No. 12-1296

In The
Supreme Court of the United States

ED RAY and MARK McCAMBRIDGE,

Petitioners,

v.

OSU STUDENT ALLIANCE and WILLIAM ROGERS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners demonstrated that this case is well suited for the Court to address the question whether 42 U.S.C. § 1983 requires that a government official have engaged in conduct that caused a constitutional violation, or whether the official can be held personally liable simply because he knew of and acquiesced in a subordinate's actions that violate the Constitution. As illustrated by the Ninth Circuit's split decision, this case presents the "knowledge and acquiescence" issue in stark form – the majority ruled that petitioners' knowledge of and acquiescence in a subordinate's allegedly unconstitutional actions was enough to subject petitioners to personal liability under § 1983, while the dissent concluded that such knowledge and acquiescence is insufficient under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Given the sharp contrast over a pure issue of law, this case provides a prime opportunity to clarify an important, recurring issue that has split the circuits.

Respondents nevertheless offer a litany of reasons why the Court should not review this case. Respondents devote much of their brief to arguing that *Iqbal* did not eliminate supervisory liability under § 1983, that the circuits are not split on the question whether supervisory liability is cognizable under § 1983, that the Ninth Circuit correctly applied *Iqbal* to hold that knowledge and acquiescence alone are sufficient to impose § 1983 liability, and that eliminating supervisory liability would lead to "absurd results" and poor public policy. Those issues are

fully addressed in the petition and amicus briefs and need not be repeated here.

Respondents also contend that certiorari is inappropriate given the procedural posture of this case. Because the Ninth Circuit gave respondents leave to replead when it reversed the district court's order dismissing respondents' complaint, respondents argue that "any alleged deficiencies in the complaint under [*Iqbal*] may not have any effect on the final adjudication of this matter." Br. in Opp. at 14. Leave to amend, however, is not an impediment to review. In fact, in the course of dismissing the respondent's claims, *Iqbal* contemplated that the respondent may be permitted to replead, stating that "[t]he Court of Appeals should decide in the first instance whether to remand to the District Court so that respondent can seek leave to amend his deficient complaint." 556 U.S. at 687.[1]

Additionally, respondents here will not likely be able to bolster their claims against petitioners Ed Ray and Mark McCambridge. A review of the complaint reveals that respondents took their best shot at stating a claim against petitioners. Notwithstanding their detailed allegations and voluminous attached materials, all respondents could muster against

[1] The Second Circuit subsequently remanded the case for further proceedings, in which it gave the district court discretion to allow amendment. *Iqbal v. Ashcroft*, 574 F.3d 820, 822 (2d Cir. 2009).

petitioners were a few allegations that showed that petitioners kept apprised of the dispute with respondents and left the matter for their subordinates to handle. And even if respondents could somehow allege that petitioners engaged in conduct that caused the alleged constitutional deprivation, review would still serve the valuable purpose of clarifying the question whether a supervisor's knowledge of and acquiescence in an alleged violation is sufficient under *Iqbal*.

In a related vein, respondents argue that because the case will proceed against defendant Vincent Martorello regardless of the disposition of respondents' claims against petitioners, the Court should await final adjudication of all claims to avoid the prospect of piecemeal appeals. Br. in Opp. 15. Respondents' argument overlooks the point that review of the supervisory liability issue at this juncture may well terminate the litigation against petitioners, which would prevent them from having to undergo the burden and expense of facing trial as well as a potential appeal in which they would again raise the supervisory liability issue in order to present the issue to this Court. And as again illustrated by *Iqbal* – which involved several defendants who were not parties to the appeal – the presence of additional defendants does not impede review, especially when the petition provides the opportunity for the Court to clarify an important question of law.

Finally, respondents urge the Court not to grant certiorari because the record is not sufficiently clear

to address the issue presented in the petition. Br. in Opp. 16-19. According to respondents, the complaint alleges that petitioners were personally involved in the alleged constitutional violation as well as alleging that they knew of and acquiesced in the alleged violation, so "[t]he issue of supervisory liability, while academically interesting, is consequently superfluous in this case." Br. in Opp. 19. On that point, respondents are simply incorrect. As an initial matter, the Ninth Circuit majority and dissent did not share respondents' assessment of their complaint. Although the majority and dissent divided sharply over the question whether knowledge and acquiescence suffice to state a claim under § 1983, they were united in reading the complaint as alleging that petitioners' involvement was limited to knowledge of and acquiescence in the allegedly unconstitutional conduct. Thus, the majority summarized the salient allegations of the complaint as follows:

> The claims against President Ray and Vice President McCambridge require closer examination. According to the complaint, neither defendant actually made the decision to deny plaintiffs permission to place their newsbins throughout campus; Martorello did that. Both Ray and McCambridge, however, oversaw Martorello's decision-making process and knowingly acquiesced in his ultimate decision. . . . According to the complaint, then, Ray and McCambridge knew that their subordinate, Martorello, was applying the previously unannounced and

> unenforced policy against the *Liberty*, but not against any of the other off-campus newspapers, and they did nothing to stop him. The question is whether allegations of supervisory knowledge and acquiescence suffice to state claims for speech-based First Amendment and equal protection violations.

Pet. App. 32-34. *See also* Pet. App. 54 (respondents' "complaint nowhere indicates how OSU's president, Ed Ray, and the vice president of finance and administration, Mark McCambridge, also violated those rights through their 'own individual actions'") (Ikuta, J., dissenting).

In arguing that they have properly pleaded that petitioners' own actions caused the alleged constitutional violations, respondents offer an inflated view of their complaint that is not supported by their actual allegations and exhibits. For example, respondents contend that petitioner McCambridge sent respondents an e-mail, which shows that "Martorello was acting at his and Ray's direction." Br. in Opp. 18. In fact, McCambridge's e-mail states that he has "asked Vincent [Martorello] to follow through with you and be the point of contact for President Ray and myself. He will keep us informed." Resp. App. 17. Obviously, having Martorello keep petitioners informed is a far cry from acting at their direction. Similarly, respondents assert that Charles Fletcher (an attorney for the university) wrote that he was acting as the "point of contact" for petitioners, Br. in Opp. at 18, when he actually stated that "I will be your [respondents']

point of communication on this issue." Resp. App. 27. In other words, Fletcher told respondents to direct all communications to him, not that he was speaking for petitioners as respondents suggest.[2] Because respondents' complaint shows that petitioners Ray and McCambridge were merely kept informed of the controversy with respondents and that they delegated the matter to their subordinates to handle, the case does turn on the issue of supervisory liability, making it an appropriate vehicle for the Court to clarify whether a supervisor who does not cause a constitutional violation should be subjected to § 1983 liability.

CONCLUSION

The issue of § 1983 supervisory liability after *Iqbal* has created a split among the circuits and engendered a great deal of uncertainty among the lower courts. This case affords a prime opportunity to resolve the circuit split and to clarify the confusion because it presents the question whether a government official's knowledge of and acquiescence in a

[2] Respondents also assert, somewhat contradictorily, that the Court should not review the case because they need discovery to determine the extent to which petitioners were personally involved. Br. in Opp. 16-17. If respondents had alleged that petitioners were personally involved in the alleged constitutional deprivation as they argue in their brief, they would not need discovery to state a claim.

subordinate's actions is sufficient to impose § 1983 liability. Respondents have offered no sound reason why the Court should not review this case to address the existence and scope of supervisory liability under § 1983. The Court should therefore grant certiorari to clarify this important issue of law.

Respectfully submitted,

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