No. 07-1082

In The
Supreme Court of the United States

JOSHUA D. BAKER,
Petitioner,

v.

ERIC CHISOM, DREW COUNTY DEPUTY SHERIFF, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, AND MARCIA BRUNER, DREW COUNTY DEPUTY SHERIFF, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES.

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

REPLY BRIEF OF PETITIONER

AMY HOWE
KEVIN K. RUSSELL
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814

PAMELA S. KARLAN
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

THOMAS C. GOLDSTEIN
(Counsel of Record)
AKIN GUMP STRAUSS
HAUER & FELD, LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4060

WILLIAM C. PLOUFFE
ATTORNEY AT LAW
211 N. Washington St. #107
P.O. Box 1537
El Dorado, AR 71731

TABLE OF CONTENTS

Table of Contents i
Table of Authorities i
Reply Brief of Petitioner 1
Conclusion 13

TABLE OF AUTHORITIES

Cases

Baba-Singhri v. Cent. State U.,
2008 U.S. Dist. LEXIS 18355
(S.D. Ohio Mar. 10, 2008). 3

Biggs v. Meadows,
66 F.3d 56 (4th Cir. 1995) 8, 9

Brandon v. Holt,
469 U.S. 464 (1985) 2

Brown v. Rector & Visitors of the Univ. of Va.,
2008 U.S. Dist. LEXIS 36427
(W.D. Va. May 2, 2008) 3

City of Newport v. Fact Concerts, Inc.,
453 U.S. 247 (1981) 7

Conley v. Gibson,
355 U.S. 41 (1957) 2

Hafer v. Melo,
502 U.S. 21 (1991) 1

Kentucky v. Graham,
473 U.S. 159 (1985) 2

Lewis v. Williams,
2008 U.S. Dist. LEXIS 32870
(D.N.J. Apr. 22, 2008) 3

Moore v. City of Harriman,
272 F.3d 769 (6th Cir. 2001) 8

Morton v. City of Little Rock,
934 F.2d 180 (8th Cir. 1991) 5

Murphy v. Arkansas,
127 F.3d 750 (8th Cir. 1997) 1

Murrell v. Springdale Mem'l Hosp.,
952 S.W.2d 153 (Ark. 1997) 5

Paffhausen v. Bay Country Library Sys.,
2008 U.S. Dist. LEXIS 33650 (E.D. Mich. Apr. 24, 2008) 3

Powell v. Alexander,
391 F.3d 1 (1st Cir. 2004) 1, 7

Price v. Akaka,
928 F.2d 824 (9th Cir. 1990), *cert. denied*, 502 U.S. 967 (1991) 12

Sanderson v. McCollum,
112 S.W.3d 363 (Ark. App. 2003) 6

Short v. McKay,
2008 U.S. Dist. LEXIS 27323
(S.D. W. Va. Feb. 29, 2008) 3

Smith v. St. Paul Fire & Marine Ins. Co.,
64 S.W.3d 764 (Ark. App. 2001) 6

Tatus v. Hayes,
88 S.W.3d 864 (Ark App. 2002) 6

Wilson v. Garcia,
471 U.S. 261 (1985) 5

Statutes:

42 U.S.C. § 1983 2

REPLY BRIEF OF PETITIONER

This Court has previously recognized the long-standing split among the circuits over whether a civil rights complaint will be construed solely as an official-capacity suit unless the defendant is expressly named in his "personal capacity." *Hafer v. Melo*, 502 U.S. 21, 24 n.* (1991). That conflict now encompasses three distinct and irreconcilable rules applied by twelve different courts of appeals. *See* Pet. 8-14. The Eighth Circuit categorically holds that such an express statement is required, even when (as in this case) the course of the proceedings in the lawsuit establishes the plaintiff's intent to name the defendant in his individual capacity as well. The judgment in this case turns solely on the correctness of that per se rule, to which the Eighth Circuit is completely committed in light of its consistent precedent spanning more than a decade capped by the denial of rehearing en banc over a dissent in this case (Pet. App. 28a-29a), and despite the court's repeated recognition (*id.* 11a-12a (concurring opinion); *e.g.*, *Murphy v. Arkansas*, 127 F.3d 750, 755 (8th Cir. 1997)) that every other court of appeals rejects its "formalistic 'bright-line' test" (*Powell v. Alexander*, 391 F.3d 1, 22 (1st Cir. 2004)).

