No. 01-1132

IN THE
Supreme Court of the United States

DARREN MCBROOM, TERRY FINK, RANDY HEIDLE, VIRGIL MCCARTER, and JERRY SINGLETON,

Petitioners,

v.

RALPH MOORE, JR.,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a district court may look to the course of proceedings to determine whether a section 1983 defendant has been given adequate notice that the plaintiff is seeking to hold him liable in his individual capacity.

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Factual Background

The complaint alleges the following facts:

On the morning of April 7, 1996, five police officers (Petitioners here) went to Mr. Moore's residence in four separate police cruisers, supposedly to investigate a report that shots had been fired in the neighborhood. Mr. Moore was not at home when the officers arrived. He drove up shortly thereafter in his own car with his wife and his son's 17-year-old girlfriend. At that time, the officers were all out of their cars, in his yard, on his porch, or at his door.

Mr. Moore asked the officers to leave, and the officers refused. He repeated his request several times, and one of the officers told him that if he did not calm down he would be arrested for disorderly conduct. Mr. Moore then said that he was going to go see the mayor about the matter, and he got back into his car. At that point, Mr. Moore was not under arrest and had not violated any law. The officers did not have probable cause to believe that he had committed any offense, nor did they have any legal grounds to confine him or restrict his movements in any way.

Nonetheless, the officers pulled open the driver's side door to Mr. Moore's car, sprayed him in the face with Mace, and dragged him out of the car by his arm. The five officers then beat him viciously, sprayed Mace several more times, and struck him on the head with hard objects.

Following the beating, the officers threw Mr. Moore headfirst into a police cruiser and took him to a hospital. He had seizures on the way and had to remain in the hospital, on oxygen, for more than a day. After Mr. Moore's release from

the hospital, the officers charged him with disorderly conduct, aggravated assault on a police officer, simple assault on a police officer, resisting arrest, and contributing to the delinquency of a minor.

As a result of the beating, Mr. Moore suffered numerous injuries, including permanent impairment of his left arm and permanent injury to his eyes.

Proceedings Below

Mr. Moore filed his complaint on April 4, 1997, alleging that the City of Harriman, the Chief of Police, and five individual police officers had violated his civil rights by arresting him without cause, using excessive and unreasonable force while arresting him, and charging him with criminal offenses without good cause. He alleged violations of his constitutional rights under 42 U.S.C. § 1983 and the Tennessee Constitution, and other state-law claims including assault, battery, false arrest, false imprisonment, abuse of process, and malicious prosecution. R. 1, App. 9.[1]

Aside from Roy Jenkins, the Chief of Police, the style of the complaint listed the individual defendants by name, without designation of their official positions. Paragraph 1 of the complaint, which identified the parties, referred to the police officers as the "individual defendants," as did paragraph 16. Paragraph 11 alleged that "said officers, acting *for themselves* and for the City," acted "with malice" and "violated the

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[1] Citations in the form of "R.#, App. #" refer to the record entry number in the district court and appendix page number of the joint appendix filed in the Sixth Circuit.

plaintiff's civil rights" (emphasis added). Paragraph 14 alleged that the "actions of the said officers were accomplished in concert and in conspiracy with one another." And the prayer for relief requested "compensatory damages *against each of the defendants*" and "punitive damages *against each of the defendants*" (emphasis added).

The City and the individual defendants filed a joint answer. R. 11, App. 14. Ten months later, on January 22, 1992, the individual defendants filed a motion to dismiss on the ground that the complaint did not sufficiently notify them that they were being sued in their individual capacities. R. 13, App. 20. Mr. Moore opposed the motion, arguing that he was suing them in their individual capacities and that the complaint itself showed that he was doing so. On February 27, 1998, the district court nonetheless granted the motion and dismissed all claims against the individual officers. R. 18, App. 35; R. 19, App. 43.

One week later, on March 6, 1998, Mr. Moore moved to amend his complaint to allege more specifically that the individual officers were being sued in their individual capacities. R. 20, App. 22. At the same time, he moved the court to alter or amend its prior order to reflect that his state law causes of action against the individual officers had not been dismissed. R. 22, App. 24. The court denied the motion to amend the complaint, but granted the motion to alter or amend the order. R. 29, App. 44. Accordingly, the section 1983 claim proceeded against the City of Harriman and the state law claims proceeded against both the City and the individual officers.

