No. 15-1389

In the Supreme Court of the United States

WAYNE M. ANDERSON, PETITIONER

v.

ASHTON B. CARTER, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that petitioner's complaint does not raise a First Amendment retaliation claim.

2. To the extent petitioner raised a First Amendment retaliation claim, whether the court of appeals correctly concluded that petitioner's request for declaratory relief is moot.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 802 F.3d 4. The opinion of the district court (Pet. App. 16a-41a) is reported at 20 F. Supp. 3d 114.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2015. A petition for rehearing was denied on February 11, 2016 (Pet. App. 42a-43a). The petition for a writ of certiorari was filed on May 11, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Wayne Anderson, is a freelance journalist who, at the time of the events giving rise to this action, was embedded with the Minnesota Army National Guard in Afghanistan. Pet. App. 17a-18a. In

July 2010, during his first week in Afghanistan, petitioner filmed casualties of a shooting at a nearby military base and reported on the incident. *Id.* at 53a-54a. His story and video were published online by the *Washington Times* on July 29, 2010. *Id.* at 18a.

The next day, petitioner was notified that his embed status would be terminated. Pet. App. 18a. On July 31, 2010, Colonel Hans E. Bush, one of the respondents, reviewed the termination request and approved petitioner's termination, after finding that petitioner had posted video of wounded soldiers in violation of media ground rules, which require written permission from wounded soldiers—or notification of next of kin in the case of a fatality—before dissemination. *Id.* at 3a, 18a-19a.[1]

Upon his return to the United States, petitioner appealed the termination of his embed status. Pet. App. 19a. In January 2011, Colonel Gregory Julian, Chief of Public Affairs of Supreme Headquarters Allied Powers Europe and Allied Command Operations, upheld petitioner's termination. *Id.* at 3a-4a, 19a. In separate correspondence, Colonel Julian informed petitioner that he could reapply for accommodation as an embed journalist 90 days after his "disembeddment." C.A. App. 87.

2. Petitioner, proceeding pro se, filed a complaint in the United States District Court for the District of Columbia against then-Secretary of Defense Robert Gates, then-Secretary of the Army John M. McHugh,

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[1] As part of the process of becoming an embed reporter, petitioner signed a copy of the International Security Assistance Force's "Media Accommodation and Ground Rules Agreement," acknowledging that he had read the media ground rules and would abide by them. Pet. App. 17a.

Colonels Bush and Julian, and Colonel Sean Mulholland. Pet. App. 44a-64a. The complaint sought relief against respondents in both their individual and official capacities. *Id.* at 49a-51a. Count 1 alleged that petitioner "possessed a constitutionally protected interest and he was subsequently deprived of that interest without a meaningful hearing * * * in violation of his procedural due process rights." *Id.* at 59a. Count 1 further alleged that respondents "caused the termination of [petitioner's] journalist-embed status without just cause of his constitutionally protected speech." *Id.* at 60a. Count 2 alleged that by signing the Media Accommodation and Ground Rules Agreement (see note 1, *supra*), petitioner had entered into a contract with the U.S. Army and that respondents had breached that contract. Pet. App. 60a-62a. Count 3 sought a "judicial declaration that [respondents'] conduct deprived [petitioner] of his rights under the U.S. Constitution and the laws of the United States." *Id.* at 63a. In addition to declaratory relief, petitioner also asked the court to "enjoin [respondents] to reverse the Memorandum terminating [his] embed accommodation status without procedural due process." *Ibid.*; see *id.* at 63a-64a.

3. The district court granted respondents' motion to dismiss. Pet. App. 16a-41a. The court concluded that it lacked personal jurisdiction over respondents in their individual capacities because they had not been properly served. *Id.* at 23a-28a. The court nevertheless addressed the merits of petitioner's constitutional claims and dismissed them under Federal Rule of Civil Procedure 12(b)(6). The court construed Count 1 of the complaint as a claim under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of*

Narcotics, 403 U.S. 388 (1971).[2] The court concluded that petitioner had failed to state a *Bivens* claim against respondents Gates and McHugh because he did not allege that those respondents had personally participated in the alleged violations of his constitutional rights. Pet. App. 30a-31a. The court further concluded that petitioner had failed to state a claim against the remaining respondents because he did not demonstrate a clearly established right to be embedded with the military in the exercise of his First Amendment rights, *id.* at 31a-33a, or any other protected liberty or property interest of which he had been deprived without due process of law, *id.* at 34a.