Though they neither deny the circuit conflict, nor defend the merits of the Eighth Circuit's wholly isolated position, respondents seek to evade any liability for a vicious assault on petitioner that was captured on videotape and resulted in a criminal conviction. As the petition explains (at 23-24), the holding of the Eighth Circuit that mandated the dismissal of petitioner's civil rights complaint cannot be reconciled

with this Court's precedents, which make clear that even when plaintiffs do "not expressly allege at the outset of . . . litigation that they were suing [a defendant] in his official capacity" (*Brandon v. Holt*, 469 U.S. 464, 469 (1985)), "[t]he course of proceedings . . . typically will indicate the nature of the liability sought to be imposed" (*Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)). Moreover, unlike the Eighth Circuit's per se rule, this Court's "course of proceedings" test properly balances a defendant's interest in having "fair notice of what the plaintiff's claim is and the grounds upon which it rests" (*Conley v. Gibson*, 355 U.S. 41, 47 (1957)), with a plaintiff's interest in pursuing his claims without being thwarted by technical mistakes in pleading.

Respondents also do not dispute that the Eighth Circuit's holding functions principally as a trap for the unwary – the tens of thousands plaintiffs who file suit each year under 42 U.S.C. § 1983, many *pro se*. Given the difficulty that trained attorneys have navigating the nuanced distinctions between individual and official capacity suits, it is entirely unrealistic to expect that uncounseled plaintiffs will conform their pleadings to the Eighth Circuit's formalistic rule. Unquestionably, "[i]n many cases, the complaint will not clearly specify whether officials are sued personally, in their official capacity, or both." *Kentucky v. Graham*, 473 U.S. 159, 167 (1985). *See* Pet. 19-20.

Because only this Court can bring uniformity to this important and recurring question of federal law

and correct the serious error of the Eighth Circuit's holding, certiorari should be granted.[1]

1. There is no merit to respondents' contention that the "dispositive question" in this case is "a disputed question of Arkansas law," which turns on "applicable state law and the facts of the case." BIO 4-5. Respondents' position seems to be that resolving the question of federal law decided by the lower courts and presented by the petition would amount to a prohibited "advisory opinion" (*id.* 6), because, as a matter of Arkansas law, the State's savings statute applies only if the original complaint expressly named the defendant in the same capacity as the later-filed suit.

Respondents' point is easily answered. The lower courts did not decide this case on the basis of the proper construction of the Arkansas savings statute. Rather, they decided, purely and exclusively as a matter of *federal* law, that petitioner's original complaint sued respondents only in their official capaci-

---

[1] That the question presented arises frequently is demonstrated by the fact that, in only the short time since the petition was filed, courts outside the Eighth Circuit have repeatedly applied the "course of proceedings" test to determine that a defendant was sued in his individual capacity. *See, e.g.*, *Lewis v. Williams*, Civ. No. 07-1592 (GEB), 2008 U.S. Dist. LEXIS 32870, at *11 (D.N.J. Apr. 22, 2008); *Brown v. Rector & Visitors of the University of Virginia*, No. 3:07cv00030, 2008 U.S. Dist. LEXIS 36427, at *8 n.3 (W.D. Va. May 2, 2008); *Short v. McKay*, 2:07-cv-00409, 2008 U.S. Dist. LEXIS 27323, at *10 (S.D. W. Va. Feb. 29, 2008); *Paffhausen v. Bay Country Library Sys.*, No. 06-13324-BC, 2008 U.S. Dist. LEXIS 33650, at *28-*31 (E.D. Mich. Apr. 24, 2008); *Baba-Singhri v. Cent. State U.*, No. 3:03cv429, 2008 U.S. Dist. LEXIS 18355, at *19-*20 (S.D. Ohio Mar. 10, 2008).

