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.	Case No. 1:10-cv-00036-RBW

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO MOTION TO DISMISS OF
DEFENDANT DANIEL P. MULHOLLAN

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INTRODUCTION

Plaintiff Col. Morris Davis was terminated from his employment at the Congressional Research Service ("CRS"), an arm of the Library of Congress ("Library"), for writing an Op-Ed in the *Wall Street Journal* and a Letter to the Editor in the *Washington Post* regarding the Obama Administration's decision to prosecute some Guantánamo detainees in federal court and some in military commissions—a topic of immense public concern related solely to Col. Davis's former career as the Chief Prosecutor of the military commissions at Guantánamo. Col. Davis's Complaint alleges that the termination violated his First Amendment and due process rights. Defendant Daniel P. Mulhollan, who made the decision to fire Col. Davis, has now moved to dismiss the claims against him on the grounds that Col. Davis has not stated a claim, the claims are barred by qualified immunity, and Col. Davis is precluded from bringing a damages claim against him. These assertions should be rejected.

Col. Davis has stated a claim for the violation of his First Amendment right to speak on a matter of public concern, and Mr. Mulhollan is not entitled to qualified immunity on this claim because the right was clearly established. This Court has already found that Col. Davis is likely to succeed on this claim. The Court should reject Mr. Mulhollan's arguments, which are identical to the ones made by the Library in opposition to Col. Davis's motion for preliminary relief, that Col. Davis could be dismissed for his speech simply because he was a policy-level employee. As an initial matter, according to the allegations in the Complaint, Col. Davis was not a policy-level employee. Even if he were, policy-level status is not dispositive where, as here, the speech was on a matter of significant public concern, it did not criticize or even relate to the employer, and it did not harm or even potentially harm the employer. Viewing the allegations in the Complaint in the light most favorable to Col. Davis, as this Court must do on a motion to

dismiss, Mr. Mulhollan violated the constitutional principle, about which any reasonable official would have known, that a public employer cannot dismiss an employee, even a policy-level one, on the basis of speech of significant public interest, where the speech caused no harm.

Col. Davis has also stated a claim for the violation of his clearly established First and Fifth Amendment rights not to be dismissed without fair notice that his speech was prohibited or pursuant to a facially vague policy, and qualified immunity should likewise be denied for this claim. Because the Library's written policy on public speaking encourages employees to engage in outside speaking, and because the Complaint establishes that Col. Davis and other CRS employees had previously been permitted to speak on similar topics without suffering any repercussions, Col. Davis did not have fair warning that his opinion pieces violated the Library's or CRS's policies on outside speaking. The lack of fair warning stems, in large part, from the fact that the policies rely on inherently ambiguous terms, such as "sound judgment," "caution," and "objectivity," and do not contain any clear standards or definitions to provide clarity to employees such as Col. Davis about what speech is or is not permissible.

Finally, Mr. Mulhollan's contention that Col. Davis is precluded from suing him for his termination, no matter how flagrantly unconstitutional that termination was, should also be rejected. Although he concedes that Col. Davis has no administrative rights or remedies available to him under the Civil Service Reform Act ("CSRA"), Mr. Mulhollan claims that CSRA precludes Col. Davis from bringing a *Bivens* claim for damages against him. Such a result would be unwarranted and unjust. Because CSRA does not cover Col. Davis or recognize constitutional claims like those at issue in this case, there are no special factors counseling hesitation in the recognition of a judicial remedy. The Court should, thus, permit Col. Davis's *Bivens* claims based on the First and Fifth Amendments to proceed.

BACKGROUND

On December 21, 2009, the Library of Congress ("Library") terminated Plaintiff Col. Morris Davis from his position as the Assistant Director of the Foreign Affairs, Defense, and Trade ("FDT") Division at the Congressional Research Service ("CRS"). Compl. ¶¶ 1, 58-60, Docket No. 1. The Library terminated him for writing an Op-Ed in the *Wall Street Journal* and a Letter to the Editor in the *Washington Post* ("the opinion pieces") regarding the Obama Administration's decision to prosecute some Guantánamo detainees in federal court and some in military commissions—a topic of immense public concern related solely to Col. Davis's former career as the Chief Prosecutor of the military commissions at Guantánamo. *Id.* ¶¶ 1-6, 43-61.

Col. Davis is a twenty-five year veteran of the United States Air Force and the former Chief Prosecutor for the Department of Defense's Office of Military Commissions. *Id.* ¶¶ 12, 16, 18. He resigned from that position in October 2007 because he came to believe that the military commissions had become fundamentally flawed. *Id.* ¶ 19. After his resignation, he became a vocal critic of the system, speaking, writing, and testifying before Congress about what he saw as the system's flaws. *Id.* ¶¶ 20-22.

Col. Davis was subsequently hired as the Assistant Director of the FDT Division at CRS in December 2008. *Id.* ¶¶ 25-26. Although the Library and Mr. Daniel P. Mulhollan, the Director of CRS, were aware of Col. Davis's background and his prior public writing and speaking about Guantánamo and the military commissions, at no time did they tell him that he could not continue such public speaking or writing or that doing so in the future could imperil his ability to serve as a CRS employee and/or harm CRS or the Library. *Id.* ¶¶ 25, 27.

Col. Davis began working for CRS on December 22, 2008. *Id.* ¶ 29. His primary responsibility as an Assistant Director was to supervise the research and analytical work of the

approximately 95 employees within the FDT Division. *Id.* He had no authority to establish substantive policy and had little opportunity for significant contact with the public. *Id.* He was not expected to and did not author any written reports or analyses on behalf of CRS, and he did not have any congressional inquiries or requests for information directed to him. *Id.*

The FDT Division has responsibilities and duties for subject matters relating to foreign affairs, the Defense Department, and international trade and finance, but not for issues related to the military commissions. *Id.* ¶ 30. Legislative attorneys within a separate division of CRS, the American Law Division ("ALD"), which has a separate Assistant Director, have sole responsibility for military commissions issues. *Id.* ¶ 31. Every congressional inquiry and all reports and analyses on the military commissions have been handled by ALD, not by FDT. *Id.* In addition, ALD employees —not FDT employees or Col. Davis—have conducted CRS's seminars and workshops for congressional staff on the military commissions and related issues since 2001. *Id.*

During his tenure at CRS, Col. Davis often spoke publicly about his views on policy issues relating to the military commissions. *Id.* ¶¶ 33-39, 46. That outside speaking was consistent with Library policies. *Id.* ¶ 65. In fact, because of the nature of their jobs and their expertise, Library and CRS employees regularly express their personal opinions in public on policy matters, including controversial and high-profile issues. *Id.* ¶ 77. This outside writing and speaking has been occurring for decades and has not compromised the mission of the Library or CRS. *Id.*

The Library and Mr. Mulhollan knew and routinely approved of Col. Davis's outside speaking engagements regarding the military commissions. *Id.* ¶¶ 33-39. For example, Col. Davis spoke at a Human Rights Watch dinner, participated in an interview for a BBC

documentary, spoke at a conference at the Case Western Reserve University Law School, published a law review article in connection with the conference, and gave a speech at the Lawyers Association of Kansas City when accepting an award for opposing torture and the politicization of the military commissions. *Id.* ¶¶ 33-38. All of these instances were permitted by Mr. Mulhollan and the Library. Indeed, a CRS attorney expressly informed Col. Davis that he could speak at the Case Western conference and publish his law review article without giving a formal express disclaimer stating that the opinions he was expressing were his own and not necessarily shared by CRS or the Library. *Id.* ¶ 35. Mr. Mulhollan also expressly approved his participation, requiring only that Col. Davis participate on his personal time by using a vacation day, because the subject of the conference—Guantánamo and the military commissions—had nothing to do with his CRS responsibilities or duties. *Id.* Mr. Mulhollan similarly approved Col. Davis's participation at the Kansas City event. *Id.* ¶ 38.

Although Col. Davis expressed views consistent with those published in the opinion pieces during these and other outside speaking engagements, he was never disciplined in any manner before the publication of the opinion pieces for writing or speaking publicly about Guantánamo or the military commissions. *Id.* ¶ 40. Indeed, at the Case Western conference, Col. Davis made the same point that he later made in the opinion pieces—that there should be only one system of justice for all of the detainees. *Id.* ¶ 36. Although the Case Western conference and Col. Davis's comments were published on the Internet via a webcast, and CRS routinely monitors all public appearances and publications of its employees, *id.* ¶ 37, neither Mr. Mulhollan nor anyone else from CRS or the Library ever informed Col. Davis that his speech compromised the work of CRS or undermined his effectiveness as a CRS employee, *id.* ¶ 37. Similarly, media coverage of the Kansas City event—also monitored by CRS—made clear that

Col. Davis had expressed views critical of both the Bush and the Obama Administrations' policies relating to military commissions, but neither Mr. Mulhollan nor anyone else from CRS or the Library ever informed Col. Davis that such speech had compromised the work of CRS or undermined Col. Davis's effectiveness as a CRS employee. *Id.* ¶ 38.

In fact, on numerous occasions—including the day before the opinion pieces were published in print—Col. Davis was told by Mr. Mulhollan and others that he was doing a very good job, that he was well liked and respected by his CRS colleagues, and that he was a good fit for CRS. *Id.* ¶¶ 41-42. Consistent with that assessment, Mr. Mulhollan assured Col. Davis that he was satisfactorily completing his mandatory one-year probationary period. *Id.* ¶ 41.

Col. Davis wrote the opinion pieces that triggered his termination after the Obama Administration announced its decision in November 2009 to try some of the individuals being held in Guantánamo in federal court and others in military commissions. *Id.* ¶¶ 43-44. Col. Davis felt compelled to express his opinions because of his experience as the former Chief Prosecutor for the military commissions. *Id.* ¶ 49. He wrote the pieces in his personal capacity, on his home computer, during non-work hours. *Id.* ¶ 48. Neither of the pieces singled out or criticized Congress, any Member of Congress, any political party, or positions associated with one party but not another. *Id.* ¶ 47. Nor did they denigrate or criticize CRS, the Library, Mr.Mulhollan, or any of their employees or policies. *Id.* ¶ 50. In fact, the pieces did not mention CRS, the Library, or Col. Davis's current employment, making it clear to all that Col. Davis was writing in his personal capacity based on his former role as Chief Prosecutor. *Id.* ¶¶ 50-51.

Col. Davis notified Mr. Mulhollan as soon as he learned that the pieces would be published. *Id.* ¶¶ 52-53. After reviewing the opinion pieces, Mr. Mulhollan sent several e-mails to Col. Davis questioning his judgment and ability to continue serving as an Assistant Director.

