U.S. Department of Justice

United States Attorney
Southern District of New York

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August 7, 2017

By Electronic Case Filing
The Honorable Catherine O'Hagan Wolfe
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

Re: *Tanvir v. Tanzin*, No. 16-1176 (2d Cir.)

Dear Ms. Wolfe:

Defendants (or the "agents") respectfully submit this reply to the letter filed by plaintiffs ("Pls. Ltr.") pursuant to the Court's Order of July 6, 2017. Plaintiffs' letter confirms that reasonable officers in the agents' position "might not have known for certain" that their alleged conduct was prohibited by RFRA, and the agents are therefore entitled to qualified immunity on the face of the amended complaint under *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017).

A. Plaintiffs Fail to Allege That Any Agent Knowingly Imposed a Substantial Burden on Plaintiffs' Religious Exercise

Plaintiffs effectively concede that they did not convey to any defendant that they had religious objections to serving as informants. Instead, they ask the Court to draw a "reasonable inference" that defendants "were familiar with Islamic religious beliefs," simply because (1) the agents knew plaintiffs were Muslim, and (2)

"[f]or many years, the FBI has been aggressively recruiting and deploying informants in American Muslim communities." Pls. Ltr. at 8-9. But it is far from reasonable to charge the defendant agents with broad knowledge of "Islamic religious beliefs"—which surely include a diverse range of beliefs—simply because the FBI—an institution comprising thousands of agents—had recruited Muslim-American informants in the past. Nor would general "familiar[ity]" with "Islamic religious beliefs" provide the requisite "certainty" under *Abbasi* that asking plaintiffs to serve as informants would impose a substantial burden on their religious exercise. 137 S. Ct. at 1869.

Moreover, in arguing that the agents' knowledge of their religious objections is "immaterial," Pls. Ltr. at 11, plaintiffs underscore why RFRA does not provide for individual capacity claims at all. Plaintiffs correctly note that "Congress's intent in passing RFRA was to protect religious exercise against 'neutral, generally applicable' laws and practices.'" *Id.* at 12 (citing 42 U.S.C. § 2000bb(a)(2)). That Congress was focused on neutral and generally applicable laws and practices that substantially burden religious exercise, even "in an incidental way," *id.* at 11 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997)), is one of the many reasons why RFRA was *not* intended to create a damages remedy against individual federal officers. *See* ECF No. 64 ("Defs. Br.") at 33-35.

There is no support for plaintiffs' extraordinary proposition that officers can be held personally liable for damages for unknowingly violating RFRA, and the

Sixth Circuit has held to the contrary. *See Weinberger v. Grimes*, No. 07-6461, 2009 WL 331632, at *5 (6th Cir. Feb. 10, 2009) (unpublished) (no RFRA violation where defendant did not "act[] knowingly"). At a minimum, the agents are entitled to immunity because they could not have known for certain that their conduct imposed a substantial burden on plaintiffs' religious exercise. *Abbasi*, 137 S. Ct. at 1867 ("qualified immunity protects 'all but the plainly incompetent or those who *knowingly* violate the law' (citation omitted; emphasis added)).

B. Plaintiffs Fail to Cite Any Clearly Established Law Showing That the Particular Conduct They Allege Violated RFRA

Plaintiffs also fail to identify any clearly established law that would have afforded the agents certainty that their alleged actions violated RFRA. Plaintiffs invoke the text of the statute itself, *see* Pls. Ltr. at 8, which is far too "abstract [a] legal standard" to establish the contours of particular right, *Gittens v. Lefevre*, 891 F.2d 38, 42 (2d Cir. 1989); *accord Abbasi*, 137 S. Ct. at 1866 (text of Fourth Amendment an example of "abstract rights"); *Redd v. Wright*, 597 F.3d 532, 536 (2d Cir. 2010) (inmate's First Amendment right "not to be subjected to punishment . . . as a consequence of his religious beliefs" was not "reasonably specific"). That is why the Supreme Court has repeatedly stated that "the dispositive question is 'whether the violative nature of the *particular* conduct is clearly established.'" *Abbasi*, 137 S. Ct. at 1866 (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015), and *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)).