The district court further concluded that it lacked subject matter jurisdiction over the breach-of-contract claim in Count 2 because petitioner had not alleged any claim for money damages as required by the Tucker Act, 28 U.S.C. 1491. Pet. App. 36a-38a. The court rejected petitioner's request for declaratory relief in Count 3 because, as the court had already determined in analyzing Count 1 of the complaint, petitioner had no viable constitutional claim to justify a declaratory judgment. *Id.* at 39a-40a.

4. The court of appeals affirmed. Pet. App. 1a-15a. Petitioner did not appeal the dismissal of his claims against respondents in their individual capacities. *Id.* at 5a. He maintained, however, that he had "sufficiently alleged 'a claim for retaliation under the First Amendment and a claim for violation of the Administrative Procedure Act'" (APA), 5 U.S.C. 701 *et seq.*

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[2] Count 1 alleged a violation of 42 U.S.C. 1983, but that provision governs state (not federal) officials. Pet. App. 28a-30a.

Pet. App. 5a (citation omitted).[3] The court concluded that it lacked jurisdiction over petitioner's claims. *Id.* at 5a-12a.

a. The court of appeals concluded that petitioner's claims were barred by sovereign immunity. Pet. App. 6a-9a. The court construed petitioner's complaint as asserting claims only under the APA, and it explained that the APA does not waive sovereign immunity for petitioner's claims because the statute expressly excludes "military authority exercised in the field in time of war" from the scope of agency action that is subject to judicial review. 5 U.S.C. 701(b)(1)(G); see Pet. App. 7a-8a.

The court of appeals left open "the possibility that under other circumstances and based on other pleadings a plaintiff similarly situated to [petitioner] might bring a retaliatory claim for violation of First Amendment rights within the jurisdiction of the court," but it concluded that "this is not that case." Pet. App. 9a. The court explained that although petitioner's complaint "cited the First Amendment and alleged its violation in general terms," petitioner's prayer for relief "made it plain that his complaint was for a lack of 'procedural due process,' not for the violation of his First Amendment rights." *Ibid.*

The court of appeals further concluded, in the alternative, that "even if we err[ed] in our determination that [petitioner] brought no justiciable claim in the first instance, any claim which he may have asserted is now moot." Pet. App. 10a. The court noted (*ibid.*), that petitioner's prayer for relief asks the court "to reverse the Memorandum terminating [his]

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[3] Petitioner abandoned his breach-of-contract claim in the court of appeals.

embed accommodation status." *Id.* at 63a. The court explained that "the war in Afghanistan has drawn down" and "the remaining embed program is operated by [the North Atlantic Treaty Organization (NATO)], which is not a party to this action." *Id.* at 10a. The court thus concluded that there "appears to be nothing this court can do that will put [petitioner] back in the same position he occupied before the events alleged in the complaint and nothing the court can do to make whole any loss caused by the removal." *Id.* at 11a.

As to petitioner's request for declaratory relief, the court of appeals rejected petitioner's argument that he suffered a "reputational injury" that can "be relieved by a judicial declaration that his First Amendment rights were violated." Pet. App. 11a. The court distinguished its previous decision in *Foretich* v. *United States*, 351 F.3d 1198, 1212 (D.C. Cir. 2003), which held that the plaintiff had standing to challenge a statute enacted by Congress that restricted his right to visitation with his daughter—even though his daughter had already reached the age of majority—because "there remained among congressionally enacted statutes essentially a declaration of guilt against an untried citizen." Pet. App. 12a. In *Foretich*, the court explained that "where reputational injury derives directly from an unexpired and unretracted government action, that injury satisfies th[e] requirements of Article III standing to challenge th[e] action." 351 F.3d at 1213. The court further explained, however, that where reputational injury is the "lingering effect of an otherwise moot action," as in petitioner's case, "no meaningful relief is possible and the

injury cannot satisfy the requirements of Article III." Pet. App. 12a (quoting *Foretich*, 351 F.3d at 1212).