Id. ¶ 54. At a meeting the day after the pieces were published in print, Mr. Mulhollan told Col. Davis that he would not be converted to permanent status from his probationary status because the opinion pieces had made him doubt Col. Davis's judgment and suitability to serve as an Assistant Director. *Id.* ¶ 55. On the next day, Col. Davis was given a letter of admonishment that focused entirely on Col. Davis's writing of the opinion pieces. *Id.* ¶¶ 57-58. One week later, Mr. Mulhollan informed Col. Davis that he would be removed from his position as of December 21 and would thereafter be given a thirty-day temporary position as Mr. Mulhollan's Special Advisor. *Id.* ¶ 58. Like the letter of admonishment, the written notice of termination focused on Col. Davis's decision to publish the opinion pieces. *Id.* ¶ 59.

There were no administrative procedures available to Col. Davis under the Civil Service Reform Act ("CSRA") or the Library of Congress regulations to challenge his dismissal. *Id.* ¶ 10. As a result, on January 8, 2010, Col. Davis filed suit against Dr. James H. Billington in his official capacity as the Librarian of Congress, and against Mr. Mulhollan in his individual capacity, for unlawfully terminating him in violation of his First and Fifth Amendment rights. Col. Davis simultaneously filed a motion for a temporary restraining order or a preliminary injunction, and submitted numerous declarations and exhibits substantiating the allegations in his Complaint. Mot. for Prelim. Relief, Docket No. 2. The Court held that Col. Davis was likely to succeed on the merits based on the record before it, but denied the motion on the ground that Col. Davis had not shown that he was suffering irreparable injury. Order, Jan. 20, 2010, Docket No. 11.

Col. Davis's last day at the Library was January 20, 2010. Compl. ¶ 61. He remains unemployed to date, nearly three months later, despite his best efforts to obtain other employment. His termination by the Library and Mr. Mulhollan has made CRS employees even

more confused and uncertain about what outside speaking and writing is permissible under the Library's and CRS's policies. *Id.* ¶¶ 63, 74. That is in great part because the Library's regulation on outside speaking, LCR 2023-3, actually "encourage[s]" Library employees to engage in outside speech and does not prohibit employees from speaking or writing about any issues. *Id.* ¶ 65. The regulation likewise makes clear that personal writings are not subject to prior review. *Id.* ¶ 66. In 2004, CRS issued a policy on outside speaking and writing purporting to clarify the Library's regulation. *Id.* ¶ 68. Like the Library's regulation, CRS's policy does not expressly prohibit employees from engaging in any outside speaking or writing, and it does not require employees to obtain prior approval before such speech. *Id.* ¶¶ 68-69. The policy does, however, advise CRS employees to use "sound judgment" in outside speaking and writing, but it does not discuss or define that term (or other similarly vague terms it uses). *Id.* ¶ 71.

Instead of filing a responsive pleading or a motion to dismiss on March 15, the Library filed a motion to stay the entire litigation against it, arguing that all proceedings against it should await the resolution of any individual-capacity defenses that Mr. Mulhollan might raise. Docket No. 16. Col. Davis opposed that motion on the ground that Mr. Mulhollan's assertion that he has qualified immunity does not shield the Library from its obligation to file a legal response or an answer. Docket No. 17. The Library filed a reply. Docket No. 22. That motion is now fully briefed and ready for decision by the Court.

On March 29, Mr. Mulhollan filed this motion to dismiss all claims against him. Docket No. 18.[1]

[1] The motion to dismiss illustrates the absurdity of staying litigation against the Library, because there is no reason why the Library, represented by the same counsel, could not have filed a motion to dismiss making the same arguments as Mr. Mulhollan (other than those arguments applicable only to Mr. Mulhollan). In fact, despite the pending motion to stay litigation against the Library, Mr. Mulhollan's motion claims to move for dismissal of Col. Davis's due-process challenges on behalf of the Library as well. Def.'s Br. at 33.

ARGUMENT

I. THE CIVIL SERVICE REFORM ACT DOES NOT PRECLUDE *BIVENS* CLAIMS WHERE IT OFFERS NO ADMINISTRATIVE PROCESS FOR ADJUDICATING PLAINTIFF'S CLAIMS.

Col. Davis is precisely the type of plaintiff who should be entitled to a damages remedy for the violation of his constitutional rights under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999 (1971). "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens*, 403 U.S. at 395, 91 S. Ct. at 2004. *Bivens* thus gives plaintiffs like Col. Davis, whose constitutional rights were violated, the right to recover damages from federal officers unless there are "special factors counseling hesitation" or there is an "explicit congressional declaration that persons injured . . . may not recover money damages from the [federal] agents, but must instead be remitted to another remedy, equally effective in the view of Congress." *Id.* at 396-97, 91 S. Ct. at 2005; *see also Carlson v. Green*, 446 U.S. 14, 18-23, 1000 S. Ct. 1468, 1471-74 (1980) (recognizing a *Bivens* remedy for the violation of Eighth Amendment rights, despite the availability of the Federal Tort Claims Act, because there were no special factors counseling hesitation and no congressional declaration denying the remedy); *Davis v. Passman*, 442 U.S. 228, 245-48, 99 S. Ct. 2264, 2277-79 (1979) (recognizing a *Bivens* remedy for discriminatory termination because of no special factors, congressional declaration to the contrary, or "equally effective alternative remedies").

Mr. Mulhollan concedes that Col. Davis's termination is not covered by CSRA and that he has no equally effective remedies under CSRA—in fact, he states that Col. Davis "enjoys <u>no</u> avenue for review under the Act" of his constitutional claims.[2] Def.'s Br. at 11 (emphasis in

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[2] CSRA does not provide Col. Davis with its detailed procedural protections. Because the Library of Congress is not an Executive Agency, it is excluded from the definition of agencies covered under the protections of Chapters 23

original). Yet he argues that this complete unavailability of review counts as a "special factor[] counseling hesitation" before permitting a *Bivens* remedy. Such a result would be unwarranted and unjust. Although some D.C. Circuit cases contain language seemingly supportive of that view, *see, e.g.*, *Wilson v. Libby*, 535 F.3d 697, 709 (D.C. Cir. 2008) ("[T]he special factors analysis does not turn on whether the statute provides a remedy to the particular plaintiff for the particular claim he or she wishes to pursue . . . ."), *cert. denied*, 129 S. Ct. 2825 (2009); *Spagnola v. Mathis*, 859 F.2d 223, 228 (D.C. Cir. 1988) (en banc) (stating that Supreme Court case law can be read as suggesting that CSRA precludes a *Bivens* remedy "even to those claimants within the system for whom the CSRA provides 'no remedy whatsoever'"), neither the Supreme Court nor the D.C. Circuit has ever held that CSRA precludes a *Bivens* claim when it provides absolutely no administrative procedure or remedy to address the violation of the plaintiff's constitutional rights, or that federal employees should never be able to bring an employment-related *Bivens* claim, regardless of whether they have a remedy under CSRA. *See Wilson*, 535 F.3d at 714-15 (Rogers, J., concurring in part and dissenting in part) ("[E]xcept possibly in a military context, neither the Supreme Court nor this court has denied a *Bivens* remedy where a plaintiff had no alternative remedy at all.").

Neither of the Supreme Court cases relied upon by Mr. Mulhollan precluded a *Bivens* remedy for plaintiffs who had no access to an alternative administrative scheme. In both of the cases, plaintiffs filed their *Bivens* actions in federal court *after* pursuing and recovering remedies under the applicable administrative schemes—the Social Security system in *Chilicky* and the federal civil service system, including CSRA, in *Bush*. *See Schweiker v. Chilicky*, 487 U.S. 412,

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and 43. *See* 5 U.S.C. §§ 2301(a), 2302(a)(2)(C), 3132(a), 4301. As a probationary employee with less than one year of experience, Col. Davis is also not covered under the procedural protections in Chapter 75. *See* 5 U.S.C. § 7511(a)(1) (not covering any probationary employee who has not completed a year of service).

417-18, 108 S. Ct. 2460, 2464-65 (1988); *Bush v. Lucas*, 462 U.S. 367, 369-71, 103 S. Ct. 2404, 2407-08 (1983). The question before the Court in those cases was whether it should *supplement* the existing, albeit incomplete, administrative remedies with additional relief, like damages for emotional distress and other hardships. *See Chilicky*, 387 U.S. at 425, 103 S. Ct. at 2469; *Bush*, 462 U.S. at 388, 103 S. Ct. at 2407.

The Court answered the question of supplementing remedies in the negative. In *Bush*, the Court held that additional remedies are not necessary where CSRA's administrative scheme recognizes "[c]onstitutional challenges to agency action, such as the First Amendment claim raised by [plaintiff]," and "provides meaningful remedies for employees who may have been unfairly disciplined for making critical comments about their agencies." 462 U.S. at 386, 103 S. Ct. at 2415. Of particular importance to the instant case, the Court noted that certain personnel actions are not covered by CSRA, *id.* at 385 n.28, 103 S. Ct. at 2415 n.28, and it explicitly left open the question whether "the Constitution itself requires a judicially-fashioned damages remedy in the absence of any other remedy to vindicate the underlying right, unless there is an express textual command to the contrary," *id.* at 378 n.14, 103 S. Ct. at 2412 n.14. Thus, "there [was] nothing in [the] decision to foreclose a federal employee from pursuing a *Bivens* remedy where his injury is not attributable to personnel actions which may be remedied under the federal statutory scheme." *Id.* at 391, 103 S. Ct. at 2418 (Marshall, J., concurring). *Cf. Stewart v. Evans*, 275 F.3d 1126, 1130 (D.C. Cir. 2002) (holding that "*Bush* virtually compels the conclusion that the Act does not preclude a *Bivens* action for a warrantless search," a claim not covered by CSRA).

