UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:12-cv-01130

CARLOS LOUMIET,

v.

THE UNITED STATES OF AMERICA,
MICHAEL RARDIN, LEE STRAUS,
GERARD SEXTON, and RONALD
SCHNECK, each in their individual capacities

defendants.
_____/

CARLOS LOUMIET'S OPPOSITION TO THE INDIVIDUAL DEFENDANTS'[1] MOTION TO DISMISS UNDER FED. R. CIV. P. 12(B)(6) AND THE UNITED STATES' MOTION TO DISMISS UNDER FED. R. CIV. P. 12(B)(6) AND (B)(1)[2]

[1] The "Individual Defendants" are Michael Rardin, Lee Straus, Gerard Sexton, and Ronald Schneck. The United States will be referred to as the "Government." The Government is responsible for the acts of its agency, the Office of the Comptroller of the Currency, which will be referred to as the "OCC." Both the Individual Defendants and the Government will be referred to collectively as "defendants." And their motions to dismiss [at D.E. 62 and 63] will be referred to separately as either the "Motion," or collectively as the "Motions."

[2] For sake of clarity we will refer to the D.C. Circuit opinion in *Loumiet v. Office of Comptroller of Currency*, 650 F.3d 796 (D.C. Cir. 2011) as "*Loumiet EAJA*," the decision in *Loumiet v. U.S.*, 968 F. Supp. 2d 142 (D.D.C. 2013) as "*Loumiet I*," the reconsideration decision in *Loumiet v. U.S.*, 106 F. Supp. 3d 219 (D.D.C. 2015) as "*Loumiet II*," and the D.C. Circuit opinion in *Loumiet v. U.S.*, 828 F.3d 935 (D.C. Cir. 2016) as "*Loumiet III*."

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[3] The symbol "*" denotes cases on which Mr. Loumiet chiefly relies. *See* Local Civil Rules 7(a).

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INTRODUCTION

This case is not about bank regulation or the closure of Hamilton Bank. Plaintiff Carlos Loumiet has alleged facts, which must be accepted as true, that the Individual Defendants exceeded and misused their authority to bring a retaliatory prosecution against him for exercising his freedom of speech. That retaliatory prosecution had nothing to do with the closure of Hamilton Bank or lawful bank regulation. Thus, on remand from the D.C. Circuit, two issues are before this Court: (1) are Loumiet's claims for retaliatory prosecution cognizable under *Bivens*,[4] and (2) has Loumiet alleged that the retaliatory prosecution violated his Constitutional rights so as to fall outside of the discretionary function exception of the Federal Tort Claims Act (the "FTCA").[5]

As to the first question, the D.C. Circuit has concluded on at least three occasions that First Amendment retaliatory prosecution claims are cognizable under *Bivens*. This case stands on that familiar ground. It is not a "new context" that requires the Court to decide whether "special factors" counsel against extending *Bivens*. And even if the Court were so inclined to look for "special factors," none exist. The mere existence of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") is not a "special factor," among other reasons, because Loumiet is not a bank, a banker, or someone that participates in a banking practice. One cannot possibly conclude that Congress intended for FIRREA to supplant *Bivens* claims brought by people to whom FIRREA by its terms does not apply. This District has concluded that *Bivens* claims aren't precluded where a statutory scheme peripherally touches on the conduct at issue.[6]

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[4] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971).
[5] Loumiet hereby incorporates by reference the arguments made in his Opposition to the Motion to Dismiss [D.E. 19] (the "Opp") to the extent applicable. Moreover, for sake of brevity Loumiet refers the Court to the detailed factual recitation in his initial Opposition.
[66] *E.g., Hartley v. Wilfert*, 918 F. Supp. 2d 45, 47 (D.D.C. 2013) (finding that Privacy Act did not preempt *Bivens* claim because "Plaintiff staunchly contest[ed]" that the Privacy Act had anything

Even if FIRREA had any relevance to this case, it is not a comprehensive remedial scheme that administers public rights. A scheme that administers public rights is one that provides for *both* substantive rights and procedural remedies. The Individual Defendants have failed to point to a single substantive right under FIRREA that could possible apply to Loumiet. Thus, no "special factors" exist that would preclude his *Bivens* claims. Moreover, no qualified immunity is available because the D.C. Circuit held by at least 1988 that government officials could not violate the First Amendment by initiating a retaliatory prosecution.

As to the second question, Loumiet has adequately pleaded that the Individual Defendants violated the First and Fifth Amendments, rendering the FTCA's discretionary function exception inapplicable. Moreover, the Court's prior ruling as to the timeliness of his invasion of privacy claim in *Loumiet II*, 106 F. Supp. 3d at 225-26—which was that the FTCA's discretionary function exception prevented Loumiet from relying on the prosecution to toll accrual—did not survive the D.C. Circuit's ruling. Consequently, Loumiet's invasion of privacy claim also is timely, because the accrual of it was tolled during the pendency of the retaliatory prosecution. For these reasons, and those more fully discussed below, the Court should deny the Motions and let this case proceed.

"to do with [her] case" and "Defendants' unduly technical characterization of the conduct here would lead to the unjust result of protecting a violation of constitutional rights simply because Defendants' intimidation included a request for Hartley's personal information."); *Navab-Safavi v. Broad. Bd. of Governors*, 650 F. Supp. 2d 40, 68 (D.D.C. 2009) (finding that Contract Disputes Act did not preempt *Bivens* claim simply because defendants used the acts "as a means to retaliate," which "does not transform [a *Bivens* claim] into one arising under or relating to" that statute.").

I. Loumiet Has Pleaded a Cognizable *Bivens* Claim under the First and Fifth Amendments[7]

Below we demonstrate that: (1) Loumiet's First Amendment retaliation claims land squarely within a familiar context, obviating the need for a "special factors" analysis; (2) even if a "special factors" analysis were required, there is no comprehensive remedial scheme at issue here that administers public rights vis-à-vis Loumiet; and (3) no Individual Defendant can avail himself of either absolute or qualified immunity.

A. The Supreme Court, the D.C. Circuit, and virtually every other Circuit have recognized that First Amendment retaliation gives rise to a Bivens claim

The Individual Defendants spend the first portion of their brief urging this Court to look to "special factors," because Loumiet's claims purportedly present a "new context." *See* Mot. at 5-12. They counsel the Court to "tread carefully" when deciding whether to extend *Bivens*. *Id*. This is a canard—it asks the Court to ignore (1) *Hartman v. Moore* (a Supreme Court case that originated from the D.C. Circuit), (2) binding precedent from the D.C. Circuit, and (3) similar holdings in at least five other circuits.

1. In *Hartman*, the Supreme Court recognized First Amendment retaliation claims as cognizable under *Bivens*

In *Hartman*, the Supreme Court proclaimed that "***the law is settled*** that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." 547 U.S. 250, 256 (2006) (emphasis added). The Court will search in vain to find even a simple acknowledgement of *Hartman* in the Individual Defendants' briefs, much less any discussion of it. Even more telling

[7] The Individual Defendants appear to concede that Loumiet's Fifth Amendment *Bivens* claim is cognizable. Thus, Loumiet will only address in this section whether his First Amendment *Bivens* claim is cognizable.

is the Individual Defendants' failure to acknowledge that, in addition to *Hartman*, a legion of cases, including ones from the D.C. Circuit, have concluded that First Amendment retaliation claims are cognizable under *Bivens*.

2. The D.C. Circuit has recognized on at least three occasions that First Amendment retaliation claims are cognizable under *Bivens*

At least ***three times*** the D.C. Circuit has concluded that First Amendment retaliation claims are a familiar context and cognizable under *Bivens*.[8] As another court of this district put it: "the D.C. Circuit has" explicitly "authorized a First Amendment *Bivens* action." *Patterson v. U.S.*, 999 F. Supp. 2d 300, 308-09 (D.D.C. 2013) (Jackson, J.) (emphasis added) (denying motion to dismiss claims for retaliatory violations of the First Amendment) (citing *Dellums*, 566 F.2d 167). In fact, "the *Bivens* doctrine has been extended to recognize an implied cause of action for the violation of several constitutional amendments, including the Fifth, Eighth, Ninth, Fourteenth, and—contrary to Defendants' staunch assertion—the First." *Patterson*, 999 F. Supp. 2d at 308-09 (citing Rodney A. Smolla, 2 FED. CIVIL RIGHTS ACT, § 14:155 at 850 (3d ed. 2013) (collecting cases)).

The *Patterson* case is instructive. There, the court rejected the argument that First Amendment retaliation claims presented a "new context" and denied the defendants' motion to dismiss. The court found that "the D.C. Circuit has expressly recognized that there is a First Amendment right not to be arrested in retaliation for one's speech . . . and this Court cannot ignore the D.C. Circuit's binding precedent." *Id.* at 310. The court further noted that "decisions of the D.C. Circuit are binding 'unless and until overturned by the court en banc or by Higher

[8] *E.g.*, *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977) (First Amendment retaliatory arrest claim cognizable); *Haynesworth v. Miller*, 820 F.2d 1245, 1274 (D.C. Cir. 1987) (First Amendment retaliatory prosecution claim cognizable); *Moore v. Valder*, 65 F.3d 189, 196 (D.C. Cir. 1995) (First Amendment retaliatory prosecution claim cognizable).

Authority.'" *Id*. The same is true here. Contrary to the Individual Defendants' argument, the D.C. Circuit has explicitly recognized First Amendment retaliatory prosecution claims as cognizable under *Bivens*. *See Haynesworth*, 820 F.2d at 1274; *Valder*, 65 F.3d at 196. Thus, Loumiet's First Amendment retaliatory prosecution claim is not a "new context"; it is a familiar one.

3. The D.C. Circuit is among at least six circuits that have recognized First Amendment retaliation claims as cognizable under *Bivens*

The *Patterson* court also noted that the D.C. Circuit was just one circuit court among many that have recognized First Amendment retaliation claims as cognizable under *Bivens*. *Patterson*, 999 F. Supp. 2d at 309. Those other circuits include the Second, Third, Fourth, Eighth, and Ninth Circuits. *Id*. at 309-10. For instance, the Third Circuit recently held that "despite the cautionary notes sounded by the [Supreme] Court, ***it does appear*** that the [Supreme] Court has held that there is a *Bivens* cause of action for First Amendment retaliation claims." *George v. Rehiel*, 738 F.3d 562, 585 (3d Cir. 2013) (citing *Hartman*, 547 U.S. 250) (emphasis added). Relying on *Hartman*, the Third Circuit "proceed[ed] on the assumption that there is a *Bivens* cause of action for First Amendment retaliation claims." Other circuits have agreed.[9]

Numerous district courts also have concluded that First Amendment retaliation claims are cognizable under *Bivens*. For example, in *Pellegrino v. U.S. Transp. Sec. Admin.*, 2014 WL

[9] *See, e.g.*, *Solomon v. Petray*, 795 F.3d 777, 787 (8th Cir. 2015) (affirming district court's denial of defendant's motion for summary judgment on First Amendment retaliation claim under *Bivens* "because the facts and reasonable inferences allege that [defendant] violated [plaintiff's] constitutional right to be free from retaliation for exercising his right to expression"); *Tobey v. Jones*, 706 F.3d 379, 382 (4th Cir. 2013) ("We have held that '[i]t is well established that a public official may not misuse his power to retaliate against an individual for the exercise of a valid constitutional right,'" and "[w]e further declared that 'the First Amendment prohibits an officer from retaliating against an individual for speaking critically of the government.'"); *M.E.S., Inc. v. Snell*, 712 F.3d 666, 675 (2d Cir. 2013) (stating that the Supreme Court in *Hartman* "reiterated the general availability of a *Bivens* action to sue federal officials for First Amendment retaliation"); *Moss v. U.S. Secret Serv.*, 967 (9th Cir. 2009) ("This court, however, has held that *Bivens* authorizes First Amendment damages claims.").