None of the cases cited by plaintiffs to show that their "RFRA rights were clearly established" involves the "*particular* conduct" alleged in this case. *See* Pls. Ltr. at 8-11. Rather, they addressed challenges to state laws of neutral applicability under the Free Exercise Clause;[1] claims that state actions violated the Establishment Clause;[2] and a First Amendment retaliation claim by a prison inmate disciplined for giving the Quran to another inmate.[3] The one case plaintiffs cite that involved RFRA is an unreported district court case, *Bass v. Grottoli*, No. 94 Civ. 3220, 1995 WL

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[1] *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972) (state law criminally penalized Amish plaintiffs for violating compulsory school attendance law); *Thomas v. Review Bd.*, 450 U.S. 707, 709 (1981) (state law denied unemployment compensation to Jehovah's Witness who quit his job due to religious beliefs).

[2] *DeStefano v. Emergency Hous. Grp. Inc.*, 247 F.3d 397, 402 (2d Cir. 2001) (state-funded private alcoholic treatment facility that included religious programs); *Lee v. Weisman*, 505 U.S. 577, 586-87 (1992) (prayers in obligatory public school graduation ceremony). Notably, the amended complaint does not allege that the agents violated the Establishment Clause, nor that plaintiffs were "coerc[ed] . . . to participate in religious activities and observances," as plaintiffs argue now. Pls. Ltr. at 10. Rather, plaintiffs allege that their religious beliefs precluded them from informing on others in their community and elsewhere. *See* JA 77, 85, 95 (¶¶ 84, 121-22, 156-57). Also, plaintiffs allege that certain agents asked Algibhah to "act like an extremist" on Islamic websites, JA 85, 88 (¶¶ 121, 133), not at a place of worship, *see* Pls. Ltr. at 10.

[3] *Washington v. Gonyea*, 538 F. App'x 23, 26 (2d Cir. 2013). As an unpublished and non-precedential order issued in September 2013, after the alleged conduct, this decision could not have provided any relevant notice to defendants. *See Wilson v. Layne*, 526 U.S. 603, 614-18 (1999); *Matusick v. Erie Cty. Water Auth.*, 757 F.3d 31, 61 (2d Cir. 2014). And in a published decision issued in the same case, this Court held that RLUIPA does not provide for individual capacity suits, *see Washington v. Gonyea*, 731 F.3d 143, 144 (2d Cir. 2013), providing further proof that the virtually identical language in RFRA does not create a cause of action for damages against individual federal officials. *See* Defs. Br. at 22-27.

565979 (S.D.N.Y. Sept. 25, 1995), which could not "clearly establish" any right for qualified immunity purposes. *See Tellier v. Fields*, 280 F.3d 69, 84 (2d Cir. 2000). And like the other cases plaintiffs invoke, *Bass* did not involve factual allegations remotely similar to those alleged here. *See* 1995 WL 565979, at *1-4 (inmate alleged he was repeatedly subjected to "anti-Semitic harassment and deliberate interference with religious services" by prison personnel). Such cases could not have "placed the statutory . . . question" whether the agents violated RFRA by allegedly pressuring plaintiffs to serve as informants "beyond debate." *Mullenix*, 136 S. Ct. at 308.

Because plaintiffs identify no clearly established law that would have put defendants on notice that their particular alleged conduct violated RFRA, defendants are immune from plaintiffs' claims. *See Davila v. Gladden*, 777 F.3d 1198, 1211 (11th Cir. 2015) (not clearly established that inmate had right to "obtain his [Santeria] beads and shells infused with Ache"); *Lebron v. Rumsfeld*, 670 F.3d 540, 557 (4th Cir. 2012) (defendants immune because "any rights that enemy combatants may have had under RFRA were not clearly established" at the time); *Rasul v. Myers*, 563 F.3d 527, 533 n.6 (D.C. Cir. 2009) (not clearly established that RFRA applied to aliens detained abroad).