Chilicky, the "linchpin decision" according to Mr. Mulhollan, Def.'s Br. at 10, is no different from *Bush*. *See Chilicky,* 487 U.S. at 425, 108 S. Ct. at 2468 ("The case before us

cannot reasonably be distinguished from *Bush v. Lucas*."); *id.* (stating that "Congress . . . had not failed to provide meaningful safeguards or remedies for the rights of persons situated as [the plaintiffs] were"). Relying on its holding in *Bush*, the Court in *Chilicky* reiterated the principle that "*additional Bivens* remedies" are not necessary "[w]hen the design of the Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration." 487 U.S. at 423, 108 S. Ct. at 2468 (emphasis added). Although Mr. Mulhollan cites the *Chilicky* Court's statement that the lack of statutory relief "does not by any means necessarily imply that courts should award money damages," Def.'s Br. at 10, that statement was made not in the context of discussing or extending *Bush*, but in discussing *Bivens* claims brought by military personnel, where the special nature of military life was itself considered a "special factor counseling hesitation." *See Chilicky*, 487 U.S. at 421, 108 S. Ct. at 2467. Thus, "[n]o Supreme Court opinion holds squarely that the CSRA always prevents federal employees from bringing *Bivens* actions to right job-related wrongs." *Saul v. United States*, 928 F.2d 829, 837 (9th Cir. 1991).[3]

Nor has the D.C. Circuit so held. The precise question before the court in *Spagnola v. Mathis* was "[w]hether the Court intended *Bush* to bar damages actions for those employees or applicants for whom the CSRA remedies are *not so complete* . . . ," 859 F.2d at 226 (emphasis added)—not for those for whom they are non-existent. Although the court stated in dicta that a reference in *Chilicky* implicitly suggests that the availability of specific alternative remedies does not matter even as to plaintiffs with "no remedy whatsoever," *id.* at 227-28, the availability of some remedy to a particular plaintiff plainly mattered in the court's determination of the "outer boundaries for inclusion in 'comprehensive systems,'" *id.* at 229. If the "particular claimant—

[3] There is one reference in *Chilicky* to the absence of certain remedies under CSRA, but the Court did not discuss whether plaintiffs seeking such remedies could bring a *Bivens* claim. *See* 487 U.S. at 423, 108 S. Ct. at 2467.

and his underlying claim—[is] included in a given congressional 'comprehensive system' for purposes of applying 'special factors' analysis," *id.* at 229, and Congress has not plainly expressed an intention to preserve the *Bivens* remedy, then the remedy is not available because Congress has "'not inadvertently' omitted damages remedies for him," *id.* at 228. The *Spagnola* court therefore denied a *Bivens* remedy to the plaintiffs because CSRA "at least technically accommodates [plaintiffs'] constitutional challenges" based on the First Amendment by permitting them to file a petition on that basis to the Office of Special Counsel ("OSC"), thus including the plaintiffs and their claims within the comprehensive system. *Id.*

Wilson v. Libby, a subsequent D.C. Circuit case discussing *Spagnola*, as well as many of the non-binding cases cited by Mr. Mulhollan, similarly involved situations in which those plaintiffs' claims were included in the preclusive comprehensive scheme because the scheme provided *some* remedy to them for the unconstitutional actions alleged. *See* 535 F.3d at 709 (denying *Bivens* claim, and noting that alternative remedies were available under the Privacy Act).[4]

None of these cases precludes Col. Davis from seeking relief under *Bivens* because CSRA does not even "technically accommodate" Col. Davis's constitutional challenges. His

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[4] *See also, e.g.*, *Dotson v. Griesa*, 398 F.3d 156, 160 (2d Cir. 2005) (holding that judicial employees have no *Bivens* remedies, where Congress's deliberate choice of excluding them from CSRA was "informed in no small part by the existence of the judiciary's own administrative review procedures for employment disputes, which, in many respects, mirror those afforded in the CSRA"), *cert. denied*, 547 U.S. 1191 (2006); *Saul*, 928 F.2d at 836-39 (holding that CSRA precludes *Bivens* where it offers some remedy to the plaintiff, although also stating that preclusion extends to situations where there are no remedies); *Volk v. Hobson*, 866 F.2d 1398, 1403 (Fed. Cir. 1989) (holding that a *Bivens* remedy is precluded where CSRA provided for establishment of a grievance procedure that was applicable to plaintiff, as well as the Federal Labor Relations Authority and OSC remedies), *cert. denied*, 490 U.S. 1092 (1989); *Kotarski v. Cooper*, 866 F.2d 311, 312 (9th Cir. 1989) ("Because Congress provided some mechanism for appealing adverse personnel actions, it cannot be said that the failure to provide damages, or complete relief, was 'inadvertent.'"); *McIntosh v. Turner*, 861 F.2d 524, 526 (8th Cir. 1988) (denying a *Bivens* remedy because "Congress knew that wrongs of this kind would occur, and it apparently believed that the OSC process would adequately address them"); *Hatfill v. Ashcroft*, 404 F. Supp. 2d 104, 116 (D.D.C. 2005) (Walton, J.) ("[T]he Privacy Act, being a comprehensive scheme that provides a meaningful remedy for the kinds of harm Dr. Hatfill alleges he has suffered, qualifies it as a special factor counseling hesitation against the applicability of *Bivens*.").

constitutional claims are not, therefore, within the "outer boundaries for inclusion" in CSRA and are not intentionally omitted from it. *Spagnola*, 859 F.2d at 228-29. It does not matter that Library employees receive some benefits under CSRA (for example, under Chapter 41 regarding training and under Chapter 71 regarding labor organization, Def.'s Br. at 12-14), because these benefits do not in any way relate to Col. Davis's constitutional claims. Similarly, the passage of the Congressional Accountability Act ("CAA"), which made certain labor and anti-discrimination laws applicable to some congressional employees, *see* Def.'s Br. at 12-14, has nothing to do with the First or Fifth Amendment rights of employees. The D.C. Circuit has permitted *Bivens* claims by federal employees when the constitutional claims alleged are not cognizable in the allegedly comprehensive statutory scheme, even if other claims by the same plaintiff might be cognizable under the same scheme. *See, e.g.*, *Stewart*, 275 F.3d at 1130 (recognizing a *Bivens* action for Fourth Amendment warrantless search claim by federal employees, which is not cognizable under CSRA); *Ethnic Employees of Library of Cong. v. Boorstin*, 751 F.2d 1405, 1415 (D.C. Cir. 1985) (holding that Title VII does not preclude a *Bivens* remedy for First Amendment claims of Library employees that fall outside the scope of Title VII because "[n]othing in [the legislative] history even remotely suggests that Congress intended to prevent federal employees from suing their employers for constitutional violations against which Title VII provides no protection at all"); *see also Navab-Safavi v. Broad. Bd. of Governors*, 650 F. Supp. 2d 40, 67 (D.D.C. 2009) ("Even if it is assumed that the [Contract Disputes Act] is a comprehensive regulatory scheme that could preclude certain *Bivens* claims, this does not mean that it necessarily precludes plaintiff's particular claim.").

Mr. Mulhollan's argument is in essence that no federal employee should ever be able to bring an employment-related *Bivens* claim because of the existence of CSRA. That argument

conflicts with *Spagnola*'s emphasis on the "outer boundaries for inclusion in 'comprehensive systems,'" 859 F.2d at 229, as well as the Supreme Court's and the D.C. Circuit's repeated recognition of *Bivens* remedies for federal employees who fall outside such outer boundaries. *See, e.g.*, *Davis*, 442 U.S. at 247, 99 S. Ct. 2264 (rejecting defendant's argument that Title VII of the Civil Rights Act of 1964, which protects most federal employees from discrimination but did not cover the plaintiff, precluded a *Bivens* claim under the Fifth Amendment); *Stewart*, 275 F.3d at 1130 (recognizing employee's right to *Bivens* claim); *Ethnic Employees*, 751 F.2d at 1415 (same). *Spagnola*'s analysis of the availability of remedies under CSRA simply cannot be squared with Mr. Mulhollan's view that all federal employees fall within the statute's outer boundaries and, thus, that no federal employee could ever have a *Bivens* remedy.

The implications of Mr. Mulhollan's argument are chilling. Under his view of the law, all federal supervisors would enjoy absolute immunity from damages even "[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights." *Harlow v. Fitzgerald*, 457 U.S. 800, 819, 102 S. Ct. 2727, 2739 (1982) (rejecting claim of absolute immunity for Presidential aides); *Butz v. Economou*, 438 U.S. 478, 505, 98 S. Ct. 2894, 2910 (1978) ("The extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees."). Yet he provides no reason to believe that Congress intended to overrule these Supreme Court decisions when it enacted CSRA. Mr. Mulhollan's view of the law would leave individuals who are not covered by CSRA with no remedy for even the clearest constitutional violations, including major personnel actions such as termination, despite the Supreme Court's recognition of *Bivens* remedies precisely in circumstances where it is "damages or nothing." *Davis*, 442 U.S. at 245, 99 S. Ct. at 2277; *see also Bagola v. Kindt*, 131 F.3d 632, 644 (7th Cir.

1997) ("If an administrative scheme that did not safeguard a claimant's constitutional rights precluded a *Bivens* claim, unconstitutional conduct would be insulated from review by any adjudicatory forum."). It would thereby undermine the well-established right of public employees—even those probationary employees not covered by CSRA's protections—to speak without fear of retaliation on matters of public concern when the value of the speech outweighs any possible harm to the government. *See Rankin v. McPherson*, 483 U.S. 378, 383-84, 107 S. Ct. 2891, 2896 (1987) (recognizing First Amendment rights of probationary employees). That cannot be the law.

Indeed, if Congress explicitly tried to enact a statutory scheme foreclosing all relief for constitutional violations, that would raise a "[s]erious constitutional question." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12, 106 S. Ct. 2133, 2141 n.12 (1986) ("[A]ll agree that Congress cannot bar all remedies for enforcing constitutional rights." (quoting Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895, 921 n.113 (1984))); Order, Jan. 20, 2010, at 6. This Court should not infer that Congress has attempted to implicitly preclude all constitutional claims. *See Webster v. Doe*, 486 U.S. 592, 603, 108 S. Ct. 2047, 2053 (1988) (requiring clear congressional intent to preclude judicial review of constitutional claims). These constitutional considerations make inapposite the cases cited by Mr. Mulhollan regarding CSRA's preclusion of *statutory* remedies.[5]

Recognizing the lack of any administrative remedies for Col. Davis, Mr. Mulhollan raises the availability of injunctive relief in the form of reinstatement as a reason for denying a *Bivens*

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[5] *See, e.g.*, *United States v. Fausto*, 484 U.S. 439, 455, 108 S. Ct. 668, 677 (1988) (Blackman, J., concurring) (stating that the majority opinion that CSRA precludes plaintiff's use of the Back Pay Act was not inconsistent with the common-law power of courts to recognize *Bivens* actions); *Filebark v. U.S. Dep't of Transp.*, 555 F.3d 1009, 1014 (D.C. Cir. 2009) (holding that CSRA precludes review under the Administrative Procedure Act), *cert. denied*, 130 S. Ct. 487 (2009).

remedy.[6] Def.'s Br. at 16-17. That argument should be rejected. "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens*, 403 U.S. at 395, 91 S. Ct. at 2004. Injunctive relief alone is "useless to a person who has already been injured," *Butz*, 438 U.S. at 504, 98 S. Ct. at 2910, and cannot serve *Bivens*' purpose of deterring the officer from again violating constitutional rights, *see Carlson*, 446 U.S. at 21, 100 S. Ct. at 1472-73. Moreover, the Supreme Court has never denied a *Bivens* remedy based on the availability of injunctive relief—to the contrary, it has routinely recognized *Bivens* actions against officials also subject to injunctive or declaratory relief. *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970 (1994) (plaintiff seeking *Bivens* damages and an injunction); *Cleavinger v. Saxner*, 474 U.S. 193, 106 S. Ct. 496 (1985) (same).