1489939, at *4 (E.D. Pa. 2014), the defendants argued (like here) that the court "should not extend" *Bivens* to a "unique context." The court rejected that argument and distinguished between First Amendment free exercise *Bivens* claims, which the Supreme Court "has thus far declined to recognize," (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009), and First Amendment retaliation claims, which "the Supreme Court in *Hartman* explicitly recognized." *Id.* (citing *Tobey*, 706 F.3d at 386). The court accordingly refused to "dismiss Plaintiff's First Amendment claim on this ground." *Id.; accord Vanderklok v. U.S.*, 2016 WL 4366976, at *5 (E.D. Pa. 2016) ("When presented with the issue of whether a First Amendment retaliation claim can be asserted pursuant to *Bivens*, the Supreme Court of the United States, Third Circuit Court of Appeals, other circuit courts and our court have all operated on the assumption that a plaintiff can in fact assert such a cause of action. This Court will do the same.").

4. Loumiet's *Bivens* claims do not arise from a new context merely because the Individual Defendants are banking officials

The Individual Defendants fail to acknowledge, much less address, the substantial weight of authority demonstrating that First Amendment retaliatory prosecution claims, like Loumiet's, do not present a new context for a *Bivens* remedy. Instead, they attempt to make an irrelevant factual distinction between those cases and Loumiet's by drilling down to the lowest level of specificity and arguing that Loumiet's First Amendment retaliation claim represents a "new context," because "no court has ever extended *Bivens* to the conduct of government officials [purportedly] engaged in oversight of the safety and soundness of the national banking system." *See* Mot. at 6-7 (relying on *Meshal v. Higgenbotham*, 804 F.3d 417, 420 (D.C. Cir. 2015)). This argument is wrong for two reasons.

First, as made clear throughout this brief, this case is ***not*** about the "oversight of the safety and soundness of the national banking system." It is a plain-vanilla First Amendment

retaliatory prosecution case. Moreover, whatever factual differences this case has from other First Amendment retaliation claims, those differences do not transform this case into one that is applying *Bivens* in a "new context."

In fact, it would be error to conclude that a First Amendment retaliation claim represents a "new context" merely because that claim involves facts that are different from other retaliation claims. Such a result would invite needless litigation because "every case has points of distinction," but not all of them give rise to a new *Bivens* context. *Arar v. Ashcroft*, 585 F.3d 559, 572 (2d Cir. 2009). The points that are relevant, and that avoid unnecessary re-litigation over an already-established *Bivens* context, relate to whether (1) "the rights injured," and (2) the "mechanism of the injury" have previously given rise to a *Bivens* claim.[10] *See Turkmen v. Hasty*, 789 F.3d 218, 234 (2d Cir. 2015). When viewed properly, "new contexts" are easy to spot, and this case does not involve a new context.

For instance, in *Arar*, the Second Circuit found that, while the "rights injured" were not new (violation of Fifth Amendment due process), the "mechanism of the injury" was new ("extraordinary rendition"). *Arar*, 585 F.3d at 572 ("This is a 'new context': no court has previously afforded a *Bivens* remedy for extraordinary rendition."); *Turkmen*, 789 F.3d at 234 (noting that "[i]n rejecting the availability of a *Bivens* remedy [in *Arar*], we focused on the *mechanism* of his injury: extraordinary rendition . . . and determined this presented a new context for *Bivens*-based claims").[11]

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[10] In *Meshal*, the court applied a definition that it adopted from the Second Circuit's decision in *Arar*, which defined "context" as a "potentially recurring scenario that has similar legal and factual components." *Meshal v. Higgenbotham*, 804 F.3d 417, 424 (D.C. Cir. 2015). The Second Circuit later refined this definition in *Turkmen*. Thus, we used the more recent definition of what constitutes a new "context."

[11] In *Meshal*, the mechanism of injury was new, but the rights were not. Specifically, the mechanism involved "actions occurring in a terrorism investigation conducted overseas by federal law enforcement officers." *Meshal*, 804 F.3d at 424. The D.C. Circuit concluded that the

In *Turkmen*, neither the rights nor the mechanism of injury was new. There, the rights were substantive due process and equal protection rights. 789 F.3d at 234-35. The mechanism involved detainment in "punitive conditions without sufficient cause." *Id*. at 235. In finding this claim to be cognizable under *Bivens*, the Second Circuit rejected that "context" requires looking to the "reasons why Plaintiffs were" detained, "just as the reason for Arar's extraordinary rendition did not present the context of his claim." *Id.* at 234. Instead, the "context" was simply "federal detainee Plaintiffs, housed in federal facility, allege that individual federal officers subjected them to punitive conditions." *Id*.

Here, the context is quite simple and familiar—private citizen alleges retaliatory prosecution by federal officials in response to protected speech. Thus, the "right injured" is First Amendment freedom of speech, and the "mechanism of injury" is retaliatory prosecution.[12] This is the same identical context that the Supreme Court in *Hartman* and the D.C. Circuit have already recognized as a cognizable under *Bivens*.[13] And, the fact that the Individual Defendants are banking regulators—that misused their authority as the means to retaliate—changes nothing about the context of Loumiet's claim. Indeed, the Individual Defendants provide no explanation as to why they, as banking regulators, are entitled to special treatment not afforded to other

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new mechanism of injury "is critical," because "no court has previously extended *Bivens* to cases involving either the extraterritorial application of constitutional protections . . . ." *Id*.

[12] Contrary to the Individual Defendants' argument, Loumiet is not arguing that the context here is similar to the context in *Haynesworth* or *Valder/Hartman* simply because his *Bivens* claim arises under the First and Fifth Amendment. *See* Mot. at 13 (suggesting that Loumiet is arguing that his *Bivens* claim is cognizable because he alleged "violations of constitutional provisions that have given rise to *Bivens* claims in the past"). Instead, Loumiet's claim arises from the same context as *Haynesworth* and *Valder/Hartman* because he has alleged the same "right injured" (First Amendment freedom of speech) and the same "mechanism of injury" (retaliatory prosecution).

[13] A "new context" may be found had Loumiet alleged violation of the free exercise clause of the First Amendment (*i.e.*, the "rights injured"), or that he was harmed from a retaliatory investigation (*i.e.*, the "mechanism of injury").

federal government actors who have been subject to *Bivens* claims like Loumiet's, including federal prosecutors, Postal Service inspectors, and officials from the FBI, INS, and the United States Secret Service, all of whom were also purportedly carrying out their duties by enforcing federal laws. Thus, this Court need not go any further and decide whether purported "special factors" counsel against extending *Bivens* here, because both the Supreme Court and the D.C. Circuit have already extended *Bivens* to Loumiet's claim.

B. Even if the Court were to undergo a "special factors" analysis, there is no evidence that Congress ever intended for FIRREA to preempt a Bivens claim, much less one brought by a person to whom FIRREA doesn't apply

No "special factors" analysis should be undertaken for the reasons discussed above. But if the Court were to do so, it should reject the backwards approach laid out by the Individual Defendants. They would have the Court presume that no *Bivens* remedy is available (despite *Hartman*, *Valder*, *Haynesworth*, and *Dellum*), and then consider whether to create one, with a heavy presumption against doing so. The Court should reject this invitation to error. *See, e.g.*, *Koprowski v. Baker*, 822 F.3d 248, 258 (6th Cir. 2016) (rejecting identical argument). Instead, to the extent a "special factors" analysis is warranted (Loumiet submits that it is not), the Court should decide whether the Individual Defendants have met their burden and presented any compelling reason to preclude a *Bivens* remedy that *already exists*.

In support of its "special factors" argument, the Individual Defendants make two arguments. First, they argue that FIRREA is a comprehensive remedial scheme that Congress enacted to administer public rights. *See* Mot. at 7. Second, they argue that a *Bivens* claim would have a chilling effect on regulators' ability to do their job. *Id.* at 11. Neither argument has merit.

1. The mere existence of FIRREA is not a special factor[14]

A commonly misused "special factors" argument by *Bivens* defendants is that Congress enacted a comprehensive remedial scheme to administer public rights. The underlying rationale behind this argument is that if Congress has indicated that it has already provided all the remedies it thinks are due, then this is a "special factor" counseling against recognizing a *Bivens* remedy. Thus, to successfully make this argument, the Individual Defendants needed to demonstrate (1) that Congress considered (and indicated a preference about how to handle) the kind of claim at issue when it enacted FIRREA (*i.e.*, congressional intent), and (2) that FIRREA is a comprehensive remedial scheme that administers "public rights." The Individual Defendants have failed to demonstrate either one.

a. It would be illogical to find congressional intent where FIRREA did not, and does not, apply to Loumiet, who did not participate in any banking practice

Congress enacted FIRREA for one overarching purpose—to increase the power of banking regulators over banks. *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 741 (D.C. Cir. 1995) ("FIRREA was enacted to 'enhance the regulatory enforcement powers of the depository institution regulatory agencies to protect against fraud, waste, and insider abuse.'"). In order to supplant Loumiet's *Bivens* claim, the Individual Defendants needed to demonstrate that Congress considered and indicated a preference for how to deal with people like Loumiet, who did not participate in *any* banking practice, as well as claims like the ones presented in this case.

[14] The Individual Defendants appear to concede that Administrative Procedure Act is not a comprehensive remedial scheme that administers public rights. In any event, to the extent the Individual Defendants were to improperly raise this argument for the first time in their reply, Loumiet refers the Court to the discussion in prior briefing that puts this argument to rest. *See* Opp. [D.E. 19] at 22-28.

To that end, the Individual Defendants could have pointed to direct evidence of legislative history, like in *Bush v. Lucas*, 462 U.S. 367, 388 (1983), in which plaintiffs' *Bivens* claim was based on an unlawful demotion, and the defendants pointed to the fact that Congress had "constructed step by step," paying "careful attention to conflicting policy considerations," no fewer than eight statutes that provided Bush with various types of relief for an unlawful demotion.[15] Or, the Individual Defendants could have pointed to the type of direct evidence found in *Schweiker v. Chilicky*, 487 U.S. 412, 425-426 (1988), in which the plaintiff's *Bivens* claim was based on the wrongful termination of disability benefits, and the defendants provided sufficient evidence of Congress's intent to foreclose such claims by showing that Congress spent considerable time addressing the type of claim raised by the plaintiff.

