No. 22-7614

IN THE SUPREME COURT OF THE UNITED STATES

LISA A. BIRON, PETITIONER

v.

JODY UPTON, WARDEN, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the dismissal of petitioner's claims alleging that prison officials violated the First Amendment and the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb et seq., by confiscating a manuscript petitioner had written because the officials concluded that it was sexually explicit and therefore constituted contraband.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.N.H.):

United States v. Biron, No. 12-cr-140 (May 28, 2013)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C8) is not published in the Federal Reporter but is available at 2022 WL 17691622. The order of the district court (Pet. App. A1-A12) is not published in the Federal Supplement but is available at 2019 WL 3304885.

JURISDICTION

The judgment of the court of appeals was entered on December 14, 2022. A petition for rehearing was denied on February 13, 2023 (Pet. App. B1). The petition for writ of certiorari was filed

on May 11, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an inmate at Waseca Federal Correctional Institution in Minnesota. Pet. App. C2. In 2013, she was convicted of eight counts relating to the sexual exploitation of her minor daughter, including one count of transportation of a minor with intent to engage in criminal sexual activity, six counts of sexual exploitation of children, and one count of possession of child pornography. See Biron v. United States, No. 16-cv-108, 2017 WL 4402394, at *1 (D.N.H. Oct. 2, 2017). Petitioner was sentenced to 480 months of imprisonment, followed by a lifetime term of supervised release. 12-cr-140 Judgment 2-3 (D.N.H. May 28, 2013). She was directed to participate in a sex offender treatment program in connection with her supervised release, and the sentencing court recommended that she also participate in a sex offender treatment program while incarcerated. Id. at 4.

In 2019, petitioner -- who is a former attorney -- filed a pro se complaint in Texas state court against respondents, two prison psychologists and the then-warden at Carswell Federal Medical Center (FMC Carswell) in Texas, where petitioner had previously been incarcerated. Pet. App. C2. The complaint alleged that respondents had violated petitioner's statutory and

constitutional rights while she was at FMC Carswell by confiscating a manuscript petitioner "was writing to record her conclusions on Christian morality of sexual conduct." Ibid.

Respondents removed the case to federal court, where petitioner filed an amended complaint. Pet. App. C2, D1-D7. The complaint alleges that petitioner has a sincere belief that she has been directed by God to "research, pray about, and study the Bible concerning God's view of morality involving sex and sexual conduct, and to record these findings in writing for use in her rehabilitation and to help disciple and educate other Christians" on this subject. Id. at D3-D4. The complaint further alleges that, while petitioner was incarcerated at FMC Carswell, she began drafting a manuscript addressing, among other things, "how a Christian's ability to hear from God and to grow in their faith is hampered by sexual immorality," as well as "the relevant application of this information to [petitioner's] life and moral failings." Id. at D4.

The amended complaint alleges that in September 2015, one of the respondent psychologists who was involved in sex-offender treatment at FMC Carswell searched petitioner's locker and removed her draft manuscript, indicating that the document would be reviewed to determine whether petitioner was allowed to have it. Pet. App. D4-D5. The complaint alleges that petitioner told the respondent warden that her manuscript had been seized,

but that he did not intervene. Id. at D5-D6. Instead, the complaint alleges, petitioner was called into a meeting with the other respondent psychologist, where she was told that her manuscript had been confiscated because it was "sexually explicit" and constituted "hard contraband." Id. at D5.

As relevant here, petitioner's operative complaint seeks damages from the psychologists in their individual capacities under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb et seq. Pet. App. D1, D6-D7. The complaint also seeks declarative and injunctive relief against all three respondents, including an injunction compelling respondents to return the manuscript. Ibid.

2. The district court granted respondents' motion to dismiss. Pet. App. A1-A12. The court first rejected petitioner's claims for damages against the psychologists in their individual capacities. Id. at A9-A11. The court declined to extend the implied cause of action recognized in Bivens to the new context presented here. Id. at A10. And the Court determined that, even if RFRA permits a damages suit against a federal employee in her individual capacity (as this Court would later hold in Tanzin v. Tanvir, 141 S. Ct. 486 (2020)), respondents were entitled to qualified immunity because

petitioner had not "pointed out any case showing that [their] confiscation of her manuscript violated a clearly established constitutional or statutory right of which reasonable officials would have known." Id. at A12.