Col. Davis has no administrative remedies either under CSRA or under the Library of Congress's regulations. In these circumstances, the Court should recognize a *Bivens* remedy because Col. Davis's First and Fifth Amendment claims are not within the scope of CSRA, there is no evidence that Congress intended to preclude such constitutional claims by enacting CSRA, and hence there are no "special factors counseling hesitation." Where, as here, Congress has completely omitted an administrative procedure for constitutional claims of federal employees, "the public interest that there be a reasonably spacious approach to a fair compensatory award for denial or curtailment of the [First Amendment] right," *Tatum v. Morton*, 562 F.2d 1279, 1282 (D.C. Cir. 1977), compels the conclusion that Col. Davis's constitutional claims should be permitted to proceed.

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[6] Defendant cryptically "assum[es]" that "this Court has subject matter jurisdiction" to grant such injunctive relief, Def.'s Br. at 16, implying that Defendants might challenge the Court's jurisdiction at some later time. The Court clearly has jurisdiction to grant equitable relief. *Spagnola*, 859 F.2d at 229-30 (holding that courts have jurisdiction over equitable relief claims against government officials); *see also* Order, Jan. 20, 2010, at 6-7.

II. COL. DAVIS HAS STATED A CLAIM FOR THE VIOLATION OF HIS FIRST AMENDMENT RIGHT, AND MR. MULHOLLAN IS NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE THAT RIGHT WAS CLEARLY ESTABLISHED.

The relevant question on a Rule 12(b)(6) motion to dismiss is whether the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). As Mr. Mulhollan acknowledges, "'[p]lausibility' represents something less than 'probability.'" Def.'s Br. at 5-6. Given that this Court has already found a likelihood—i.e., a probability—of success on the merits of Col. Davis's First Amendment claim, *see* Order, Jan. 20, 2010, at 3, Mr. Mulhollan cannot as a logical matter establish, based on the same arguments, that Col. Davis has not even made out a plausible First Amendment claim. *See, e.g., Burritt v. N.Y. State Dep't of Transp.*, No. 08-CV-605, 2008 WL 5377752, at *1 (N.D.N.Y. Dec. 18, 2008) ("[A]n action in which it is determined that the plaintiff is entitled to a preliminary injunction could not be dismissed *en toto* pursuant to Fed. R. Civ. P. 12(b)(6).").

A. Col. Davis Has Stated A Claim For The Violation Of His First Amendment Right To Speak On A Matter Of Immense Public Concern.

Col. Davis has stated a First Amendment claim under *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563, 88 S. Ct. 1731 (1968), and its progeny, because the Complaint's allegations establish all four prongs of the inquiry: (1) Col. Davis spoke on a matter of significant public concern, (2) the speech was a substantial factor for Col. Davis's termination, (3) Col. Davis would not have been terminated in the absence of his protected speech, and (4) the value of the speech outweighed any possible harm to the Library or CRS. *See O'Donnell v. Barry*, 148 F.3d 1126, 1133 (D.C. Cir. 1998). Mr. Mulhollan concedes that the Complaint adequately pleads the first three prongs and argues solely that CRS's interest

in promoting the efficiency of its workplace outweighed the value of Col. Davis's speech because he was allegedly a policy-level employee. Def.'s Br. at 18. That argument must fail in light of the Complaint's allegations, regardless of whether or not Col. Davis was a policy-level employee.

1. The Complaint's Allegations Establish That Col. Davis Was Terminated For Speech On A Matter Of Significant Public Concern That Did Not Harm CRS.

Col. Davis has stated a First Amendment claim under *Pickering* as a matter of law because the Complaint's allegations establish that Col. Davis was terminated for speech on a matter of significant public concern that did not harm CRS.

Mr. Mulhollan does not dispute that the speech was on a matter of significant public concern. Nor could he. Col. Davis sought to contribute as a citizen to one of the most important public debates of our time: the debate about the appropriate response of our constitutional democracy to the threat posed by international terrorism. Compl. ¶¶ 45-51. "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145, 103 S. Ct. 1684, 1689 (1983) (internal quotation marks omitted); *Sanjour v. EPA*, 56 F.3d 85, 91 (D.C. Cir. 1995) (en banc) ("[C]urrent government policies" are "the paradigmatic 'matter[] of public concern.'"). Where, as here, the challenged speech "more substantially involved matters of public concern," the government must make "a stronger showing" of disruption to its interests as an employer to overcome the employee's First Amendment rights. *Connick*, 461 U.S. at 152, 103 S. Ct. at 1692-93; *Waters v. Churchill*, 511 U.S. 661, 674, 114 S. Ct. 1878, 1887 (1994) (where an employee has "a strong, legitimate interest in speaking out on public matters . . . the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished").

Based on the allegations in the Complaint, Mr. Mulhollan cannot make this "stronger showing" of harm, much less any showing of harm, that outweighs the significant First Amendment interests at stake. Col. Davis's allegations, made on first-hand knowledge, specifically establish that his opinion pieces had nothing to do with his work at CRS and that they did not and could not have harmed the Library or CRS's interests. *See, e.g.*, *Eberhardt v. O'Malley*, 17 F.3d 1023, 1027 (7th Cir. 1994) (Posner, J.) ("The less [a public employee's] speech has to do with the office, the less justification the office is likely to have to regulate it."); *Navab-Safavi*, 650 F. Supp. 2d at 57-58 (examining Supreme Court case law and concluding that in the only employee speech case where the speech had no direct nexus to Government employment, the Court had held that speech restrictions violated the First Amendment). Specifically, the Complaint alleges that:

- The speech for which he was fired was not related to Col. Davis's official work at CRS. Compl. ¶¶ 30-32.

- The opinion pieces did not single out or criticize Congress, any Member of Congress, any political party, or any position associated with one party. *Id.* ¶ 47.

- The pieces did not denigrate or criticize CRS, the Library, Mr. Mulhollan, or any of their employees or policies in any manner. *Id.* ¶ 50.

- The opinion pieces were written in Col. Davis's personal capacity, on his own time and with his own resources, based on his experience with the military commissions system, not based on his work at CRS. *Id.* ¶¶ 48, 49, 51.

- The views expressed in the opinion pieces were similar to and consistent with views Col. Davis regularly discussed before coming to CRS. *Id.* at ¶¶ 19-24.

- The Library's regulation on speech encourages outside speech, and no Library or CRS policy prohibits any speech. *Id.* ¶¶ 65, 68-69; *see also* Library of Congress Regulation ("LCR") 2023-3, § 3(A); CRS Policy at 2-3.[7]

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[7] The Library's regulation and the CRS policy relating to outside speaking are attached to this opposition as Exhibits A and B. They can be considered by the Court at the motion to dismiss stage because they were discussed in detail in the Complaint and they are central to Col. Davis's claims. *See, e.g.*, *Robinson v. Dist. of Columbia Hous. Auth.*, 660 F. Supp. 2d 6, 10 n.5 (D.D.C. 2009) (Walton, J.).

- Col. Davis had spoken publicly on this precise topic during his employment with CRS, without any repercussions or any indication that such speech was harming the Library or CRS. Compl. ¶¶ 33-42, 46.

- Other CRS employees have regularly expressed their opinions on policy matters of public concern for decades, including on controversial and high-profile issues, without compromising the mission of the Library or of CRS. *Id.* ¶ 77.

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

Accepting as true the factual allegations in the Complaint and drawing reasonable inferences in Col. Davis's favor—as this Court must do on a motion to dismiss, *Iqbal*, 129 S. Ct. at 1949—the allegations more than adequately state a plausible First Amendment claim that the value of Col. Davis's speech outweighed any possible harm to CRS. Mr. Mulhollan's attempt to dispute Col. Davis's detailed allegations regarding the scope of his work at FDT by ignoring their actual substance and broadly asserting that they are "conclusory," Def.'s Br. at 27-28, 31, is improper on a motion to dismiss. Even a cursory review of Col. Davis's allegations makes clear that the Complaint provides sufficient factual detail to establish that the opinion pieces were not related to his work for CRS. *See* Compl. ¶¶ 30-32; *supra* at 4 (summarizing allegations). There is nothing "defying common sense" or "implausible," Def.'s Br. at 27, about these specific, first-hand factual allegations. Indeed, each of them was amply supported by evidence in Col. Davis's motion for preliminary relief. That Defendant may disagree with these allegations and with Col. Davis's evidence is irrelevant on a motion to dismiss.[8]

[8] Mr. Mulhollan attempts to fault Col. Davis for focusing on his "official" responsibilities at CRS, Def.'s Br. at 27, but the Library's own policy concerning outside speech makes this exact distinction. *See* LCR 2023-3, § 3 ("Generally, personal writings and prepared or extemporaneous speeches that are on subjects unrelated to the Library and to staff members' *official duties* are not subject to review." (emphasis added)); Compl. ¶¶ 65, 67.

Although Mr. Mulhollan asks the Court to draw "reasonable inferences" of unidentified potential harm to CRS's principles of "objectivity, nonpartisanship and balance," Def.'s Br. at 29-30, he is not the party entitled to factual inferences on his own motion to dismiss, and there is nothing in the Complaint that could reasonably lead to the conclusion that Col. Davis's speech—about a subject having nothing to do with his job—caused or was likely to cause any harm to CRS or the Library as a matter of law. To the contrary, the specific allegations in the Complaint, including those detailed above, establish that no such harm occurred and that any anticipated harm was unfounded. Compl. ¶¶ 30-77.

The only "evidence" Mr. Mulhollan can point to are his own self-serving assertions of potential harm in the letters of admonishment and termination that he wrote. Def.'s Br. at 29-30. Those concerns are contradicted by the Library's regulations encouraging speech, Compl. ¶¶ 65, 68-69, as well as Mr. Mulhollan's own prior approval of Col. Davis's speech on identical issues and the past practice of other CRS employees, *id.* ¶¶ 33-42, 46, 77. The D.C. Circuit and this Court have rejected similar claims of speculative harm, where there is "no evidence whatsoever, apart from a[n] [employer's] opinion, that [the employee's] speech interfered with a legitimate government interest." *Am. Postal Workers Union v. U.S. Postal Serv.*, 830 F.2d 294, 303 (D.C. Cir. 1987) (rejecting claimed harm to "public confidence" in government); *Am. Fed'n of Gov't Employees v. Loy*, 332 F. Supp. 2d 218, 230-31 (D.D.C. 2004) (Walton, J.) (holding that where the government "speculatively asserts that [its] interest . . . [is] endangered" without "com[ing] forth with any affirmative evidence" that the speech actually interfered with the efficient functioning of the office or discredited the employer, a motion to dismiss is improper). The Court should do so again here.