Here, the Individual Defendants have pointed to *no evidence* (direct or otherwise) that would demonstrate congressional intent. No such evidence exists because Congress enacted FIRREA to empower banking agencies to take action against banks, bankers, and people that participate in a banking practice. Loumiet ***does not fall within any of those categories***—a fact that the Individual Defendants knew and the Comptroller admitted (*see* Compl. ¶ 108).[16] Indeed, the D.C. Circuit confirmed that there was no evidence that Loumiet did anything that justified invoking FIRREA and prosecuting him." *See Loumiet EAJA,* 650 F.3d at 802.

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[15] *See also Spagnola v. Mathis*, 859 F.2d 223, 229 (D.C. Cir. 1988) (citing to *Bush* and finding the Civil Service Reform Act of 1978 to be a comprehensive scheme).

[16] At most, he was a lawyer that happened to participate in a bank audit, which is not, as a matter of law, a banking practice. *Grant Thornton, LLP v. OCC*, 514 F.3d 1328, 1332 (D.C. Cir. 2008) (concluding that Congress only intended FIRREA to apply to those who "participate" in a "banking practice," which does not include a bank audit, no matter how "incompetently or recklessly the audit may have been performed"). It is beyond peradventure that mere affiliation with a bank does not bring one within the ambit of FIRREA.

Taken to its logical conclusion, the Individual Defendants' argument would mean that bank regulators purporting to apply FIRREA are free to retaliate against individuals to whom FIRREA does not apply. Congress could not have intended for FIRREA to preempt a *Bivens* claim in a case such as this one, where FIRREA, despite being inapplicable, was knowingly misused as a pretext for retaliation. Absent *any* evidence to the contrary, it must be accepted as true that Congress did not consider (and, accordingly, did not indicate a preference about to how to handle) claims brought against individuals who do not fall within the scope of FIRREA.

FIRREA's inapplicability to Loumiet's *Bivens* claims is evidenced by the following hypothetical— suppose Loumiet had only drafted an employment contract for a teller that worked at Hamilton Bank, but voiced the same criticisms of the OCC and the Individual Defendants and been subjected by the Individual Defendants to the same retaliatory prosecution as in this case. Could it be said that FIRREA in such a scenario would preempt a *Bivens* claim? Of course not. Were it otherwise, the "special factors" analysis would end up swallowing all *Bivens* remedies because *Bivens* defendants as a bar could point to any statute that was peripherally relevant, without regard for whether the statute actually applied to the situation.

In fact, Courts have explicitly rejected preemption of *Bivens* claims based on the mere existence of peripherally relevant statutes, even where those statutes are comprehensive remedial schemes that administer public rights. For instance, in *Hartley v. Wilfert*, 918 F. Supp. 2d 45, 47 (D.D.C. 2013), the plaintiff sued Secret Service agents for First Amendment retaliation based on intimidation in the form of threats to obtain the plaintiff's personal information. The defendant argued that the First Amendment retaliation claim was preempted by the Privacy Act, which is a comprehensive remedial scheme dealing with obtaining and disclosing personal information. However, the "Plaintiff staunchly contest[ed]" that the Privacy Act had anything "to do with [her] case." The court agreed:

> Defendants' unduly technical characterization of the conduct here would lead to the unjust result of protecting a violation of constitutional rights ***simply because Defendants' intimidation included a request for Hartley's personal information***. The conduct here ***strays so far afield*** from the compass of the Privacy Act that it cannot be said that Congress ever contemplated the sort of claim here being covered by that statute.

Hartley, 918 F. Supp. 2d at 54–55 (emphasis added).

Another court of this district held that even when defendants use their powers under an otherwise comprehensive statute "as a means to retaliate," that "does not transform [a *Bivens* claim] into one arising under or relating to" that statute. *Navab-Safavi v. Broad. Bd. of Governors*, 650 F. Supp. 2d 40, 68 (D.D.C. 2009), *aff'd sub nom. Navab-Safavi v. Glassman*, 637 F.3d 311 (D.C. Cir. 2011) (Plaintiff's *Bivens* claim was not "governed by the [Contract Disputes Act]. As a result, the CDA does not preclude *Bivens* recovery for plaintiff's claims."). Similarly, in *Zherka v. Ryan*, 52 F. Supp. 3d 571, 580–81 (S.D.N.Y. 2014), the defendants used their power under the Internal Revenue Code (the "IRC") to retaliate. Even though the IRC is unquestionably a comprehensive remedial scheme, the court concluded that "plaintiff is not alleging a mere retaliatory tax audit, but a retaliatory investigation involving potential criminal sanctions." "[C]onstitutional rights, if they are to be rights at all, must have some discernible remedy" and "[l]eaving plaintiff to pursue administrative remedies through the very agency he asserts has targeted him . . . would be, in essence, no remedy at all." *Id*. at 581.

So it is here. Loumiet "staunchly contests" that FIRREA is determinative of this case. As the D.C. Circuit held in *Loumiet EAJA*, Loumiet was not subject to FIRREA because he was not an "institution-affiliated party," noting that the record was "***noticeably devoid***" of evidence that he was an institution-affiliated party, except for Individual Defendant Rardin's statement, which "***was both vague and unsubstantiated***." 650 F.3d at 800 (emphasis added). Consequently, and consistent with the court's holding in *Hartley*, "it cannot be said that Congress ever contemplated

the sort of claim here being covered by that statute." 918 F. Supp. 2d at 54-55. Thus, even if FIRREA were a comprehensive remedial scheme (it is not), Loumiet's *Bivens* claims aren't preempted simply because the Individual Defendants unlawfully used FIRREA "as a means to retaliate." The already-established fact that FIRREA did not apply to Loumiet puts an end to any claimed "special factors" analysis.[17]

b. Even if FIRREA were applicable, it is not a comprehensive remedial scheme that administers public rights

Even if FIRREA had applied to Loumiet, it is not a comprehensive remedial scheme that administers public rights. The question is not simply: is FIRREA a "comprehensive remedial scheme?", as the Individual Defendants frame it. *See* Mot. at 11 (citing *Adair v. Lease Partners, Inc.*, 587 F.3d 238, 241 (5th Cir. 2009)). Instead, the relevant question is whether Congress intended and designed FIRREA to administer "public rights." In the absence of express congressional intent, a statute will be considered "designed to administer public rights" only if the statute "provides ***both*** substantive rights and administrative procedures for adjudicating those rights." *Navab-Safavi*, 650 F. Supp. 2d at 71 (emphasis added). In other words, the type of remedial scheme necessary to preclude a *Bivens* claim must evidence Congress's consideration of the substantive "rights *and* procedural remedies" available to persons situated similarly to the *Bivens* plaintiff before the court. *Id.* (emphasis in original) (noting that "Congress's provision of substantive rights *and* procedural remedies has been a defining feature of the other regulatory schemes that the D.C. Circuit has held to preclude *Bivens* recovery").

As to Loumiet's *Bivens* claims, there is nothing indicating that Congress thought about, much less included, "substantive provisions giving meaningful remedies *against* the United

[17] *Accord Lyttle v. U.S.*, 867 F. Supp. 2d 1256, 1276 (M.D. Ga. 2012) (finding that the Immigration and Nationality Act did not preclude a *Bivens* claim based on a wrongful detainment because the INA only applies to aliens and the plaintiff was a U.S. citizen).

States," such that it would be "inappropriate . . . to supplement that regulatory scheme with a new judicial remedy." *Navab-Safavi*, 650 F. Supp. 2d at 66. Indeed, the Court will be unable to find in FIRREA "any substantive right [applicable to Loumiet] that might be violated." *Id*. at 71. This becomes clear when one compares FIRREA to statutory schemes that *do* provide substantive rights for improper agency action, like the Civil Service Reform Act, Social Security Act, Privacy Act, and Contract Disputes Act.

The presence of substantive rights in each of these laws demonstrates that Congress considered the harm a plaintiff might suffer and provided a meaningful remedy for it. *E.g. Spagnola*, 859 F.2d 229 (federal employee's claim that he was passed over for job because of whistleblowing could be remedied under specific provisions of the CSRA) (citing *Bush*, 462 U.S. at 383 (same)); *Chilicky*, 487 U.S. at 428 (plaintiff's disability due-process claim already had been remedied by a statutorily-required, retroactive award of the benefits the government wrongfully withheld); *Wilson v. Libby*, 535 F.3d 697, 707 (D.C. Cir. 2008) (constitutional violation held to fall within Privacy Act, which provided monetary penalties for "willful" disclosure of confidential information).[18] The Individual Defendants cannot point to *any* "substantive provisions giving meaningful remedies *against* the United States" for victims of retaliatory prosecutions that mirror the type of substantive provisions in *Spagnola*, *Bush*, *Chilicky*, or *Wilson*. At most, the Individual Defendants have pointed to the OCC's powers and

[18] The D.C. Circuit noted in *Wilson v. Libby* that "a remedial statute need not provide full relief to the plaintiff to qualify as a 'special factor' against the creation of a *Bivens* remedy." *See* 535 F.3d 697, 705 (2008) (citing *Chilicky*, 487 U.S. 412). The Individual Defendants brandish this argument (Mot. at 12-13), but fail to note that the Privacy Act at issue in *Wilson* provided numerous remedies, including monetary penalties. Defendants also ignore Judge Rogers' dissenting observation that "except possibly in the military context, neither the Supreme Court nor this court has denied a *Bivens* remedy where a plaintiff had no alternative remedy at all." *Id.* at 715.

the procedures that apply when the OCC sues someone.[19] Procedures do not provide substantive remedies. "[C]onstitutional rights, if they are to be rights at all, must have some discernible remedy." *Zherka*, 52 F. Supp. 3d at 580-81.

There is no better example of the foregoing than the Supreme Court's decision in *Hartman* and the D.C. Circuit's opinion in *Munsell v. U.S. Dept. of Agric.*, 509 F.3d 572 (D.C. Cir. 2007). In both cases, the defendants were regulators that had used regulatory power to retaliate against private citizens. In both cases it could be argued that the regulators invoked statutes that were comprehensive. For instance, in *Munsell*, the plaintiff was the president of meat packaging company. The USDA had regulated that industry for almost 100 years through the Federal Meat Inspection Act (the "FMIA"). Like FIRREA, the FMIA authorized enforcement actions and provided procedural rules to govern those actions.[20] Nevertheless, the D.C. Circuit concluded that the FMIA (coupled with review of agency action under the APA) did not preclude liability under *Bivens* where the regulators "pursue[d] retaliatory enforcement actions in order to chill constitutionally protected speech." *Munsell*, 509 F.3d at 587. The court found that even if APA review might factor into the determination of whether a *Bivens* remedy is unavailable, its

[19] For example, the Individual Defendants cite to (1) 12 U.S.C. 1818(b), which authorizes the OCC to commence cease-and-desist proceedings; (2) 12 C.F.R. § 19.3(a), which is a definition section; (3) 12 C.F.R. § 19.5, which gives authority to an administrative law judge to preside over the prosecution and make rulings; (4) 12 C.F.R. §§ 19.35, 19.36, which are in essence the procedural and evidence rules governing the prosecution; (5) 12 C.F.R. §§ 19.38, 19.39(a) which governs the final decision and the time frame within which to object to the decision; (6) 12 C.F.R. § 19.40, which governs the review by the Comptroller; and (7) 12 U.S.C. 1818(h)(2), which authorizes an appeal of the final decision to D.C. Circuit. Obviously, none of these affords Loumiet any substantive remedy.

