United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Sharon Swingle, Tony West, Ronald C. Machen Jr., Thomas M. Bondy

Aden J. Fine, Alexander A. Abdo, Arthur B. Spitzer, and Frederick V. Mulhauser

Louis Fisher and Morton Rosenberg as amici curiae

, Chief Judge,

See
Bivens
Davis v. Passman
Carlson
v. Green

Schweiker
v. Chilicky
Bivens

Bivens

Wilson,

Bush v. Lucas,

Bivens

Bush

Id. at

Id. at

Bivens

Bush

Id. at

8

Schweiker v. Chilicky

Spagnola

Wilson

Id.

Bush

Id.

Id.

Bush

Chilicky,

Wilson Id.

B.

1.

i.e.,

See id.

Id.

Id.

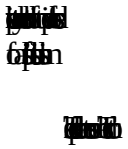
Id.

Id. §

Id. §

see id. §

See id. § 7[illegible]



Bivens

Bivens

Spagnola

Spagnola

Id.

See

id.

Bivens

ROGERS, *Circuit Judge*, dissenting: From the unremarkable fact that Congress was *aware* that it was not including employees of the Legislative Branch in the remedial provisions of the Civil Service Reform Act of 1978 ("CSRA"), Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.), the court concludes that "Congress consciously, 'not inadvertently' omitted remedies" for Library of Congress employees, and thus the CSRA precludes a *Bivens*[1] remedy for Col. Morris D. Davis. Op. at 15. The premise of the court's holding is that when Congress enacts a remedial scheme for a specific group of claimants, it is making a conscious decision *not* to enact a remedial scheme for *other* claimants, regardless of how far beyond the intended scope of the enacted scheme those other claimants are, and even in the absence of any evidence demonstrating Congress chose to exclude them *because* it did not want them to have a remedy at all. There is no limiting principle to this theory, and in adopting it, the court allows the "special factor" exception to swallow the rule. The Supreme Court has not gone so far, *see Minneci v. Pollard*, 132 S. Ct. 617 (2012); nor should we.

The court ignores the real question in this case – *why* did Congress exclude Legislative Branch employees? The answer, found in the unambiguous legislative history of the CSRA and the Congressional Accountability

Congress expressly concluded that judicial adjudication posed none of the same separation of powers concerns. Because

Congress intended *anything* about what remedies should be available to Library employees when it enacted the CSRA; it was addressing the altogether different question of how to provide a fair system for adjudicating remedial claims within the Executive Branch civil service. That Library employees are in the "excepted service" as a matter of vernacular convenience adds nothing to the analysis. Congress did not view itself as legislating on what remedies should be available to Library

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Sept. 6, 1966, Pub. L. 89-554, §§ 2101–2103; 80 Stat. 378, 408 (1966) (enacting Title 5, United States Code, entitled "Government Organization and Employees"). The legislative history of the 1966 Act indicates that Congress defined the "civil service" to "consist of all appointive positions in the executive, judicial, and legislative branches," 5 U.S.C. § 2101(1) (1966), in order "to establish a basis of reference to employees in this title." S. REP. NO. 89-1380, at 46; H.R. REP. NO. 89-901, at 26. Section 2102 of the 1966 Act, 5 U.S.C. § 2102, defined the "competitive service," with some exceptions not relevant here, as "all civil service positions in the executive branch." This was done simply to reorganize and centralize the Code's definition based on two prior statutes, the Act of Jan. 16, 1883, ch. 27 § 7, 22 Stat. 406 (1883), and the Act of Nov. 26, 1940, ch. 919, title I, 54 Stat. 1211 (1940). *See* S. REP. NO. 89-1380, at 46; H.R. REP. NO. 89-901, at 26. Finally, section 2103 of the 1966 Act, 5 U.S.C. § 2103 (1966), provided that "[f]or purposes of this title, the 'excepted service' consists of those civil service positions which are not in the competitive service." Both the House and Senate Reports of the 1966 Act stated that section 2103 "is supplied for convenience. The 'excepted service' has come to mean all employees not in the competitive service, for whatever reason." S. REP. NO. 89-1380, at 47; H.R. REP. NO. 89-901, at 27. The only modification the CSRA made

employees when it enacted the CSRA and it is thus irrelevant to the "special factors" analysis.

