No. 07- ___

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

PETITION FOR A WRIT OF CERTIORARI

Amy Howe
Kevin K. Russell
Howe & Russell, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814

Thomas C. Goldstein
(Counsel of Record)
Akin Gump Strauss Hauer &
Feld LLP
1333 New Hampshire Ave. NW
Washington, DC 20036
(202) 887-4060

Pamela S. Karlan
Stanford Law School
Supreme Court
Litigation Clinic
559 Nathan Abbott Way
Stanford, CA 94305

William C. Plouffe
Attorney at Law
211 N. Washington St. #107
P.O. Box 1537
El Dorado, AR 71731

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QUESTION PRESENTED

When a complaint does not specify that a defendant is being sued in her individual capacity, but the course of the proceedings establishes the plaintiff's intent to hold the defendant personally liable, must the complaint nonetheless be construed to name the defendant only in her official capacity?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Joshua D. Baker respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. 1a-14a) is published at 501 F.3d 920. The district court's opinion holding that respondents had originally been sued only in their official capacity and that petitioner's individual capacity claims against them were thus time-barred (Pet. App. 15a-26a) is unpublished. The order of the court of appeals denying rehearing and rehearing en banc (*id.* 28a-29a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 2007. The order of the court of appeals denying rehearing en banc was entered on October 5, 2007. Justice Alito subsequently extended the time to file this petition to and including February 15, 2008. App. No. 07A512. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS AND RULES

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to

> be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Federal Rule of Civil Procedure 8(a)(2) provides, in relevant part: "A pleading that states a claim for relief must contain . . .(2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."

Federal Rule of Civil Procedure 9(a)(1)(A) provides, in relevant part: "Except when required to show that the court has jurisdiction, a pleading need not allege: (A) a party's capacity to sue or be sued . . . ."

STATEMENT

While petitioner Joshua Baker was at the Drew County, Arkansas detention facility being processed for traffic violations, he was handcuffed to a concrete bench by respondent Marcia Bruner, and then choked and shocked with a taser by respondent Eric Chisom. He brought suit against respondents under 42 U.S.C. § 1983, seeking compensatory and punitive damages. The courts below held that his suit was time-barred because his original complaint did not comply with an Eighth Circuit requirement that complaints in § 1983 suits contain an unambiguous statement that the plaintiff has named the governmental defendant in his individual capacity. A member of the panel concurred in the judgment, noting that the Eighth Circuit rule

conflicts with that applied by the "overwhelming majority" of other courts of appeals. This Court should grant certiorari to resolve this deep, persistent, and intractable conflict among the circuits.

1. Section 1983 provides a remedy for individuals whose constitutional rights have been violated by a "person" acting under color of state law. When the defendant in a § 1983 damages action is a natural person,[1] there are two distinct capacities in which he might face suit. In her *personal* capacity, a defendant faces liability for both compensatory and punitive damages, *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); *Smith v. Wade*, 461 U.S. 30, 35 (1985); she also has available the defense of qualified immunity from suit unless she violated a clearly established constitutional right, *Hafer v. Melo*, 502 U.S. 21, 25 (1991). By contrast, when a defendant is sued in her *official* capacity, the lawsuit will be treated as if it had been brought against the government. *Graham*, 473 U.S. at 165-66. A municipal-level official (such as the respondents here), while she cannot invoke qualified immunity in an official-capacity suit, will face liability only if she acted pursuant to municipal policy under *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978), and she will be liable only for compensatory, and not for punitive damages.[2]

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[1] Since this Court's decision in *Monell*, the word "person" in § 1983 has been construed to extend to sub-state-level governmental entities as well as natural persons.

[2] With respect to state-level officials, if they are sued in their official capacity, they will be entitled to raise the defenses available to the state, including immunity from suit under the Eleventh Amendment. *Graham*, 473 U.S. at 167.

2. On the morning of August 15, 2002, officers in Drew County, Arkansas arrested petitioner Joshua Baker for traffic violations. After petitioner was transferred to the county's detention facility for processing, respondent Marcia Bruner, a Drew County Deputy Sheriff, handcuffed petitioner to a concrete bench pending the arrival of the arresting officer. While respondent Bruner looked on, respondent Eric Chisom – also a Drew County Deputy Sheriff – choked petitioner and shocked him with a taser to the back of his head. Respondent Chisom's actions were captured on videotape by the detention facility. He was subsequently convicted of third-degree battery. Pet. App. 1a.

Less than a year later, on June 24, 2003, petitioner filed a 42 U.S.C. § 1983 suit against respondents, as well as Drew County Sheriff LaRon Meeks, and nine members of the Drew County Quorum Court.[3] Pet. App. 30a-35a. The caption of petitioner's complaint identified Sheriff Meeks and the members of the Quorum Court as defendants in both their individual and official capacities. *Id.* 30a. The caption did not specify the capacity in which Bruner and Chisom (respondents here) were sued. *Id.* The body of the complaint, however, described them "as individual [d]efendants," *id.* 31a, and sought punitive damages against all the defendants, *id.* 35a.

Defendants jointly moved for summary judgment. Pet. App. 18a. Petitioner responded with a motion for a voluntary non-suit. *Id.* With respect to respondents, the district court granted petitioner's motion,

[3] In Arkansas, a quorum court is a part-time legislative body with overall responsibility for a county's affairs.

dismissing petitioner's claims against them without prejudice. *Id.* 19a. (The district court granted the other defendants' motion for summary judgment, and accordingly entered judgment against petitioner on the claims against them. *Id.* 18a.).

