No. 05-977

In The
Supreme Court of the United States
October 2005 Term

DENA BRISCOE, *et al.,*

Petitioners,

v.

JOHN E. POTTER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

In their Petition for Writ of Certiorari, Petitioners raised an important question of federal law, namely, whether a *Bivens*-type action is maintainable where a plaintiff alleges that a defendant violated his procedural due process rights by interfering with or rendering unavailable contractual or statutory remedies that the plaintiff otherwise had the right to pursue. In this case, it was especially important that Petitioners be able to invoke the remedies at issue in a timely manner to protect themselves from imminent danger: continued exposure to a highly potent, "weaponized" form of anthrax that had contaminated their workplace in October 2001.

Respondents argue in their Brief For the Respondents In Opposition ("Resp'ts' Br.") that the Court answered this question in *Schweiker v. Chilicky*, 487 U.S. 412 (1988). *See* Resp'ts' Br. at 12. Respondents' argument misses the mark, however, because it misconstrues the question presented in *Schweiker*.

In *Schweiker*, the plaintiffs' social security disability benefits were terminated improperly. Although the plaintiffs' benefits were subsequently restored, the plaintiffs brought a *Bivens*-type action seeking consequential damages for the economic and emotional hardships they suffered as a result of the termination. *Schweiker*, 487 U.S. at 428. The question in *Schweiker* was whether the plaintiffs could recover money damages above and beyond the restoration and retroactive payment of benefits they had achieved by invoking preexisting statutory remedies. The question was not whether

the plaintiffs were unconstitutionally deprived of a statutorily created remedial scheme or any portion thereof.

The case at bar presents a very different question. Petitioners alleged that Respondents prevented them from invoking remedies otherwise available under their collective bargaining agreements, the Occupational Safety and Health Act, and other provisions by lying to them about anthrax contamination at the Brentwood facility. Moreover, time was of the essence. The imminent danger posed by exposure to weaponized anthrax spores made it all the more necessary for Petitioners to be able to invoke these remedies as quickly as possible in order to protect themselves and their co-workers from continued exposure. Under such circumstances, wherein Petitioners were prevented from invoking remedies that would have protected them from continued exposure to anthrax, it is not enough for Respondents to point to the Federal Employees Compensation Act ("FECA") and assert that workers who became ill or died as a result of exposure to anthrax could later seek compensation under FECA. Our constitution requires these workers to have been treated better.

The "special factor" militating against the creation of a *Bivens* remedy that the Court found to exist in *Schweiker* does not exist in a case such as this because it makes no difference whether a comprehensive statutory or contractual scheme exists if the plaintiffs are prevented from availing themselves of the remedies contained therein. The court in *Rauccio v. Frank*, 750 F. Supp. 566, 571 (D. Conn. 1990), a case decided *after* this Court's decision in *Schweiker*, correctly recognized this critical distinction:

> However, as plaintiff points out, *Bush v. Lucas* and its progeny are premised on the existence and availability of an adequate system of procedural safeguards through which a plaintiff may seek relief. In the instant case, the plaintiff's due process claim is premised on the defendants' interference with the procedural mechanism which Congress has created for the protection of employees. It is in this critical respect that *Bush v. Lucas* and the related cases cited by defendants are distinguishable. In each, the availability of an adequate procedural remedy was fatal to plaintiff's *Bivens* claims. In this case, assuming plaintiff's factual allegations to be true, defendants have rendered effectively unavailable any procedural safeguard established by Congress. Thus, *Bush* and its progeny are inapplicable to the facts of this case.

The Court should, thus, take this opportunity to address the novel question of law presented in this case and declare that a procedural due process, *Bivens*-type remedy is maintainable if it is alleged that the defendant interfered with or otherwise rendered unavailable the substantive statutory or contractual remedies that the plaintiff had a right to pursue.[1]

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[1] Respondents argue in a footnote that "petitioners' situation does not actually present the question whether a *Bivens* remedy would be available if government officials had prevented all meaningful access to statutory remedies" because petitioners "failed sufficiently to allege that their access to all of the remedies that they were entitled to [was] blocked by [respondents]." Resp'ts' Br. at 12 n.5. Respondents are clearly wrong, as Petitioners alleged in their Complaint that Respondents interfered with and prevented Petitioners from pursuing their statutory and contractual administrative remedies during the critical four days that Respondents

Respondents also misconstrue the holding in *McIntosh v. Turner*, 861 F.2d 524 (8th Cir. 1988), as inconsistent with *Bishop v. Tice*, 622 F.2d 349 (8th Cir. 1980). *See* Resp'ts' Br. at 13. In *McIntosh*, the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") was called upon to decide whether a federal employee could bring a *Bivens* cause of action for money damages for the denial of the right to be considered for a promotion on a fair and unbiased basis. The Eighth Circuit concluded that the plaintiffs' cause of action was maintainable because the available civil service statutory remedies were inadequate in that they did not provide for money damages for a violation of a constitutional right when federal employees are denied promotions on an unfair and biased basis. *McIntosh v. Weinberger*, 810 F.2d 1411, 1435-36 (8th Cir. 1987).

