No. 15-1389

# In the Supreme Court of the United States

WAYNE ANDERSON,

*Petitioner,*

–v–

ASHTON CARTER, Secretary of Defense, ET AL.,

*Respondents.*

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

## REPLY BRIEF OF PETITIONER

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### I. RESPONDENTS HAVE NOT RECONCILED THE CASES CITED BY PETITIONER DEMONSTRATING THE CLEAR, CONTROVERSIAL EXISTENCE OF A THREE-WAY SPLIT AMONG THE CIRCUIT COURTS ON THE QUESTION OF WHETHER AND WHEN REPUTATIONAL HARM ALONE MAY BE INJURY SUFFICIENT TO AVOID MOOTNESS

Respondents fail to meaningfully address the entrenched, ongoing circuit split described in the Petition for a Writ of Certiorari. Simply put, the circuits continue to be divided on the question of whether reputational harm alone can ever present a sufficiently concrete injury, so as to avoid dismissal of an otherwise moot government action. Those circuits that recognize that reputational harm alone may constitute a concrete injury are further split with others on what standard applies to determine whether the particular case survives a mootness challenge. Resolution on this issue among the divided circuits calls for review and clear guidance by this Court.

Respondents mischaracterize Petitioner's arguments about the nature of the circuit courts' split. Petitioner does not contend, as Respondents suggest, that any circuit follows the "categorical rule that reputational injury is <u>always</u> sufficient to preserve an otherwise moot case[.]" (Resp.Br.17 n.5) (emphasis added). Rather, Petitioner points out that "the majority of circuits hold that reputational harm or stigma <u>may</u> alone constitute a sufficiently serious collateral consequence to prevent a case from becoming moot" (Pet.Br.11) (emphasis added) whereas "the

Eighth and Federal Circuits follow a rigid rule under which reputational harm or stigma can never constitute sufficiently concrete collateral consequences to avoid mootness" (Pet.Br.10) (emphasis added).

Petitioner further observes that the D.C. and Fifth Circuits, which fall into the former category, are all alone in applying a mechanical test under which alleged reputational injury which "derives directly" from an otherwise moot government action will save a case from mootness, but a reputational harm that is the "lingering effect" of an otherwise moot government action will not. (Pet.Br.12) These two conflicting interpretations are in stark contrast to each other and the controversy can only be resolved by this Court.

Respondents also contend that the cases cited by Petitioner do not demonstrate that the Federal and Eighth circuits "categorically hold that reputational harm cannot prevent mootness." (Resp.Br.18) Respondents then suggest that the cases from these circuits cited by Petitioner do not represent any disagreement with the majority view on an issue of law, but rather simply represent application of a settled rule of law to the particular facts at hand. However, the Federal Circuit's majority opinion in *Tesco Corp. v. Nat'l Oilwell Varco, L.P.*, 804 F.3d 1367 (Fed. Cir. 2015) openly acknowledged that its holding was in conflict with the holding of another circuit on the issue of whether reputational harm alone can ever prevent mootness. The *Tesco* majority explicitly acknowledged and rejected two Tenth Circuit cases in which "reputational injury without more was deemed sufficient to justify the exercise of jurisdic-

tion," making no attempt to distinguish these cases on the facts. *Id.* at 1379. Judge Newman, dissenting in *Tesco*, further elaborated on the majority's departure from the view of other circuit courts on the issue. For example, the dissent noted, "The First Circuit explicitly allows review of 'factual findings by themselves (*i.e.* unattached to any sanctions)' due to the 'serious practical consequences' they may have on counsel's reputation.' *Sheppard v. River Valley Fitness One, L.P.*, 428 F.3d 1, 6 (1st Cir. 2005)."

With respect to the Eight Circuit's decision in *N.D. Rural Dev. Corp. v. United States Dep't of Labor*, 819 F.2d 199 (8th Cir. 1987), Respondents point to particular facts in the case that led that court to conclude no redress was possible and the case should be dismissed as moot. (Resp.Br.18-19) The Eighth Circuit's determination that the case was moot, however, did not result from a finding that the particular facts of the case failed to support a finding of sufficient stigma attached to the federal agency's decision. Rather, the Eighth Circuit explicitly "recognize[d] that in a practical sense a certain stigma may follow NDRDC's designation as nonresponsible," but held that "[e]ven so" the case was moot because "NDRDC has not applied for grants for upcoming fiscal years, and any application it makes will not be considered by the Department until a later date." *Id.* at 200.

Further, Respondents cite no case from either the Federal or Eighth Circuits in which those courts have ever found reputational interest alone to be sufficient to avoid mootness. The absence of any such case law from these circuits, combined with the express holdings

in *Tesco* and *N.D. Rural Dev. Corp.*, make it clear that in the Federal and Eighth Circuits, reputational harm alone cannot prevent mootness.