[20] For example, 9 C.F.R. § 500.2 gives the regulators authority to take regulatory action, requires adequate notice of the charges, and sets forth the manner in which a person can appeal; 9 C.F.R. § 500.5 sets forth what must be in notice of charges and provides for a cure period, among other procedural rules; 9 C.F.R. § 500.8 provides for procedures for rescinding or refusing approval of marks, labels, or containers; 9 C.F.R. § 306.5 provides for appeals of an adverse decision. Finally, enforcement actions under the FMIA are reviewable in federal district court. 5 U.S.C. § 702.

relevance would be minimal because the "only viable relief . . . would be for backward-looking damages," which would insulate recovery from officials that were "animated by retributive animus" and "ultimately succeeded in driving Munsell/MQF out of the meat processing business." *Id*. Similarly, in *Hartman*, the Supreme Court recognized the viability of the plaintiff's *Bivens* claim for retaliatory prosecution even though the plaintiff was afforded all the procedural protections afforded to him by criminal law. *See* 547 U.S. at 253.

In sum, *Munsell* and *Hartman* involved retaliatory prosecutions brought by regulators under the purported authority of statutes that appeared to be comprehensive. But as those cases make clear, not all comprehensive statutes are remedial statutes that administer public rights. *Accord Zherka,* 52 F. Supp. 3d at 580–81 (where IRC was held not to provide any "discernible remedies" so as to preclude a *Bivens* claim). Instead, *Bivens* claims can only be supplanted by statutes that provide for both substantive rights and procedural remedies for the displaced claims. Accordingly, as was true in *Munsell* and *Hartman*, in this instance FIRREA is not a statute that provides "substantive provisions giving meaningful remedies *against* the United States." *Navab-Safavi*, 650 F. Supp. 2d at 66. This is true especially where, as here, FIRREA's procedural remedies could not possibly have protected Loumiet from the Individual Defendants' intended harm. *See Munsell,* 509 F.3d at 587.

FIRREA's procedures could not have protected Loumiet from the Individual Defendants' wrath because the harms he suffered resulted from the Individual Defendants' bringing and pursuit of the retaliatory prosecution, regardless of its outcome. As in *Hartman*, the fact that the prosecution failed as a result of procedural remedies is irrelevant.

Despite its failure, the retaliatory prosecution allowed the Individual Defendants to succeed in their goal of punishing Loumiet and sending an ominous message to other lawyers like him who in the future might have considered reporting misbehavior by OCC representatives,

or providing legal advice to clients despite OCC representatives' strong dislike of that advice. FIRREA's procedures didn't, couldn't, and won't prevent First Amendment violations arising from a retaliatory prosecution. Indeed, under any circumstances, it is hard to imagine that future lawyers who learn about Loumiet's case and all that he has been made to suffer over the past 10 years, will feel free in the future to report wrongful conduct by OCC officials, or to advise their clients as they feel is correct, regardless of the OCC's view of that advice. Beyond this, it's simply absurd to suggest that they will view FIRREA's procedures, its reference to the ADA, or even the possibility of recovering attorneys' fees, as adequately protecting them, their careers, and their futures from the type of mercenary retaliatory conduct undertaken by the Individual Defendants in this case.

Bivens remedies are needed precisely for circumstances like Loumiet's, where constitutional guarantees have and will continue to be trampled absent the requested *Bivens* remedy, because the existing statutory procedures delineated by Congress were neither intended nor designed to address the circumstances or category of plaintiff at bar. Thus, the Individual Defendants have failed to demonstrate any compelling reason to preclude the clearly-established *Bivens* claim for First Amendment retaliatory prosecution.

2. *Sinclair* is irrelevant and not good law in the D.C. Circuit

The Individual Defendants claim that *Sinclair v. Hawke*, 314 F.3d 934, 939 (8th Cir. 2003) "closely resembles the case at bar" (*see* Mot. at 9), but a cursory examination of the case reveals this to be far from the truth. *Sinclair* is a case where a bank brought a *Bivens* claim on the basis that "facially lawful regulatory actions were the product of an unlawful motive." *Id*. *Sinclair* neither "resembles," nor controls, this case for at least three reasons.

First, the plaintiff in *Sinclair* was a bank, not a private citizen.[21] The bank alleged that the OCC's regulatory decisions, including the decision to declare the bank unsafe and unsound, were based on a retaliatory motive. *Id*. at 938-39. Given that Congress enacted FIRREA ***for that exact purpose***—to expand federal agencies' power to declare banks unsafe and unsound—the applicability of FIRREA to the bank plaintiff in *Sinclair* was obvious and indisputable (as opposed to this case, where the *inapplicability* of FIRREA is equally indisputable). Consequently, it was no stretch for the Eighth Circuit to conclude that FIRREA provided the best avenue for bank plaintiffs to adjudicate OCC decisions as to the safety and soundness of banks.

Sinclair, therefore, stands in stark contrast to this case, where FIRREA never applied to Loumiet, and the basis for Loumiet's claim is not premised on "facially lawful regulatory action." Instead, Loumiet's claims are based on an *ultra vires prosecution* that exceeded the intended scope of FIRREA, taken for the purpose of retaliation. Thus, the policy rationale that was at issue in *Sinclair* has no force here. *Sinclair*, 314 F.3d at 942 ("All the adverse regulatory actions at issue ***fell within the OCC's express statutory powers to regulate national banks***, to take action against unsafe and unsound banking practices, and to appoint a receiver for insolvent banks.") (emphasis added).

Moreover, the bank in *Sinclair* could have challenged the bank closure in federal court. *See* 12 U.S.C. § 191 (2006) (allowing a national bank to bring an action within 30 days to challenge appointment of receiver, subject to standard set forth in the APA (5 U.S.C. § 702)); *see also Hamilton Bank, N.A. v. OCC*, 227 F. Supp. 2d 1, 4 (D.D.C. 2001) (Kollar-Kotelly, J.) (discussing reviewability of cease and desist orders). As this Court is well aware, all of the bank's grievances could have been aired in that proceeding, including Constitutional ones. *E.g.*,

[21] The claims brought by the bank's president were dismissed for lack of standing. *Sinclair*, 314 F.3d at 939.

James Madison Ltd. by Hecht v. Ludwig, 868 F. Supp. 3, 10 (D.D.C. 1994) (addressing and denying Fifth Amendment Due Process claim). And, if it turned out that the OCC unlawfully declared the bank unsound—the court could order removal of the receiver, returning the bank to its rightful owners, which after all, is full relief for a bank plaintiff. But here, preclusion of Loumiet's *Bivens* rights would result in his getting no relief whatsoever.[22] It bears repeating—Defendants' unduly technical characterization of the conduct here [as related to bank regulation] would lead to the unjust result of protecting a violation of Constitutional rights simply because Defendants' retaliation peripherally involved a bank. *Hartley*, 918 F. Supp. 2d at 54-55.

Second, *Sinclair* is also fundamentally different because the bank's claims were entirely based on what the court described as "facially lawful" bank regulation. In essence, the claims in *Sinclair* were based on the bank's closure. Here, however, Loumiet's claim has nothing to do with the closure of Hamilton Bank, much like the plaintiff in *Zherka*, who was "not alleging a mere retaliatory tax audit," 52 F. Supp. 3d at 580-81, or the plaintiff in *Hartley*, whose claim "did not involve the sort of collection of information contemplated" by the Privacy Act. 918 F. Supp. at 56. In fact, other parallels exist between the defendant's argument in *Hartley* and those here. In *Hartley*, the defendant went to "great lengths to frame" plaintiff's claims as falling within the D.C. Circuit's *Wilson* opinion, just as defendants here go to great lengths to make this case seem like the one in *Sinclair*. But the *Hartley* court continually rejected this comparison, finding that the defendant was "not engaged in collecting information, he was engaged in intimidating plaintiff from exercising her First Amendment rights." 918 F. Supp. 2d at 56.

[22] As the D.C. Circuit noted in *Munsell*, "the very success of the unconstitutional conduct in removing [plaintiff] from the regulated arena would make APA review unavailable and insulate the conduct entirely from judicial review. That would make little sense." 509 F.3d at 591; *accord Zherka*, 52 F. Supp. 3d at 581 ("Leaving plaintiff to pursue administrative remedies through the very agency he asserts has targeted him for retaliatory investigation would be, in essence, no remedy at all.").

The same is true here. The Individual Defendants were not engaged in "facially lawful regulation." Rather, the Individual Defendants were engaged in prosecuting Loumiet because he exercised his freedom of speech.[23] Thus, this case does not put the Court, or the jury, in the role of re-litigating regulatory decisions. To the contrary, his claim "brings with it a tailwind of support from our longstanding recognition that the Government may not retaliate for exercising First Amendment speech rights." *Wilkie*, 551 U.S. 556; *Munsell*, 509 F.3d at 587 (suggesting that such a context would not preclude a *Bivens* claim); *Pellegrino*, 2014 WL 1489939, at *13 ("the present circumstances encompass exactly the type of facts and issues comfortably within the judiciary's purview—retaliatory action, probable cause, causation, and damages").

Finally, it is unlikely that *Sinclair* is good law in the D.C. Circuit because it cannot be reconciled with *Munsell*. Specifically, *Sinclair* held that APA review of regulatory action under FIRREA amounts to a comprehensive regulatory scheme that administers public rights. This exact argument failed to persuade the D.C. Circuit in *Munsell*, where the issue involved regulatory action pursuant to the FMIA (a comprehensive regulatory scheme), which also is subject to APA review. The D.C. Circuit found this argument left "some weighty issues unanswered," such as whether the argument withstands *Wilkie* and whether the result would be the same when the alleged conduct involved First Amendment retaliation. *Munsell*, 509 F.3d at 590 (citing to *Hartman*, 547 U.S. at 256). Thus, whatever significance *Sinclair* has to claims by banks relating to bank regulation, it is unlikely that the D.C. Circuit would reach the same conclusion, especially in this case, where the claim is not by a bank, but by a private citizen, and is based on a First Amendment retaliatory prosecution that lacked probable cause.

[23] Expecting the Individual Defendants to muddy the waters, Loumiet expressly disclaimed that his claims are, in any way, premised on "the OCC's decision to intervene Hamilton." Compl. ¶ 108. What the OCC did at Hamilton is totally irrelevant to this case.