2. On September 22, 2005, petitioner filed a second complaint (which gives rise to this petition for certiorari) against respondents in both their official and individual capacities. *See* Pet. App. 19a.

Under Arkansas law, which governs this case, the statute of limitations for § 1983 claims is three years. *See* Pet. App. 2a (citing *Morton v. City of Little Rock*, 934 F.2d 180, 182 (8th Cir. 1991)).[4] Arkansas law also contains a "savings" statute, which permits timely non-suited claims to be refiled within one year. *Id.* (citing Ark. Code Ann. § 16-56-126).

Notwithstanding that petitioner's complaint was filed within one year of his non-suit, respondents moved to dismiss the individual-capacity claims against them as outside the statute of limitations because they claimed that petitioner's first suit had not been brought against them in their individual capacities. Pet. App. 19a. Respondents pointed to Eighth Circuit case law providing that civil rights actions are deemed to be solely official-capacity suits unless the plaintiff expressly states otherwise. *E.g.*, *Johnson v. Outboard Marine Corp.*, 172 F.3d 531, 535 (1999). Thus, respondents reasoned, the filing date for the complaint in this case could not relate back to the

[4] Under *Wilson v. Garcia*, 471 U.S. 261 (1985), the statute of limitations for a § 1983 claim is the personal-injury statute of limitations for the state in which the case is brought. *Id.* at 275.

2003 complaint. The district court agreed, reasoning that petitioner's original complaint had not specifically stated that respondents were sued in both their official and individual capacities. Pet. App. 20a-21a.[5]

3. On appeal, the Eighth Circuit affirmed. Citing circuit precedent requiring an express statement for officials to be sued in their individual capacity for Section 1983 claims, the panel found it dispositive that "[t]he caption was silent as to the capacities in which [respondents] were named," while (in the panel's view) the body of the complaint "contained . . . only allegations that were, at most, 'cryptic hints.'" Pet. App. 5a-6a. The panel accordingly rejected petitioner's argument that his first complaint had adequately named respondents in their individual capacities because it referred to them as "individual defendants" and sought punitive damages, which could not have been recovered in a suit against them in their official capacity. *Id.*

Judge Gruender concurred separately. He agreed that the Eighth Circuit's "current precedent mandate[d]" affirmance. Pet. App. 10a. He nonetheless wrote separately to express his concern that what was once a "judicially-created suggestion that 'section 1983 litigants wishing to sue government agents in both capacities should simply use the following language: "Plaintiff sues each and all defendants in both their individual and official capacities"'" had "mutated into a bright-line presumption that '[i]f a plaintiff's complaint is silent

[5] The court separately granted respondents summary judgment as to their liability in their official capacity. Pet. App. 25a. That decision is not before this Court.

about the capacity in which she is suing the defendant, we interpret the complaint as including only official-capacity claims.'" *Id.* 10a (citation omitted). Such a presumption, Judge Gruender explained, had arisen in cases involving state-level officials, who are "arguably entitled to an Eleventh Amendment immunity defense," to ensure that jurisdiction was present; that presumption should not, he continued, necessarily extend to cases involving county or municipal-level officials, in which immunity under the Eleventh Amendment is not at issue. Pet. App. 11a (citing *Biggs v. Meadows*, 66 F.3d 56, 59-60 (4th Cir. 1995)). Indeed, he pointed out, not only do the "overwhelming majority of our sister circuits uniformly take a different approach to capacity-pleading issues," *id.* 12a (citing decisions of nine circuits), but the Eighth Circuit's rule also "seem[ed] to be swimming against recent currents from the Supreme Court regarding notice pleading," *id.*

4. Petitioner sought rehearing and rehearing en banc, which was denied by a divided vote. Pet. App. 28a-29a. This petition followed.

REASONS FOR GRANTING THE WRIT

I. The Courts of Appeals Are Intractably Divided on this Important and Recurring Question.

As this Court and the courts of appeals have recognized, the circuits are divided on the question of what legal standard governs whether a Section 1983 defendant has been named in her individual capacity, a designation that has significant consequences for the elements of a plaintiff's case and the scope of the

defendant's potential liability. In *Hafer v. Melo*, this Court noted that the Third Circuit in that case, applying the same rule as "[s]everal other Courts of Appeals," had "looked to the proceedings below to determine whether [the plaintiffs] brought their claims for damages against [the defendant] in her official capacity or her personal capacity," while other circuits "apply a more rigid pleading requirement." 502 U.S. 21, 24 n.* (1991) (citing, *e.g.*, *Nix v. Norman*, 879 F.2d 429 (8th Cir. 1989)). The Court, however, did not resolve the conflict because the issue was "not properly before [it]." *Id.* *See also, e.g.*, *Powell v. Alexander*, 391 F.3d 1, 21-23 (1st Cir. 2004) (recognizing the conflict); *Biggs v. Meadows*, 66 F.3d 56, 59-60 (4th Cir. 1995) (same). Since *Hafer*, numerous courts of appeals have considered the question; several of those that originally appeared to apply a stringent pleading requirement have reassessed or clarified their position; and yet a third competing approach has emerged. Now, only the Eighth Circuit – in conflict with *eleven* other courts of appeals – applies a bright-line requirement that a plaintiff expressly name a defendant in her individual capacity. As the denial of rehearing en banc in this case illustrates, that court has steadfastly adhered to its outlier position. Certiorari is warranted to resolve the three-way circuit conflict.