C. The Court Should Decide Defendants' Qualified Immunity Now

The Court should not defer a determination on qualified immunity, as *Abbasi* itself demonstrates. 137 S. Ct. at 1852 (Court reviewing determination of motions to dismiss, and accepting allegations in complaint as true). Indeed, the Supreme

Court has instructed that as an immunity from suit, qualified immunity should be resolved "at the earliest possible stage in the litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). Plaintiffs not only ignore this principle, but they disregard this Court's recognition that the defense may be "successfully asserted in a Rule 12(b)(6) motion" where, as here, "the complaint itself establish[es] the circumstances required as a predicate to a finding of qualified immunity." *McKenna v. Wright*, 386 F.3d 432, 435-36 (2d Cir. 2004) (quotation marks and citation omitted).

There is no basis to permit discovery on "'whether and how' Defendants placed Plaintiffs on the No Fly List in retaliation for their refusal to serve as informants." Pls. Ltr. at 4. Even if one or more agents had engaged in such conduct,[4] "reasonable officers in [their] positions would not have known with any certainty the alleged [actions] were forbidden by [RFRA]." *Abbasi*, 137 S. Ct. at 1869. Defendants are therefore immune from suit on plaintiffs' claims, including discovery. *See Ashcroft v. Iqbal*, 556 U.S. 662, 685-86 (2009); *Lebron*, 670 F.3d at 560; *Rasul*, 563 F.3d at 533 n.6 (both finding officials immune based on complaint). As *Abbasi* recognized, moreover, discovery imposes substantial costs on the government as

[4] This allegation is implausible, given plaintiffs' acknowledgment that FBI agents only nominate individuals to the No Fly List; it is the Terrorist Screening Center ("TSC") that "makes the final decision on whether an individual should be placed on the No Fly List." JA 68 (¶ 41); *see also* JA 67 (¶ 40). Moreover, many of the agents are not even alleged to have taken part in the purported requests that plaintiffs serve as informants, and plaintiffs were able to fly following their interactions with many of the agents. *See* ECF No. 90, at 4-8 & Addendum.

well as individual agents, *see* 137 S. Ct. at 1856, particularly in cases where it would require "inquiry into sensitive issues of national security," *id.* at 1861. This case challenges the FBI's use of a vital component of the government's counterterrorism efforts, and thus directly implicates the concerns identified in *Abbasi*.[5]

For all these reasons, the Court should hold that defendants are entitled to qualified immunity.

Respectfully,
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[5] Plaintiffs seek to distinguish *Abbasi* by mischaracterizing their suit as involving "individual instances of . . . law enforcement overreach by" by "low-level FBI agents," Pls. Ltr. at 13-14, but the amended complaint makes sweeping claims of government misuse of the No Fly List, *see* JA 66-67, 73. Plaintiffs also ignore that, as in *Abbasi*, the "specific policies" challenged in this case have "attracted the attention of Congress." Pls. Ltr. at 13 (quoting 137 S. Ct. at 1862). Congress created a comprehensive remedial scheme for individuals who "believe they have been delayed or prohibited from boarding a commercial aircraft because they were wrongly identified as a threat," 49 U.S.C. § 44926(a); *see also* 49 U.S.C. §§ 44903, 46110(a); 49 C.F.R. §§ 1560.201-.207 (establishing "DHS TRIP" program including judicial review), and in doing so specifically considered and rejected a civil damages remedy, *see* H.R. Rep. No. 108-724, pt. 5, at 270–71 (2004). Indeed, plaintiffs have successfully invoked the DHS TRIP procedures, *see* SPA 11-12, and so "this is not a case . . . in which it is damages or nothing," *Abbasi*, 137 S. Ct. at 1862 (citations and internal quotation marks omitted).