No. 20-726

In the Supreme Court of the United States

In re Stephanie Michael

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

SUPPLEMENTAL PETITION

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INTRODUCTION

Pursuant to this Court's Rule 15.8, this supplemental brief informs this Court *Tanzin, et al v. Tanvir,et al,* 592 U.S.__2020 decided on December 10, 2020 is relevant to this case. Upon Government's waiver of response, *In re Stephanie Michael* is scheduled for conference review on January 8, 2020. The Supreme Court affirms U.S. Court of Appeals for the Second Circuit determination Government was not entitled to immunity from suit under the Religious Freedom Restoration Act of 1993 (RFRA) because its "express remedies provision permits litigants, when appropriate, to obtain money damages against federal officials in their individual capacities" for the respondents in *Tanzin, et al v. Tanvir,et al,* 592 U.S.__2020. The U.S. Court of Appeals for the Fifth Circuit leaves to this Court to decide whether veteran is deprived of right to "in the absence or inadequacy thereof" remedy under provisions of the Veterans Judicial Review Act of 1988 to bring "any applicable form of legal action, in a court of competent jurisdiction." 5 U.S.C. 703(APA)

The mandamus petition presently before the court with specificity addresses why agency regulations and the text, legislative history and purposes of the Administrative Procedure Act (APA), 38 U.S.C. 511(a), and Veterans Judicial Review Act of 1988 give clear answer against Government's argument she has no clear and indisputable right to remedy under provisions of the Federal Tort Claims Act. It is veteran's hope this supplemental petition aids the Court in doing justice for this nation's veterans. Congress permits litigants of claims involving VA benefit matters to when appropriate, to obtain money

damages in circumstances like these relevant to this supplemental brief "features a suit against individuals, who do not enjoy sovereign immunity" See *Tanzin, et al v. Tanvir,et al,* 592 U.S.__2020 "An action against the United States under 28 U.S.C. 2671-2680 is the exclusive remedy under these circumstances." See 38 CFR 14.605(a). These questions of law are important to judges, litigants and advocates. Resolution is necessary to effect adherence to procedural requirements in such cases— only this Court has plenary authority in this circumstance.

ARGUMENTS

I. Questions of law relevant to Government privilege rulings must be resolved consistent with constitutional, statutory, and procedural requirements.

There is no dispute between parties in *Tanzin, et al v. Tanvir,et al,* 592 U.S.__2020 and this mandamus action qualified immunity is a bedrock principle of judicial review of executive agency action. "The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known *Harlow v. Fitzgerald*, 457 U. S. 800, 818 (1982). The litigation positions of the Government and the parties seeking judicial redress from injury as a result of executive agency action in each case diverge at *Harlow* in the context of *Pearson v. Callahan*, 555 U.S. 223 (2009). In *Pearson*, the Supreme Court recognizes, "Qualified immunity balances two important

interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson* at II, A.

The dispute arises in both cases identified as relevant to this supplemental brief is whether the procedure established by *Saucier v. Katz*, 533 U. S. 194 (2001) is under the circumstances "the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all." *See Pearson* at 555 U.S. (internal citations omitted). *Saucier* was mandatory prior this court's ruling in *Pearson*, the procedure stipulates: if plaintiff satisfies "the first step to allege facts "(see Fed. Rules Civ. Proc. 12(b)(6), (c)) or shown (see Rules 50, 56)" necessary "to make out a violation of a constitutional right. 533 U. S., at 201" — "the court must decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. *Ibid."*

In each instance, parties allege constitutional and statutory basis to bring suit against the Government involving executive agency actions. In the context of the *Saucier v. Katz*, in these cases, the district courts are asked to defer to Government's concessions a "violation of a constitutional right" may be discernible enough to satisfy the first prong of *Saucier* and omit consideration of the second prong "because qualified immunity is "an immunity from suit rather than a mere defense to liability ... it is effectively lost if a case is erroneously permitted to go to trial." See *Pearson* at II, A. paragraph 2. Here, "a specific duty is assigned

by law" for the Department of Justice and Department of Veterans Affairs agencies to observe constitutional, statutory, and procedural requirements, "and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy." See *Marbury v. Madison*, 5 U.S. 137, 166 (1803).

