

22-5710 **ORIGINAL**
No. _____

Supreme Court, U.S.

FILED

SEP 22 2022

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IN THE
SUPREME COURT OF THE UNITED STATES

Lisa A. Biron,
Petitioner

v.

Colette Peters, FCI Waseca Warden Michael Segal,
and Deanna Hiller,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO
THE EIGHTH CIRCUIT COURT OF APPEALS
PETITION

Lisa A. Biron (Reg. # 12775-049)
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P.O. Box 1731
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Question Presented

Are discretionary actions of the federal Bureau of Prisons ("FBOP")—an executive agency responsible for more than 130-thousand prisoners nationwide—exempt from judicial scrutiny of these actions when sued for regulatory noncompliance under the Administrative Procedure Act and Accardi doctrine for the violation of regulations that affect the Prisoner-Plaintiff's interests in law library access, typewriter access, and U.S. mail access, but do not, necessarily, violate her constitutional rights? Or, are these actions reviewable and its regulations (C.F.R.s), duly promulgated under the authority of 18 U.S.C. §§ 4041 and 4042, enforceable?

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION OF A WRIT OF CERTIORARI

Petitioner, Lisa A. Biron, respectfully prays that a writ of certiorari issue to review the judgment below.

Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit appears at Appendix A to the Petition and is unpublished.

The opinion of the United States District Court for the District of Minnesota appears at Appendix B to the Petition.

The Report and Recommendation of the Magistrate Judge appears at Appendix C to the Petition.

Jurisdiction

The United States Court of Appeals for the Eighth Circuit issued its judgment on June 24, 2022. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory and Regulatory Provisions Involved

The following statutes and regulations are involved and are set forth verbatim in Appendix D to this Petition:

18 U.S.C. § 4041
18 U.S.C. § 4042
5 U.S.C. § 701
5 U.S.C. § 706
5 U.S.C. § 702
28 C.F.R. § 540.12
28 C.F.R. § 540.14
28 C.F.R. § 543.10
28 C.F.R. § 543.11

Statement of the Case

In summer of 2019, the FBOP-Respondents began rejecting incoming general correspondence mail without opening and inspecting the correspondence based only on what the exterior of the envelope containing the correspondence looked like. Petitioner alleged in her amended complaint (no. 20-cv-2110, ECF DOC 5) that the rejection of at least one piece of her unopened mail, because the envelope contained an address label, violated the FBOP's federal regulations which require all incoming general correspondence to be opened and inspected. See 28 C.F.R. § 540.12, .14 (App'x D.)

Then, during the COVID-19 pandemic, Respondents placed severe restrictions on Petitioner's ability to prepare legal filings in several active cases. Petitioner alleged that Respondents' restrictions violated the FBOP's federal regulations regarding typewriter access, access to the electronic law library ("ELL")¹ and legal materials, and regarding her ability to prepare legal documents in the living quarters as required if practicable. See 28 C.F.R. §§ 543.11(h); 543.11-.11 (App'x D.)

Petitioner brought these regulatory noncompliance claims, after final agency action, under the Administrative Procedure Act ("APA") and Accardi doctrine.²

The Respondents moved to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim, and the magistrate, in an 89-page Report and

¹ The ELL is the only way to access the legal materials provided by the FBOP. It can be activated for use on any of the many TRULINCS email computer terminals in use at the institution.

² Petitioner also brought a constitutional claim for interference with her access to the court. She is not seeking review of the constitutional claim.

Recommendation recommended dismissal. (See App'x C.) Petitioner timely objected and the district court adopted the R & R dismissing the case. Relevant to this Petition, the district court found that the APA-Accardi claims failed because Petitioner did not plausibly allege the violation of a constitutional right. (See App'x B.) Petitioner appealed to the Eighth Circuit arguing that the APA-Accardi claims do not require allegations of constitutional injury to state a claim for regulatory noncompliance, and that she is in the zone-of-interest these regulations—promulgated under the enabling authority of 18 U.S.C. §§ 4041 and 4042—are meant to protect. The matter was fully briefed, and on June 24, 2022, in three (3) sentences (8th Cir. R. 47B), the Panel affirmed. (See App'x A.)

Petitioner now files this Petition for a Writ of Certiorari with this Court.

Reasons for Granting the Writ

Whether the FBOP may be held accountable by a federal court to follow its own regulations is a matter of national importance to a particularly vulnerable group of people, a group of people that this particular Court should be particularly concerned about: federal prisoners. While the Constitution provides very minimal protections to these prisoners, sometimes the FBOP's agency regulations, if they are followed, provide more.

This Court has said that "[s]ubstantive regulations have the force and effect of law[,]" Perez v. Mortg. Bankers' Ass'n, 575 U.S. 92, 122-23 (2015), and that these regulations supplement the bare bones of federal statutes, United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954) ("Accardi"), in this case, the enabling statutes of the FBOP, 18 U.S.C. §§ 4041 and 4042. Consequently, an agency must adhere to its own regulations, and its "failure to follow [them] can be challenged under the APA . . ." Webster v. Doe, 486 U.S. 592, 602 n.7 (1988). This is true even where Government officials have broad discretion. See Accardi, 347 U.S. at 268. But when it comes to the FBOP, the law is unclear as to if, when, and how a federal court is to adjudicate a federal prisoner's claim for regulatory noncompliance.

In the present case, Petitioner alleges the actions and inactions of the FBOP violated its regulations regarding delivery of the U.S. mail; access to the electronic law library; typewriter access; and the ability to prepare legal documents in the prisoner living quarters. (See Amend. Compl., no. 20-cv-2110, ECF DOC 5.) Her Amended Complaint brought claims for declaratory and injunctive relief pursuant to 5 U.S.C. §§ 701(a)(2), and 706(2)(A), (E) of the APA.