Defendants later moved for summary judgment on the section 1983 claim against the City and the state law claims pending against the individual defendants. In August 1998, the

district court, without questioning that the officers had severely beaten Mr. Moore, found insufficient evidence that the use of pepper spray and excessive force against Mr. Moore evinced a policy or custom of the City. On that basis, the court granted the motion as to the section 1983 claim and dismissed the case against the City. The court also granted in part and denied in part summary judgment for the officers on the pendent state law claims. R. 44, App. 47; R. 45, App. 60. On February 10, 1999, the court dismissed the remaining state law claims without prejudice to pursuit of those claims in state court. R. 51 Order, App. 61.

Mr. Moore appealed from the dismissal of his claims against the officers in their individual capacities and from the denial of his motion to amend. R. 52, Notice of Appeal, App. 62. The panel reversed. It found that the complaint taken as a whole provided sufficient notice to the individual officers that they were being sued individually. Pet. App. 83a. Having reversed on that ground, the panel did not reach the issue whether the district court had wrongly denied leave to amend. *Id.* 88a.

Petitioners sought en banc review, which the court of appeals granted. 218 F.3d 555 (6th Cir. 2000). On rehearing, the Sixth Circuit agreed that dismissal of the section 1983 claims against the officers had been improper. The court stated that the course of proceedings had provided sufficient notice that the officers were being sued in their individual capacities. Pet. App. 6a & n.1, 8a-9a.[2]

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[2] "The 'course of proceedings' test considers such factors as the nature of the plaintiff's claims, requests for compensatory or (continued...)

Six members of the Sixth Circuit also found that the district court erred in denying leave to amend the complaint to allow Mr. Moore to plead capacity more explicitly. *Id.* 9a-11a. One judge concurred in all but that portion of the opinion; he thought it "unnecessary" to address the amendment issue. *Id.* 11a-12a. Six judges dissented, stating that they would require an express averment of individual capacity and that the motion for leave to amend was properly denied. *Id.* at 13a.

REASONS FOR DENYING THE WRIT

Although the petition purports to present three questions, this case in fact presents only one: whether a district court may look to the course of proceedings to determine whether a section 1983 defendant has been given adequate notice that the plaintiff is seeking to hold him individually liable. Petitioners' first and third questions are different ways of asking that question. Petitioners' second question, which concerns the jurisdictional requirements of the Eleventh Amendment, is not presented by this case, in which neither the state nor any state employee has been a defendant.

As to the one question actually presented, review is unwarranted for three reasons. First, the decision below is consistent with the rule of all the federal courts of appeals

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[2](...continued)
punitive damages, and the nature of any defenses raised in response to the complaint, particularly claims of immunity, to determine whether the defendant had actual knowledge of the potential for individual liability. [citation] The test also considers whether subsequent pleadings put the defendant on notice of the capacity in which he or she is sued." Pet. App. 61 n.1.

except for one, the Eighth Circuit. However, the Eighth Circuit's rule regarding amendment of pleadings in this context reflects the course of proceedings approach taken by the other courts of appeal. Thus, although the Eighth Circuit might construe the complaint in this case differently than would the other circuit courts, the outcome in that circuit would be the same, as the court of appeals would grant leave to amend to add an express allegation that the five officers were sued in their individual capacities. Moreover, the Eighth Circuit's rule requiring an express averment of individual capacity is based on Eleventh Amendment concerns not at issue in this suit against municipal defendants. Second, because the court below also indicated that Mr. Moore should have been granted leave to amend his complaint, an independent basis exists on which to affirm the decision below. Petitioners did not seek certiorari on that independent ground. Therefore, a ruling on the pleading issue presented here would likely not affect the outcome of this case. Third, the decision below is correct. The complaint provided ample notice to the officers that they were being sued as individuals, and they suffered no prejudice from the lack of an express averment of capacity.