1. In holding that petitioner had named respondents as defendants only in their official capacities because his complaint did not contain an express statement that he was suing them in their individual capacities, the Eighth Circuit applied a *per se* rule that dates back at least thirteen years to its decision in *Egerdahl v. Hibbing Community College*,

72 F.3d 615, 619-20 (1995). In that case, "the caption and body of [the plaintiff's] complaint referred to [the defendants] by name rather than by official position" and, in responding to the defendants' motions to dismiss, the plaintiff "asked the District Court to construe her amended complaint as seeking damages from the defendants in their personal capacities." *Id.* Nevertheless, the court of appeals rejected her claim that the defendants had had "ample notice" of her intent to hold them personally liable. Circuit precedent, the panel explained, "requires that a plaintiff's complaint contain a clear statement of her wish to sue defendants in their personal capacities. Neither a cryptic hint in a plaintiff's complaint nor a statement made in response to a motion to dismiss is sufficient." *Id.* at 620 (citing *Nix v. Norman*, 879 F.2d 429 (8th Cir. 1989)).

Even while acknowledging that other circuits would apply a different and more holistic inquiry, the Eighth Circuit has repeatedly adhered to this rule, deeming itself bound by circuit precedent. *See, e.g.*, *Murphy v. Arkansas*, 127 F.3d 750, 755 (8th Cir. 1997) (noting that "other circuits have adopted a more lenient pleading rule," but applying clear statement rule and explaining that it was "bound by *Egerdahl* and *Nix*"); *Artis v. Francis Howell North Band Booster Ass'n*, 161 F.3d 1178, 1182 (1998); *Rumery v. Outboard Marine Corp.*, 172 F.3d 531, 535 (1999). Accordingly, district courts within the circuit have applied this *per se* rule. *See, e.g.*, *infra* note 14 (listing recent district court cases). Moreover, and as Judge Gruender noted in his separate opinion in this case, *see* Pet. App. 11a-12a, although the Eighth Circuit's original justification for the rule arose in part from its view that a clear

statement of capacity is required to demonstrate jurisdiction in cases involving the Eleventh Amendment, *see, e.g.*, *Nix*, 879 F.2d at 431; *Murphy*, 127 F.3d at 755, the Eighth Circuit has subsequently extended that rule to cases, such as this one, that do not implicate state sovereignty in any respect.[6]

By contrast, the First, Second, Third, Fourth, Fifth, Sixth, Tenth, Eleventh, and District of Columbia Circuits all reject the requirement of an explicit pleading rule. Instead, they use a "course of proceedings" test that looks to the totality of the circumstances to determine whether the defendant had notice that she faced individual liability in her personal capacity. *See Powell*, 391 F.3d at 22 (declining "to adopt a formalistic bright-line test requiring a plaintiff to use specific words in his or her complaint," "join[ing] the multitude of circuits employing the 'course of proceedings' test," and emphasizing that "the central inquiry remains whether the course of proceedings here gave [the defendant] fair notice that she was being sued in her individual capacity and was subject to personal liability for punitive damages"); *Yorktown Med. Lab., Inc. v. Perales*, 948 F.2d 84, 88-89 (2d Cir. 1991) ("In place of express pleading, we look to the totality of the complaint as well as the course of proceedings to determine whether the defendants were provided with sufficient notice of potential exposure to personal liability."); *Melo v. Hafer*, 912 F.2d 628, 635, 636 n.7 (3d Cir. 1990) (noting that "[i]n determining whether

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[6] *See also, e.g.*, *Andrus ex rel. Andrus v. Arkansas*, 197 F.3d 953, 955 (8th Cir. 1999); *Artis v. Francis Howell North Band Booster Ass'n*, 161 F.3d 1178, 1182 (8th Cir. 1998); *Rollins v. Farmer*, 731 F.2d 533, 536 n.3 (8th Cir. 1984).

plaintiffs sued Hafer in her personal capacity, official capacity, or both, we first look to the complaints and the 'course of proceedings'" and adding that the key inquiry is whether a "defendant being sued in his or her personal capacity . . . [is] given adequate notice that his or her personal assets are at stake"), *aff'd on other grounds*, *Hafer v. Melo*, 502 U.S. 21 (1991); *Biggs v. Meadows*, 66 F.3d 56, 60-61 (4th Cir. 1995) (holding that a "plaintiff need not plead expressly the capacity in which he is suing a defendant in order to state a cause of action under § 1983" and adopting "course of proceedings" test instead); *United States ex rel. Adrian v. Regents of the University of California*, 363 F.3d 398, 402 (5th Cir. 2004) (relying on course of proceedings test when it was "unclear whether the first amended complaint named the [defendants] in their official or in their personal capacities"); *Moore v. City of Harriman*, 272 F.3d 769, 773 (6th Cir. 2001) (en banc) ("When a § 1983 plaintiff fails to affirmatively plead capacity in the complaint, we then look to the course of proceedings to determine whether [the] concern [that defendants receive adequate] notice has been satisfied."), *cert. denied sub nom. McBroom v. Moore*, 536 U.S. 922 (2002);[7] *Daskalea v. District of Columbia*, 227 F.3d 433, 448 (D.C. Cir. 2000) (holding that "this circuit has joined those of its sisters that employ the 'course of proceedings' approach," although ultimately concluding that "the course of proceedings in this case