The district court then found that it lacked jurisdiction to consider petitioner's claims for equitable relief against respondents in their official capacities because petitioner was "no longer incarcerated at FMC Carswell," and her claims for "declaratory or injunctive relief" therefore "appear[ed]" to be "moot." Pet. App. A11.

3. Petitioner appealed, asserting that her official capacity claims were not moot because respondents could still return her writings. Pet. C.A. Br. 5. Petitioner also argued that respondents were not entitled to qualified immunity because they had violated clearly established law. Id. at 24-28. In support of that argument, petitioner asserted that it was clearly established that prison officials violate a prisoner's constitutional rights when they "fail the reasonableness test set forth by the Supreme Court in Turner v. Safley, 482 U.S. 78 (1987)." Id. at 25. Petitioner then added a footnote stating: "In contrast, [petitioner's] RFRA claims are reviewed under strict scrutiny. Because [respondents] fail the rational basis standard, it is unnecessary to analyze the RFRA strict scrutiny-claims." Id. at 25 n.12. The remainder of petitioner's brief

argued that the prison officials' conduct was not reasonable under Turner, without further reference to RFRA. Id. at 25-27.

4. The court of appeals affirmed in an unpublished, per curiam order. Pet. App. C1-C8.

a. The court of appeals first held that qualified immunity barred petitioner's individual-capacity claims for money damages under both the First Amendment and RFRA. Pet. App. C4-C5. The court acknowledged that it had "never squarely held" that qualified immunity is a defense under RFRA, but it found that petitioner had "forfeited" any argument that the defense does not apply. Id. at C3-C4. The court then determined that respondents were entitled to qualified immunity because petitioner had not "alleged a violation of any clearly established Free Exercise right." Id. at C4. The court explained that, even "[a]ssuming [petitioner's] manuscript was not sexually explicit," petitioner "has identified no authority holding that a prison official's mistaken designation of an inmate's personal writings as contraband violates the Constitution or any federal law." Ibid.

The court of appeals further held that, "even if qualified immunity is unavailable here, [petitioner] also has not established a constitutional violation." Pet. App. C5 (brackets omitted). The court concluded that petitioner had "made no showing that the confiscation of her manuscript poses a

'substantial burden,' on her religious exercise" under RFRA, 42 U.S.C. 2000bb-1(a). Pet. App. C5. And the court found that she had not established a First Amendment violation because "prison officials may impose reasonable restrictions on the type and amount of property that inmates are allowed to possess." Ibid.

Finally, the court of appeals concluded that its rejection of petitioner's individual-capacity claims also foreclosed her official-capacity claims: "If [respondents] violated no law or constitutional provision in their individual capacities, they cannot be liable in their official capacities." Pet. App. C5.

b. Judge Elrod concurred in part and dissented in part. Pet. App. C6-C8. She agreed that the district court properly dismissed petitioner's individual-capacity claims as barred by qualified immunity. Id. at C6 n.*. She also agreed with the district court that the bulk of petitioner's official-capacity claims are moot because petitioner is no longer incarcerated at the facility where the confiscation took place. Ibid. In Judge Elrod's view, however, petitioner's claim seeking the return of her manuscript was not moot because the manuscript could be sent to her current facility. Id. at C7. Judge Elrod further concluded that "viewed in the light most favorable to [petitioner], her allegations, if true, could establish that the confiscation of her manuscript poses a 'substantial burden' on

her religious exercise" under RFRA. Id. at C8 (citation omitted).

ARGUMENT

Petitioner contends (Pet. 4-5) that the court of appeals erred in finding that her RFRA and First Amendment claims are barred by qualified immunity. That factbound challenge to the court of appeals' unpublished decision lacks merit and does not warrant this Court's review. Petitioner also contends (Pet. 4-6) that the court of appeals erred by holding that rational basis review applies to her RFRA claims; that the allegations in her complaint do not establish a substantial burden on her religious exercise within the meaning of RFRA; and that her official capacity claims are moot. But the court of appeals does not appear to have adopted the holdings petitioner challenges. The petition for a writ of certiorari should be denied.