ties. Pet. App. 6a (court of appeals opinion: "[W]e agree with the district court that Baker's first complaint did not include the requisite clear statement that Chisom and Bruner were being sued in their individual capacities. Therefore, the one-year savings statute did not apply, and these claims were properly dismissed as time-barred."); *id.* 21a (district court opinion: "According to the Eighth Circuit's rule requiring an unambiguous statement to sue municipal officials in their individual capacities, the first action had to be treated as a suit against Bruner and Chisom in their official capacities only."). Despite respondents' attempt to suggest otherwise (BIO 8 (citing Pet. App. 3a, 6a)), the lower courts neither mentioned the state law question that respondents now contend is "dispositive" (*id.* 6) nor discussed any of the cases that respondents cite as "intriguingly analogous" (*id.* 10). *Accord* BIO 4 (recognizing that the district court actually held that respondents "were not sued in their individual capacities in the original action, that the tolling effect of the 'Arkansas Savings Statute' thus did not apply, and that Petitioner's claim(s) against the Respondents in their individual capacities should therefore be dismissed"). If certiorari were granted, this Court would decide only that federal law question, rather than the proper construction of the Arkansas savings statute, for the very reason that respondents give – namely, that this Court generally does not pass upon questions of state law.

To be sure, respondents are correct in their assertions (BIO 9-10) that petitioner's Section 1983 suit can proceed only if it was timely filed and that the

length of the limitations period is defined by Arkansas law. *Wilson v. Garcia*, 471 U.S. 261, 275 (1985); *Morton v. City of Little Rock*, 934 F.2d 180, 182 (8th Cir. 1991). But that manifestly does not convert the question presented into "at best, a disputed question of state law." *Contra* BIO 9. If respondents were correct, then this Court would never decide any question regarding the statute of limitations under Section 1983, which always imports the analogous state law limitations period.

In any event, respondents' argument finds no basis in Arkansas law. Rather, respondents seek to extend cases such as *Murrell v. Springdale Mem'l Hosp.*, 952 S.W.2d 153 (Ark. 1997), and its progeny far beyond their actual holdings. In *Murrell*, for example, the Arkansas Supreme Court considered the timeliness of wrongful-death claims by the decedent's children when the original complaint, filed by their father (the decedent's widower), had been non-suited. The court's conclusion that "[t]he savings statute . . . cannot save their claims because the children were not parties to the first action" rested on the plain language of the savings statute, which "provides that if '*the plaintiff* therein suffers a nonsuit' then '*the plaintiff* may commence a new action within one (1) year.'" *Id.* at 156 (quoting 16-56-126 (emphasis in opinion)). Nothing in *Murrell* – or in the line of wrongful-death cases that followed it – deals at all with defendants or the circumstances in which a defendant named in

a complaint becomes a party to the action, much less the question presented by this case.[2]

Respondents moreover only glancingly invoked their state law argument before the court of appeals, notably citing *no* cases (much less any of the decisions they now regard as dispositive).[3] To the extent those passing references were sufficient to preserve the issue, respondents are free to raise it as an alternative ground for dismissal of the complaint on remand from this Court.

Because the "dispositive" question decided by the lower courts in this case unquestionably one of federal law, this case is an appropriate vehicle to decide the question presented.

---

[2] *See also Sanderson v. McCollum,* 112 S.W.3d 363, 366 (Ark. App. 2003) ("[T]he savings statute cannot save a wrongful-death action when the current plaintiffs are not the same plaintiffs who were parties to first suit, which has been nonsuited."); *Tatus v. Hayes*, 88 S.W.3d 864, 866 (Ark App. 2002) (wrongful-death action brought by administratrix of decedent's estate was time-barred when prior wrongful-death action, which was nonsuited, was brought by decedent's heirs); *Smith v. St. Paul Fire & Marine Ins. Co.*, 64 S.W.3d 764, 769 (Ark. App. 2001) ("the savings statute is inapplicable because the plaintiffs differed between the first and second suits").

