*, 428 F.3d 1079, 1087 (D.C. Cir. 2005) (stating that the D.C. Circuit "has long recognized that a party opposing summary judgment needs a reasonable opportunity to complete discovery before responding to a summary judgment motion and that insufficient time or opportunity to engage in discovery is cause to defer decision on the motion") (internal quotation marks and citation omitted). Col. Davis must be given an opportunity to obtain discovery regarding the alleged harm to the Library (relevant to his free speech claim) and the knowledge and treatment of past advocative speech by CRS (relevant to both constitutional claims).

Conclusion

For all the above reasons, Defendant's Motion to Dismiss or for Summary Judgment should be denied, Plaintiff's Motion for Summary Judgment should be granted, and this Court should order discovery limited to the proper equitable remedies. Alternatively, should this Court find that material facts are in dispute, all pending motions should be denied.

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Respectfully submitted,

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