Stewart v. Evans, 275 F.3d 1126 (D.C. Cir. 2002), illustrates this point. In *Stewart*, a federal employee filed a *Bivens* action against her employer for an alleged unlawful search in violation of the Fourth Amendment. *Id.* at 1129. This court reasoned that the CSRA did not preclude the *Bivens* action because "a warrantless search is not a 'personnel action[] . . . covered by this system' and [thus] such a search does not fall 'within the statutory scheme.'" *Id.* at 1130 (quoting *Bush v. Lucas*, 462 U.S. 367, 385 n.28 (1983)). The court noted that "*Bush* virtually compels the conclusion that the [CSRA] does not preclude a *Bivens* action for a warrantless search." *Id.* *Stewart* thus stands for the proposition that where a claim is outside the scope of a remedial scheme, such that Congress did not envision itself as legislating on the subject of that claim, the remedial scheme does not preclude a *Bivens* action based on that claim.

This principle applies with equal force here, where Davis is a claimant who is outside the scope of the remedial scheme, such that Congress did not envision itself as legislating about the remedies available to that claimant. "The [CSRA] is not concerned with the conduct of which [he] claims," *id.*, that is, violation of constitutional rights of a Legislative Branch employee. *Stewart* reflects the appropriate limiting principle to the proposition that "a comprehensive statutory scheme precludes a *Bivens* remedy even when the scheme provides the plaintiff with no remedy whatsoever." *Wilson v. Libby*, 535 F.3d 697, 709 (D.C. Cir. 2008) (internal quotation marks and citations omitted). A specific claimant or a specific claim must be "within the statutory scheme," *Bush v. Lucas*, 462 U.S. 367, 385 n.28 (1983), such that Congress withheld a remedy for the conscious purpose of denying one, in order for the scheme to preclude a *Bivens* action for that claimant or claim.

The Supreme Court's precedent holding that a comprehensive remedial statutory scheme precludes a *Bivens* action reflects this limiting principle. For example, in *Bush*, 462 U.S. at 386, the Executive Branch federal employee's claims were "fully cognizable" by the Civil Service Commission's "elaborate, comprehensive scheme." In *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988), the Social Security disability beneficiaries and their claims were within the "considerably more elaborate," *id*. at 424, remedial scheme enacted by Congress, even though it did not provide "complete relief," *id*. (internal quotation marks and citation omitted). Similarly, in *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 71–73 (2001), the prisoner's claims were covered by "alternative remedies [] at least as great, and in many respects greater, than anything that could be had under *Bivens*." The Court's most recent discussion of *Bivens* in *Minneci*, 132 S. Ct. at 626, adheres to this approach, holding that a federal prisoner in a private correctional facility had no Eighth Amendment *Bivens* claim where the alleged "conduct is of a kind that typically falls within the scope of traditional state tort law."

Until recently, this court has followed suit. For example, in *Spagnola v. Mathis*, 859 F.2d 223, 225 n.3 (D.C. Cir. 1988), the *en banc* court concluded that the constitutional claims of the Executive Branch employees were covered by the CSRA, and thus they were within the scope of the remedial scheme. In *Wilson*, 535 F.3d at 707, the court stated that "each Constitutional claim, whether pled in terms of privacy, property, due process, or the First Amendment, is a claim alleging damages from the improper disclosure of information covered by the Privacy Act." *Id.* *But see id.* at 713 (Rogers, J., dissenting). On the basis of unambiguous legislative history, the court concluded that Congress intentionally excluded the President, Vice-President, and their staffs as possible defendants for Privacy Act claims. *Id.* at 708. I dissented from the court's

holding in *Wilson*, and continue to disagree with its analysis. Yet in *Wilson* the court at least sought to determine, through legislative history, whether Congress acted with the

however, depends on *why* Congress excluded either the claimant or the claim. If it acted with the *purpose* of preventing a remedy altogether, then the *Stewart* limiting principle is inapplicable. If it did so for reasons unrelated to a desire to remove all remedies, then *Stewart* applies.