A. There Is No Conflict Among The Circuits As To The Appropriate Outcome On The Facts Of This Case.

This Court has recognized that the "course of proceedings typically will indicate the nature of the liability sought to be imposed" in cases where "the complaint does not clearly specify whether officials are sued personally, in their official capacity, or both." *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985). *See Bender v. Williamsport Area School District*, 475 U.S. 534, 543 (1986) (defendant lacked standing to appeal in individual capacity where, despite allegation of individual capacity, course of proceedings made clear that action

was against defendant in official capacity); *Brandon v. Holt*, 469 U.S. 464, 469 (1985) (using course of proceedings to determine capacity in which police director was sued). *Cf. Hafer v. Melo*, 502 U.S. 21, 24 n.* (1991) (noting conflict on this issue).

Similarly, all the courts of appeals but one—the Eighth—look to the course of proceedings to determine whether officials are being sued in their official or their personal capacities. Pet. at 9.[3] The Ninth Circuit, although it does not use the term "course of proceedings," looks to the complaint as a whole and presumes that plaintiffs are suing officials in their individual capacities when, as here, the complaint seeks monetary damages. *See Shoshone-Bannock Tribes v. Fish & Games Comm'n*, 42 F.3d 1278, 1284 (9th Cir. 1994); *Price v. Akaka*, 928 F.2d 824, 828 (9th Cir.1990) (looking to basis of the claims asserted and nature of the relief sought). The Ninth Circuit's test is entirely consistent with the approach and holding of the Sixth Circuit in construing Mr. Moore's complaint as alleging claims against the officers in their individual capacities.

The one circuit out of step with this Court and the other courts of appeals on this issue is the Eighth Circuit. That circuit applies an irrebuttable presumption that, absent an express statement that suit is brought against officers in their individual capacities, officers are sued solely in their official capacities. *Murphy v. State of Arkansas*, 127 F.3d 750, 755 (8th Cir. 1997). Although the Eighth Circuit's view is inconsistent with

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[3] The First Circuit has not addressed this issue. See *Pieve-Marin v. Combas-Sancho*, 967 F. Supp. 667, 669-70 (D.P.R. 1997) (noting that First Circuit has not addressed issue; using course of proceedings test); *Lewis v. City of Boston*, 829 F. Supp. 471, 476 (D. Mass. 1993) (same).

the approach taken by this Court and the holdings of the other circuits, that inconsistency does not warrant certiorari in this case, for two reasons.

1. Although the Eighth Circuit requires an express averment of individual capacity, its consideration of requests for leave to amend to add such allegations reflects a course of proceedings approach that would result in the same outcome in the majority of cases. For example, in *Nix v. Norman*, 879 F.2d 429 (8th Cir. 1989), where the plaintiff sought compensatory and punitive damages against state defendants but did not expressly aver capacity, the court of appeals indicated that leave to amend would be appropriate. *Id.* at 433 n.3. Likewise, in *Murphy*, the court assumed that the district court would have granted leave to amend and, therefore, deemed the complaint amended, where despite the omission of an express allegation of capacity the "defendants had sufficient notice that they were being sued in their personal capacities." 127 F.3d at 755. Conversely, the court has denied leave to amend to add express averments of individual capacity where, for example, the plaintiff had amended the complaint once after a motion to dismiss brought the pleading issue to her attention but had not added capacity allegations at that time. *Egerdahl v. Hibbing Community College*, 72 F.3d 615, 619, 620 (8th Cir. 1995). And in *Artis v. Francis Howell North Band Booster Ass'n*, 161 F.3d 1178, 1182 (8th Cir. 1998), the court denied leave to amend to aver individual capacity where the plaintiff sought leave for the first time on appeal.

Here, where the complaint as a whole put the officers on notice that the complaint sought individual liability, and where Mr. Moore moved for leave to amend to add express allegations of capacity promptly upon the district court's ruling, the Eighth Circuit would have permitted Mr. Moore to amend his

complaint to add an express averment of individual capacity. Thus, in *every* court of appeals, including the Eighth, the outcome of Mr. Moore's appeal would have been the same.

More generally, the Eighth Circuit's approach to considering requests for leave to amend takes into account the same types of concerns that other courts use to consider whether an individual defendant has been given fair and adequate notice of suit through the course of proceedings. This overlap mitigates the effect of any conflict on the question presented here. Accordingly, review by this Court is unwarranted.