3. The purported "chilling effect" argument is dealt with by qualified immunity

The second "special factor" the Individual Defendants point to is the purported "chilling effect" on regulators' "willingness" to aggressively attack unsafe and unsound banking practices. *See* Mot. at 11 . Of course, there could be no chilling effect because the Individual Defendants were not attacking "unsafe and unsound banking practices" by an "institution-affiliated party", as FIRREA allows. It bears repeating—Loumiet did not participate in a banking practice and was not subject to that statute. Thus, allowing him to proceed on his *Bivens* claim will not have a chilling effect.[24]

Moreover, the Supreme Court has already put to rest a variation of this "chilling" argument, which of course could apply equally to virtually any action against a private citizen brought by any government official enforcing virtually any law, when it recognized a *Bivens* claim against prison officials. *Carlson v. Green*, 446 U.S. 14, 19 (1980). In *Carlson*, the prison official defendants argued that allowing a *Bivens* claim "might inhibit" their "efforts to perform their official duties." *Id*. at 19. However, the Supreme Court rejected that this was a "special factor" counseling hesitation because the qualified immunity doctrine "provides adequate protection." *Id*. "The Supreme Court's conclusion has become even more pertinent over time because the qualified-immunity doctrine has expanded to give more protection to government officers." *Koprowski*, 822 F.3d at 257. The same is true here.

[24] As the D.C. Circuit found in *Loumiet EAJA*, in addition to their failure to provide any evidence that Loumiet was an institution-affiliated party subject to FIRREA, the Individual Defendants did not even seriously attempt to establish that the bank suffered "more than a minimal financial loss," another threshold requirement for FIRREA to apply. 650 F.3d at 801 (citing *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339 (1928)). The Individual Defendants didn't care about satisfying FIRREA's statutory requirements because they were trying to punish Loumiet; not enforce its provisions.

C. Absolute immunity does not apply

The Court should reject the Individual Defendants' request to immunize their conduct under the absolute immunity doctrine because it is a rare privilege that is unavailable here. The Supreme Court has "been quite sparing in [its] recognition" and has "refused to extend it any further than its justification would warrant." *Burns v. Reed*, 500 U.S. 478, 487 (1991). Moreover, resolving immunity defenses raises fact-specific questions. "[A] limited factual inquiry may in some cases be necessary to determine in what role the challenged function was exercised, thus precluding on occasion disposition at the Rule 12 stage." *Gray v. Bell*, 712 F.2d 490, 496 (D.C. Cir. 1983) (citations omitted). In any event, the doctrine does not apply for the following reasons:

First, Straus cannot immunize himself because, even if his initiation of the prosecution was protected, his false statements to the press aren't. *Buckley v. Fitzsimmons*, 509 U.S. 259, 277 (1993) (finding prosecutors' false statements to the press regarding an indictment were not subject to absolute immunity). Here, Straus and the other defendants intentionally and maliciously made multiple damaging false statements to the press, including, among other things, (1) that Loumiet was "concealing . . . crimes;" (2) that Loumiet made "materially false and misleading assertions;" (3) that Loumiet "suppress[ed] material evidence;" and (4) that Loumiet did all of these things because he was "greedy" and wanted to share in fees from Hamilton, even though Loumiet had left Greenberg well before any of those fees could have ever been distributed to him (Compl. ¶ 65). Each of these allegations was proved false at trial and confirmed by the D.C. Circuit to have been frivolous. *Loumiet EAJA*, 650 F.3d at 802.

Second, Straus and Schneck, who were both OCC lawyers, also are not protected to the extent their actions were non-prosecutorial. The nature of a prosecutor's immunity depends on the capacity in which the prosecutor acts at the time of the alleged misconduct. Actions taken as an advocate enjoy absolute immunity, *see Imbler v. Pachtman*, 424 U.S. 409, 431 (1976), while

actions taken as an investigator enjoy only qualified immunity. *Buckley*, 509 U.S. at 273 ("When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'"). Here, Straus and Schneck, along with the other defendants, cooked up a frivolous OCC action that had absolutely no basis in law or fact, as the D.C. Circuit confirmed. In doing so, they acted as investigators; not prosecutors. Straus and Schneck, therefore, are not entitled to absolute immunity for pre-prosecutorial conduct. *Buckley*, 509 U.S. at 273 (prosecutor's fabrication of evidence during preliminary investigation not entitled to absolute immunity).

Finally, the Court should reject Rardin, Sexton, and Schneck's argument that they are absolutely immune from damages merely because their actions "relate" to Loumiet's prosecution, in that they influenced, instigated, and conspired with each other to retaliate. Mot. at 15. Absolute immunity has never been interpreted to be this broad. *Burns*, 500 U.S. at 495 (rejecting such a broad reading of absolute immunity because "almost any action . . . could be said to be in some way related to the ultimate decision whether to prosecute, but we have never indicated that absolute immunity is that expansive"). To the contrary, the Supreme Court confirmed in *Hartman* that *no immunity* should protect the unlawful actions of non-prosecutor defendants, like those here, who instigated and induced a prosecution. 547 U.S. at 261-62. The Supreme Court found that the postal inspectors who had participated and induced the prosecution were not subject to absolute immunity, or even qualified immunity. *Id*.; *accord Rehberg v. Paulk*, 611 F.3d 828, 850 (11th Cir. 2010) (affirming district court's denial of absolute and qualified immunity to chief investigator who induced the district attorney to initiate retaliatory prosecution).

Moreover, defendants are not "quasi-judicial" officers as that term is used in *Butz v. Economou*, 438 U.S. 478, 512 (1978). *Butz* extended to the agency equivalents of prosecutors

and judges the long-standing absolute immunity afforded to federal and state prosecutors and judges. *Id*. at 512-13. But just as examiners and investigative officers are not entitled to absolute immunity in state or federal prosecutions, neither are agency examiners (Rardin) or investigators (Sexton and Schneck) in this case. *E.g., Beck v. Texas State Bd. of Dental Examiners*, 204 F.3d 629, 636 (5th Cir. 2000) (reversing district court's order that investigator for state board of dental examiners was a "quasi-judicial" officer because the investigator "performed investigative, not adjudicative nor prosecutorial functions"); *Rehberg*, 611 F.3d at 850 (chief investigator not entitled to absolute or qualified immunity). Defendants have cited no statute, rule, or regulation showing that they performed the type of "quasi-judicial" function contemplated in *Butz.*

D. Loumiet has sufficiently pleaded First and Fifth Amendment claims and the Supreme Court and D.C. Circuit already found that First Amendment retaliation claims were "clearly established" at the time of the unlawful conduct, which prevents the defendants from invoking qualified immunity

The Court should also reject the Individual Defendants' qualified immunity argument because Loumiet has sufficiently pleaded violations of clearly-established constitutional rights.

1. Loumiet has pleaded a First Amendment retaliatory prosecution claim that was clearly established in 2006

For sake of brevity, Loumiet incorporates his arguments in **Section II. A** which demonstrate the sufficiency of his allegations as to the First Amendment retaliatory prosecution claim. As for whether this right was clearly established in 2006, this issue cannot seriously be debated. In *Loumiet III*, the D.C. Circuit cited *Hartman* and *Valder* as cases that involved clearly-established constitutional rights. *Valder* held that "the precedent in this Circuit clearly established in 1988 . . . the contours of the First Amendment right to be free from retaliatory prosecution" and *Hartman* held that a "retaliatory prosecution claim . . . does allege the violation of clearly established law." *Loumiet III*, 828 F.3d at 946 n. 4; *see Hartman* 547 U.S. at 256 ("[T]he law is settled that as a general matter the First Amendment prohibits government officials from

subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out"). The Individual Defendants ignore these statements and instead make the frivolous argument that retaliation by way of a civil administrative proceeding is somehow different. This argument is wrong for three reasons.

First, this argument ignores that qualified immunity looks at the right, not the particular nuances of a claim. *Navab-Safavi*, 637 F.3d at 317 ("there is no need that 'the very action in question [have] previously been held unlawful.'"); *Hartley*, 918 F. Supp. 2d at 57 (A clearly-established right does "not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate"); *accord Vanderklok*, 2016 WL 4366976, at *8 ("The qualified immunity analysis . . . is not premised on the existence of a clearly established cause of action, but instead on a violation of a clearly established constitutional right."). Thus, the test is whether it would be apparent to a federal officer that the prohibited nature of an act was "unlawful[ ] in light of pre-existing law." *Navab-Safavi*, 637 F.3d at 317.

Here, "such an elementary violation of the First Amendment" cannot immunize the defendants because the "absence of a reported case with similar facts," if anything, "demonstrates nothing more than widespread compliance with well-recognized constitutional principles." *Navab-Safavi*, 650 F. Supp. 2d at 63 (denying immunity asserted as to First Amendment retaliation claims) (citing *Eberhardt v. O'Malley*, 17 F.3d 1023, 1028 (7th Cir. 1994), which noted "The easiest cases don't even arise."). The immunity defense, therefore, should fail because the Individual Defendants were presumably "reasonably competent public official[s] [who] should know the law governing [their] conduct." *See Anderson v. Creighton*, 483 U.S. 635, 653 n.5 (1987). In other words, it is beyond belief that the Individual Defendants did not know in 2006 that bringing retaliatory litigation against Loumiet was both improper and

unlawful.

Second, the D.C. Circuit has held since at least 1960 that malicious prosecution is unlawful in *all forms*, no matter the process used—civil, criminal, or administrative. *Morfessis v. Baum*, 281 F.2d 938, 940 (D.C. Cir. 1960); *see also Bennett v. Hendrix*, 423 F.3d 1247, 1255 (11th Cir. 2005) (malicious prosecution brought by public officials could be sufficiently retaliatory to chill the exercise of First Amendment rights (citing *Cate v. Oldham*, 707 F.2d 1176, 1189 (11th Cir. 1983)); *Dillon v. Boyce*, 1995 WL 116476, at *4 (E.D.N.Y. 1995).

Finally, the sole authority defendants cite only supports Loumiet's position. In *Bank of Jackson County v. Cherry*, an Eleventh Circuit opinion, the Farmers Home Administration debarred the plaintiff from participating in federal funds as a litigation tactic to coerce a favorable settlement in an ongoing dispute. 980 F.2d 1362, 1370 (11th Cir. 1993). The court found that plaintiff's First Amendment violation through coercion theory was not a "clearly established" right and, in any event, the debarment had no "lasting stigma associated with it" therefore distinguishing the case from traditional retaliatory prosecution cases. Moreover, the government's actions in *Cherry* served many "legitimate objectives," whereas the criminal retaliatory prosecutions did not. *Id*. The defendants cannot seriously contend that the OCC Action was like the one in *Cherry* where here (i) the OCC asked to ban Mr. Loumiet ***for life*** from representing FDIC-insured banks (Compl. ¶75) and (ii) the action served no "legitimate objectives," and, instead, was "frivolous" (*Loumiet*, 650 F.3d at 802). Therefore, *Cherry* is entirely distinguishable, even if we were in the Eleventh Circuit, and not in the D.C. Circuit, which had found by 2006 that retaliatory prosecution in all forms—civil, criminal, and administrative—violated the First Amendment.

2. Loumiet has also pleaded a Fifth Amendment claim, which was also clearly established in 2006

Loumiet also incorporates his arguments in **Section II.B** below as to the sufficiency of the Fifth Amendment claim. Moreover, we note that the Individual Defendants made no effort to address whether this right was clearly established. Consequently, they are not entitled to qualified immunity from this claim.