[7] Although this Court in *Hafer*, *supra*, classified the Sixth Circuit as employing the same per se approach as the Eighth Circuit in this case, the Sixth Circuit subsequently made clear that it has "never applied such a strict interpretation," and that it instead applies the "course of proceedings" test "to determine whether § 1983 defendants have received notice of the plaintiff's intent to hold them personally liable," *Moore*, 272 F.3d at 772.

neither put [a defendant] on notice that she was being sued in her individual capacity[] nor evidenced her understanding that her personal liability was at stake"); *Pride v. Does*, 997 F.2d 712, 715 (10th Cir. 1993) ("[W]here the complaint fails to specify the capacity in which the government official is sued, we look to the substance of the pleadings and the course of the proceedings in order to determine whether the suit is for individual or official liability."); *Jackson v. Georgia Dep't of Transportation*, 16 F.3d 1573, 1575 (11th Cir.) ("When it is not clear in which capacity the defendants are sued, the course of proceedings typically indicates the nature of the liability sought to be imposed."), *cert. denied*, 513 U.S. 929 (1994).

For their part, the Seventh and Ninth Circuits have also rejected the Eighth Circuit bright-line rule requiring an express statement that a defendant is being sued in her individual capacity. Although the Seventh Circuit does not label its approach a "course of proceedings" test, that court looks at the entirety of the complaint and the "nature of the conduct alleged": if "the complaint alleges the tortious conduct of an individual acting under color of state law, an individual capacity suit plainly lies, even if the plaintiff failed to spell out the defendant's capacity in the complaint." *Hill v. Shelander*, 924 F.2d 1370, 1374 (1991). *Hill* involved facts quite similar to this case: a Section 1983 damages lawsuit against a prison guard who injured the plaintiff by (among other things) slamming his head into metal bars and kicking him in the testicles. In contrast to the Eighth Circuit's approach here, the Seventh Circuit held that the guard was being sued in his individual capacity despite the plaintiff's failure to so specify. *Id.* The

court of appeals reasoned that the plaintiff's "complaint[,] when 'read in its entirety[,]' plainly shows that an individual capacity suit was intended," as the plaintiff sought punitive damages and the allegedly unconstitutional conduct at issue involved only the guard's actions. *Id.* And in *Miller v. Smith*, 220 F.3d 491, 494 (7th Cir. 2000), the court of appeals held that the plaintiff had brought an individual-capacity suit, reasoning that the plaintiff had sought damages, the allegations involved individual torts, and the defendants had raised a qualified immunity defense.

Similarly, the Ninth Circuit – like the courts of appeals that use the "course of proceedings" test – considers "the 'basis of the claims asserted and nature of relief sought.'" *Price v. Akaka*, 928 F.2d 824, 828 (1990), *cert. denied*, 502 U.S. 967 (1991). However, that court goes even further, presuming that government officials have been sued in their individual capacity when they are named in a complaint that seeks damages under Section 1983. *Id.*; *see also Cerrato v. San Francisco Community College District*, 26 F.3d 968, 973 n.16 (9th Cir. 1994) ("[W]e have held that a section 1983 suit against state actors necessarily implies a suit against the defendants in their personal capacities."). That court reasons that "[a]ny other construction would be illogical where the complaint is silent as to capacity, since a claim for damages against state officials in their official capacities is plainly barred." *Shoshone-Bannock Tribes v. Fish & Game Commission, Idaho*, 42 F.3d 1278, 1284 (1994).

2. Certiorari is warranted because only this Court can resolve this three-way circuit conflict. The Eighth Circuit has applied its bright-line presumption for nearly fifteen years, during which it has acknowledged the contrary holdings of the other circuits but nonetheless adhered to its precedent mandating use of the clear statement rule. *See supra* at 9. Indeed, in this very case, Judge Gruender explicitly questioned the validity of the circuit's clear statement rule and emphasized that "the overwhelming majority of [the Eighth Circuit's] sister courts uniformly take a different approach to capacity pleading issues." Pet. App. 12a. The panel responded only that such an argument should instead be addressed to the en banc court, *id.* 6a n.2, which subsequently denied review, *id.* 28a-29a. In light of the Eighth Circuit's intransigence on this question, then, the treatment of Section 1983 plaintiffs will remain forever balkanized absent this Court's intervention.

3. This case presented an ideal vehicle for resolving the circuit split. The issue was squarely presented below and is outcome determinative for petitioner, whose lawsuit was dismissed solely because the courts below treated his original complaint as having sued respondents in only their official capacities – a result that no other circuit would have reached.

Courts applying the "course of proceedings" approach would find that petitioner's original complaint sued respondents in their individual capacities. First, the body of the original complaint indicated petitioner's intent to hold respondents

personally liable. Petitioner named respondents "as individual Defendants." Pet. App. 31a. He also sought punitive damages, *id.* 35a, which would not have been available had he been suing respondents only in their official capacities. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259-60 (1981). Finally, he sought to hold all of the defendants (including respondents) jointly and severally liable. *Id.* 35a. Because respondents were both employees of the same county agency, joint and several liability would make no sense in an official capacity suit, since it would be the equivalent of holding the Drew County Sheriff's Department jointly and severally liable with itself.