2. The Complaint States A Viable Claim Regardless Of Whether Or Not Col. Davis Was A Policy-Level Employee.

As Mr. Mulhollan recognizes, there is no *per se* exception to *Pickering* balancing for the speech of policy-level employees; whether an employee occupies a policy-level position is just one of the considerations. Def.'s Br. at 19. Although the law "gives employers considerable leeway to ensure that high-level officials toe the party line . . . it does not give them unchecked power to silence them." *O'Donnell*, 148 F.3d at 1137. "In some cases, the public interest in a high-level official's speech will outweigh any interest in that official's bureaucratic loyalty." *Id. See also McEvoy v. Spencer*, 124 F.3d 92, 103 (2d Cir. 1997) (holding that the policymaking status of a discharged employee is not conclusive in the *Pickering* balance). Thus, even if an employee occupies a policy-level position, he or she has First Amendment rights, and this Court must still apply the *Pickering* balancing test to determine if the value of the employee's speech is outweighed by any harm to the employer.

Where, as here, the Complaint establishes for purposes of a motion to dismiss that the speech is on a matter of significant public concern and it did not harm or even potentially harm the Library's interests, *see supra* at 19-23, the government cannot possibly meet its burden of proving a sufficient interference with its interests that outweighs the value of the employee's speech, even with respect to speech by policymakers. That is especially true where, as here, there is only unadorned speculation, and "no evidence whatsoever, apart from a[n] [employer's] opinion, that [the employee's] speech interfered with a legitimate government interest." *Am. Postal Workers Union*, 830 F.2d at 303; *Loy*, 332 F. Supp. 2d at 230-31 (same). In other words, if there is no evidence or reasonable inference of harm from the facts alleged in the Complaint, then the balance cannot tip towards the government as a matter of law, even if the employee holds a policy-level position. *See, e.g.*, *Catletti ex rel. Estate of Catletti v. Rampe*, 334 F.3d 225,

231 (2d Cir. 2003) (reversing grant of summary judgment because "[e]ven if Catletti is considered a policymaker . . . [defendants] have presented no evidence of . . . potential disruption"); *Barker v. City of Del City*, 215 F.3d 1134, 1140 (10th Cir. 2000) (reversing grant of summary judgment against policy-making employee where defendant "never articulated any particular interests it had in . . . punishing [her] speech, nor . . . articulated how that speech actually, or even potentially, disrupted its governmental functions").

Because of his inability to show actual harm from Col. Davis's speech, Mr. Mulhollan is left to argue that "[p]laintiff's former position as a policy-level employee is virtually dispositive as to the ultimate legal question under *Pickering*." Def.'s Br. at 28. There is no support for that position. In the cases relied upon by Mr. Mulhollan to argue that Col. Davis's speech was disruptive enough to be dispositive of the *Pickering* balance, Def.'s Br. at 20, 28-29, the speech for which the employee was terminated was significantly different from Col. Davis's speech: it "reflected *a policy disagreement with his superiors* such that they could not expect him to carry out their policy choices vigorously." *Hall v. Ford*, 856 F.2d 255, 265 (D.C. Cir. 1988) (emphasis added); *O'Donnell*, 148 F.3d at 1135 (holding that "it is especially disruptive for the high-level employees of a governmental agency to express *public disagreement with the agency's policies*" (emphasis added)).[9] Adverse employment action was justified in those cases because the "tremendous disruption to the public workplace likely to result from the *critical speech* of [a policy-level] employee would in most cases outweigh any First Amendment interests possessed by that employee." *McEvoy*, 124 F.3d at 103 (emphasis added); *see also Pickering*, 391 U.S. at

[9] *See also, e.g.*, *Caruso v. De Luca*, 81 F.3d 666, 671 (7th Cir. 1996) (holding that defendant's concern with efficiency of public service was reasonable given plaintiff's criticism of earlier decisions); *Bates v. Hunt*, 3 F.3d 374, 377-79 (11th Cir. 1993) (holding that the Governor could legally terminate an employee, whose job requires extensive public contact on the employer's behalf, for voluntarily aiding a civil lawsuit against the Governor); *Kinsey v. Salado Indep. Sch. Dist.*, 950 F.2d 988, 996 (5th Cir. 1992) (holding that because plaintiff was a high-level and confidential employee, "not much opposition to [defendants] was required in order to disrupt, and prevent, effective performance"), *cert. denied*, 504 U.S. 941 (1992).

570 n.3, 88 S. Ct. at 1735 n.3 (contemplating situations in which "the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of *public criticism of the superior by the subordinate* would seriously undermine the effectiveness of the working relationship between them" (emphasis added)). By contrast, where, as here, the employee's speech is not critical of the employer or its policies, Compl. ¶ 50, and it has nothing to do with the employer, *id.* ¶¶ 50-51, there is no reasonable inference of disruption to be drawn under these cases and no reason to permit the termination of even a policy-making employee. *See, e.g.*, *Bonds v. Milwaukee County*, 207 F.3d 969, 973 (7th Cir. 2000) ("The policymaking employee exception does not cover a government entity's refusal to hire based on the prospective employee's criticism of a different governmental entity for whom he had worked."), *cert. denied*, 531 U.S. 944 (2000); *Watters v. City of Philadelphia*, 55 F.3d 886, 898 (3d Cir. 1995) (rejecting policymaker argument where nothing plaintiff said "impugn[ed] the integrity of his superiors" and there was no evidence that he engaged in "complaining and negative criticism of his superiors . . . " (internal quotation marks omitted)); *see also Hall*, 856 F.2d at 263 (creating the policy-level employee doctrine from political patronage-dismissal case law and adopting the reasoning that if the President is allowed to terminate a Deputy Secretary of Defense for being a member of the opposition party, he should also be able to terminate him "for a public expression of policy *contrary to his own*" (emphasis added) (internal quotation marks omitted)).

Indeed, *Hall* makes clear that that an employee's policy-level status matters only if "the government interest in accomplishing its organizational objectives through compatible policy level deputies is implicated by the employee's speech." *Hall*, 856 F.2d at 264. This requirement is satisfied only if, "[a]t a minimum, the employee's speech . . . relate[s] to policy areas for which he is responsible." *Id.* That is not the case here. The allegations in the Complaint

establish that Col. Davis's speech had nothing to do with the purported policy areas for which Mr. Mulhollan asserts that Col. Davis was responsible: policies relating to leading, planning, directing, and evaluating the research and analytical activities of the FDT division. Def.'s Br. at 22. Col. Davis's opinion pieces did not criticize, or even comment on, CRS's priorities or other policies with regard to how to lead, plan, and direct CRS research. Compl. ¶ 50. Col. Davis's opinion pieces related solely to the military commissions—an issue on which CRS does not have a policy direction, and that, in any event, did not fall under FDT's scope of work. *Id.* ¶¶ 30-32. Col. Davis's speech on military commissions policy, thus, does not even implicate the case law regarding policy-level employees.

Mr. Mulhollan's argument boils down to an assertion that Assistant Directors at CRS can never publicly take a policy position or criticize even a former public official on any issue potentially on the congressional agenda, even if it has nothing to do with their job. *See* Def.'s Br. at 27. That assertion must be rejected if there is any meaning to the well-settled principle that "public employees do not surrender all their First Amendment rights by reason of their employment." *Garcetti v. Ceballos*, 547 U.S. 410, 417, 126 S. Ct. 1951, 1957 (2006).

3. Col. Davis's Position Did Not Relate To A Policy Area, And He Was Not At A Policy Level.

Even if the policymaker cases were relevant here, Mr. Mulhollan's argument should still be rejected because Col. Davis does not fall into the "narrow band of fragile relationships requiring for job security loyalty at the expense of unfettered speech." *Hall*, 856 F.2d at 264. Contrary to Mr. Mulhollan's contentions, the allegations in the Complaint establish that Col. Davis's position did not fall within a policy area and that he was not a policy-level employee as a matter of law.

The Complaint alleges that Col. Davis had no authority to establish substantive policy, he had little opportunity for significant contact with the public, he was not expected to and did not author any written reports or analyses setting forth policy views on behalf of CRS, and he did not have any congressional inquiries or requests for information directed to him. Compl. ¶ 29. Thus, he did not have "broad responsibilities with respect to policy formulation, implementation, or enunciation," and was not "a highly visible spokesman" for CRS. *Hall*, 856 F.2d at 264-65. The Complaint does allege that Col. Davis supervised approximately 95 employees and led, directed, and evaluated their research and analytical activities. *Id.* That allegation alone does not support the conclusion that Col. Davis was a substantive policymaker; it simply suggests that he was a manager and that he supervised numerous individuals. That he had "some policy responsibilities" and was in charge of some issues relating to "policies" is not enough to include him as part of the "narrow band" of policymakers. *O'Donnell*, 148 F.3d at 1136 (holding that plaintiff was not a policymaker for *Pickering* purposes even though he was in charge of a number of Police Department facilities and instituted several reforms in their operations). Accepting the Complaint's allegations as true, therefore, Col. Davis did not fall within the required "narrow band."

Mr. Mulhollan relies on Col. Davis's job application to attempt to refute the Complaint's allegations. *See* Def.'s Br. Ex. 1. That extraneous material should not be considered on Mr. Mulhollan's motion to dismiss because it is not central to Col. Davis's claims and it is mentioned only in passing in the Complaint. *See Robinson*, 660 F. Supp. 2d at 10 n.5 (permitting exhibits to motion to dismiss where they are central to the claims and referenced in the Complaint). In any event, "the KSAs/Competencies" on which Mr. Mulhollan relies merely state the desired "general qualifications" for the job applicants that CRS seeks. Similarly, whether Col. Davis had

previously had such experiences at prior jobs—which is all his application responses reveal—is irrelevant to whether he was a substantive policymaker at the Library.

B. Mr. Mulhollan Is Not Entitled To Qualified Immunity Because He Violated Col. Davis's Clearly Established First Amendment Rights.

As detailed above, the allegations in the Complaint, taken in the light most favorable to Col. Davis, establish that Col. Davis's dismissal for his speech on a matter of public concern violated his First Amendment rights. That means that Col. Davis has satisfied the first prong of the qualified immunity test: whether a constitutional right has been violated. *See Pearson v. Callahan*, 129 S. Ct. 808, 816 (2009). Because these constitutional rights were clearly established when Defendants terminated Col. Davis for writing the opinion pieces, Col. Davis also satisfies the second step in the qualified immunity inquiry. *Id.* Mr. Mulhollan is, thus, not entitled to qualified immunity.