2. In the cases in which the Eighth Circuit developed its rule, the individual defendants were *state* employees. *See Nix*, 879 F.2d at 431; *Egerdahl*, 72 F.3d at 619; *Murphy*, 127 F.3d at 754-55. In adopting its strict rule, the court focused on the jurisdictional limit imposed on suits against states by the Eleventh Amendment. The court looked to Federal Rule of Civil Procedure 9(a), which states:

> Capacity. It is not necessary to aver capacity of the party to sue or to be sued . . . except to the extent required to show the jurisdiction of the court.

The Eighth Circuit construed Rule 9(a) to require a plaintiff to expressly allege individual capacity to demonstrate that the Eleventh Amendment presents no jurisdictional bar to the suit. *Nix*, 879 F.2d at 431. Although more recently the court has applied *Nix* in cases against municipal employees and required an express statement of individual capacity in that situation as well, it has not confronted the state-municipality distinction. *See Johnson v. Outboard Marine Corp.*, 172 F.3d 531 (8th Cir.

1999) (individual capacity not properly pleaded but, in any event, alleged facts and evidence failed to state § 1983 claim against individuals). The distinction is important, given that the court's reason—whether or not correct—for rejecting the course of proceedings approach turns on Eleventh Amendment concerns that are inapplicable to non-state employees. *See Coleman v. Wirtz*, 745 F. Supp. 434, 441 (N.D. Ohio 1990) (*Nix* not applicable in case against municipal defendant). Upon a closer look, the Eighth Circuit may recognize that the Eleventh Amendment concerns so central to the *Nix* analysis are inapplicable in cases involving municipal employees. Certiorari is therefore premature at this time, as the conflict may resolve itself without this Court's intervention.[4]

B. Because Mr. Moore's Motion For Leave To Amend Presents An Independent Ground For Reversing The District Court's Decision, Resolution Of The Question Presented Would Not Affect The Outcome Of This Case.

The petition should also be denied because the Court's ruling on the question presented will not determine the outcome

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[4] Even as to state employee defendants, the Eighth Circuit's reasoning is wrong. The Eleventh Amendment does not bar section 1983 suits against state employees in either their official or their individual capacities; it simply limits the relief available in official capacity suits to prospective relief. *See Edelman v. Jordan*, 415 U.S. 651 (1974); *Ex Parte Young*, 209 U.S. 123 (1908). Accordingly, Rule 9(a) does not require an express statement of capacity in such cases. In this case, where the Eleventh Amendment does not even arguably apply, the Eighth Circuit's rule makes even less sense.

of the case. Rather, even if this Court were to adopt the Eighth Circuit's singular view and hold it applicable to municipal employees, on remand Mr. Moore would be granted leave to amend to plead capacity more explicitly.

The petition for rehearing en banc raised only the pleading issue, not the issue whether the district court should have granted leave to amend. Although a remand after a ruling on the pleading question here would, as formal matter, return the case first to the Sixth Circuit sitting en banc, *see, e.g.*, *Donahey v. Bogle*, 16 Fed. Appx. 283 (6th Cir. 2000) (remand for reconsideration from Supreme Court returned case to en banc court), the en banc court would likely return the case to the panel for reconsideration of the amendment issue, on which en banc rehearing was neither sought nor granted. *See Marathon Oil Co. v. A.G. Ruhrgas*, 182 F.3d 291 (5th Cir. 1999) (remanding to panel after remand from Supreme Court to en banc court); *see also* 6th Cir. Internal Operating Procedure 104 (remand from Supreme Court goes to original panel).

Two of the three panel judges have already agreed, at the en banc stage, that the district court abused its discretion in denying Mr. Moore leave to amend his complaint to make explicit that he was suing the officers in their individual capacities. Pet. App. 9a-11a. (The panel had not reached the issue whether denial of leave to amend was proper. Pet. App. 88a.) And Petitioners have not sought certiorari on the issue of leave to amend. If this Court were to grant certiorari and hold that Mr. Moore did not adequately plead capacity, on remand the panel would almost certainly permit Mr. Moore to amend his complaint to correct that deficiency. The Court's opinion here would therefore serve only as an advisory opinion.