b. Judge Srinivasan concurred in part and dissented in part. Pet. App. 13a-15a. He agreed that the district court lacked jurisdiction over petitioner's APA claim. *Id.* at 13a. But Judge Srinivasan "read the complaint differently" from the other members of the panel and concluded that petitioner had also raised a First Amendment retaliation claim. *Id.* at 14a. He acknowledged that "[t]h[e] claim might ultimately fail on the merits for a variety of reasons," but, in his view, the claim should not have been dismissed at the outset of the case. *Id.* at 13a. He further concluded that petitioner's First Amendment claim was not mooted "by the drawdown of military operations in Afghanistan" because it was unclear at this stage of the proceedings whether NATO's administration of the embed program, together with changes to the embed requirements, have made it "impossible for the court to provide any relief bearing on a United States journalist's ability to embed." *Id.* at 14a-15a.

Judge Srinivasan further concluded that, because the order terminating petitioner's embed status "remains in effect" and "'memorializes judgments' about him * * * that inflict ongoing personal and professional harm," a declaratory judgment that pronounced respondents' actions unconstitutional "could help restore [petitioner's] reputation and status in the journalistic community, potentially affecting his ability to obtain employment." Pet. App. 15a (citation omitted).

ARGUMENT

Petitioner contends (Pet. 17-19) that the court of appeals erred in concluding that he did not raise a First Amendment retaliation claim, and he further

contends (Pet. 13-17) that the court of appeals erred in concluding that any First Amendment claim raised in his complaint would be moot in any event. The court of appeals correctly rejected those contentions on the facts presented here, and its decision does not conflict with any decision of this Court or create any split of authority that warrants this Court's review.

1. Petitioner contends (Pet. 17-19) that he adequately alleged a First Amendment retaliation claim in his complaint. That contention does not warrant review.

a. The court of appeals understood petitioner to allege that he was deprived of a First Amendment interest in the status of embed journalist without having been afforded procedural due process, and not that he was subjected to retaliation for exercising his First Amendment rights. Pet. App. 9a. Because petitioner had no First Amendment right to an embed status, the court of appeals rejected petitioner's procedural due process claim. *Ibid.*

The court of appeals' reading of the complaint is consistent with the way in which petitioner framed his allegations and arguments in the complaint. Count 1 alleged that petitioner "possessed a constitutionally protected interest and he was subsequently deprived of that interest without a meaningful hearing * * * in violation of his procedural due process rights as afforded by the Fifth Amendment." *Id.* at 59a. And petitioner's prayer for relief asked the court to enjoin respondents "to reverse the Memorandum terminating [petitioner's] embed accommodation status without procedural due process." *Id.* at 63a. Accordingly, the court correctly concluded that, although petitioner's complaint "cited the First Amendment and al-

leged its violation in general terms," it did not allege a claim for retaliation under the First Amendment. *Id.* at 9a.

In any event, the court of appeals' conclusion rests on the particular facts of this case and the specific allegations in petitioner's complaint. See Pet. App. 9a. A writ of certiorari is not warranted to review petitioner's fact-bound disagreement with the court of appeals' conclusion. See Sup. Ct. R. 10.

b. Petitioner contends (Pet. 17-19) that the court of appeals' reading of his complaint conflicts with this Court's decision in *Johnson* v. *City of Shelby*, 135 S. Ct. 346 (2014) (per curiam). In *Johnson*, police officers filed suit against the city, alleging that they were fired for exposing the criminal activities of an aldermen. *Id.* at 346. In their complaint, the plaintiffs alleged a violation of their Fourteenth Amendment due-process rights and sufficient facts to support a claim for relief. *Id.* at 346-347. The district court, however, granted summary judgment for the defendants because the plaintiffs' complaint had failed to invoke 42 U.S.C. 1983, and the court of appeals affirmed. *Johnson*, 135 S. Ct. at 346. This Court reversed, holding that plaintiffs seeking damages for violations of constitutional rights need not "invoke [Section] 1983 expressly in order to state a claim." *Id.* at 347.

