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

Reply To The Petition For A Writ Of Certiorari

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Petitioner, Lisa Biron, has finally received the Solicitor's response brief at her new facility and she offers this reply, which she prays this Honorable Court will consider before its conference.

Qualified Immunity

Contrary to Respondents' claim (Resp. 8-10), Petitioner, in her argument against qualified immunity for the defendants, cited to Turner v. Safley, 482 U.S. 78 (1987) and the government-psychologists' failure of Turner's rational-basis test to show that her right to write was clearly established. Moreover, she cited to Procunier v. Martinez, 416 U.S. 396 (1974) and other First Amendment cases of this Court to show that her right to write is so basic, so obvious, so "indispensible" and "too certain to need discussion." See United States v. Am. Library Assoc., 539 U.S. 194 (2003); Roth v. United States, 354 U.S. 476 (1957); Mutual Film Corp. v. Industrial Com., 236 U.S. 230 (1915). (Pet. App. Br. 25-27.) Respondents' citations to cases that allow prison officials to limit an inmate's possession of sexually explicit material has zero application to this case. Ms. Biron has pleaded, in the operational complaint, that the writing was Biblical and not sexually explicit, and these facts must be accepted as true at the pleading stage.

As noted by the Petitioner, but misconstrued by the Respondents (Resp. 10-11), because defendants are not entitled to qualified immunity on the First Amendment claims, they are not entitled to qualified immunity on the RFRA claim either. A separate analysis was unnecessary. (See Pet. App. Br. 25 n.12.)

What these government officials did in stealing Petitioner's Christian writing was plainly unconstitutional and even violated their own BOP

Program Statement on inmate manuscripts. That this writing was an exercise of Petitioner's Christian faith stacks one constitutional violation (Freedom of Expression) on top of another (Free Exercise of Religion), as well as violating RFRA. This case is not only appropriate to define the limits of qualified immunity, or to determine when a defendant is "plainly incompetent", it may be the Court's best chance to do so. The case is unique because the prisoner-Petitioner is an attorney and pro se federal prisoner rights cases are generally not as well presented or thoroughly briefed. The Court should take this rare opportunity to grant the writ on one or more of the questions presented in the Petition.

The Appellate Decision Means What It Says

The Respondents try to convince this Court that the Fifth Circuit did not reject Petitioner's RFRA claim by subjecting it to rational basis review and by erroneously finding (in the first instance at the appellate level) that she did not plead a "substantial burden," but instead considered her RFRA claim abandoned or forfeited. (Resp. 10-11.) This is a revisionist argument and unsupported by the record.

Indeed, the Panel cited to 42 U.S.C. § 2000bb-1 (a), (b), the RFRA statute, in stating Petitioner "has made no showing," (which can only mean that Petitioner has not adequately alleged in her operative complaint) "that the confiscation of her manuscript poses a 'substantial[] burden on her religious exercise." (App. Decision 5). Then in the next sentence it held that Respondents' actions were, nevertheless, reasonable. (Id.)

In claiming that the Panel deemed her RFRA claim abandoned, the Respondents argue that the Petitioner "failed to make any independent argument in support of her RFRA claim" at the Panel-stage briefing. (Resp.

10.) Respondents, however, misunderstand the issues that were in play at that point in the litigation. The district court did not conduct any analysis of RFRA as applied to the facts alleged in the operative complaint. The Petitioner's brief, therefore, addressed the relevant RFRA issues in light of the district court's opinion, which were: 1) the district court's erroneous application of qualified immunity to the defendants' actions without first addressing whether RFRA allowed individual capacity damages, and 2) that RFRA does allow such damages. (Pet.'s App. Br. 22-24.)

Notably, Petitioner was not permitted to file an appellate reply brief because her December 2, 2019 motion for an extension of time to file her reply was, inexplicably, denied by the court of appeals.

In addition, in November 2020, the appellate court stayed the case until, inter alia, this Court's Tanzin decision regarding RFRA-damages.

Finally, upon receiving the Panel's opinion with its erroneous and anemic RFRA-analysis, the Petitioner filed a petition for Panel re-hearing arguing the proper legal framework of RFRA as applied to the facts of this case.

In sum, nobody, until the Solicitor's Brief in Opposition to the Petition for a Writ of Certiorari, had considered Petitioner's RFRA claim--her strongest claim--forfeited. Admittedly, this is a creative way to explain or justify such a wrongly decided case, but it has no basis in fact.

This Honorable Court should grant the writ to protect the erroding constitutional rights of its federal prisoners.

Respectfully submitted,

12-21-23
Date

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