In light of these considerations, courts applying the course of proceedings test recognize that a request for punitive damages can provide notice to an official that he or she is being sued in her individual capacity, *see Powell*, 391 F.3d at 23.[8] Similarly, a complaint that seeks to hold the defendants jointly and severally liable supports an intention to sue an official in his or her personal capacity because such a pleading would "make[] little sense in a damages action against an officer in his official capacity given that such a suit is equivalent to a suit directly against the municipality."

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[8] *See also Moore*, 272 F.3d at 772 n.1; *Biggs*, 66 F.3d at 61 ("Another indication that suit has been brought against a state actor personally may be a plaintiff's request for compensatory or punitive damages, since such relief is unavailable in official capacity suits."); *Does*, 997 F.2d at 715 (finding that a plaintiff's prayer "for punitive damages, which are not available against the state," suggested that the claim was in fact against the official in her individual capacity).

Atchinson v. District of Columbia, 73 F.3d 418, 425 (D.C. Cir. 1996).[9]

Second, petitioner's claims against respondents were grounded in their individual wrongdoing – their decision to choke and taser him – rather than ministerial implementation of a municipal custom or policy that would underlie an official-capacity action. Courts applying the course of proceedings test reason that allegations of individual wrongdoing by the defendant identify potential personal liability, while official capacity suits – which are equivalent to a suit against "an entity of which an officer is an agent," *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 n.55 (1978) – require a plaintiff to show that the defendant was in fact executing or acting pursuant to the government's policy or custom. *Id.* at 694. *E.g.*, *Biggs*, 66 F.3d at 61 (suggesting that both individual allegations and a reference in a complaint to a seminal case on the constitutionality of individual officer actions can give notice of individual liability); *Powell*, 391 F.3d at 24 (noting that the complaint did not seek to show the official acted according to a governmental policy or custom "as would be expected in an official-capacity suit").

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[9] *See also Daskalea*, 227 F.3d at 448 (finding that the complaint did not provide notice of personal liability in part because the complaint did not "seek to hold the defendants jointly and severally liable, a formulation that might have given some indication of an intention to sue [the official] in her personal capacity"); *Jackson*, 16 F.3d at 1576 (finding that the complaint included an individual-capacity suit against employees of a state agency in part because it sought to hold both the agency and the employees jointly and severally liable).

Third, the remaining proceedings in the case confirm that respondents understood that they had been sued in both their official and their individual capacities. Respondents explicitly filed their motion for an extension of time to answer the complaint "in both their individual and official capacities." Pet. App. 36a. Respondents also subsequently asserted a qualified immunity defense in their answers, *id.* 41a, 45a, and in their motion for summary judgment. Defs. Mot. for Summary Judg. at 2 (filed Aug. 25, 2004) (E.D. Ark. No. 5-03-CV-00238). Courts employing the "course of proceedings" test consider whether events that occurred after the filing of the initial complaint reflect the defendants' awareness that they have been sued in their individual capacity. *Moore*, 272 F.3d at 772 n.1. Thus, for example, a defendant's assertion of a qualified immunity defense indicates that the defendant understood the plaintiff's action as an individual-capacity suit. *Biggs*, 66 F.3d at 23.[10]

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[10] *See also Powell*, 391 F.3d at 22 (reasoning that the nature of the defenses raised in response to the complaint, particularly the defense of qualified immunity, is relevant to determining whether the official had notice of potential personal liability); *Moore*, 272 F.3d at 772 n.1 (course of proceedings test considers "the nature of any defenses raised in response to the complaint, particularly claims of qualified immunity, to determine whether the defendant had actual knowledge of the potential for individual liability."); *Daskalea*, 227 F.3d at 449 (finding that the defendant official lacked notice under the course of proceedings test, citing the fact that the official never raised the defense of qualified immunity); *Lundgren v. McDaniel*, 814 F.2d 600, 604 (11th Cir. 1987) ("The raising, litigation, and submission to the jury of the qualified immunity defense as a defense that would preclude liability on the section 1983 claim demonstrates, however, that the section 1983 claim was actually tried as a claim against the deputies solely in their individual capacities.").

Moreover, because the course of the proceedings reflects petitioner's intent to hold respondents personally liable, the majority of circuits would find that petitioner filed his original complaint against respondents in their individual capacities notwithstanding that the caption of the complaint expressly named the other county officials as defendants in both their individual and official capacities while making no express indication either way about the capacity in which respondents were being sued. Such a specification was necessary to make clear that petitioner sought to hold the *other* county officials liable in their individual capacities as well – an inference that could not otherwise be drawn because those defendants were not directly involved in the choking and tasering of petitioner.[11]

The Seventh and Ninth Circuits would also construe petitioner's suit against respondents as one brought against them in their individual capacities. The Seventh Circuit would deem dispositive the fact that petitioner's complaint "allege[d] tortious conduct of [respondents] acting under color of state law," rather than "seek[ing] injunctive relief from official policies or customs." *Miller*, 220 F.3d at 494. And for its part, the Ninth Circuit would rely on its