The plaintiffs in *Johnson* had clearly alleged facts supporting their due-process claim and explicitly asserted a Fourteenth Amendment violation; they had merely failed to cite the statute that made that violation actionable against state officials. Here, however, having reviewed the factual allegations in petitioner's complaint and petitioner's prayer for relief, the court

of appeals concluded that petitioner's factual allegations and assertions raised a procedural due process claim, not a First Amendment retaliation claim. Pet. App. 9a. Far from requiring a "punctiliously stated theory of the pleadings," *Johnson*, 135 S. Ct. at 347 (internal quotation marks omitted), the court merely required that petitioner give respondents fair notice of the claim he was raising and the grounds upon which it rests. See *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007). The court of appeals' decision does not conflict with *Johnson.*

2. Petitioner further contends (Pet. 13-17) that the court of appeals erred in holding that any First Amendment retaliation claim raised in petitioner's complaint would be moot. Review of that issue is also unwarranted.

a. As an initial matter, the court of appeals' holding that petitioner did not adequately allege a First Amendment retaliation claim is sufficient to support the judgment. The court addressed the mootness issue only on the assumption that it was mistaken in its view that petitioner failed to plead a First Amendment retaliation claim. Pet. App. 10a. Because the court's mootness determination was not necessary to the judgment, and because the Court does not grant review on an issue unless it could affect the judgment, the court's mootness determination does not provide an independent basis for granting review. Review of that issue could affect the judgment if the Court also granted review and reversed on petitioner's factbound challenge to the court of appeals' conclusion that he did not raise a retaliation claim. But since that contention so plainly does not warrant review, there is

no basis for granting review on the court of appeals' mootness determination either.

b. In any event, the court of appeals correctly concluded that petitioner's challenge to the order revoking his embed status for violating media embed rules is moot. As the court of appeals explained, "the War in Afghanistan has drawn down, the remaining embed program is operated by NATO, which is not a party to this action," and petitioner "is at liberty to apply for the limited embed program still available." Pet. App. 10a.

Petitioner asserts that the case is not moot because the order he challenges has the lingering effect of harming his reputation. But on the facts presented here, petitioner's naked assertion of reputational harm is insufficient to keep alive an otherwise moot controversy. Importantly, while petitioner's embed status was revoked, petitioner was informed in separate correspondence that he could reapply for accommodation as an embed journalist in 90 days. C.A. App. 87. Petitioner's complaint alleges in general terms that the termination of petitioner's embed status has "prevented him from employment opportunities," Pet. App. 47a, but that vague allegation does not identify any concrete employment opportunity he lost, and thus falls far short of an allegation that could establish ongoing injury in fact. Nor does petitioner make any allegation that the order has harmed his reputation as a reporter in any concrete way. In those circumstances, petitioner's naked assertion of reputational harm is entirely speculative and insufficient to establish that the case is not moot.

Petitioner challenges (Pet. 14-15) the court of appeals' distinction between orders that have a "direct"

effect on reputation and those that have a "lingering" effect. But even assuming some orders having only a lingering effect on reputation could prevent a case from becoming moot, it would not assist petitioner. To avoid a finding of mootness, the lingering effect would have to be non-speculative. And petitioner has not alleged any non-speculative harm to reputation here.

In any event, petitioner is mistaken in suggesting (Pet. 14) that the court of appeals' approach is inconsistent with *Powell* v. *McCormack*, 395 U.S. 486, 498-500 (1969). In *Powell*, this Court rejected a distinction between "primary" and "secondary" claims for relief, explaining that even where a claim for injunctive relief has become moot, a "secondary" claim for declaratory relief may prevent mootness. *Id.* at 499. The court of appeals, in contrast, has recognized that claims for declaratory relief can prevent mootness but has distinguished between (1) reputational harm resulting from "unexpired and unretracted government action," and (2) reputational harm resulting from "an otherwise moot aspect of a lawsuit." *Foretich* v. *United States*, 351 F.3d 1198, 1212-1213 (D.C. Cir. 2003).