1. Petitioner asserts (Pet. 4-5) that the court of appeals erred in holding that respondents are entitled to qualified immunity with respect to her RFRA and First Amendment claims. That is incorrect. This Court has repeatedly held that an official is entitled to qualified immunity unless she violated a statutory or constitutional right that "was 'clearly established' at the time of the challenged conduct." Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011) (citation omitted). Here, the court of appeals explained that petitioner had neither challenged the applicability

of the qualified immunity doctrine nor identified any precedents demonstrating that respondents' alleged actions constituted a "clearly established" violation of RFRA or the First Amendment. Pet. App. C4.

Petitioner errs in asserting that only a "plainly incompetent" prison psychologist would "think it is lawful" to engage in the conduct petitioner alleged in her complaint -- the confiscation of a sex offender's religious writings addressing sexual conduct based on the psychologist's belief that the writing is sexually explicit. Pet. 5 (citation omitted). The court of appeals cited circuit precedent establishing that the Constitution does not bar prison officials from limiting access to sexually oriented materials. See Pet. App. C5 (citing Thompson v. Patteson, 985 F.2d 202, 205-206 (5th Cir. 1993)). And both this Court and other courts of appeals have similarly recognized that prison officials may limit prisoners' access to sexually explicit material. See Thornburgh v. Abbott, 490 U.S. 401, 414-419 (1989) (rejecting facial challenge to Bureau of Prisons regulations permitting wardens to prevent federal inmates from receiving certain publications, including sexually explicit material); Reynolds v. Quiros, 25 F.4th 72, 84 (2d Cir.) (collecting cases), cert. denied, 143 S. Ct. 199 (2022).

Petitioner does not contend that the court of appeals' qualified-immunity holding conflicts with any decision of this

Court or another court of appeals. And the court's factbound and nonprecedential assessment of the sufficiency of the allegations in petitioner's complaint does not otherwise warrant this Court's review. See Sup. Ct. R. 10.

2. Petitioner asserts (Pet. 4-6) that the court of appeals committed additional errors in rejecting her RFRA claim on the merits and holding her official capacity claims moot, but those assertions are based on a misunderstanding of the court's decision.

Petitioner asserts that the court of appeals applied "rational basis review" to her RFRA claim, Pet. 4, and made a "conclusory" finding that the allegations in her complaint did not establish a "substantial burden," Pet. 6. In fact, the court stated only that petitioner had "made no showing" of a "'substantial burden'" under RFRA. Pet. App. C5 (emphasis added; brackets and citation omitted). That statement came in the midst of a paragraph explaining why petitioner had failed to "establish[] any constitutional violation." Ibid. In context, the court's statement about RFRA is best read to reflect its view that petitioner's appellate briefing had failed to make any independent argument in support of her RFRA claim, such that the claim rose or fell based on the viability of her constitutional arguments. That reading is supported by petitioner's panel-stage briefing, which argued that her allegations established a First Amendment violation and addressed RFRA's distinct requirements in a single

footnote asserting that "[b]ecause [respondents] fail the rational basis standard, it is unnecessary to analyze the RFRA strict scrutiny-claims." Pet. C.A. Br. 25 n.12.

The court of appeals did not err in concluding that petitioner's appellate brief had effectively abandoned any independent argument under RFRA. That case-specific forfeiture holding does not warrant this Court's review. And even if petitioner were correct that the court of appeals' opinion could be read as rejecting her RFRA claim on the merits, the ambiguity about the basis for the court's decision would at minimum make this case an unsuitable vehicle for further review.

Petitioner is similarly mistaken in asserting (Pet. 5) that the court of appeals found her official-capacity claims moot. The district court dismissed those claims based on mootness, Pet. App. A11-A12, and Judge Elrod agreed as to some but not all of the claims, id. at C6 n.8. But the majority did not address the mootness issue. Instead, it concluded that its rejection of petitioner's individual-capacity claims also foreclosed her official-capacity claims. Id. at C5. The court thus did not adopt the mootness holding petitioner attacks. And if anything, the presence of that unaddressed threshold jurisdictional issue presents an additional reason why this case would not be an appropriate vehicle for considering the other issues petitioner seeks to raise.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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