In brief, she alleged that 28 C.F.R. §§ 540.12 and 540.14 require the warden to establish controls on the mail and require prisoners to consent to the opening and reading of incoming general correspondence if they want to receive their mail, and these regulations require institution staff to open and inspect all incoming general correspondence mail. In July, 2019, staff began refusing to open or deliver the mail to prisoners if envelopes were not white in color or if they contained a label. The FBOP failed to deliver Petitioner's important mail and returned it (unopened) to the sender because of a label on the exterior of the envelope in violation of these regulations.

Title 28 C.F.R. §§ 543.10 and 543.11 require the warden to provide adequate access to legal materials (i.e., the ELL) for a reasonable time and to provide for preparation of legal documents in the living quarters if practicable. Petitioner alleged facts to show insufficient access to insufficient legal materials for insufficient time, and no ability to prepare legal documents on her housing unit.

Finally, 28 C.F.R. § 543.11(h), in relevant part, states, "unless clearly impractical, the warden shall allow an inmate preparing legal documents to use a typewriter. . . ." The Respondents refused to provide Petitioner access to a typewriter during most of 2020 and Petitioner was forced to handwrite multiple documents, including several petitions filed with this Court and multiple documents filed in the District of Minnesota. She alleged that during this same time period, multiple TRULINCS computers were available and in use constantly by inmates for emailing.

These APA-Accardi claims were wholly separate from Petitioner's constitutional access to the court claim. Petitioner was never under the illusion that there is a constitutional right to a typewriter.

Throughout the case, Respondents argued, and the district court and Eighth Circuit agreed, that the Petitioner failed to state a claim because she did not allege an actual injury to her constitutional rights. The decision was based on United States v. Lee, 274 F.3d 485 (8th Cir. 2001), which is not a civil regulatory case at all, but a criminal post-conviction case challenging the DOJ's internal death penalty protocol contained in the United States Attorneys' Manual ("USAM"). As one circuit court explained, "[t]he USAM is not published in the . . . Code of Federal Regulations and none of its provisions are promulgated through the Federal Register. It does not have the force of law." San Pedro v. United States, 79 F.3d 1065, 1070 (5th Cir. 1996)(internal quotation marks omitted). Petitioner argued that Lee is wholly inapplicable to the case, that her APA-Accardi claims for regulatory noncompliance do not require an actual injury to a constitutional right, and that the Respondent-agency's actions were reviewable and the regulations enforceable. (See ECF case no. 21-3615 (8th Cir.) App. Br. 7-17; App. Reply Br. 1-9.) Nevertheless, the Eighth Circuit affirmed the dismissal of the case without an opinion.

This Court should grant the writ to decide this issue and advise the lower courts of their legal duty, if any, to review the actions of this federal agency under the APA and Accardi doctrine. This Congress-ordained authority is an essential judicial "check" on executive agency action—especially important because imprisoned human beings are involved.

A long time ago, in Wolfish, federal prisoners brought a class action that included claims for regulatory noncompliance under the APA. Finding for the prisoners and granting relief under the APA, the district court pondered, "whether a federal court, confronted with demands

for fair treatment from its own inmates, [as opposed to demands from state inmates] may not in such a case shoulder greater responsibilities or, to put it less demurely, exercise greater powers. We send them there, after all." Wolfish v. Levi, 439 F. Supp. 114, 121 (S.D.N.Y. 1977). Subsequently, after the Second Circuit held that the APA was inapplicable to the case because the FBOP's discretionary actions were exempt from judicial review under the APA, see Wolfish v. Levi, 573 F.2d 118, 125 (2d Cir. 1978), this Court noted that it could not review that holding because the respondents did not challenge the APA rulings. See Bell v. Wolfish, 441 U.S. 520, 559 n.11 (1979). A mere 41 years later, here is this Court's opportunity.

This case provides the uniquely appropriate vehicle for that review because the issue and arguments have been adequately raised and developed in the lower courts, preserved for review, and fully briefed. And this is so only because the pro se Prisoner-Petitioner in the case is also a trained (formerly licensed) attorney. Pro se prisoners are generally incapable of identifying and litigating complex legal issues to this point. And absent any financial incentive whatsoever from a case like this one, the likelihood of an attorney taking a federal prisoner's APA-Accardi regulatory noncompliance case to this point is nil. Moreover, the financial disincentive to the pro se prisoner, under the Prison Litigation Reform Act, cannot be overstated. It is only because of the importance of this issue to all federal prisoners that Petitioner has borne the cost³ to bring this issue to this Court.

³ Petitioner originally filed this case in state court because that court has concurrent jurisdiction and in state court she qualified for waiver of

In other words, this issue is not likely to get any riper. Because of the pro se prisoner litigation limitations described above, there is no deep and mature circuit-split on this issue. In fact, there is virtually no appellate case law on the subject at all.⁴ Yet, this is an extremely important issue to the prisoners in this Court's criminal justice system. This agency cannot police itself, nor would our Founding Fathers, have intended it to.

Conclusion

WHEREFORE, the Petitioner respectfully urges this Honorable Court to grant this Petition for a Writ of Certiorari.

Respectfully submitted,

9/22/2022
Date


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the filing fee. The Respondents removed the case to federal court. The \$ 505.00 appellate court filing fee (for the 3 sentences) was unavoidable, however, and she has just finally paid the last installment.

⁴ The Second Circuit in Federal Defenders held that federal attorneys were in the zone-of-interest that FBOP regulations were meant to protect, but that is as far as that opinion went, and the Sixth Amendment was implicated in the claims. It was not solely a regulatory noncompliance case. See Fed. Defs. of NY, Inc. v. Fed. Bureau of Prisons, 954 F.3d 118 (2d Cir. 2020).