II. Loumiet Plausibly Pleaded Constitutional Violations Rendering Inapplicable the Discretionary Function Exception under the FTCA

In remanding the case to this Court, the D.C. Circuit held that "the FTCA's discretionary-function exception does not provide a blanket immunity against tortious conduct that a plaintiff plausibly alleges also flouts a constitutional prescription," and instructed the Court to determine "whether Loumiet's complaint plausibly alleges that the OCC's conduct exceeded the scope of its constitutional authority so as to vitiate discretionary function immunity." *Loumiet III*, 828 F.3d at 943. Predictably, the Government argues that Loumiet has not plausibly pleaded *any* facts that would support *any* constitutional violation. *See* Mot. at 6. If this were true, one is forced to wonder why the D.C. Circuit issued the two prior opinions that it did. The question begets the answer—Loumiet has adequately pleaded violations of the First and Fifth Amendment, rendering the FTCA's discretionary function exception inapplicable.

A. Loumiet adequately pleaded a First Amendment retaliation prosecution claim

Ignoring that the Supreme Court ever decided *Hartman v. Moore* in 2006, the Government reaches back to 1987 for what it claims is the standard for pleading a retaliation claim under the First Amendment. *See* Mot. at 7 (citing *Haynesworth*, 820 F.2d at 1256 n. 93)). However, *Haynesworth* is no longer the prevailing law when it comes to setting what a plaintiff needs to prove retaliation claims. Instead, *Hartman* set the standard. Three allegations are

required: (1) constitutionally protected speech; (2) a retaliatory prosecution; and (3) a causal link between the speech and the decision to prosecute. *E.g., Pellegrino v. U.S. Transp. Sec. Admin.*, 855 F. Supp. 2d 343, 360 (E.D. Pa. 2012) ("In order to establish a retaliatory prosecution claim, a plaintiff must plead '(1) constitutionally protected conduct, (2) retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and (3) a causal link between the constitutionally protected conduct and the retaliatory action.'"). Loumiet has alleged each element in sufficient detail to meet the applicable pleading standard.

The Government doesn't take issue with the first two elements.[25] It instead attacks the causal link. *See* Mot. at 7 ("Loumiet fails to allege facts sufficient to permit the Court to draw a reasonable inference that OCC officials commenced an enforcement action to retaliate against him for the exercise of his First Amendment rights."). However, it is important to understand what is, and is not, required to allege a retaliatory prosecution claim. On this issue, *Hartman* is instructive.

Contrary to the Government's argument, Loumiet is not required to allege an *actual* agreement between the prosecutor and non-prosecuting defendants. *See* Mot. at 7-8 (arguing that Loumiet need plead that the defendants "conspired to find some means to retaliate," or "agreed to retaliate against Loumiet"). The *Hartman* Court explained that retaliatory prosecution claims are different from other retaliation claims because they require a plaintiff to prove that "the retaliatory animus of one person [caused] the action of another" (as opposed to "the retaliatory animus of one person [caused] that person's own injurious action"). *Hartman*, 547 U.S. at 262. Recognizing this difference, the Court created a rule to bridge this "causal gap." The rule is as follows—a First Amendment retaliatory prosecution claim will lie where a plaintiff pleads and

[25] To the extent there is any dispute, Loumiet refers the Court to his prior Opposition, at pages 41 to 48, which spell out in detail the protected speech and the retaliation suppressing the speech.

proves a retaliatory motive on behalf of the instigators and a lack of probable cause underlying the decision to prosecute. *Id*. at 265 ("a retaliatory motive on the part of an official urging prosecution combined with an absence of probable cause . . . are reasonable grounds to suspend the presumption of regularity behind the charging decision . . . and enough for a prima facie inference that the unconstitutionally motivated inducement infected the prosecutor's decision to bring the charge.).

Here, Loumiet has pleaded a prima facie case of a but-for causal connection. As for the retaliatory motive, Loumiet has pled that (1) he did not prepare the second Greenberg report to the OCC's liking and did not reach the conclusions they wished despite being pressured to do so at a February 2001 meeting at OCC headquarters (*see* Compl. ¶¶ 37-43); (2) he cosigned Hamilton's 2001 civil rights complaint against the OCC (*id.* ¶¶ 56, 60); (3) he sent letters to the OIG that embarrassed and angered Rardin, Schneck, and Sexton (*see id.* ¶¶ 52, 61) (the instigators); (4) he traveled to Washington D.C. and met with an OIG attorney to discuss the letters (*id.* ¶ 55); (5) representatives of the OCC met with the OIG to discuss the letters and ultimately persuaded their OIG counterparts that it was not necessary for them to look into the matters, since the OCC itself would do so (*id.*); and (6) defendants made statements in pre-suit negotiations that Loumiet had "gone too far" and "had to pay" (*id*. ¶ 64). This is more than enough to establish retaliatory motive—Rardin, Schneck, and Sexton were angered and embarrassed by Loumiet criticizing their behavior to the OCC and the OIG. *See, e.g.*, *Rehberg*, 611 F.3d at 850 (finding sufficient allegations that defendants "acted in retaliation for [plaintiff's] criticisms . . . and that chilling [plaintiff's] speech was a motivating factor in . . . investigating and prosecuting [plaintiff]").

Moreover, retaliatory motive is reinforced where probable cause is absent. *Hartman*, 547 U.S. at 261 (pleading lack of "probable cause . . . will tend to reinforce the retaliation evidence

and show" the retaliatory animus). Not only did Loumiet extensively allege the wealth of evidence pointing to the frivolous nature of the prosecution (*see, e.g.*, Compl. ¶¶ 73-80, 87-90, 93-105), but the D.C. Circuit also concluded that the prosecution was not "substantially justified," which is a charitable way of saying that the prosecution was "frivolous." *Loumiet EAJA*, 650 F.3d at 797-798, 802; *Loumiet III*, 828 F.3d at 938 ("After prosecuting Loumiet for nearly three years, culminating in a three-week trial, the OCC dismissed its enforcement action against him—an action which this court has since described as not 'substantially justified.'"). Thus, Loumiet has plausibly alleged a First Amendment retaliatory prosecution claim.

After ignoring the standard, the Government also asks the Court to ignore the inferences it should logically draw from these well-pleaded allegations. For example, the Government argues that "[a]t most, the Complaint's allegations . . . allow the 'sheer possibility' that the defendants pursued a retaliatory" action, and that the allegations are "do not permit the court to infer more than mere possibility of misconduct . . . ." *See* Mot. at 7-8. The Court should reject this invitation to error. *Hartman* and its progeny explain that pleading a "retaliatory motive on the part of a 'non-prosecuting official' combined with an absence of probable cause will create 'a prima facie inference that the unconstitutionally motivated inducement infected the prosecutor's decision to bring the charge.'" *Rehberg*, 611 F.3d at 849 (citing *Hartman*, 547 U.S. at 265); *accord Pellegrino*, 2014 WL 1489939, at *15 ("an official that engineers a criminal prosecution lacking probable cause is likely to have been impelled by malicious motivation"). Nothing more is required of Loumiet—he has adequately pleaded a First Amendment retaliatory prosecution claim, rendering the FTCA's discretionary function exception inapplicable.[26]

[26] The Government's "information and belief" argument is much ado about nothing. While the Government correctly notes that the "*Iqbal/Twombly* pleading standard does not prevent a plaintiff from pleading facts alleged upon information and belief where the facts are peculiarly within the possession and control of the defendant, ***or*** where the belief is based on factual

B. Loumiet adequately pleaded a Fifth Amendment claim

Loumiet also has adequately pleaded that the Government violated the Fifth Amendment. The D.C. Circuit recognizes a "stigma plus" and "reputation plus" due process claim. *O'Donnell v. Barry*, 148 F.3d 1126, 1140 (D.C. Cir. 1998). Such a claim lies where a plaintiff alleges (1) harm beyond reputation, such as loss of employment, or a demotion in rank and pay; (2) the government has stigmatized plaintiff's reputation by, for example, "charging [him] with dishonesty" or "unprofessional conduct"; and (3) the stigma "has hampered future employment prospects." *Jefferson v. Harris*, 170 F. Supp. 3d 194 (D.D.C. 2016) (denying motion to dismiss). The only difference between pleading a "stigma plus," versus a "reputation plus" claim, is the former requires allegations of "official speech," whereas the latter only requires allegations of "official action." *Id*. Loumiet has adequately pleaded both.

The "stigma" here is undeniable. Mr. Loumiet had never been the subject of any complaint in almost 29 years of practicing law. Compl. ¶106. For 16 years, his colleagues gave him the highest possible ratings for quality and ethical behavior in the Martindale-Hubbell Legal Directory. *Id*. The retaliatory prosecution erased twenty-nine years' worth of hard work. In it, the OCC alleged that Loumiet (1) made "materially false statements and misleading assertions (Compl. ¶¶ 73, 76, 91); (2) "suppressed evidence" (Compl. ¶¶ 47, 73, 78, 82, 91); and (3)

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information that makes the inference of culpability plausible," the Government conveniently ignores the word "or," and everything that comes before it. Mot. at 8 (citing *Jefferson v. Collins*, 905 F. Supp. 2d 269, 288-89 (D.D.C. 2012)). Instead, the Government focuses only on plausibility, which as demonstrated above, is clearly satisfied here given the Government's lack of probable cause to prosecute Loumiet, as already established by the DC Circuit in *Loumiet EAJA*. Importantly, although the Government glosses over it, it is indisputable that the facts and evidence relevant to this case are in the Government's exclusive possession and control, as is usually the case in retaliation claims. On the Government's reasoning, only when a government official voluntarily confessed retaliatory intent to a person being pursued by the Government, would "plausibility" exist. On this standard, the Supreme Court was obviously mistaken in its *Hartman* decision in not dismissing that case for lack of plausibility.

"concealed crimes" (Compl. ¶¶ 47, 82, 85, 91), among other false accusations. This satisfies the second prong of a stigma/reputation-plus claim, which requires stigmatization statements such as accusations of "dishonesty" or "unprofessional conduct."

Loumiet also alleged that this stigma not only resulted in a tangible change in status, evidenced by a demotion in rank and pay, but also has hampered his future employment prospects. As summarized by the D.C. Circuit, the "frivolous enforcement proceeding caused significant damage: his banking-law practice evaporated, his income fell significantly, [and] he dropped several partnership levels at his firm . . . ." *Loumiet III*, 828 F.3d at 939. In fact, while the OCC did not succeed in its requested punishment—that Loumiet be banned for life from representing banks—the requested punishment was largely self-fulfilling. To this day, Loumiet has rarely been able to pursue his chosen field of banking practice because of the defendants' actions. Compl. ¶106. Thus, the mere bringing of these charges served as a virtual death knell for Loumiet's banking practice, to which he had devoted many years.

The right to pursue one's profession is a recognized right that cannot be deprived without due process. *Kivitz v. Sec. & Exch. Comm'n*, 475 F.2d 956, 962 (D.C. Cir. 1973) ("we have always viewed an attorney's license to practice as a 'right' which cannot lightly or capriciously be taken from him"); *see also Charlton*, 543 F.2d at 907; *Phillips v. Vandygriff*, 711 F.2d 1217, 1222 (5th Cir. 1983) ("excluding a person from an occupation by making false defamatory statements is actionable") (citing *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 573 (1972)); *Reeves v. Shalala*, 56 Soc. Sec. Rep. Serv. 311 (N.D. Cal. 1998) ("Plaintiff has a property interest in continuing to practice as an attorney representative before the [Social Security Administration].").