In the unlikely event that the Sixth Circuit chose to decide the amendment issue en banc, the most probable outcome, again, would be to allow Mr. Moore to amend, thereby rendering this Court's decision purely advisory. Six members of the Sixth Circuit have agreed that Mr. Moore is entitled to amend, and six have disagreed. In his concurring opinion below, Judge Merritt did not express any view on the amendment issue, stating that to address that point was "unnecessary." Pet App. 12a. Because Judge Merritt concurred in the holding that Mr. Moore had given the officers fair and adequate notice that individual liability was at issue, he would likely agree that "justice . . . require[d]" leave to amend. Fed. R. Civ. P. 15(a). Moreover, the only concern that Judge Merritt expressed about the substance of the opinion of the six judges who favored leave to amend related to state employee defendants, not municipal employee defendants such as Petitioners. Pet App. 12a.

Thus, whether on remand from this Court the remaining issue in this case were decided by the original panel or by the Sixth Circuit sitting en banc, Mr. Moore would almost surely win on an alternate ground. Because a decision on the question presented would therefore not affect the outcome of the case, the petition for a writ of certiorari should be denied.

C. The Decision Below Is Correct.

Finally, the petition should be denied because the decision below is correct. The complaint made clear that Mr. Moore was suing the officers in their individual capacities. It included state law claims that were properly pleaded to allege claims against the officers individually. R. 29, App. 45-46 (order). It requested compensatory and punitive damages "against each of the defendants," although neither form of

damages would be available against the officer defendants in their official capacities. *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). Punitive damages would be unavailable against the City as well, *see City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), and, therefore, could only have been sought from the officers in their individual capacities. Those aspects of the complaint, along with the facts that the caption did not include any designation of official capacity and that the complaint referred to the five officers as "individual defendants" and alleged that they had acted "*for themselves* and for the City," left no room for doubt that the complaint sought relief against the officers individually. In fact, Petitioners' motion to dismiss did not state that the officers did not understand that Mr. Moore sought damages from them, only that the complaint had not properly pleaded capacity under their reading of the Sixth Circuit case law. *See* R.14 (Memo in Supp. of Motion to Dismiss, 2/19/98). As this Court has stated, "it is obviously preferable for the plaintiff to be specific in the first instance to avoid any ambiguity." *Hafer v. Melo*, 502 U.S. at 24 n.* But viewing the complaint as a whole, not to mention the subsequent proceedings in the case, there was no ambiguity.

Accordingly, Petitioners' policy arguments are misplaced; none applies in this case. For instance, Petitioners suggest that the lack of an express averment of individual capacity prejudiced them because, as a result, they "did not file individual answers, did not hire independent counsel, [and] did not participate in settlement negotiations." Pet. 12. Yet Mr. Moore had properly pleaded individual capacity as to the state-law claims, which were based on the same facts as the section 1983 claim. And all of the state claims were still in the case when the officers raised the pleading issue, at which point Mr. Moore made crystal clear that he sought to hold each of them personally liable under section 1983. Thus, even if the officers

had truly not understood the section 1983 claim to be directed at them in their personal capacities up to that point, their decision to forgo individual representation and participation was a choice they made *knowing* that they might be held personally liable under state law for the beating and injury they inflicted on Mr. Moore.

For the same reason, Petitioners' claim that they were prejudiced because they did not know to raise the defense of qualified immunity, and thus did not get the advantage of an early exit from the case, is without merit. Pet. 12. Even had they successfully invoked qualified immunity early in the litigation, the existence of the state law claims would have precluded them from avoiding the burdens of litigation. Moreover, Petitioners' motion to dismiss itself made clear that the officers were aware that individual liability was a potential issue in the case. Nothing stopped them from moving in the alternative for dismissal on qualified immunity grounds, if any basis for qualified immunity existed in a case where the complaint alleged that the individual defendants viciously beat the plaintiff without provocation. In fact, however, a claim to qualified immunity would have been frivolous. *See Graham v. Connor*, 490 U.S. 386 (1989); *Pray v. City of Sandusky*, 49 F.3d 1154, 1158-59 (6th Cir. 1995); *Adams v. Metiva*, 31 F.3d 375, 385 (6th Cir. 1994).

Moreover, the plain terms of Rule 9(a) foreclose a requirement of pleading capacity in cases, such as this one, where there is no possible Eleventh Amendment jurisdiction issue. A "court may sustain jurisdiction when an examination of the entire complaint reveals a proper basis for assuming jurisdiction . . . ." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1206, p. 91 (2d ed. 1990) (discussing Rule 8(a)(1)).

CONCLUSION

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

Respectfully submitted,

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