For a constitutional right to be clearly established, "its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 2515 (2002) (internal quotation marks omitted). There is no need, however, for earlier decisions with "fundamentally similar" or "materially similar" facts. *Id.* at 741, 122 S. Ct. at 2516. "[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and . . . a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question . . . ." *Id.* (internal quotation marks omitted). A single controlling authority from the D.C. Circuit is sufficient to clearly establish the law in this circuit. *Moore v. Hartman*, 388 F.3d 871, 885 (D.C. Cir. 2004), *rev'd on other grounds*, 547 U.S. 250, 126 S. Ct. 1695 (2006).

Mr. Mulhollan's primary qualified immunity argument is that he should be shielded from liability because it is difficult for plaintiffs in certain *Pickering* cases to overcome the qualified

immunity standard. Def.'s Br. at 39-40. This, however, is the quintessential case in which the *Pickering* plaintiff overcomes qualified immunity: the facts alleged establish that Mr. Mulhollan terminated Col. Davis for speaking in his personal capacity on a matter of significant public concern, despite the lack of any actual or reasonably likely harm to CRS. Taking those allegations as true, any reasonable officer would have known that it was not permissible to fire Col. Davis for writing the opinion pieces. *See, e.g.*, *Pickering*, 391 U.S. at 568-69, 88 S. Ct. at 1734-35 (First Amendment claim made out if plaintiff spoke on matter of public concern and defendant did not demonstrate that the harm to its interests outweighed the First Amendment rights at stake) . As Judge Posner held at the motion-to-dismiss stage in a case in which the plaintiff alleged that he was punished without any legitimate reason for writing a novel: "This is such an elementary violation of the First Amendment that the absence of a reported case with similar facts demonstrates nothing more than widespread compliance with well-recognized constitutional principles." *Eberhardt*, 17 F.3d at 1028.

In any event, there is controlling authority clearly establishing Col. Davis's First Amendment rights. Case law on point establishes that, because the government bears the burden of justifying the discharge, *Rankin*, 483 U.S. at 388, 107 S. Ct. at 2899, it cannot prevail on a *Pickering* balance where there is "no evidence whatsoever, apart from a[n] [employer's] opinion, that [the employee's] speech interfered with a legitimate government interest," *Am. Postal Workers Union*, 830 F.2d at 304. That is especially the case where, as here, the employee's speech is on a subject of immense interest and concern to the public. *Connick*, 461 U.S. at 152, 103 S. Ct. at 1692-93 ("stronger showing" of disruption necessary where speech is of significant public concern); *Waters*, 511 U.S. at 674, 114 S. Ct. at 1887 ("substantial showing" required). This well-established case law makes clear that in such circumstances, the burden of

demonstrating harm is especially high for government employers, and any reasonable government official would have known that absent such evidence, which was non-existent here, it was not permissible to fire Col. Davis.[10]

Defendant's assertion that there is not a case on point involving a policymaker should similarly be rejected. *See Hope*, 536 U.S. at 741, 122 S. Ct. at 2516 (rejecting position that materially similar case must exist to overcome qualified immunity). As a threshold matter, the Complaint's allegations establish that he was not a policy-level employee. *See supra* at 26-28. Even if he were, *Hall* makes clear that the policymaker cases only apply to situations when "the government interest in accomplishing its organizational objectives through compatible policy level deputies is implicated by the employee's speech," and only when "the employee's speech . . . relate[s] to policy areas for which he is responsible." *Hall*, 856 F.2d at 264. That is not this case. The Complaint establishes that Col. Davis's speech is not about the Library, CRS, or Mr. Mulhollan, or related to policy areas for which Col. Davis was responsible. *See supra* at 26.

Moreover, even if Col. Davis were a policy-level employee, existing case law made clear that he still had the clearly established right to speak on a matter of public concern absent a greater showing of harm to CRS. *O'Donnell* makes clear that, even for a policymaker, the government must still show that the harm to it outweighs the employee's and the public's free speech interests, and that, therefore, a policy-level employee cannot be terminated for engaging in speech on a matter of immense public concern absent such harm. *O'Donnell*, 148 F.3d at

[10] Defendant cannot argue that he was reasonably mistaken as to his belief that harm would befall CRS and the Library from Col. Davis's opinion pieces. As the Complaint alleges, CRS employees have regularly engaged in high-profile outside speech, similar to Col. Davis's, for decades, without harming CRS or the Library. Compl. ¶ 77. Indeed, Col. Davis himself had previously spoken and written about the exact same subject matter on numerous prior occasions, without any sign of harm to CRS. Compl. ¶¶ 33-42, 46.

1137; *see also Rankin*, 483 U.S. at 390, 107 S. Ct. at 2900 (stating that "the responsibilities of the employee within the agency" is only a part of the *Pickering* balance).[11]

It was therefore fundamental—and binding—First Amendment law in the D.C. Circuit when Defendants terminated Col. Davis that, regardless of an employee's policy-level status, a public employer cannot retaliate against the employee for speech on a matter of public concern unrelated to the employee's job duties, when the speech has not harmed the employer sufficiently to outweigh the First Amendment values at stake. *See O'Donnell*, 148 F.3d at 1137; *Hall*, 856 F.2d at 264. Other circuits have held the same. *See, e.g.*, *Vojvodich v. Lopez*, 48 F.3d 879, 887 (5th Cir. 1995) ("As far back as 1985, the established law in this circuit has been that a public employer cannot retaliate against an employee for expression protected by the First Amendment merely because of that employee's status as a policymaker."), *cert. denied*, 516 U.S. 861 (1995); *Catletti*, 334 F.3d at 231 (denying qualified immunity because "[e]ven if Catletti is considered a policymaker, however, defendants' claim fails because they have presented no evidence of potential disruption").

Finally, if there were any doubt, the Library's own regulation encouraging—not discouraging—outside speaking of exactly this sort was sufficient to provide Mr. Mulhollan with the requisite fair notice that restricting Col. Davis's speech was unconstitutional. *Hope*, 536 U.S. at 743-44, 122 S. Ct. at 2517-18 (holding that failure to follow employer's policy demonstrated that qualified immunity was not available).

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

Given this clearly established law, any reasonable official would have known that terminating Col. Davis based on his speech of immense public concern that did not significantly harm his employer violated his First Amendment rights.

III. COL. DAVIS HAS STATED A CLAIM FOR THE VIOLATION OF HIS RIGHT TO DUE PROCESS, AND MR. MULHOLLAN IS NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE THAT RIGHT WAS CLEARLY ESTABLISHED.

A. Col. Davis Has Stated A Due Process Claim.

The Complaint adequately pleads that Mr. Mulhollan terminated Col. Davis in violation of his entitlement to due process under the First and Fifth Amendments. "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 where the law interferes with the right of free speech. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499, 102 S. Ct. 1186, 1193-94 (1982). Here, the Complaint sufficiently pleads as a matter of law that the application of the Library's and CRS's policies on outside speaking and writing to Col. Davis was unconstitutionally vague for two reasons: first, none of the relevant policies or past practices with respect to those policies gave Col. Davis "fair warning" that he could not express a public opinion on a controversial policy matter, *Grayned*, 408 U.S. at 108, 92 S. Ct. at 2299; and second, CRS's policy requiring "caution" and "sound judgment" to avoid "an appearance of conflict" even when speaking on matters outside one's official responsibilities is facially unconstitutional because it is impermissibly vague and lacks any discernible standards.

1. Col. Davis Did Not Have Fair Warning That His Outside Speech Might Violate CRS's Or The Library's Policies.

Nothing in the applicable Library and CRS policies or their past enforcement warned Col. Davis that Defendants might newly interpret them to apply to his outside writing or speaking on Guantánamo and the military commissions, matters on which he had previously been permitted to speak with no repercussions.

As set out in the Complaint, the Library's and CRS's policies do not expressly prohibit any speech, much less Col. Davis's publication of his opinion pieces. Compl. ¶¶ 65-69. The Library's policy "encourage[s]" all outside speaking and writing, LCR 2023-3, § 3(A); Compl. ¶ 65, and CRS's policy very generally advises CRS employees only to "think carefully," exercise "sound judgment" and "caution," and maintain "objectivity" when engaging in outside speaking and writing, CRS Policy at 2-3; Compl. ¶ 71.[12] CRS's past practice confirms that CRS and Mr. Mulhollan never interpreted the Library's regulation or CRS's own policy to prohibit Col. Davis's speech on the military commissions. Specifically, the Complaint alleges that CRS and Mr. Mulhollan expressly or implicitly approved of Col. Davis's outside speaking and writing on the subject of the military commissions on at least five occasions, on at least one of which Col. Davis made precisely the same argument he made in his opinion pieces, and that Col. Davis was never told prior to his termination that his speech on the subject of the military commissions would compromise the mission of CRS. Compl. ¶¶ 25, 27, 33-42. Nor was Col. Davis ever disciplined for such speech until he wrote the opinion pieces. *Id.* ¶ 40. Moreover, the Complaint alleges that other Library and CRS employees "regularly write and speak and express their

[12] Mr. Mulhollan inaccurately claims that the Library's regulation states that "personal writings and speeches 'on subjects unrelated to the Library and to staff members' official duties' are 'encouraged.'" Def.'s Br. at 36. In fact, the Library's regulation contains no such limitation: it encourages *all* "teaching, lecturing, or writing that is not prohibited by law," LCR 2023-3, § 3(A), not merely outside speaking and writing unrelated to "official duties." Mr. Mulhollan attempts to import that limitation from a subsequent sentence in the regulation pertaining to official review of outside writing.

opinions in public on policy matters of public concern, including on controversial and high-profile issues." *Id.* ¶ 77. Finally, the chill, confusion, and uncertainty that CRS's policy and Col. Davis's termination pursuant to it have engendered among CRS employees, *see* Compl. ¶¶ 72-74, evidence the policy's inherent vagueness to those governed by it.[13]

These allegations are sufficient as a matter of law to state a claim that Mr. Mulhollan deprived Col. Davis of the constitutionally required fair warning that he could be terminated for publicly expressing his personal views on the military commissions. This claim closely resembles a similar cause of action found meritorious on summary judgment by the D.C. Circuit in *Keeffe v. Library of Congress*, 777 F.2d 1573 (D.C. Cir. 1985). In *Keeffe*, a CRS employee sought to participate in a political convention, an activity that was not expressly prohibited by CRS's or the Library's regulations. *Id.* at 1575-76. The Library advised the employee that the conduct would nevertheless violate the Library's regulations on conflicts of interest. *Id.* at 1576. The Library's General Counsel's office eventually upheld that advice, but that decision was not timely relayed to the employee prior to the convention. *Id.* at 1576, 1582. In the suit over her subsequent discipline, the D.C. Circuit concluded that the Library's general policy about conflicts of interest had not given the employee fair warning of the new interpretation embodied in the General Counsel's decision. *Id.* at 1582. Focusing on past practice, the D.C. Circuit held