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knew the Brentwood facility was contaminated with anthrax but still kept the facility open. *See Complaint* at ¶¶ 19, 20, 22, 23, 25, 26, 29, 30-34, 43-47, 49-76, 78-84, 86, 87, 89, 92-97, 100, 101, 103, 105, 107, 111, and 112. Respondents prevented Petitioners from pursuing their administrative remedies during these four days by coercing, intimidating, and threatening Petitioners not to make inquiries about the Daschle letter, the safety of the facility, or their own safety, and making false and/or misleading statements to Petitioners that the Brentwood facility was safe and that there was no evidence of anthrax contamination at the facility, among other false and/or misleading statements. *Id.* But for Respondents' illegal conduct, Petitioners would have timely invoked the remedies available to them under their collective bargaining agreements and the OSHA, as well as USPS emergency response procedures to have the facility shut down. *Id.* When the facility eventually was shut down after the four days in which Petitioners were needlessly exposed to anthrax contamination, Petitioners lost forever their right to pursue their remedies to have the facility closed.

This Court, however, vacated and remanded the case in light of its decision in *Schweiker*. *See Turner v. McIntosh*, 487 U.S. 1212 (1988). Upon remand, the Eighth Circuit abandoned its reasoning in light of *Schweiker* that a *Bivens'* type remedy is available if Congress fails to provide an adequate remedy for federal civil service employees who bring constitutional challenges to personnel actions. Contrary to Respondents' contention in the case at bar, however, the Court did not abandon the rule established in *Bishop*, namely, that a *Bivens*-type remedy is available if government officials prevent a plaintiff from availing himself of pre-existing remedies he is entitled to pursue. Ultimately, the Eighth Circuit found in *McIntosh* that Congress had provided remedies to the plaintiffs, even though those remedies might not be adequate. *McIntosh*, 861 F.2d 526. As a result, the plaintiffs could not maintain their *Bivens* claim. *Id.*

Lastly, despite the fact that Respondents admit Petitioners' allegations must be taken as true for purposes of review, Respondents nonetheless improperly attempt to influence this Court's deliberations, as they did in the district and appellate courts, by citing extraneous materials not mentioned in or attached to Petitioners' Complaint and not subject to judicial notice. *See* Resp'ts' Br. at 4 n.1. This Court must reject Respondents' improper litigation tactic as, in evaluating a Federal Rule of Civil Procedure 12(b)(6) motion, a court may only consider the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice. *See Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2nd Cir. 1991) (On motion to dismiss, court must limit itself to facts stated in complaint or in documents attached to complaint as exhibits or incorporated

in complaint by reference.); *ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 (3rd Cir. 1994) (On motion to dismiss, court must consider only those facts alleged in complaint.); *Milburn v. United States*, 734 F.2d 762, 765 (11th Cir. 1984) (Consideration of matters beyond complaint is improper in context of motion to dismiss); and *EEOC v. St. Francis Xavier Parochial School*, 117 F.3d 621, 624-25 and n.3 (D.C. Cir. 1997) (On motion to dismiss, court may consider only facts alleged in complaint, any documents either attached to or incorporated into complaint, and matters of which court can take judicial notice.).

Federal Rule of Evidence 201(b) states that a court may only take judicial notice of a fact that is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." This Court has recognized that "[j]udicial notice cannot be used to shortcut the evidentiary hearing process," so a court must not take judicial notice of facts contained in government reports if the facts are disputed and/or the facts go to the ultimate issue in the case, as do the facts in the government report that the Respondents improperly cite in the instant case. *Korematsu v. United States*, 584 F. Supp. 1406, 1415 (N.D. Cal. 1984). As a result, the Court should reject Respondents' improper references to extraneous matters outside the pleadings.

CONCLUSION

Petitioners respectfully request that a writ of certiorari be issued to resolve this important question of federal law that has not been, but should be, settled by this Court.

Respectfully submitted,

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