In direct conflict with the Federal and Eighth Circuits, the First, Second, Third, Fifth, Sixth, Seventh, Ninth, Eleventh, and D.C. Circuits, along with numerous state courts of last resort, have held that in appropriate circumstances reputational harm alone may prevent mootness. (Pet.Br.10-13) (collecting cases). Respondents themselves concede that the Second and Sixth Circuits have "conclude[d] that reputational injury was sufficient to maintain an Article III case or controversy based on the specific facts presented." (Resp.Br.17 n.5)

The D.C. Circuit, followed by the Fifth Circuit, however, has taken a divergent view, an approach that is irreconcilably different from those of the other courts which recognize that reputational interest alone may be cognizable in the mootness analysis. As Respondents correctly point out, the D.C. Circuit "has concluded that when reputational injury 'derives directly from an unexpired and unretracted government action,' the injury 'satisfies the requirements of Article III standing to challenge th[e] action." *Foretich*, 351 F.3d at 1213. On the other hand, where 'injury to reputation is alleged as a secondary effect of an otherwise moot action,' the court of appeals has 'required that some tangible, concrete effect remain, susceptible to judicial correction.'" (Resp.Br.12)

This stark dichotomy between reputational injury which "derives directly from an unexpired and unretracted government action" and reputational injury which "is alleged as a secondary effect of an otherwise

moot action" is not found in the case law of any other federal circuit court of appeals, except for the Fifth. Instead, the majority of circuits employ an *ad hoc* analysis of whether reputational harm will prevent mootness, and that analysis, as Respondents correctly put it, "turn[s] on the specific facts presented." (Resp. Br.15) Moreover, the dichotomy is not rooted in any precedent of this Court or in the text of Article III itself, and Respondents utterly fail to cite to one single case from this Court supporting the D.C. Circuit's mechanical test.

This Court should grant the Petition for a Writ of certiorari to resolve the continuing, controversial three-way circuit split and answer the questions of whether reputational harm alone may ever constitute a concrete injury, and if so, whether the nature of the injury should be evaluated through a mechanical dichotomy (as in the D.C. and Fifth Circuits) or through a flexible, *ad hoc* approach (as in the First, Second, Third, Sixth, Seventh, Ninth, and Eleventh Circuits).

## II. THE D.C. CIRCUIT'S HOLDING THAT THE COMPLAINT FAILED TO STATE A CLAIM FOR RETALIATION UNDER THE FIRST AMENDMENT DOES NOT MAKE THIS CASE AN INAPPROPRIATE VEHICLE FOR RESOLVING THE CONTINUING THREE-WAY CIRCUIT SPLIT ON THE MOOTNESS ISSUE

This case presents an appropriate and timely vehicle for resolving the controversial circuit split on the mootness issue, notwithstanding the fact that the D.C. Circuit held, by a 2-to-1 decision, that Petitioner failed to state a claim for retaliation under the First Amendment.

Respondents' contention that the grant of a writ of certiorari on the pleading issue is inappropriate relies on an inaccurate characterization of the issue as being Petitioner's "fact-bound disagreement with the court of appeals' conclusion." (Resp.Br.9) The issue raised by Petitioner is not a mere disagreement with the court of appeals' application of the correct rule of law to the facts of the case. Rather, Petitioner seeks review from this Court on the grounds that the conflict between the D.C. Circuit's split decision on the issue and this Court's holding in *Johnson v. City of Shelby*, 574 U.S. __ (2014) "is so obvious as to warrant a grant of certiorari and summary reversal." *Alabama v. Battles*, 452 U.S. 920, 925 (1981). Indeed, *Johnson* itself was decided by this Court through a grant of certiorari and summary reversal.

Respondents contend that the present case is distinguishable from *Johnson* because "[t]he plaintiffs in *Johnson* had clearly alleged facts supporting their due-process claim and explicitly asserted a Fourteenth Amendment violation; they had merely failed to cite the statute that made that violation actionable against state officials." (Resp.Br.9) However, Respondents' narrow and oblique reading of *Johnson* cannot be squared with this Court's opinion in the case. This Court explicitly held in *Johnson* that a plaintiff need do no more than inform the defendant of the factual basis for their complaint. *Johnson*, 574 U.S. at __ ("Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim.") Thus, it is of no moment that the plaintiffs in *Johnson* referred to the Fourteenth Amendment, while *pro se* Petitioner did not specifically

refer to "retaliation" under the First Amendment, particularly where Petitioner clearly intended to and cited the First Amendment generally in his pleading, as Judge Srinivasan noted in his dissent. (Pet.App.14a) What is significant in both this case and *Johnson* is that the Complaint contained an adequate factual basis to support a claim for relief. That is all that is required.

The D.C. Circuit majority failed to even cite–much less follow–this Court's decision in *Johnson*. Instead, in examining Petitioner's prayer for relief to determine what "his complaint was for," (App.9a) the D.C. Circuit made precisely the same mistake as the circuit court in *Johnson*, which was "insistence on a punctiliously stated 'theory of the pleadings[.]'" *Johnson*, 574 U.S. at __.

Respondents make the same mistake in defending the D.C. Circuit's decision, arguing that "the court merely required that petitioner give respondents fair notice of the claim he was raising and the grounds upon which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)." (Resp.Br.10) However, the "fair notice" requirement of *Twombly* simply means that a Complaint must provide fair notice of the <u>factual</u> basis of the claim. *Johnson*, 574 U.S. at __ ("Our decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009), are not in point, for they concern the factual allegations a complaint must contain to survive a motion to dismiss.") The D.C. Circuit did not indicate that the Complaint lacked notice of the factual basis of the claim, and therefore Respondents' reliance on *Twombly* is misplaced.

## CONCLUSION

For the foregoing reasons showing a continuing conflict among the circuits and need for this Court to resolve it, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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