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[13] Defendant's motion inaccurately claims that Col. Davis's "assertion of any 'chill' from the policy and its enforcement is merely a conclusory statement and is not supported by facts in the Complaint." Def.'s Br. at 35. That is untrue. The Complaint alleges that the termination of Col. Davis "has intimidated and chilled other CRS employees from speaking and writing in public. CRS employees are confused, uncertain, and fearful about what outside speaking and writing is permissible." Compl. ¶ 63; *see also id.* at ¶¶ 72-74. These are factual allegations supportable by evidence, not bare assertions of legal elements, and the Complaint need go no further. In any event, Col. Davis supported these factual allegations with numerous declarations in support of his motion for preliminary relief. This is not, therefore, a situation as in *Iqbal* or *Twombly* where the Supreme Court feared the use of bare allegations of tortious conduct to engage in far-reaching and unsupported discovery.

that the Library's "course of dealing with [the employee] . . . was insufficient to place [her] on notice that the prior interpretation [of its conflict-of-interest policy] had changed." *Id.*[14]

The same is true here. The Library and Mr. Mulhollan seek to apply a novel reinterpretation of the policies on outside speaking on matters unrelated to employees' official duties, despite their prior approval of virtually identical speech by Col. Davis on numerous occasions and the decades-long practice of permitting other employees to engage in outside speech. In these circumstances, their actions failed to give Col. Davis fair warning and, as in *Keeffe*, "[s]urprise, in this instance, was unpleasant, unfair, and unconstitutional." *Id.* at 1583.

Mr. Mulhollan's primary response to Col. Davis's as-applied, fair-warning claim is to claim that Col. Davis violated the Library's and CRS's disclaimer policies. Def.'s Br. at 35-36. That argument must fail. First, whatever the actual language of the disclaimer policies, Col. Davis had no fair warning that Mr. Mulhollan would now interpret that language to prohibit the opinion pieces when a CRS attorney had—just two months prior—approved of two speech activities related to the very same topic of the military commissions *without* the use of a formal express disclaimer. Compl. ¶ 35; *Keeffe*, 777 F.2d at 1582. Second, the inference fairly implied in the Complaint is that Mr. Mulhollan terminated Col. Davis based on the content of the opinion pieces, not for his alleged failure to comply with the disclaimer policy. *Compare* Compl. ¶¶ 35-37, *with id.* ¶¶ 55-59.[15]

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[14] The D.C. Circuit held that *prospective* application of the General Counsel's advice, which was subsequently incorporated into CRS's policies, was constitutional, because employees would thereafter have the requisite fair warning. *See Keeffe*, 777 F.2d at 1581.

[15] That inference is substantiated by the letters of admonishment and termination, which focus on the content of the opinion pieces as allegedly compromising Col. Davis's objectivity and standing with Congress, and by Mr. Mulhollan's own brief, Def.'s Br. at 36 (focusing on Col. Davis's allegedly "inflammatory language" as "warrant[ing] [his] separation"). *See also* Order, Jan. 20, 2010, at 3 ("Regardless of the defendants' contention to the contrary, Defs.' Opp'n at 26, it appears that the content of the plaintiff's published opinions was one of the reasons, if not the primary reason, he was fired . . . .").

In any event, the allegations in the Complaint establish that Col. Davis complied with the Library's and CRS's rules regarding disclaimers. Specifically, Col. Davis alleges that he complied with those rules by making clear in his opinion pieces that he was writing purely in his personal capacity, signing the pieces in his own name, including only his home residence, and not ever mentioning any association with the Library or CRS. *Id.* ¶¶ 50-51. A reasonable inference from those facts is that—as required by the policies—Col. Davis did adequately disassociate CRS from his opinion pieces. *Id.*

2. CRS's Policy On Outside Speech Is Facially Vague.

The Complaint also states a claim that CRS's policy on outside speaking and writing is facially vague under the First and Fifth Amendments. As alleged in Col. Davis's Complaint, the policy relies upon inherently vague terminology—like "sound judgment," "caution," and "objectivity"—that fails to give notice of its reach or to meaningfully cabin the discretion it affords Mr. Mulhollan in determining which speech violates the policy. Compl. ¶¶ 65-77. CRS's past practice with respect to the policy—which directly contradicts CRS's application of the policy to Col. Davis here—evidences the vagueness of the policy. *Id.* ¶¶ 33-42, 77.

Although the government enjoys certain leeway in crafting codes of conduct for its employees, *Arnett v. Kennedy*, 416 U.S. 134, 159-61, 94 S. Ct. 1633, 1646-48 (1974) (plurality opinion), prohibitions, especially those directed at protected speech, must still be clear. *See, e.g.*, *Keeffe*, 777 F.2d at 1582. In *Keeffe*, for example, the Library's general policy against creating potential conflicts of interest failed to put the employee on notice that she could not participate in a political convention, and was thus held to be unconstitutionally vague. *Keeffe*, 777 F.2d at 1576, 1581-82. Similarly, a school's policy against "criticism" was held to be unconstitutionally vague because "the term 'criticism' is indefinite, fluid, and contingent," and because no

interpretive guidance clarified or narrowed its application. *Westbrook v. Teton County Sch. Dist. No. 1*, 918 F. Supp. 1475, 1490-91 (D. Wyo. 1996).

By contrast, limitations on governmental speech that have been upheld have either been sufficiently precise or have been informed by (1) statutory or regulatory clarification, (2) past practice and interpretive guidance, and (3) the availability of administrative clarification. *See, e.g.*, *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 550, 575-76, 580, 93 S. Ct. 2880, 2895-98 (1973); *Arnett*, 416 U.S. at 160, 224 n.24, 94 S. Ct. at 1647, 1679 n.24 (plurality opinion). CRS's policy lacks these characteristics. First, all of the criteria used in the policy are inherently vague. The policy states, for example, that "sound judgment" should be used and that "[e]veryone must make every effort to avoid presenting even the appearance that [CRS] is not true to the mandates given it to be objective, non-partisan, and confidential." CRS Policy at 3. Like the word "criticism," "sound judgment" and "objective" are "complex and variable word[s]. [They] can mean many things to many people. In fact, [they] can mean so many things to so many people that [they are] too vague for use in an enactment that regulates speech." *Westbrook*, 918 F. Supp. at 1490; *see also Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 127 (D. Mass. 2003) (holding that "responsible" and "good judgment" are inherently vague terms). Indeed, the very nature of terms like "judgment" is flexible: different people will reach different judgments. Fundamentally, the language in CRS's policy fails to provide any fair warning of what is prohibited or to provide standards to guide its application by CRS's management. *See Grayned*, 408 U.S. at 108-09, 92 S. Ct. at 2298-99; *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S. Ct. 1686, 1688 (1971) ("Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard,

but rather in the sense that no standard of conduct is specified at all.").

Second, CRS's restriction on outside speech lacks any interpretive guidance or clarification, Compl. ¶¶ 73-74, 76, and has been applied here in a manner directly contradicting past practice with respect to both Col. Davis and other CRS employees, *Id.* ¶¶ 33-42, 77.

Finally, although CRS allows employees to submit proposed writings for review prior to publication, there are no discernible standards or criteria that would allow consistent and non-arbitrary review, even if the requirement were mandatory. *Id.* ¶ 76. Unlike the statute at issue in *Letter Carriers*, where a significant statutory, regulatory, and interpretive framework informed the process of administrative pre-clearance, here, administrative pre-clearance would be an exercise in arbitrary and subjective enforcement, a primary vice of vague and standardless laws. *See Grayned*, 408 U.S. at 108-09, 92 S. Ct. at 2298-99 ("A vague law impermissibly delegates basic policy matters" to the executive "for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."); *Coates*, 402 U.S. at 614, 91 S. Ct. at 1688. That danger is particularly acute here, as Col. Davis was terminated on the basis of speech substantially similar to his own speech that was previously approved by CRS, including speech on the military commissions made without an express disclaimer. That reversal of course is powerful evidence of the very vagueness of CRS's policy: if Mr. Mulhollan previously approved speech on this exact topic, which he now claims is impermissible, and if a CRS attorney and Mr. Mulhollan disagree about whether formal express disclaimers are always necessary, it is unreasonable to expect Col. Davis (or any other CRS employee) to know what the rules are. Accordingly, CRS's policy on outside speech is unconstitutionally vague on its face.[16]

[16] Mr. Mulhollan broadly asserts that Col. Davis has "fail[ed] to point to any term or phrase in the Library's regulation or in CRS's policy" that is vague. Def.'s Br. at 34-35. That is simply not true: the Complaint focuses on the policies' vagueness as a whole, drawing particular attention to the phrase "sound judgment" in CRS's policy. Compl. ¶ 71.

The fundamental flaw in Mr. Mulhollan's defense of CRS's policy on outside speaking is his failure and inability to explain how his multiple and divergent interpretations of what the policy purportedly prohibits—speech on anything on "the congressional agenda," Def.'s Br. at 28; "issue advocacy," Defs. Opp'n to Pl.'s Mot. for a TRO at 10, Docket No. 6; "prospective" speech, Decl. of Daniel Mulhollan ¶¶ 31, 35, 37, Jan 15, 2010; and "inflammatory language," Def.s Br. at 36—derive from either the text or past application of the policy.[17] They do not, and the policy is vague on its face and as applied precisely because it provides no standard for determining what speech is prohibited and could result in termination, thereby permitting arbitrary decisionmaking.

Although Mr. Mulhollan claims that the disclaimer policy is facially clear, that argument ignores the fact that the Complaint makes clear that Mr. Mulhollan terminated Col. Davis on the basis of the content of his speech, not his alleged failure to comply with the disclaimer policy. *Compare* Compl. ¶¶ 35-37, *with id.* ¶¶ 55-59. Mr. Mulhollan disputes the accuracy of that claim—contradicting the claim in his own brief that he terminated Col. Davis in part because of the opinion pieces' "inflammatory language," Def.'s Br. at 36—but resolution of that factual dispute is not appropriate at this stage in the litigation.[18]

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[17] To the extent Defendants now interpret the policies to prohibit Col. Davis's speech, those policies would be facially unconstitutional for the same reason that Col. Davis's termination was unconstitutional. *See United States v. Nat'l Treasury Employees Union* (*NTEU*), 513 U.S. 454, 468, 115 S. Ct. 1003, 1014 (1995) (holding that with respect to rules that suppress the prospective speech of a broad category of public employees, the "Government's burden is greater . . . than with respect to an isolated disciplinary action.").