[11] Respondents did not seriously argue below that the course of proceedings, when viewed in their entirety, would lead to a determination that petitioner's claims against respondents were in their official capacities only. Respondents instead maintained that petitioner simply failed to conform to the Eighth Circuit's pleading rule: he "did not sue [respondents] in their individual capacities in the original action as a matter of law" because he "failed to clearly . . . and unambiguously name [respondents] in their individual capacities in the original action." Resps. C.A. Br. 14.

presumption that government officials are sued in their individual capacity when they are named in a complaint that seeks damages under Section 1983.[12]

4. Review is also warranted because the legal question over which the courts of appeals are divided arises frequently. *See* Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 1.1 (4th ed. 2007 Supp.) (noting that between 40,000 and 50,000 Section 1983 claims are brought each year). While it is true that it would be "clearly preferable that plaintiffs explicitly state whether a defendant is sued in his or her 'individual capacity,'" *Moore*, 272 F.3d at 772, a large proportion of these complaints are filed either by inexperienced counsel or by *pro se* plaintiffs, who may be unaware of both the Eighth Circuit's longstanding rule (particularly when the rule is so crucially different from the rule applied in all the other circuits to have considered the question) and that court's admonition that "section 1983 litigants wishing to sue government agents in both capacities should simply use" the language that it has prescribed, *see Nix v. Norman*, 879 F.2d 429 (1989). For example,

[12] To be sure, the Ninth Circuit in *Shoshone* held that when the plaintiffs "specified . . . that one of the state officials . . . was being sued in both his individual and official capacities, while neglecting to specify in what capacity the remaining officials were named," the remaining officials were sued in their official capacities only. 42 F.3d at 1285. However, the court in *Shoshone* rested its holding on the premise that the officials not explicitly named in the caption in their individual capacities "could assume that they were *not* being sued in their individual capacities." *Id.* In this case, by contrast, there can be no such assumption: not only did the body of petitioner's complaint name respondents as "individual defendants" and seek punitive damages, but respondents initially appeared in both capacities and asserted a qualified immunity defense.

approximately half of all civil rights suits are filed by prisoners, ninety-six percent of whom file *pro se*. Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 Notre Dame J.L. Ethics & Pub. Pol'y 475 (2002). Construing these plaintiffs' complaints as suing defendants only in their official capacities unless the plaintiffs expressly plead individual capacity may preclude many plaintiffs from obtaining redress for violations of their constitutional rights even when – as here – the complaint and the subsequent proceedings nonetheless reflect the plaintiff's intent to hold a defendant liable in her individual capacity. Indeed, that the Eighth Circuit's per se rule does indeed serve as a trap for unwary civil rights litigants, *cf. Slack v. McDaniel*, 529 U.S. 473, 487 (2000), can be seen in the myriad decisions by district courts in that circuit which rely on the rule to find that a plaintiff has sued a governmental defendant solely in her official capacity, only to then dismiss the case based either on immunity under the Eleventh Amendment or because the plaintiff has failed to allege a government policy or custom responsible for the alleged constitutional violation.[13] Such a result is directly contrary to Congress's purpose in enacting Section 1983 – *viz.*, to "provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Monroe v. Pape*, 365 U.S. 167, 174 (1961).

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[13] S*ee, e.g.*, *Hill v. Moss*, No. 4:07CV1589 RWS, 2007 WL 4593501 (E.D. Mo. Dec. 28, 2007); *Carter v. Wright*, No. 2:07CV00048 DDN, 2007 WL 4554009 (E.D. Mo. Dec. 19, 2007); *Hebron v. Simpson*, No. 4:07CV1349 CDP, 2007 WL 3311290 (E.D. Mo. Nov. 5, 2007).

The question presented is also frequently recurring. Not only have twelve circuits addressed this issue, *see supra* Part I, but most of those circuits have done so repeatedly. For example, during an eleven-year period, the Sixth Circuit alone issued over two hundred unpublished opinions addressing the capacity in which defendants had been sued. *See Moore*, 272 F.3d at 780-89 (Suhrheinrich, J., dissenting). The issue also arises frequently at the district court level. In the Eighth Circuit, for example, district courts issued over three dozen opinions addressing the capacity issue in 2007,[14] while district