The court does not bother to pose, let alone answer, this question, ignoring that both *Wilson* and *Spagnola* consulted the legislative history of the remedial scheme to ascertain the "outer boundaries for inclusion in 'comprehensive systems,'" *Spagnola*, 859 F.2d at 229. In *Wilson*, the court's determination that the Privacy Act, 5 U.S.C. § 552a, was a "special factor" precluding a *Bivens* action for both Wilsons' claims against the President, the Vice-President, and their staff was based on what the Supreme Court viewed as "'unambiguous' legislative history" that "Congress did not inadvertently omit the Offices of the President and Vice President from the Privacy Act's disclosure requirements." *Wilson*, 535 F.3d at 708 (quoting *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980)). In *Spagnola*, a case involving whether the CSRA precluded a *Bivens* action for constitutional claims of Executive Branch employees, the *en banc* court "f[ou]nd nothing in the legislative history suggesting that Congress' omission of a damages remedy in the CSRA was anything but advertent," 859 F.2d at 229, "nor . . . discern[ed] any clear expression of congressional intent that the courts preserve *Bivens* remedies," *id*. The court noted that "[t]he most that can be said for the legislative history of the CSRA is that Congress did not expressly intend to *eliminate* damages remedies" for Executive Branch employees, observing the "'explicit congressional declaration' exception to allowing damages remedies . . . has little relevance to the 'special factors' exception after *Chilicky*." *Id.* at 229 n.10 (emphasis in original).

The question here is not whether Congress's omission of a damages remedy in the CSRA was advertent, but whether Congress's omission of Library of Congress employees from coverage under the CSRA demonstrates a conscious choice that such employees not have a *Bivens* remedy, or instead whether such employees are simply outside the scope of the question Congress was addressing in enacting the CSRA, making the CSRA irrelevant to the *Bivens* analysis, as it was in *Stewart*. *See* 275 F.3d at 1130. The legislative history of the CSRA demonstrates the latter. In adopting the CSRA, Congress focused on reforming the "civil service system" of the "executive branch." H.R. REP. NO. 95-1403, at 3 (1978), *reprinted in* House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of the Civil Service Reform Act of 1978, at 640 (Comm. Print 1979). The CSRA thus included "general policies of the merit system principles applicable to the competitive civil service and throughout the executive branch," *id.* at 4, providing guidance for "all Executive agencies to follow," *id.* Congress's plain intent was to reform the employment practices of the Executive Branch.

The legislative history of the CSRA confirms that Legislative Branch employees were excluded from the CSRA's remedial provisions not because Congress wished to express its intent that they have no remedies available, but instead because of separation of powers concerns. During the conference committee mark-up session, the House and Senate Members agreed that the Library of Congress, the Government Accountability Office (also in the Legislative Branch), and the Administrative Office of the Courts (in the Judicial Branch), would not be required to seek allotments of "supergrade" positions from the Office of Personnel Management in the Executive Branch. These offices would "retain the supergrade allocations that they have on the theory that they are not in the Executive Branch and that the President or the personnel

manager for the President should not have the power to shift those supergrades around. The [C]ongress ought to retain that power." The Civil Service Reform Act of 1978: *Joint Conference of the Senate Committee on Governmental Affairs and the House Committee on Post Office and Civil Service*, 96th Cong. 22 (Sept. 26, 1978), *reprinted in* HOUSE-SENATE CONFERENCE MARKUP SESSION ON CIVIL SERVICE REFORM ACT OF 1978, Senate Comm. on Gov't Affairs and House Comm. on Post Office and Civil Service (1978) (statement of Rep. Udall). As one Senate Conferee put it, "we feel so strongly about the separation of powers principle." *Id.* (statement of Sen. Percy).

Although Congress was *aware* it was not extending the CSRA's remedial scheme, which is administered by the Executive Branch, to Library employees, *see* Op. at 11–15, this conclusion is only half the analysis. The *reason* for the exclusion reflected in the legislative history — the protection of the separation of powers — demonstrates that Congress did not view itself as legislating on the subject of what remedies should be available to Library employees, and in excluding Library employees from CSRA coverage did not "intentionally withh[o]ld a remedy," *Wilson*, 535 F.3d at 709. The *Stewart* limiting principle therefore applies in Davis's case.