The Government's only response is that the OCC afforded Loumiet due process before stripping him of his practice. Mot. at 21. This misses the point. Notice and opportunity to be

heard must occur *pre-deprivation*. *See, e.g, U.S. v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993). Here, the deprivation happened the instant the defendants made their false, baseless charges public. No name-clearing years after that point could reverse the reputational harm and resulting deprivation of his right to practice law as a banking lawyer. The only supposed "due process" afforded Loumiet was the opportunity to defeat in court the self-same embarrassed, angered, and blinded-by-retaliation individuals, who were hungry to prosecute him and make him "pay." Compl. ¶61. This process was not due process; due process requires "at minimum, that the government provide notice and some kind of hearing before final deprivation of a property interest." *Propert v. Dist. of Columbia*, 948 F.2d 1327, 1331 (D.C. Cir. 1991). Loumiet was not even afforded the minimum due process because the defendants tossed out any procedural protections, violated internal rules and protections for charging private citizens, and deprived Mr. Loumiet of a right with no meaningful opportunity to be heard. Compl. at ¶ 72. Loumiet has pled a plausible Fifth Amendment due process claim.

III. The Law Enforcement Proviso Does Not Bar the Malicious Prosecution Claims

Trying to balance between escaping liability and retaining its powers to search and seize evidence from national banks and affiliated parties, the Government is careful not to deny Mr. Loumiet's allegations that the defendants acted as investigative officers, empowered by federal statutes and regulations to execute searches and seize evidence. *See* Mot. at 10-13. Instead, the Government hopes through sophistry it can persuade the Court the defendants are just run-of-the-mill regulators, stripped of their ability to search and seize evidence. But the reality is that the OCC's investigative agents have massive power, which the Government cannot wipe away on this motion by merely labeling them something they are not. Instead, if the Court were to look past the label, it would see that Sexton and Schneck are, in fact, investigative officers "empowered by law to execute searches, to seize evidence, ***or*** to make arrests for violations of

Federal law." *See* 28 U.S.C. § 2680(h) (emphasis added). Therefore, the so-called "law enforcement proviso" does not apply.

For example, 12 U.S.C. § 484 grants the "the OCC or an authorized representative of the OCC" with so-called "visitorial powers," which allows federal agents to (i) examine a bank; (ii) inspect a bank's books and records; (iii) regulate and supervise the bank; and (iv) enforce compliance with any applicable federal or state laws concerning those activities. The agents also are empowered to engage in comprehensive investigations, where they can command attendance at depositions, administer oaths, and depose officers, directors, employees, or agents of the bank under oath. 12 U.S.C § 481; *see also* 12 U.S.C § 1820. And the agents are empowered to "issue, revoke, quash, or modify subpoenas, and subpoenas duces tecum" and to "make rules and regulations with respect to any such proceedings, claims, examinations, or investigations . . . ." 12 U.S.C. Section 1818(n); *see also Hamilton Bank*, 227 F. Supp. 2d at 3 (discussing an agent's power to review a bank's books and records, audit selected transactions, and evaluate the bank's systems and management).

The OCC's agents, including the Individual Defendants, are granted broad power to search a bank's books and records, seize a bank's evidence, investigate a bank, and demand compliance through enforcement actions, all of which extends to the bank's officers, directors, and employees. There is very little difference between the defendants here and the postal inspectors in *Sutton v. U.S.*, where the Fifth Circuit reversed a district court's finding that the inspectors were not investigative officers under 28 U.S.C. § 2680. 819 F.2d 1289 (5th Cir. 1987). The court remanded the case for the district court to make explicit factual findings and determine whether postal inspectors were "investigative or law enforcement officer[s]" under § 2680.

Particularly important to *Sutton*'s analysis was that the postal service inspectors could, among other things: (1) investigate postal offenses and civil matters relating to the Postal

Service; (2) protect the mails and enforce postal laws; (3) conduct investigations; (4) present evidence to the Department of Justice and U.S. Attorneys in investigations of a criminal nature; and (5) serve warrants and issue subpoenas. *See Sutton*, 819 F.2d at n.8. The district court found these characteristics dispositive, especially the fact that they could investigate postal offenses and make arrests. *Sutton v. United States*, H-83-6674 (S.D. Texas, Sept. 26, 1996) (unpublished).

Not only are the factual similarities in *Sutton* enough to compel the conclusion that the defendants here are investigative officers, but the kind of factual inquiry *Sutton* instructed the district court to engage in should also occur here. Loumiet has not been able to conduct discovery, and should be allowed to review the OCC's policy manuals, rule books, job descriptions, and other internal documents. These documents will prove that the defendants, in addition to their powers of search and seizure enumerated by statutes and regulations, do in fact search and seize evidence, which is all that Loumiet need show under § 2680. *See* 28 U.S.C. § 2680(h) (one need only show that an agent can "execute searches," "seize evidence," ***or*** "make arrests"). Therefore, dismissal is inappropriate at this stage. *E.g., Pellegrino*, 855 F. Supp. 2d at 357 (finding that discovery is needed to determine whether transportation safety officers were authorized to execute searches, seize evidence, or make arrests such that the U.S. may be liable for their intentionally tortious conduct under § 2680(h)).[27]

[27] *Biase v. Kaplan*, 852 F. Supp. 268, 281-82 (D. N.J. 1994), is inapplicable because it overlooks the fact-intensive nature of determining whether an individual is an investigative officer. Moreover, the court's holding there was limited to the bank examiners employed by the Office of Thrift Supervision. The court was not presented with whether officers similar to the caliber of Sexton and Schneck were investigative officers. *Biase*, 852 F. Supp. at 281. Indeed, we have been unable to find any published opinion discussing whether the OCC or its investigative agents are "investigative officers" under § 2680(h). To the contrary, numerous cases exist suggesting that they are. *Abrams v. U.S. Dept. of Treasury*, 458 F. Supp. 2d 304, 306 (N.D. Tex. 2006) (upholding subpoena where OCC was engaged in legitimate law enforcement inquiry); *Sutton*, 819 F.2d at n. 8.

Finally, the Government's assertion that Loumiet's malicious prosecution claim should be dismissed because "federal government attorneys" are not "investigative or law enforcement officers" under Section 2680(h) is misleading. These cases apply to federal prosecutors, not the defendants. In fact, in both of the cases cited by the Government, the courts make clear that their holding is limited to federal prosecutors such as Department of Justice Attorneys and United States Attorneys—not all federal government employees with law degrees. *Gray v. Bell*, 542 F. Supp. 927, 933 (D.D.C. 1982); *Moore v. United States*, 213 F.3d 705, 713 n.7 (D.C. Cir. 2000).

IV. Loumiet's Invasion of Privacy Claim is Timely and Well-Pleaded

The Government makes two arguments as to the invasion of privacy claim. First, it argues that the claim remains time-barred under *Loumiet II* (*see* Mot. at 13), and the continuing-violations doctrine does not apply. Second, it argues that Loumiet did not adequately plead this claim. *Id*. at 14. Both arguments are without merit.

A. This Court's ruling in Loumiet II does not withstand the D.C. Circuits' Loumiet III, because Loumiet II found that the FTCA's discretionary function exception precluded Loumiet from relying on the OCC's retaliatory prosecution as a basis to toll the accrual of the invasion of privacy claim

To understand why the Government's first argument is incorrect, it is necessary to go through the procedural history of how we got here. In its first motion to dismiss, the Government argued that Loumiet's FTCA claims were untimely (*see* D.E. 10-1 at 9), to which Loumiet demonstrated (*see* Opp. [D.E. 19] at 49) that the retaliatory prosecution tolled the accrual of all FTCA claims until the OCC dismissed its charges on July 27, 2009. Loumiet alleged that he presented his administrative claim to the OCC within two years after this date, rendering his FTCA claims timely under the continuing violations doctrine. *See* Opp. at 53.

In *Loumiet I*, the Court concluded that the continuing violations doctrine applies to toll the accrual of all FTCA claims (including the invasion of privacy claim) until "the final

disposition of the case," that is, on July 27, 2009. 968 F. Supp. 2d at 154. Although the Court adopted and applied the doctrine in *Loumiet I*, it nevertheless held that the FTCA's discretionary function exception immunized the OCC from all liability arising out of the OCC's "decision to and conduct in prosecuting" Loumiet. *Id*. at 158. Accordingly, the Court ruled that "to the extent Loumiet's claims for intentional infliction of emotional distress, invasion of privacy, negligent supervision, and conspiracy allege harms suffered from OCC officials' decision to and conduct in prosecuting him, they are . . . dismissed." *Id*. However, the Court carved out from *Loumiet I* a sliver of the invasion of privacy claim that was based on "harm suffered from the statements made by the prosecuting OCC officials to the press." *Id*.

After this ruling, the Government sought to reconsider *Loumiet I* based, in part, on the libel/slander exception. *See* D.E. 26. The Court denied reconsideration as to that aspect of *Loumiet I*. *Loumiet v. U.S.*, 65 F. Supp. 3d 19, 27 (D.D.C. 2014). On September 17, 2014, the Court held a Rule 26 conference wherein counsel for the OCC raised for the first time that it had a jurisdictional argument directed towards the invasion of privacy claim. Over the objection of Loumiet, the Court authorized letter briefing (*see* D.E. 47), after which it authorized the OCC to file a second motion to reconsider (*id*.).

The Government filed its second motion to dismiss on November 5, 2014, in which it renewed the argument as to the untimeliness of the invasion of privacy claim, which was now pared down to statements that were made to the press. *See* D.E. 50. The Government argued that, "to the extent Mr. Loumiet contends that the continuing tort doctrine applies because the OCC's statements to the press were somehow part of the alleged retaliatory prosecution, this argument fails because the Court has twice held that the FTCA's discretionary function exception immunizes the United States from all claims arising out of the agency's decision to and conduct in prosecuting him." *See* D.E. 50 at 11. The Court agreed in *Loumiet II* and refused to consider

any conduct that related to the decision to prosecute, including the OCC's decision on July 27, 2009. 106 F. Supp. 3d at 226.[28] Loumiet then appealed.

Given the D.C. Circuit's ruling in *Loumiet III* that Loumiet's claims are not barred by the discretionary function exception, the OCC can no longer argue that Loumiet cannot rely on the prosecution itself as a basis to toll the accrual of his invasion of privacy claim. Accordingly, Loumiet's invasion of privacy claim—which like all other FTCA claims is based on the prosecution itself—is timely.

B. Loumiet's invasion of privacy claim is well-pleaded

Finally, the Government argues that Loumiet has not adequately alleged his invasion of privacy claim, despite the fact that the Court already has held that "plaintiff ***clearly alleged*** in his Complaint that his invasion of privacy claim was based on the dissemination of '*private* facts that would not otherwise have become public' and not on the defamatory aspect of these facts." *Loumiet II*, 2014 WL 4100111, at *5 (emphasis in original). The Government fails to demonstrate any reason why the Court should reconsider that aspect of its order.