Petitioner's assertion (Pet. 16) that the court of appeals' approach is vague and ill-defined is also incorrect. The court has concluded that when reputational injury "derives directly from an unexpired and unretracted government action," the injury "satisfies the requirements of Article III standing to challenge th[e] action." *Foretich*, 351 F.3d at 1213. On the other hand, where "injury to reputation is alleged as a secondary effect of an otherwise moot action," the court of appeals has "required that some tangible, concrete effect remain, susceptible to judicial correction."

McBryde v. *Committee to Review Circuit Council Conduct & Disability Orders of the Judicial Conference of the U.S.*, 264 F.3d 52, 57 (D.C. Cir. 2001) (citation and internal quotation marks omitted), cert. denied, 537 U.S. 821 (2002).

The D.C. Circuit's decisions are all consistent with that distinction. In *McBryde*, a federal judge's challenge to a public reprimand remained a live controversy where the reprimand "continue[d] to be posted on the web site of the Fifth Circuit Court of Appeals." 264 F.3d at 56. But any "continuing reputational effect[]" of two restrictions imposed on the judge's docket, which restrictions had already expired and could no longer be remedied by the court, was not sufficient to prevent the judge's challenge to those restrictions from being moot. *Id.* at 57. That aspect of the judge's reputational injury was a "secondary effect of an otherwise moot action" that was not susceptible to judicial correction. *Ibid.*

Similarly, in *Foretich*, reputational injury to the petitioner caused by restrictions on his right to visitation with his daughter imposed by Congress, see Department of Transportation and Related Agencies Appropriations Act, 1997, Pub. L. No. 104-205, Tit. III, § 350, 110 Stat. 2979 (Elizabeth Morgan Act), was not redressable by a court once the daughter reached the age of majority. 351 F.3d at 1212. That "component of Dr. Foretich's reputational injury [wa]s merely the secondary effect of an injury that is otherwise moot." *Ibid.* The petitioner's broader complaint, however, that the Elizabeth Morgan Act "harmed his reputation by embodying a congressional determination that he is a child abuser and a danger to his own daughter," was sufficient to prevent mootness. *Id.* at

1213. The Elizabeth Morgan Act (which the court of appeals held was an unconstitutional bill of attainder) was an "unexpired and unretracted government action," and reputational injury arising directly from that unconstitutional Act "c[ould] be redressed by a declaratory judgment in [petitioner's] favor." *Ibid.*

And in *Penthouse International, Ltd.* v. *Messe*, 939 F.2d 1011 (D.C. Cir. 1991), cert. denied, 503 U.S. 950 (1992), the court of appeals concluded that the petitioners were not suffering a continuing injury sufficient to satisfy Article III where a government commission had withdrawn an industry letter that accused petitioners' publications of containing pornography. *Id.* at 1019. Unlike plaintiffs in other cases who had shown a continuing "tangible, concrete effect" of the government action that was "traceable to the injury, and curable by the relief demanded," the petitioners in *Penthouse International* had not shown that declaratory relief would redress their reputational injury when retraction of the letter had not. *Ibid.*; see *Foretich*, 351 F.3d at 1213 ("Because the cause of the reputational harm is an otherwise moot government action, a judicial declaration that the action was unlawful is not likely to provide any further relief beyond that resulting from the expiration of the action itself.").

The court of appeals' decision in this case is fully consistent with that line of precedent. As the court of appeals explained, "[u]nlike *Foretich*, in which there remained among congressionally enacted statutes essentially a declaration of guilt against an untried citizen, in the present case, as in *Penthouse International*, the alleged reputational injury is the 'lingering

effect' of an otherwise moot action,' and the case is moot." Pet. App. 12a.

c. Petitioner contends (Pet. 9-13) that the courts of appeals are divided on the question whether reputational harm flowing from a challenged action is a sufficient "collateral consequence" to maintain a controversy between parties. The cases petitioner identifies do not present a split of authority warranting this Court's review.

Petitioner contends (Pet. 10-11) that most circuits have held that "reputational harm or stigma may alone constitute a sufficiently serious collateral consequence to prevent a case from becoming moot." But the cases he cites are all far afield from the circumstances presented here and do not set forth a categorical rule that reputational harm will always prevent mootness. Rather, the cases involve attorney sanctions and turn on the specific facts presented.