B.

Likewise, the Congressional Accountability Act does not preclude a *Bivens* action in this case.[3] Most of its provisions do

[3] The Congressional Accountability Act, guided by the principle that "Congress should be subject to the same laws as apply to a business back in a home state," S. REP. NO. 103-397, at 6, applied, among other laws, "8 key anti-discrimination and employee-protection laws to the Congress": Title VII of the Civil Rights Act of 1964; The Age Discrimination in Employment Act of 1967; The Rehabilitation Act of 1973; The Americans with Disabilities Act of 1990; The

not apply to the Library of Congress, because "the Library of Congress[4] [was] already covered by antidiscrimination and employee protection laws." S. REP. NO. 103-397, at 2 (1994); 2 U.S.C. § 1302.[5] The House Floor debate indicates that its purpose was to make Congress abide by the same anti-discrimination laws that apply to the private sector, *see, e.g.*, 114

Family and Medical Leave Act of 1993; The Fair Labor Standards Act of 1938; The Occupational Safety and Health Act of 1970; and the Federal Service Labor-Management Relations Statute. *Id*

> separation-of-powers concerns that make executive-branch enforcement unacceptable are not applicable to [federal] district court actions. Courts and judges do not have the complex interactions with Congress that executive agencies have, so the risk of intimidation would not arise.

Id. at 8.[7]

A *Bivens* action cannot sensibly be precluded where Congress has expressed no view whatsoever on what remedies should be available for First Amendment violations and where, in extending remedies for other claims, it has expressed its desire that the judiciary resolve claims. *See* 2 U.S.C. §§ 1404, 1407–09. Although Congress restricted some employment claims from judicial review, it only did so for claims arising under the Accountability Act, which Davis's First Amendment

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[7] Some House Members would have allowed personal liability suits against Members of Congress for violations of the laws covered by the Accountability Act. *See* 141 Cong. Rec. at 536, (statements of Rep. Goodling & Rep. Fawell). Instead, Congress provided that appropriations may be used as the sole source from which to pay awards or settlements of claims under the Accountability Act, *see* 2 U.S.C. § 1415(a), precluding personal liability by Members of Congress, *see also* 141 Cong. Rec. at 536 ("Members of Congress [shall be] indemnified for any damages, costs, or legal fees to which a prevailing party may be found entitled.") (statement of Rep. Fawell). This approach is consistent with the practical result of *Bivens* actions, where the United States often indemnifies its employees sued pursuant to *Bivens*. *Cf. FDIC v. Meyer*, 510 U.S. 471, 486 (1994) (noting that government expends a good deal of money indemnifying employees); *Cleavinger v. Saxner*

are not part of the record, nor publically available, and its regulation on providing assistance without partisan bias and policy on outside activities, which are part of the record, do not constitute a "comprehensive scheme" that would preclude a *Bivens* action; neither the Supreme Court nor this court has held the availability of injunctive relief, *see* Op. at 19 n.1, is such a "comprehensive scheme," *see, e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 831, 845–47 (1994). Even assuming the brevity of Davis's eleven months' employment at the Library would affect the amount of damages he could recover for a constitutional

D.

The court observes that "in most instances the judgment has been that Congress, not the judicial branch, is in the best position to prescribe the scope of relief available for the violation of a constitutional right." Op. at 6. In *this* instance, however, Congress (acting through the Library) is the defendant alleged to have violated its employee's constitutional rights. In *Davis v. Passman*, 442 U.S. 228 (1979), a female congressional staffer whose employment was terminated because of her gender, had no statutory cause of action because Congress had *exempted itself* from Title VII, *id.* at 247. With three exceptions relevant to the Library, *see supra* n.5, only upon enactment of the Accountability Act did Congress extend application to itself

The Supreme Court has long acknowledged the Judicial Branch's competence to review congressional employment decisions:

> [J]udicial review of congressional employment decisions is constitutionally limited only by the Speech or Debate Clause of the Constitution . . . . [W]e conclude that if respondent is not shielded by the Clause, the question whether his dismissal of petitioner violated her Fifth Amendment rights would . . . require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a lack of respect due a coordinate branch of government, nor does it involve an initial policy determination of a kind clearly for non-judicial discretion.