[14] *Hill v. Singer*, No. 4:07CV1591 JCH, 2007 WL 4615955 (E.D. Mo. Dec. 31, 2007); *Hill v. Moss*, No. 4:07CV1589 RWS, 2007 WL 4593501 (E.D. Mo. Dec. 28, 2007); *Hood v. Blake*, No. 4:07CV992 HEA, 2007 WL 4593503 (E.D. Mo. Dec. 28, 2007); *Krupp v. Stubblefield*, No. 4:07CV1862 TIA, 2007 WL 4565023 (E.D. Mo. Dec. 21, 2007); *Morgan v. Dep't of Mental Health*, No. 4:07CV1784 DJS, 2007 WL 4565025 (E.D. Mo. Dec. 21, 2007); *Carter v. Wright*, No. 2:07CV00048 DDN, 2007 WL 4554009 (E.D. Mo. Dec. 19, 2007); *Fisher v. Goynes*, No. 8:07CV378, 2007 WL 4458918 (D. Neb. Dec. 14, 2007); *Chaney v. Somogye*, No. 4:07CV1624 CEJ, 2007 WL 3377004 (E.D. Mo. Nov. 13, 2007); *Jones v. Brayer*, No. 4:07CV1704 RWS, 2007 WL 3353925 (E.D. Mo. Nov. 9, 2007); *McClure v. Rehg*, No. 4:07CV1686 FRB, 2007 WL 3352389 (E.D. Mo. Nov. 8, 2007); *Hebron v. Simpson*, No. 4:07CV1349 CDP, 2007 WL 3311290 (E.D. Mo. Nov. 5, 2007); *Motton v. Lancaster County Corrections*, No. 4:07CV3090, 2007 WL 3333836 (D. Neb. Nov. 5, 2007); *Neal v. Sikeston Dep't of Safety*, No. 1:07CV129 LMB, 2007 WL 3310712 (E.D. Mo. Nov. 5, 2007); *Seltzer v. Bryson*, No. 4:07CV1665 ERW, 2007 WL 3268430 (E.D. Mo. Nov. 2, 2007); *Stainbrook v. Houston*, No. 4:07CV3196, 2007 WL 3244086 (D. Neb. Nov. 1, 2007); *Richardson v. Blake*, No. 4:07CV1089SNL, 2007 WL 3232231 (E.D. Mo. Oct. 30, 2007); *Smith v. Rowley*, No. 2:05-CV-13 (JCH), 2007 WL 3232229 (E.D. Mo. Oct. 30, 2007); *McCord v. Blake*, No. 4:07CV01313 ERW, 2007 WL 3146567 (E.D. Mo. Oct. 25, 2007); *Rulo v. Washington County Jail*, No. 4:07CV1343 HEA, 2007 WL 3146571 (E.D. Mo. Oct. 25, 2007); *Candler v. Nobles*, No. 1:07CV0003 1JL, 2007 WL

courts in the Sixth Circuit issued at least fourteen such opinions in 2006 and 2007.[15]

3125108 (E.D. Ark. Oct. 23, 2007); *Gerber v. Englehart*, No. 4:07CV1228 CEJ, 2007 WL 3119849 (E.D. Mo. Oct. 23, 2007); *Everetts v. Farmington Treatment Ctr.*, No. 4:07CV1056 JCH, 2007 WL 3028192 (E.D. Mo. Oct. 15, 2007); *Ahmed v. Fenesis*, Civ. No. 05-2388 (JRT/FLN), 2007 WL 2746842 (D. Minn. Sept. 19, 2007); *Hoyt v. Mullins*, Civ. No. 06-5115, 2007 WL 2681104 (W.D. Ark. Sept. 12, 2007); *Estes v. Lederle*, No. 4:07 CV 274 DDN, 2007 WL 2693823 (E.D. Mo. Sept. 10, 2007); *Royster v. Darling*, Civ. No. 05-947 (RHK/AJB), 2007 WL 2669466 (D. Minn. Sept. 6, 2007); *Randle v. City of Minneapolis Police Dep't*, Civ. No. 06-859 (PAM/RLE), 2007 WL 2580568 (D. Minn. Sept. 5, 2007); *Skinner v. New Madrid County, Missouri*, No. 1:07CV0097 LMB, 2007 WL 2361939 (E.D. Mo. Aug. 15, 2007); *Hardy v. Wheeler*, Civ. No. 07-2590 (MJD/RLE), 2007 WL 2026408 (D. Minn. July 9, 2007); *Patten v. Warren County Jail*, No. 4:07 CV 1127 RWS, 2007 WL 1876473 (E.D. Mo. June 28, 2007); *Zessin v. Moore*, No. 8:07CV171, 2007 WL 1825175 (D. Neb. June 22, 2007); *Wilson v. Nixon*, No. 4:07CV1055 ERW, 2007 WL 1725291 (E.D. Mo. June 12, 2007); *Ely v. Bowers*, No. 4:07CV961 AGF, 2007 WL 1577538 (E.D. Mo. May 31, 2007); *Fowler v. Arkansas State Hosp.*, No. 4:06-CV-00868 GTE, 2007 WL 990260 (E.D. Ark. Mar. 28, 2007); *Applewhite-Bey v. Tripoli*, Civ. No. 05-2160 DSD/RLE, 2007 WL 892566 (D. Minn. Mar. 21, 2007); *Smith v. United States Postal Service Inspector General*, No. 4:06 CV 01631 SWW, 2007 WL 537712 (E.D. Ark. Feb. 16, 2007); *Passley v. Poplar Bluff Police Dep't.*, No. 1:07CV3 FRB, 2007 WL 427793 (E.D. Mo. Feb. 2, 2007). This number is most likely a significant under-representation of the actual figure, given that many district court rulings are not available via computer databases.

[15] *See Hill v. Bradley County Bd. of Educ.*, No. 1:05-CV-279, 2007 WL 4124495 (E.D. Tenn. Nov. 19, 2007); *Welles v. Chattanooga Police Dep't*, No. 1:07-CV-71, 2007 WL 3120823 (E.D. Tenn. Oct. 23, 2007); *Kunz v. Franklin City School Dist. Bd. of Educ.*, No. 1:06-CV-012, 2007 WL 2835627 (S.D. Ohio Sept. 26, 2007); *Jackson v. Herrington*, No. 4:05CV-186, 2007 WL 2462185 (W.D. Ky. Aug. 29, 2007); *Patrick v. Bobby*, No. 4:06CV639, 2007 WL 2446574 (N.D. Ohio Aug. 23, 2007); *Hutton v. Jackson*, No.