In three of the cases petitioner cites, courts of appeals concluded that settlement or voluntary dismissal of underlying litigation did not moot an attorney's appeal from a district court's contempt citation or an order revoking *pro hac vice* status. See *Lasar* v. *Ford Motor Co.*, 399 F.3d 1101, 1109 (9th Cir.), cert. denied, 546 U.S. 873 (2005); *Obert* v. *Republic W. Ins. Co.*, 398 F.3d 138, 143 (1st Cir. 2005); *Kirkland* v. *National Mortg. Network, Inc.*, 884 F.2d 1367, 1369-1370 (11th Cir. 1989). As the Ninth Circuit explained, "such a 'disciplinary action and consequent disqualification may expose [the attorney] to further sanctions by the bar and portends adverse effects upon counsel's careers and public image.'" *Lasar*, 399 F.3d at 1109 (quoting *Kleiner* v. *First Nat'l Bank*, 751 F.2d 1193, 1200 n.14 (11th Cir. 1985)); accord *Kirkland*, 884 F.2d

at 1370 (same); *Obert*, 398 F.3d at 143 ("[a]n affidavit from * * * counsel underscores the serious practical consequences of [the] findings" that counsel violated state ethics rules or Federal Rule of Civil Procedure 11).

Those cases reflect "the prevailing view that 'settlement of an underlying case does not preclude appellate review of an order [sanctioning] an attorney * * * insofar as that order rests on grounds that could harm his or her professional reputation.'" *Lasar*, 399 F.3d at 1109 (quoting *Johnson* v. *Board of Cnty. Comm'rs*, 85 F.3d 489, 492 (10th Cir.), cert. denied, 519 U.S. 1042 (1996)). In two other cases, the Third and Seventh Circuits held that an attorney's appeal of disciplinary action was not rendered moot by the expiration of the term of his suspension, *In re Surrick*, 338 F.3d 224, 229-230 (3d Cir. 2003), cert. denied, 540 U.S. 1219 (2004), or his reinstatement following payment of monetary sanctions, *In re Hancock*, 192 F.3d 1083, 1084 (7th Cir. 1999).

Those cases are not inconsistent with the D.C. Circuit's approach. Unlike the attorneys in those cases, who explained that a contempt citation could result in further sanctions from the bar or described concrete, tangible harm to their professional reputations from even a temporary disbarment that had already expired, petitioner does not allege that the revocation of his embed status will subject him to further professional discipline or has harmed his reputation as a reporter in any concrete way. See, *e.g.*, *In re Indian Motorcycle Co.*, 452 F.3d 25, 29 (1st Cir. 2006) (acknowledging that "[r]eputational interests can be cognizable," but explaining that "merely to refer to reputation does not * * * denote a concrete threat,

as it might if a lawyer were sanctioned and bar discipline was in prospect").

Petitioner contends that the Fifth Circuit is the only court to follow the D.C. Circuit's approach. Pet. 12 (citing *Danos* v. *Jones*, 652 F.3d 577, 584 (5th Cir. 2011)).[4] But the Fifth Circuit has likewise held that that an attorney's appeal from an order disbarring her from practice was not rendered moot when the attorney paid her sanctions and was reinstated. See *Dailey* v. *Vought Aircraft Co.*, 141 F.3d 224 (1998). The court explained that "the disbarment on the attorney's record may affect her status as a member of the bar and have other collateral consequences." *Id.* at 226; accord *Surrick*, 338 F.3d at 230 (explaining that the attorney's suspension, even after it had expired, would have "a continuing effect on his ability to practice before the [d]istrict [c]ourt").[5]

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[4] In *Danos*, the former secretary of a federal judge sought a judicial declaration that an order suspending the judge's authority to employ staff while impeachment proceedings were pending was unconstitutional. The Fifth Circuit concluded that even if the suspension caused reputational harm to the plaintiff-secretary, the claim was moot because "such harm is 'merely the secondary effect of an injury that is otherwise moot.'" *Danos*, 652 F.3d at 584 (quoting *Foretich*, 351 F.3d at 1212). The court explained that the alleged injury was not redressable: "A declaration that [the judge] should have been permitted to employ staff while impeachment proceedings were pending would not remedy any alleged injury to [the plaintiff]." *Ibid.*