[3] *See* Resps. C.A. Br. 14 (noting in passing that "[i]n response to the Appellant's Complaint in the original action, Appellees Chisom and Bruner answered only in their official capacities and therefore were not parties to the original action in their individual capacities, as a matter of fact and law," but then explaining that "[i]n the end, the Appellant simply did not name the Appellees in their individual capacities in the original action and his claims against them in the instant case are therefore time-barred (since the Arkansas Savings Statue (sic) does not apply to toll the otherwise expired statute of limitations)" (footnote omitted)).

2. The petition demonstrated that the overwhelming majority of circuits would conclude that petitioner sued respondents in their individual capacities. Pet. 14-19. Respondents have no persuasive answer to that showing, and their assertion that this case is not an appropriate vehicle to resolve the recurring circuit conflict presented by the case lacks merit.

On three distinct grounds, other courts of appeals would easily conclude that the "course of proceedings" establish that petitioner filed an individual capacity claim. ***First***, petitioner's complaint seeks to hold respondents "jointly and severally" liable for, *inter alia*, punitive damages (Pet. App. 35a), which are available only against defendants sued in their individual capacities (*City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259-60 (1981)). *See* Pet. 15 (citing, *e.g.*, *Powell v. Alexander*, 391 F.3d 1, 23 (1st Cir. 2004) (emphasizing that course of proceedings gave city official "fair notice that she was being sued in her individual capacity" because, inter alia, a "prayer for punitive damages could only be brought against defendant governmental officials who were sued in their individual capacities"). Respondents' answer that petitioner sought punitive damages "against the 'Defendants' generally" (Br. 15) proves precisely petitioner's point (given that respondents are among the defendants) and in any event fails to account for petitioner's express request for joint and several liability. There is thus no explanation for the complaint's request for relief other than that petitioner named respondents as defendants in their individual capacities.

Second, the gravamen of petitioner's complaint against respondents is their personal wrongdoing, as distinct from the implementation of a municipal custom or policy that would give rise to official capacity liability. *See* Pet. 16 (citing, *e.g.*, *Biggs v. Meadows*, 66 F.3d 56, 61 (4th Cir. 1995) (in finding that plaintiff "intended to sue the defendants as individuals," explaining that plaintiff's allegations "focus on [defendants'] actions toward Biggs and do not necessarily implicate an official policy or custom")). Respondents point to the complaint's statement that "these acts, omissions, and conduct constitute official policies, practice or customs of the defendants." BIO 16 (quoting Pet. App. 34a). That argument is misguided. The actual *assault* for which petitioner seeks to hold respondents liable obviously is not a municipal policy, practice, or custom. The language cited by respondents instead relates to the complaint's distinct allegations that certain of the defendants "refused to or did not adequately supervise the operation of the jail and the deputy sheriffs employed by them" and "permit[ted] or fail[ed] to take the steps necessary to prevent the bodily assault." Pet. App. 33a-34a.

Third, respondents themselves recognized that petitioners had sued them in their individual capacity. *See* Pet. 17 (citing, *e.g.*, *Moore v. City of Harriman*, 272 F.3d 769, 772 n.1 (6th Cir. 2001)). Respondents specifically and expressly sought an extension of time to respond to the complaint "in both their individual and official capacities." Pet. App. 36a. Respondents' counsel now asserts that he actually "did not agree to defend the Respondents in their individ-

ual capacities until several years later." BIO 18. Although the motion speaks for itself and indicates the opposite, the precise nature of respondents' retainer agreement with their lawyer is immaterial. The relevant point is that their motion demonstrates that at the time they understood petitioner's complaint to state an individual capacity claim.

