No. 13-1318

In The
Supreme Court of the United States

TRACEY L. JOHNSON and DAVID JAMES, JR.,

Petitioners,

versus

CITY OF SHELBY, MISSISSIPPI,

Respondent.

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

PETITIONERS' REPLY MEMORANDUM

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REPLY ARGUMENT

The gist of Respondent's position is that a complaint seeking damages for violation of constitutional rights under color of state law must contain a specific citation to 42 U.S.C. § 1983. Respondent argues, however, that a suit seeking injunctive relief for violation of constitutional rights may be brought "directly under the Fourteenth Amendment" without citing 42 U.S.C. § 1983. Respondent's Brief in Opposition to Petition for Certiorari, p. 7. Because Petitioners' complaint failed to cite 42 U.S.C. § 1983 and seeks damages, Respondent argues the lower courts correctly dismissed it.

Respondent's reading of 42 U.S.C. § 1983 conflicts with the statute's clear language. By its very terms, 42 U.S.C. § 1983 provides a cause of action for violation of any rights "secured by the Constitution" whether they be in the form of "an action at law" or in the form of a "suit in equity." 42 U.S.C. § 1983. In the face of such clear statutory language, any argument attempting to distinguish between an "action at law" and a "suit in equity" as determinative of whether 42 U.S.C. § 1983 must be cited in a complaint is frivolous.

Respondent cites several cases, the genesis of which is *Ex parte Young*, 209 U.S. 123, 159-60 (1908), in support of its argument that one may sue in equity directly under the Fourteenth Amendment, without relying upon 42 U.S.C. § 1983. This argument is nonsense. *Ex parte Young*, 209 U.S. at 159-60, holds only that " . . . a suit against individuals, for the purpose of preventing them, as officers of a state,

from enforcing an unconstitutional enactment, . . . is not a suit against the state within the meaning of [the Eleventh] Amendment." *Ex parte Young*, 209 U.S. at 154. *Ex parte Young*, and the multitude of cases cited in Respondent's brief applying the rule of *Ex parte Young*, hold only that when plaintiffs are, in reality, seeking monetary damages against the state, their claims are barred by the Eleventh Amendment. *See, e.g., Robinson v. Kansas,* 295 F.3d 1183, 1191 (10th Cir. 2002), cited in Respondent's Brief in Opposition to Petition for Certiorari, p. 7.

This case is not about Eleventh Amendment immunity, which is the subject of *Ex parte Young*. Instead, this case centers upon what must be pled in order to allege a violation of federal constitutional rights. Petitioners have never claimed that they may pursue any claims (whether for injunctive relief or damage relief) directly under the Fourteenth Amendment. Petitioners know all such claims must be pursued under 42 U.S.C. § 1983. They simply failed to cite 42 U.S.C. § 1983 in the complaint, and the Fifth Circuit Court of Appeals held that this omission is fatal to Petitioners obtaining any relief on the merits.[1]

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[1] Respondent claims that Petitioners waited until after the Fifth Circuit Court of Appeals had dismissed their complaint before moving to amend the complaint so as to cite 42 U.S.C. § 1983. Respondent's Brief in Opposition to Petition for Certiorari, p. 7. Actually, Respondent waited until after the deadline for amendments to expire before it filed its motion for summary judgment, in which it alleged, for the first time, that the complaint was deficient because 42 U.S.C. § 1983 – the authorizing statute

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Perhaps the Fifth Circuit believes such hyper-technicality is endorsed by this Court's decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Those two (2) cases, however, hold only that allegations of a complaint must contain enough facts to show that a claim is "plausible." *See* Carly R. Wilson, *Complaints Must Plead Non-Conclusory Facts that Manifest Plausibility to Survive a Motion to Dismiss in All Civil Cases: Ashcroft v. Iqbal*, 48 Duq. L. Rev. 173 (2010).

In fact, to reverse this case is to honor *Iqbal* and *Twombly*. *Twombly* expressly noted that " . . . we do not apply any 'heightened' pleading standard,. . . ." 550 U.S. at 569, n. 14. *Iqbal* likewise stated that "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era,. . . ." 556 U.S. at 678.[2]

– was not cited in the complaint. The simple issue presented is whether a complaint alleging a violation of federal constitutional rights under color of state law is fatally defective when it does not cite 42 U.S.C. § 1983.

[2] To be sure, there is immense disagreement about the extent to which *Iqbal* and *Twombly* intended to modify federal pleading standards. Compare, for example, Adam N. Steinman, *The Pleading Problem*, 62 Stan. L. Rev. 1293 (2010) (arguing that "*The Supreme Court's recent decisions in* Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal *have the potential to upend civil litigation as we know it"* with Daniel W. Robertson, *In Defense of Plausibility: Ashcroft v. Iqbal and What the Plausibility Standard Really Means*, 38 Pepp. L. Rev. 111, 153-54 (2010) (arguing that *Iqbal* did not misinterpret Rule 8).

CONCLUSION

This Court should grant the Writ and hold the lower federal courts have no authority to impose a pleading requirement for a complaint beyond those requirements contained in Fed. R. Civ. P. 8.

Respectfully submitted,

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