Even if the Court were to reconsider its order, Loumiet has alleged that the Government publicly disclosed private, privileged, and protected facts about his representation of Hamilton Bank that were offensive to a reasonable person. The first statement happened on November 6, 2006, when the Government disclosed private facts in the Notice of Charges (Compl. at ¶118), including (1) the privileged and private scope of Loumiet's representation of Hamilton Bank, (2) the privileged and private results, including what he did (and did not) conclude from his

[28] The Court also held that Loumiet did not plead this decision as a basis for the invasion of privacy claim. Loumiet respectfully submits that this elevates form over substance because he incorporated that allegation into Count II, and respectfully requests leave to amend his Complaint to re-plead his invasion of privacy count, if necessary. Moreover, this technical argument is irrelevant because *Loumiet III* holds that Loumiet no longer is confined to "statements made to the press" and may argue timeliness based on the prosecution itself.

investigation, and (3) the privileged and private fees he allegedly collected from the investigation.[29]

The second statement happened in the form of an October 3, 2007 press release (Compl. at ¶118),[30] when the Government again disclosed (1) the privileged and private scope of Loumiet's representation of Hamilton,[31] (2) the privileged and private results of his investigation of Hamilton,[32] and (3) the privileged and private amount of fees Loumiet allegedly made from the representation.[33] The third statement happened before the October 2007 trial (*id*.), when the lead prosecutor disclosed additional privileged and private information relating to the Loumiet's representation, i.e., the "missing", "smoking gun" fax cover sheet that supposedly was not accounted for. The final statement happened when the OCC dismissed the charges against Loumiet (*id*.), and issued an extensive opinion, disclosing even more detail about the results of Loumiet's investigation.[34] As is clear, Loumiet has specifically identified each statement, and the

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[29] *See http://www.occ.gov/news-issuances/news-releases/2007/nr-occ-2007-107a.pdf* at 1-2, last visited November 24, 2014.

[30] *See http://www.occ.gov/news-issuances/news-releases/2007/nr-occ-2007-107.html*, last visited November 24, 2014.

[31] The statement disclosed that "[i]n 2000, the bank and holding company retained Mr. Loumiet and his former law firm to investigate the unlawful transactions, and the credibility of the bank's officers."

[32] The statement disclosed that "[t]he OCC has charged that in two reports co-authored by Mr. Loumiet and his partner at his former law firm, Mr. Loumiet protected the bank officers by making materially false and misleading assertions, and by suppressing material evidence."

[33] The statement disclosed that "[f]ollowing the reports, the bank officers steered additional business to Mr. Loumiet and his former law firm. The law firm collected $1.16 million in fees from the bank and the holding company during 2001-02, and Mr. Loumiet received a share of these fees."

[34] *See In re Carlos Loumiet*, Final Decision and Order, Department of the Treasury, Office of the Comptroller of the Currency, http://www.occ.gov/topics/laws-regulations/final_decision_and_order.pdf, last visited November 24, 2014 (the "ALJ Opinion"). For example, the opinion disclosed that "[b]ecause the conclusion reached by Mr. Loumiet in the reports (that there was no convincing evidence showing that bank officers had knowingly engaged in the adjusted price trades) departed so strikingly from the evidence in the reports . . . ." The opinion also had an entire section dedicated to Loumiet's investigation and his conclusion that was not included in any of the prior statements. *See* ALJ Opinion at 5-9.

statements themselves clearly lay out the private facts regarding Loumiet's representation, the results of that representation, and his monetary compensation, among other things.[35] All of these facts are either attorney-client or work-product protected.

The Government argues that Loumiet doesn't allege how public disclosure of these facts "would have been 'offensive' to a reasonable person." Mot. at 16. First of all, Loumiet clearly alleges that "[t]he facts disclosed would be offensive to any reasonable person." Compl. ¶118. Nothing more is required, and the Government cites no authority for the proposition that Loumiet must somehow specifically explain how the disclosure was offensive. Moreover, "offensiveness" is a fact question that cannot be decided on a motion to dismiss. *Vassiliades v. Garfinckel's, Brooks Bros.*, 492 A.2d 580, 588 (D.C. 1985) ("Although the photographs may not have been uncomplimentary or unsavory, the issue is whether the publicity of Mrs. Vassiliades' surgery was highly offensive to a reasonable person, a factual question usually given to a jury to determine.").

And even if "offensiveness" were not a fact question (it is), and even if there were authority requiring Loumiet to describe "offensiveness" it in his complaint (the Government has pointed to none), it is self-evident that disclosure of a confidential, private, and privileged representation would be offensive to a reasonable person, especially to a lawyer, which is the applicable standard. *Vassiliades*, 492 A.2d 580, 588 ("Whether something is a 'private' fact is a determination that "must be relative to the customs of the time and place, to the ***occupation of the plaintiff*** and to the habits of his neighbors and fellow citizens.") (emphasis added). As an

[35] The Court can and should take judicial notice of these facts because they are a matter of public record. *See Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1228 (D.C. Cir. 1993). If the Court were to not consider these facts, Loumiet respectfully requests that the Court grant him leave to amend his complaint. *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C.Cir.1996) (noting that "[a] dismissal with prejudice is warranted only when a trial court 'determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency'").

attorney, Loumiet reasonably expected that the details of how he represented a client, and conducted his representation, and what he was supposedly paid, would remain privileged. Disclosing his confidences with his client, as well as the result of his representation and his supposed compensation, revealed to the world what Loumiet did (and did not) do in his representation of Hamilton Bank. That public disclosure would be offensive to any lawyer practicing law, and is one of the reasons why the attorney-client privilege exists in the first place.

Lastly, the Government argues that it did not unlawfully disclose to the public "private facts," because Loumiet's privileged and protected representation and investigation of Hamilton Bank was a matter of "public record." Mot. at 15. The Government cannot seriously contend that Loumiet's representation and investigation was a matter of "public record." The attorney-client relationship is one of the most private and protected relationships that exist in American jurisprudence, and it certainly cloaks from disclosure internal investigations. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 757 (D.C. Cir. 2014) (reversing district court's ruling that an internal investigation was not privileged). Loumiet's investigation of Hamilton Bank also was work-product protected. Thus, the Government had no justification to publicize the confidential, privileged, and private aspect of that representation, as the D.C. Circuit already has found. *Loumiet EAJA*, 650 F.3d at 802 (finding prosecution was "without substantial justification").

The Government misses the point when it argues that "all enforcement hearings are open to the public" and that statutes require it to publicly disclose notice of charges and final orders. Motion at 15. The "public record" argument only works when the invasion of privacy related to a fact that ***already existed*** in the public record. For example, in *Cox Broadcasting Corp. v. Cohn*, a case the Government cites, the plaintiff (the father of a deceased rape victim) alleged that the defendant (a broadcasting company that owned a television station) unlawfully disclosed in a news broadcast that his daughter was the rape victim. 420 U.S. 469, 472-73 (1975). The Supreme

Court, however, precluded the father from pursuing his claim, because "the name of the victim appears in the indictments" and the parties did not dispute "that the indictments were public records available for inspection." *Id*. Consequently, "[t]hose who see and hear what transpired can report it with impunity." *Id*. (citing *Craig v. Harney*, 331 U.S. 367, 374 (1947)).

Loumiet is not suing the Government for reporting about facts there were already part of the public record, like the plaintiff in *Cohn*. He is suing the Government because it *made public* facts that were privileged and private, regarding his representation and investigation of Hamilton Bank, and his supposed compensation. Without any justification whatsoever, the Government vindictively disregarded one of the most sacred privileges that exists in our legal system, and publicized, multiple times, in multiple formats, including directly to the press, private facts that should have remained private. Thus, it does not matter that enforcement proceedings are required to be open to the public, or that the notice of charges is a matter of public record. The very fact that the Government published those statements is what makes its conduct wrongful.

The Government also argues that Loumiet's investigation was an "event[] of legitimate concern to the public" and that judicial proceedings "are without question events of legitimate concern to the public." Motion at 15-16 (citing as its only authority *Cohn*, 420 U.S. at 492). That's not what *Cohn* held. It concerned the media's reporting of events, which has no resemblance to this case:

> The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public and ***consequently fall within the responsibility of the press to report the operations of government***."

Cohn, 420 U.S. at 492 (emphasis added). As the Supreme Court framed it, *Cohn* dealt with "[t]he special protected nature of accurate reports of judicial proceedings . . . ." *Cohn*, 420 U.S. at 492. Loumiet's case is not about Government's accurate reporting of judicial proceedings. He has

sued the Government for its unlawful disclosure of private facts based on no other reason but to retaliate against Loumiet.

Moreover, the "legitimate public concern" argument is a defense that a broadcaster (like the one in *Cohn*) typically invokes. In fact, the Restatement (Second) of Torts, comment g, lists as examples of "legitimate public concern" matters of the kind customarily regarded as "news":

> [P]ublications concerning homicide and other crimes, arrests, police raids, suicides, marriages and divorces, accidents, fires, catastrophes of nature, a death from the use of narcotics, a rare disease, the birth of a child to a twelve-year-old girl, the reappearance of one supposed to have been murdered years ago, a report to the police concerning the escape of a wild animal and many other similar matters of genuine, even if more or less deplorable, popular appeal.

E.g. Veilleux v. Nat'l Broad. Co., 8 F. Supp. 2d 23, 38 (D. Me. 1998) (citing Restatement (Second) of Torts, comment g). The Government cannot seriously contend that it disclosed anything of "legitimate" public concern, especially after the D.C. Circuit has found that the Government's entire prosecution was frivolous, which means that it did not involve any public concern. A frivolous prosecution cannot be an event of "**legitimate** concern to the public."[36]

CONCLUSION

For the reasons stated above, the Court should deny the Motions. If the Court finds any aspect of Loumiet's claims insufficiently pleaded, Loumiet respectfully requests leave to amend pursuant to Fed. R. Civ. P. 15(A)(2), which requires that leave be given when justice so requires. The Government will suffer no harm if Loumiet is permitted to amend his complaint because (1)

[36] Even if the Government were to improperly argue on reply that the Hamilton Bank closure involved some public concern, the fact that Loumiet "engage[d] in an activity in which the public can be said to have a general interest does not render every aspect of their lives subject to public disclosure" and "[t]o hold as a matter of law that private facts as to such persons are also within the area of legitimate public interest could indirectly expose everyone's private life to public view." *Veilleux*, 8 F. Supp. 2d at 38.

no scheduling order has been entered, (2) no initial disclosures have been exchanged, (3) no depositions have been taken, and (4) with the exception of Loumiet's First Request for Production of Documents served just days ago, no discovery of any kind has taken place. On the other hand, Loumiet will be stripped of his opportunity to seek redress for the Government and Individual Defendants' malicious devastation of his banking law career.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that on October 28, 2016, this document was filed with the Clerk of the Court using CM/ECF. I also certify that this document is being served this day on all counsel of record identified on the attached service list via transmission of Notices of Electronic Filing generated by CM/ECF.

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