All the defendants, including respondents, also asserted the defense of qualified immunity, which applies only to individual capacity claims. *See* Pet. 17 (citing, *e.g.*, *Biggs*, 66 F.3d at 61 ("Because qualified immunity is available only in a personal capacity suit, the assertion of that defense indicates that the defendant interpreted the plaintiff's action as being against him personally." (citation omitted))). Respondents now note that "qualified immunity was asserted collectively for all defendants" (Br. 17), but that is of course precisely petitioner's point. They drew no distinction between respondents and the remaining defendants. Pet. 16-17.[4]

Respondents' argument that other facts show that they were sued only in their official capacities is unpersuasive. Principally, respondents rely on the "caption of the complaint." BIO 14. But the caption said *nothing* about the capacity in which *respondents* were sued. *See* Pet. 30a. If petitioner's complaint had named respondents only in their "official capacity," that would be a strong argument; the apparently conscious choice to omit an individual capacity claim would be telling. But the fact that the complaint spe-

---

[4] Petitioner's complaint also expressly states that respondents are named "as individual Defendants." Pet. App. 31a. *See* Pet. 4, 15.

cified that some other defendants were being sued in two separate capacities, individual and official (*see id.*),[5] does nothing to support an inference that respondents were sued in only one, and that one was their official capacity. Even respondents agree that petitioner must have intended to sue them in *some* capacity despite the complaint's silence on that score. And respondents have no explanation for why the correct inference is that petitioner sued them in their "official" rather than their "individual" capacity.

In any event, there is a perfectly logical explanation for why the complaint specified the dual capacities of the remaining defendants, and that explanation overcomes the persuasive force of the indirect inference that respondents ask this Court to draw. As noted *supra*, among all the defendants, respondents were the individuals who were actually involved in the assault on petitioner that gave rise to his lawsuit. The remaining defendants were municipal officials who were not directly involved in the attack. If petitioner had not specified in his complaint that the municipal officials were sued in their individual capacities, a court might have concluded that petitioner sought to hold them liable only as government officials for implementing a municipal policy. *See* Pet. 18.

Respondents also hope to suggest that petitioner recognized that he had sued them only in their official capacities. Most telling, of course, is the undis-

---

[5] Respondents' assertion that this fact is a "highly revelatory omission" from the petition (BIO 13) of course fails to recognize that the petition discusses the issue repeatedly (*see, e.g.*, Pet. 4, 18).

puted fact that petitioner has always maintained the contrary. Citing the district court's opinion, respondents nonetheless allege that, in moving to dismiss petitioner's original complaint with prejudice, they had argued "that the Petitioner had sued the Respondents only in their official capacities," and that "[t]he petitioner failed to offer any rebuttal" to that argument. BIO 3 (citing Pet. App. 18a). That is inaccurate. The district court's opinion explains that, in fact, respondents argued that they "were only sued in their official capacities since the complaint did not unambiguously state that they were sued in their individual capacities" as required by Eighth Circuit precedent. Pet. App. 18a. There was of course no possible "rebuttal" (BIO 3) to that conclusion, because it merely employs the Eighth Circuit's myopic, categorical rule requiring an explicit statement that the defendant be named in his individual capacity. *See* Pet. App. 21a (under "the Eighth Circuit's rule requiring an unambiguous statement to sue municipal officials in their individual capacities, the first action had to be treated as a suit against Bruner and Chisom in their official capacities only").[6]

Nor, finally, do respondents dispute that the Ninth Circuit – which presumes that civil rights defendants are named in their individual capacity – would have reached the opposite result from the Eighth Circuit

---

[6] Respondents place far too much weight (BIO 14) on the isolated fact that petitioner did not file a motion seeking a "default judgment" on the ground that they had answered the complaint only in their official capacities. Such a motion would have been a futile exercise: even if the district court viewed it as meritorious, respondents would merely have amended their answer.

in this case. *See* Pet. 13 (citing *Price v. Akaka*, 928 F.2d 824, 828 (9th Cir. 1990), *cert. denied*, 502 U.S. 967 (1991)).

Because other courts of appeals would have held on the basis of the course of proceedings or a presumption that would not have been overcome on the facts of this case that petitioner's complaint states an individual capacity suit against respondents, certiorari should be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

AMY HOWE
KEVIN K. RUSSELL
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814

PAMELA S. KARLAN
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

THOMAS C. GOLDSTEIN
(Counsel of Record)
AKIN GUMP STRAUSS
HAUER & FELD, LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4060

WILLIAM C. PLOUFFE
ATTORNEY AT LAW
211 N. Washington St. #107
P.O. Box 1537
El Dorado, AR 71731

MAY 2008