[5] Petitioner includes (Pet. 11-12) a cf. citation to some additional cases that he contends hold that reputational injury is sufficient to prevent mootness. Those cases do not stand for a categorical rule that reputational injury is always sufficient to preserve an otherwise moot case; they conclude that reputational injury was sufficient to maintain an Article III case or controversy based on the specific facts presented. See *ACORN* v. *United States*, 618 F.3d

Petitioner further contends (Pet. 10) that the Eighth and Federal Circuits "follow a rigid rule under which reputational harm or stigma can never constitute sufficiently concrete collateral consequences to avoid mootness." The cases petitioner cites do not categorically hold that reputational harm cannot prevent mootness. Rather, like the court of appeals in petitioner's case, those courts found reputational harm insufficient to prevent mootness where the alleged injury could not be redressed.

In *North Dakota Rural Development Corp.* v. *United States Department of Labor*, 819 F.2d 199 (8th Cir. 1987), the plaintiff challenged the U.S. Department of Labor's finding that the plaintiff was not fit to administer federal funds and the agency's resulting denial of its grant application. Although the plaintiff conceded that "actual receipt of the * * * grant funds [wa]s * * * no longer a viable alternative" because the grant period was expiring, the plaintiff ar-

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125, 134 (2d Cir. 2010) (citing *Foretich* and holding that "plaintiffs cannot be said to lack standing to sue a government agency constrained to enforce a law that specifically names ACORN and prevents the plaintiffs from receiving federal funds"), cert. denied, 564 U.S. 1030 (2011); *Parsons* v. *United States Dep't of Justice*, 801 F.3d 701, 711-712 (6th Cir. 2015) (confirming that reputational injury can qualify as an injury in fact for purposes of standing analysis); *Tazewell Cnty. Sch. Bd.* v. *Brown*, 591 S.E.2d 671, 674 (Va. 2004) (holding that grievance procedure to challenge information in personnel file was not moot where principal had been reinstated, reassigned, and subsequently resigned, because injury could be redressed through requested changes to personnel file); *Putman* v. *Kennedy*, 900 A.2d 1256, 1262 (Conn. 2006) (stating that to invoke the collateral consequences doctrine, "the litigant must establish [prejudicial] consequences by more than mere conjecture, but need not demonstrate that these consequences are more probable than not").

gued that "vindication of its reputation within Department records" prevented the case from being moot. *Id.* at 200. The Eighth Circuit disagreed, noting that the plaintiff "ha[d] not applied for grants for upcoming fiscal years"; that "[t]he present finding of nonresponsibility is not binding on the Department in future grant competitions"; and that the court's "disposition of the case deprives the Secretary's decision of any precedential effect on this point." *Ibid.* The court held that under the particular facts of the case, striking the agency's responsibility determination could not redress the plaintiff's alleged injuries. *Ibid.*

Similarly, in *Tesco Corp.* v. *National Oilwell Varco, L.P.*, 804 F.3d 1367 (2015), the Federal Circuit held that "on the facts presented," it could not redress the reputational injury alleged by sanctioned attorneys because, as a result of a settlement involving the attorneys, "[t]here [wa]s no remaining sanction which could be vacated or punishment imposed upon the [a]ttorneys which could be reversed." *Id.* at 1374 n.7, 1379. The court distinguished the case from *Kirkland*, *supra*, and other similar cases on the ground that "formal sanctions and/or reprimands were imposed upon counsel [in those cases], leaving an order in place which could be reviewed and presumably vacated." *Tesco Corp.*, 804 F.3d at 1378. The court observed that "even fine factual distinctions can alter the jurisdictional analysis," and it criticized the citation of cases "that are materially factually distinguishable." *Id.* at 1374 n.7.

The court of appeals in this case correctly concluded that, even assuming petitioner's complaint raised a First Amendment retaliation claim, on the facts of this case, petitioner's claim for declaratory relief is moot.

Petitioner has not identified any conflict on that question that warrants intervention by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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