II. The Eighth Circuit's Rule Is Wrong on the Merits.

Certiorari is also warranted because the *per se* rule applied by the Eighth Circuit is contrary to this Court's precedents, which make clear that when a plaintiff does not indicate in which capacity a defendant has been sued, courts should look to the course of proceedings to determine whether it seeks to hold the defendant liable in her personal or official capacity. Thus, in *Brandon v. Holt*, 469 U.S. 464 (1985), this Court concluded that although "petitioners did not expressly allege at the outset of the litigation that they were suing [a defendant] in his official capacity as Director of Police of the Memphis Police Department," the course of proceedings nonetheless "ma[d]e it abundantly clear that the action against Chapman was in his official capacity and only in that capacity." *Id.* at 469. And in *Kentucky v. Graham*, 473 U.S. 159 (1985), this Court – discussing the difference between individual- and official-capacity suits – noted that "in many cases, the complaint will not clearly specify whether officials are being sued

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1:06CV65, 2007 WL 2111102 (S.D. Ohio July 19, 2007); *Thornton v. Commonwealth of Kentucky*, Civ. No. 4:06CV-46-M, 2007 WL 1662690 (W.D. Ky. June 5, 2007); *Sanders v. Henderson County Detention Ctr.*, Civ. No. 4:07CV-P62-M, 2007 WL 1545941 (W.D. Ky. May 29, 2007); *Moore v. McCracken County Jail*, Civ. No. 5:06CV-P146-R, 2007 WL 855337 (W.D. Ky. Mar. 15, 2007); *Edmonds v. Turner*, No. 3:03CV7482, 2006 WL 3716796 (N.D. Ohio Dec. 14, 2006); *Neels v. Hamilton*, Civ. No. 3:06CV-P-168-H, 2006 WL 2847170 (W.D. Ky. Sept. 28, 2006); *Easterly v. Budd*, No. 4:06 CV 00186, 2006 WL 2404143 (N.D. Ohio Aug. 18, 2006); *Johnson v. United States Secret Service*, No. 06-2114-B/An., 2006 WL 1007247 (W.D. Tenn. Apr. 18, 2006); *Marshall v. Green County*, No. 1:05CV-130, 2006 WL 335829 (W.D. Ky. Feb. 13, 2006).

personally, in their official capacities, or both." *Id.* at 167 n.14. In such cases, the Court continued, "'[t]he course of proceedings' . . . typically will indicate the nature of the liability sought to be imposed." *Id.* (quoting *Brandon*, *supra*).

The Eighth Circuit's *per se* rule requiring a plain statement that a defendant is sued in her individual capacity is also contrary to both Federal Rule of Civil Procedure 8(a)(2) and this Court's precedents construing the Rule. Rule 8(a)(2) – which was intended to "discourage battles over mere form of statement and to sweep away the needless controversies which [previous] codes permitted," 5 C. Wright & A. Miller, Federal Practice and Procedure § 1201, at 67 n.11 (Advisory Comm. 1955 Report) – makes clear that a complaint need only include "a short and plain statement of the claim showing that the pleader is entitled to relief." Indeed, in *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coord. Unit*, 507 U.S. 163 (1993), this Court expressly held that courts may not impose pleading standards "more stringent than the usual pleading requirements of Rule 8(a) . . . in [§ 1983] civil rights cases alleging municipal liability," reasoning that such standards would be irreconcilable with the "liberal system of 'notice pleading' set up by the Federal Rules." *Id.* at 164.

Nor is the Eighth Circuit's *per se* rule required by Federal Rule of Civil Procedure 9(a), which requires plaintiffs to specify a "party's capacity to sue or be sued" in the complaint only "when required to show that the court has jurisdiction." Although the Eighth Circuit has sometimes sought to justify its "clear

statement" rule on the grounds that the Eleventh Amendment presents a "jurisdictional limit on federal courts in civil rights cases against states and their employees," such that a plaintiff must specify in the complaint whether a defendant is being sued in her individual or official capacity, *Nix v. Norman*, 879 F.2d 429 (8th Cir. 1989), that justification is – as Judge Gruender noted in this case – at best "debatable," Pet. App. 12a. And in any event, that rationale is entirely inapposite in cases, such as this one, in which respondents are county officials and thus not entitled to immunity under the Eleventh Amendment. *Id.*

By contrast, because it looks to the entirety of the complaint and the events that followed it, the "course of proceedings" test balances the defendant's interest in "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 the plaintiff's interest in pursuing viable claims without being thwarted by inadvertent mistakes in pleading. As this Court has reiterated, "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome." *Id.* at 48.

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.

Thomas C. Goldstein
(Counsel of Record)
Akin Gump Strauss Hauer & Feld LLP

Suite 300
Bethesda, MD 20814

1333 New Hampshire Ave. NW
Washington, DC 20036
(202) 887-4060

Pamela S. Karlan
Stanford Law School
Supreme Court
Litigation Clinic
559 Nathan Abbott Way
Stanford, CA 94305

William C. Plouffe
Attorney at Law
211 N. Washington St. #107
P.O. Box 1537
El Dorado, AR 71731

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