Davis, 442 U.S. at 235 n.11 (internal quotations, citations, and alterations omitted); *see* S. REP. NO. 103-397, at 7–8.

Other special factors do not counsel against recognizing Davis's *Bivens* action. *Wilkie*, 551 U.S. at 537, is instructive. There, the plaintiff alleged various private property and tort-like invasions by federal employees, which the Court characterized as "death by a thousand cuts." *Id.* at 555. The Court explained that he "ha[d] an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints,"

446 U.S. 14, 18 (1980) (Ginsburg, J., concurring and dissenting in part). *But see Minneci*

recognized that Judicial Branch review does not pose the same separation of powers concerns as does Executive Branch review, *see* S. REP. NO. 103-397, at 7–8, a sufficient special factor *favoring* recognizing a *Bivens* remedy.

II.

In moving to dismiss the complaint pursuant to Federal

have been violated. *See O'Donnell v. Barry*, 148 F.3d 1126, 1133 (D.C. Cir. 1998).[12] Mulhollan wisely limits his challenge to the second factor, maintaining that Davis compromised his appearance of objectivity and harmed their working relationship, but that too fails.

The Supreme Court has observed that a "stronger showing [of governmental harm] may be necessary if the employee's speech more substantially involved matters of public concern." *Connick v. Myers*, 461 U.S. 138, 152 (1983). That case involved a workplace questionnaire of little public interest. *Id.* at 151–52. Speech about government policies, on the other hand, is a "paradigmatic matter of public concern." *Sanjour v. EPA*, 56 F.3d 85, 91 (D.C. Cir. 1995) (internal quotation marks, citation, and alteration omitted). To establish governmental harm where a high level policy maker is involved "[a]t a minimum, the employee's speech must relate to policy areas for which he is responsible." *Hall v. Ford*, 856 F.2d 255, 264 (D.C. Cir. 1988). Further, the "simple assertion by [The Library and Mullhollan] without supporting evidence of the adverse effect of the speech on" CRS's function is inadequate. *Navab-Safavi*, 637 F.3d at 318 (internal quotation marks and citation omitted).

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[12] The four factors are: (1) whether the employee's speech was "on a matter of public concern"; (2) "whether the governmental interest in" non-disrupted, efficient public services "outweighs the employee's interest, as a citizen, in commenting upon matters of public concern, and the interest of potential audiences in hearing what the employee has to say"; (3) whether the employee's "speech was a substantial or motivating factor in prompting the retaliatory or punitive act of which she complains"; and (4) whether the employer "would have reached the same decision even in the absence of the protected conduct." *O'Donnell*, 148 F.3d at 1133 (internal quotation marks and citations omitted).

In *Pickering*, 391 U.S. at 569–70, the court concluded that there was no threat to harmony between the employee, co-workers, and the supervisor where "[t]he statements [were] in no way directed towards any person with whom [the employee] would normally be in contact." The Court emphasized that the public had a strong interest in being exposed to the viewpoints of teachers on issues of school funding: "Teachers are, as a class, the members of a community most likely to [be] informed . . . . [I]t is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." *Id.* at 572. Davis's two opinion pieces, relying on his professional experience prior to his employment with CRS, were not directed at Mulhollan, the Library, the CRS, or any member of Congress. Compl. ¶¶ 47, 50. In each he was identified as a former chief prosecutor for military commissions at Guantanamo; as such Davis was likely one of the more informed persons who could speak publically on the issue. The public interest in being exposed to his speech is high.

Moreover, Mulhollan concedes that at CRS Davis had no authority over military commission issues. Rather, he maintains that because the same congressional committees oversee both defense issues within Davis's purview and military commissions, the issues are related enough. But even if Davis can properly be viewed as a "policymaker," which he disputes, the court in *Hall* was clear that the relation to the policymaker's work area is a "minimum" requirement to show government harm. Davis's complaint states that Members of Congress were aware that the American Law Division, and not his division, was responsible for issues relating to military commissions, *see* Compl. ¶ 32. Davis's name has not appeared on any reports to Congress about military commissions, and no congressional inquiries have been directed to him on that subject. *Id.* ¶ 29. *Cf. Rankin*, 483 U.S. at 390–91 (whether employee serves in "public contact role" relevant to government harm inquiry).