II. It is emphatically the duty of the courts to questions of law raised in this case.

"Our task is simply to interpret the law as an ordinary person would. Although background presumptions can inform the understanding of a word or phrase, those presumptions must exist at the time of enactment." *Tanzin, et al v. Tanvir,et al,* 592 U.S.__2020. 38 U.S.C. 211(a), the statutory provision cited in *Johnson v. Robison* and *Traynor v Turnage* is repealed and replaced by enactment of the Department of Veterans Affairs Codification Act of 1991. Supreme Court silence on the implications of enactment of the Department of Veterans Affairs Codification Act of 1991 is stifling. The U.S. Court of Appeals for Veterans Claims accords no effect to precedent opinions of this Supreme Court or lower courts on the question of whether it has jurisdiction to review decisions involving "incident out of which the suit arose under circumstances in which Congress has provided by statute that the remedy provided by the Federal Tort Claims Act is made the exclusive remedy." See 28 CFR 15.4

To that end this court has recently determined, "We first have to determine if injured parties can sue" in this case, the United States under the exclusive

remedy provided by 28 U.S.C. 2679. The text of the Administrative Procedure Act and 38 U.S.C. 511(a), along with Department of Justice and Department of Veterans Affairs regulations "give clear answer. They can." *Tanzin, et al v. Tanvir,et al,* 592 U.S.__2020. "The plain meaning of the phrase 5 U.S.C. 703 of the APA applicable to form of proceedings and venue "in the absence or inadequacy thereof" the Veterans Judicial Review Act of 1988" in this case— agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement" accordingly, "individual may bring "any applicable form of legal action...in a court of competent jurisdiction."

This resonates with the plain meaning of the text of 38 U.S.C. 511(a)(b)(4) which requires "the Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." In the event the Secretary declines to do so, the decision of the Secretary shall not "be final and conclusive" and cannot be construed as a "matter covered by Chapter 72", within the subject matter jurisdiction of the U.S. Court of Appeals for Veterans Claims, established by enactment of the Veterans Judicial Review Act of 1988. In this circumstance, "the second sentence of subsection (a)", often cited the review restriction clause "does not apply"— so the action may "be reviewed by any other official...by any court... whether by an action in the nature of mandamus or otherwise."

III. Only plenary action by this Court can resolve these questions of law.

District court rulings at issue were "predicated on the constitutional tort theory of *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U. S. 388, and...it could not be determined as a matter of law" *Tanzin* or *Michael* provide a "state of facts warranting recovery." *See Schweiker v. Chilicky*, 487 U.S. 412 (1988). It is indisputable. The Department of Veterans Affairs and Department of Justice are "governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States." *See Bush v. Lucas* 462 U. S. 367,374-390 (1983). So then similarly to the recent decision, the question in this case must be answered— "whether an elaborate remedial system that has been constructed step by step, with careful attention to policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue." *See Bush supra.* at 462 at 368, 380-390.

Congress answers this question by statutory amendment of the APA; grants of jurisdiction to the U.S. District Courts, promulgation of regulations applicable to procedural requirements for Board of Veterans Appeals action and "claims asserted under the Federal Tort Claims Act, including such claims that are filed with VA." *See* 38 CFR 14.600(b). It is the duty of district courts to decide "even "assuming the challenged conduct involves an element of judgment," it remains to be decided "whether that judgment is of the kind that the discretionary function exception was designed to

shield." *United States v. Gaubert*, 499 U.S. 315, 322,323 (1991)

"The Government posits that we should be wary of damages against government officials because these awards could raise separation-of-powers concerns." *Tanzin, et al v. Tanvir,et al,* 592 U.S.__2020. Still, by motions of Government counsel, courts are asked to summarily act beyond Article III and statutory authority "to modify, abridge or enlarge the substantive; rights of litigants or to enlarge or diminish the jurisdiction of federal courts; fail to strictly construe waivers of sovereign immunity." *United States v. Sherwood*, 312 U.S. 584, 585-590 (1941). Moreover, "courts are not at liberty to pick and choose among congressional enactments...it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." See *Morton v. Mancari,*417 U.S. 535, 551 (1974).

The lower courts dilemma is exacerbated by executive actions in conduct of litigation —act consistent with Article III and statutory authority and duties and renounce Supreme Court precedent controlling or leave to this Supreme Court its "prerogative of overruling its own decisions" or continue to defer to the Government's litigation position in the absence of Supreme Court precedent speaking consistent with existing congressional policy applicable to judicial enforcement of laws affecting provision of VA benefits by the Secretary. *See R. de Quijas v. Shearson/Am. Express*, 490 U.S. 477,III, paragraph 1.

To resolve these questions of law will serve as a check on executive agency power, achieve a uniform interpretation of similar statutory language, and correct a seriously erroneous interpretation of statutory language that would undermine congressional policy as expressed in other legislation.

CONCLUSION

The Court should vacate the orders and issue a writ of mandamus to the district court ordering it to exercise its Article III and statutory authority to review the "incident out of which the suit arose under circumstances in which Congress has provided by statute that the remedy provided by the Federal Tort Claims Act is made the exclusive remedy." See 28 CFR 15.4. In the alternative, the Court should treat this as a petition for certiorari, grant the petition, and reverse the court of appeals decision below.

Respectfully submitted,

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