[18] Mr. Mulhollan also claims that Col. Davis cannot challenge the facial vagueness of the policies because they "clearly" apply to Col. Davis. Def.'s Br. at 35 n.11. As explained above, the policies on outside speaking and writing do *not* bar Col. Davis's speech, and, to the extent Mr. Mulhollan claims they do, they do so due only to a novel reinterpretation of the policies of which Col. Davis had no fair warning. Mr. Mulhollan has not and cannot explain how the terms "sound judgment," "caution," and "objectivity"—the touchstones of CRS's policy—"clearly" apply to Col. Davis's opinion pieces.

B. Mr. Mulhollan Is Not Entitled to Qualified Immunity Because He Violated Col. Davis's Clearly Established Due-Process Rights.

Qualified immunity is not appropriate here because any reasonable government official would have been aware of Col. Davis's clearly established due-process rights not to be terminated without fair warning or pursuant to a facially vague policy that restricts constitutionally protected speech.

These rights have been clearly established specifically with respect to CRS and the Library by the D.C. Circuit in *Keeffe*. The facts of that case are strikingly similar to the facts here and overwhelmingly establish that any reasonable government official would have known that Col. Davis could not be terminated absent fair notice. In *Keeffe*, the D.C. Circuit held that where CRS's and the Library's regulations on conflicts of interest did not expressly prohibit participating in a political convention and where CRS had previously countenanced nearly identical political participation by the employee and other employees, CRS failed to provide the constitutionally required fair warning that the regulations prohibited participation at a political convention. 777 F.2d at 1582 (holding that the "course of dealing" with the employee by CRS "was insufficient to place [her] on notice that the prior interpretation [of the conflict-of-interest regulations] had changed"). In light of its holding, the D.C. Circuit admonished CRS and the Library with the following prescient words:

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

Id. at 1583 (emphasis in original).

The parallels between the facts in Col. Davis's Complaint and the facts of *Keeffe* need little explanation. Here, as in *Keeffe*, CRS's policy on outside speaking and writing uses general terms—such as "sound judgment," "caution," and "objectivity"—in defining the obligation of employees to avoid "even the appearance of a conflict of interest." CRS Policy at 2-3. Here, as in *Keeffe*, the Library and CRS have never interpreted their broad and vague policies to prohibit Col. Davis's speech on the military commissions, or the speech of other employees for decades on important and often controversial policy matters. *See* Compl. ¶¶ 33-42, 77. To the contrary, as in *Keeffe*, Col. Davis was previously permitted to speak in public on precisely the same topic, and other employees have regularly engaged in similar speech. And here, as in *Keeffe*, the Library and CRS have attempted to interpret their broad and vague policies after the fact to apply to Col. Davis's previously permitted speech, in violation of the requirement of due process. Given *Keeffe*, any reasonable government official would thus have known that Col. Davis could not be terminated in these circumstances.

Mr. Mulhollan attempts to downplay the significance of *Keeffe* by mischaracterizing its holding. He claims that the D.C. Circuit upheld the facial constitutionality of CRS's general conflict-of-interest regulation. Def.'s Br. at 43-44. That is emphatically not so. As expressly stated in the opinion, the only facial vagueness claim at issue in *Keeffe* was a challenge to the so-called "Gude Memorandum," which CRS's General Counsel issued to apply the general conflict-of-interest regulation specifically to Keeffe's participation at the political convention. *Keeffe*, 777 F.2d at 1579. In other words, the court only considered whether a specific interpretation of the Library's regulations—which expressly prohibited participation at political conventions—was clear enough for prospective application. Unsurprisingly, the D.C. Circuit concluded that it was. *Id.* at 1581 ("The Gude memorandum is similarly precise—it states unequivocally that such

conduct presents an actual or apparent conflict of interest with Library duties and accordingly is proscribed. There is no ambiguity.").

Similarly, were Mr. Mulhollan to issue an opinion interpreting CRS's policy on outside speaking and writing specifically to prohibit publication of opinion pieces in newspapers, there would be no question that such an opinion would be clear enough for *prospective* application.[19] Under *Keeffe*, however, it is clear that such an interpretation could not be applied retroactively. The availability of administrative clarification does not change that answer. The D.C. Circuit held in *Keeffe* that administrative clarification informed *prospective* application of the Gude Memorandum, but it nonetheless held that Keeffe's termination was unconstitutional for lack of fair warning despite the availability of administrative clarification to interpret the general conflict-of-interest regulation. That was so because no court has ever suggested that administrative clarification or pre-publication approval on its own can cure an otherwise vague policy on speech by public employees. The reason is simple: the fundamental vice of a vague law is that it encourages subjective and discriminatory enforcement by failing to provide clear standards that guide its application. *Grayned*, 408 U.S. at 108-09, 92 S. Ct. at 2298-99. Administrative clarification cannot, on its own, guard against that vice; in fact, it exacerbates it by allowing entirely *ad hoc* application of vague and general principles. The facts of this case exemplify that possibility: Col. Davis received administrative approval to speak at a conference and write a law-review article about the military commissions without a formal express disclaimer, and yet the Library and Mr. Mulhollan now defend his termination on the basis of precisely that conduct. *See* Compl. ¶¶ 35-37.

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[19] Such a policy would, however, be unconstitutional under the First Amendment. *See NTEU*, 513 U.S. at 468, 115 S. Ct. at 1014.

For these reasons, Col. Davis had a clearly established due-process right not to be terminated without fair warning of the reach of CRS's vague and general policy on outside speaking and writing.[20]

Col. Davis also had a clearly established right not to be terminated pursuant to a facially vague policy restricting the speech of public employees. Any reasonable government official would know that employees may not be terminated on the basis of essentially standardless policies that purport to govern constitutionally protected speech through inherently vague terms like "sound judgment."[21] By its very nature, the term "sound judgment" is variable and subjective; it invites multiple interpretations, and neither the Library nor CRS ever attempted to provide any narrowing definition. The Supreme Court and the D.C. Circuit have reaffirmed the constitutional bar on such vague prohibitions on numerous occasions. *See, e.g.*, *Grayned*, 408 U.S. at 108, 92 S. Ct. at 2298-99 ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."); *Coates*, 402 U.S. at 614, 91 S. Ct. at 1688 ("Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."); *Keeffe*, 777 F.2d at 1581 ("A statute or ordinance is vague either if it does not give fair warning of the proscribed conduct or if it is an unrestricted delegation of power that enables enforcement officials to act arbitrarily and with unchecked discretion."). Numerous

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[20] Curiously, Mr. Mulhollan cites the qualified-immunity decision by the district court in *Keeffe* as evidence that the due-process rights at issue here are not clearly established and that he is entitled to qualified immunity from Col. Davis's fair-warning claim. Def.'s Br. at 44 n.15. Whatever the state of the law prior to the D.C. Circuit's decision in *Keeffe*, the principles of *Keeffe* itself were clearly established as of 1985: the Library and Mr. Mulhollan may not terminate an employee on the basis of expressive activity without fair warning of their policies.

[21] To defeat Mr. Mulhollan's claim of qualified immunity, Col. Davis need not point to an earlier decision invalidating this exact language. *Hope*, 536 U.S. at 741, 122 S. Ct. at 2516 ("fundamentally similar" or "materially similar" case not necessary); *id.* ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.").

other courts have applied these holdings to policies that—like CRS's policy—rely on similar standardless and vague terms. *See, e.g.*, *Boardley v. U.S. Dep't of Interior*, 605 F. Supp. 2d 8, 19 (D.D.C. 2009) (holding that the phrase "public expression of views," in a public-park permitting regulation, is unconstitutionally vague); *Bynum v. U.S. Capitol Police Bd.*, 93 F. Supp. 2d 50, 58-59 (D.D.C. 2000) (holding facially vague a regulation that permits suppression of speech that "conveys a message" because "[t]he determination of what conduct is prohibited by such a regulation . . . necessarily will vary depending on the subjective judgment of the particular officer"); *Stolte v. Laird*, 353 F. Supp. 1392, 1396-99 (D.D.C. 1972) (invalidating prohibition of "disloyal" conduct); *Westbrook*, 918 F. Supp. at 1490-91 (invalidating prohibition against "criticism" of other governmental staff); *Westfield High Sch. L.I.F.E. Club*, 249 F. Supp. 2d at 127 (holding that "responsible" and "good judgment" are inherently vague terms).

The D.C. Circuit's decision in *Keeffe* is also critical on this point. The implicit starting point of the *Keeffe* court's analysis was the recognition that the Library's general conflict-of-interest regulation did not provide adequate notice that Keeffe could be terminated for participating in a political convention. *Keeffe*, 777 F.2d at 1582. In other words, *Keeffe* reiterated the clearly established principle that a general and vague policy does not provide constitutionally adequate notice of its prohibitions. For that reason, the court in *Keeffe* focused on the Gude Memorandum in determining whether prospective application would be constitutional. There is no equivalent to the Gude Memorandum in Col. Davis's case. CRS terminated Col. Davis on the basis of a vague and general policy, *not* on the basis of a carefully delineated interpretation of that policy. This case, therefore, is essentially exactly like *Keeffe* except without the Library's saving grace in that case: the Gude Memorandum. Thus, analysis of Mr. Mulhollan's claim of qualified immunity is straightforward: CRS's policy relies on

inherently vague terms; CRS has never issued any narrowing interpretations of that policy; and past practice (with respect to Col. Davis and others) only buttresses Col. Davis's claim that the Library's and CRS's policies are vague. Therefore, it is clearly established under *Keeffe* and other cases that the policies are facially vague.

As with the merits of Col. Davis's claim, Mr. Mulhollan's primary argument on qualified immunity is that the disclaimer policy is clear. As explained above in Part IV.A.1, that is irrelevant because Mr. Mulhollan terminated Col. Davis based on the content of his speech, and, in so doing, he violated Col. Davis's clearly established right not to be terminated pursuant to an inherently vague policy.

For these reasons, Mr. Mulhollan's termination of Col. Davis on the basis of CRS's policy on outside speaking and writing violated clearly established rights.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss should be denied. Plaintiff requests oral argument on this matter at the Court's earliest convenience.[22]

Respectfully submitted,

/s/

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[22] Should the Court determine that Col. Davis's claims are not adequately pleaded in the Complaint, Col. Davis respectfully requests leave to amend the Complaint to address any perceived deficiencies.

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