Furthermore, "the fact that [Davis's] criticism was cumulative . . . diminish[es] the harm it caused." *O'Donnell*, 148 F.3d at 1138. Not only had Davis spoken publically on military commissions with the CRS's knowledge and was never questioned about those activities, Compl. ¶¶ 33-40, unlike the employee in *O'Donnell*, his criticism was not aimed at his employer or the Congress. The Library *encourages* outside speech by its employees, *id*. ¶¶ 65, 68–69; *see* Library of Congress Regulation 2023-3, section 3 (Mar. 23, 1998); CRS

that the two opinion pieces damaged the non-partisan reputation of the CRS. But Davis's article and letter to the editor do not take a partisan position, instead criticizing decisions and officials in both Democrat and Republican administrations. His situation is in that respect unlike the CRS analyst in *Keeffe v. Library of Congress*, 777 F.2d 1573, 1576 (D.C. Cir. 1985), who attended a partisan political convention, and such a partisan label cannot be ascribed to Davis's speech.

2. Davis's complaint also states a plausible claim under the Due Process Clause of the Fifth Amendment. The Library's policies and actions must provide Davis a "reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). This requires that "the Library . . . give loud and clear advance notice when it . . . decide[s] to interpret a particular regulation as a prohibition or limitation on an employee's outside activity." *Keeffe*, 777 F.2d at 1583.

In *Keeffe*, the CRS analyst was disciplined for attending a partisan political convention under a Library regulation regarding the potential conflict of interest posed by employees engaging in political activities. *Id.* at 1576. Although the court upheld the regulation (LCR 2023-7, "Unrestricted Political Activities of Library Employees") as facially valid and not impermissibly vague, *id.* at 1579–81, the court found that, as applied to Keeffe, the Library vi[illegible]

punishment and could result in the termination of his employment at the Library.

B.

Government officials are shielded from personal liability "if their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). What is "clearly established" is not to be defined at a "high level of generality," *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2084 (2011), and although "[the Supreme Court] do[es] not require a case directly on point, [] existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* at 2083. The district court denied Mullhollan's motion to dismiss the complaint on the ground of qualified immunity, agreeing with Davis that Mulhollan's own conduct indicated the First Amendment right in question was sufficiently clear to him. The complaint alleged that Mulhollan asked Davis to "acknowledge that . . . the First Amendment . . . did not apply" to the publication of the two opinion pieces that were the basis for the termination of his employment. Compl. ¶¶ 56. As the district court found, "Mulhollan was at least aware of 'a general constitutional rule already identified in the decisional law," *Hope [v. Pelzer]*, 536 U.S. [730,] [] 741 [(2002)], and that this constitutional rule might have applicability to [Davis's] articles." Mem. Op. at 40.

Although qualified immunity defenses should be decided at "the earliest possible stage in litigation," *Hunter v. Bryant*, 502 U.S. 224, 227 (1991), where the *Pickering* test applies, unless the "relative weight of the governmental interest and established constitutional rights . . . [are] quite evident from the pleadings," a decision may "properly await some evidentiary development" to determine "fact-dependent" interest balancing and thus may

be inappropriate at the Rule 12(b)(6) stage. *Navab-Safavi*, 637 F.3d at 318. To the extent the Library and Mullhollan contend that the potential harm to CRS was clear from the complaint and the documents it incorporated by reference, *see* Appellant's Reply Br. 18–19, they rely on factual assertions about the nature of Davis's position and job responsibilities, CRS's interest in maintaining the appearance of objectivity and lack of bias, and the content and tone of Davis's opinion pieces – aspects of which Davis disputes and are either untethered to or inconsistent with the record now before the court. Under the circumstances, a remand is required to develop a factual record.

Accordingly, I would affirm the district court's ruling that Davis's complaint stated a valid *Bivens* claim and the denial of the motion to dismiss the complaint except I would remand for further fact-finding on the qualified immunity defense; I respectfully dissent.