No.

In the
Supreme Court of the United States

JOSEPH MICCI, PETITIONER,

v.

RICK ALEMAN, RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

LISA MADIGAN
Attorney General of Illinois
MICHAEL A. SCODRO*
Solicitor General
JANE ELINOR NOTZ
Deputy Solicitor General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698
mscodro@atg.state.il.us

* Counsel of Record

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether the Seventh Circuit correctly held, on a question that has fractured the circuits, that police may be civilly liable for the use of a suspect's custodial statement, obtained either in violation of *Miranda* or as a result of coercion, where the statement was introduced to charge the suspect but the charges were dismissed prior to trial.

2. Whether the Seventh Circuit correctly held—seemingly for the first time by any federal appellate court—that a police officer unconstitutionally coerced a suspect's statements by using the routine interview technique of lying to the suspect about the strength of the case against him.

PARTIES TO THE PROCEEDING

Petitioner, who was an appellee below, is Joseph Micci. Todd Carlson, Gerard Fallon, Carol Lussky, Eric Villanueva, and the Village of Hanover Park also were appellees below. Respondent, who was appellant below, is Rick Aleman.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Constitutional Provision:

Statutes:

TABLE OF AUTHORITIES—Continued

Rule:

Other:

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Joseph Micci, respectfully requests that the Court grant the petition for a writ of certiorari to the Seventh Circuit, which reversed the district court's opinion granting summary judgment to all defendants.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit reversing the district court's decision granting summary judgment (App. 1a-20a) is reported at 662 F.3d 897.[1] The memorandum opinion of the United States District Court for the Northern District of Illinois (App. 21a-71a) is reported at 748 F. Supp. 2d 869.

JURISDICTION

The court of appeals entered judgment on November 21, 2011. App. 1a. The court denied petitioner's timely petition for rehearing and rehearing *en banc* on December 20, 2011. App. 72a-73a. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

---

[1] "App. _a" refers to the appendix to this petition; "Doc. _" refers to the document number of items in the record on appeal; "DVD" refers to the recording of respondent's interactions with police that was made part of the record on appeal.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1983 of Title 42 of the United States Code provides, in pertinent 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT

1. On September 9, 2005, respondent,[2] who was running a daycare business from his home in Hanover Park, Illinois, called 911 to report that Joshua Schrik, one of the children under his care, had stopped breathing. App. 23a. Shortly thereafter, paramedics, and then Hanover Park Police, arrived. App. 23a-24a. Joshua was taken to a hospital. *Ibid.* Respondent and his wife voluntarily accompanied the Hanover Park police to the station for questioning. App. 25a.

2. Hanover Park Police contacted the Illinois State Police and requested assistance from their Child Victimization Unit, where petitioner was assigned. App. 24a. Petitioner traveled to Hanover Park, where he

---

[2] Although Officers Todd Carlson, Gerard Fallon, Carol Lussky, and Eric Villanueva, and the Village of Hanover Park, who were defendants-appellees below, are respondents by operation of Supreme Court Rule 12.6, for clarity the petition refers to the plaintiff-appellant, Rick Aleman, alone as the "respondent."

interviewed the firefighters, paramedics, and police who had responded to respondent's 911 call. App. 24a-26a. These first responders stated that when they arrived at respondent's home, he appeared distraught and was unable to calm down. App. 25a. Respondent said at least twice that he did not want to go to jail for the rest of his life or be unable to see his children. App. 26a. Respondent explained the events preceding Joshua's collapse as follows: Joshua cried after his mother left; Joshua seemed sleepy and cried again when respondent unsuccessfully tried to get him to interact with other children; respondent stopped to check on Joshua—who was lying, propped up, on the couch—and found him completely limp; and respondent gave Joshua CPR and called 911. App. 24a-26a.

3. Other officers interviewed Joshua's doctors and family at the hospital. App. 26a. Dr. Gerardo Reyes, who had primary responsibility for Joshua's treatment, told police that Joshua had suffered a catastrophic brain injury caused by a "violent shake," and that the onset of Joshua's symptoms would have occurred immediately following the traumatic event. App. 26a-27a, 38a-39a. In Dr. Reyes' opinion, Joshua "would not have been alert and functioning" after the incident that resulted in his brain injury. App. 27a, 39a.

Dr. Michael Seigle, an ophthalmologist who had examined Joshua's eyes, stated that Joshua was suffering from retinal hemorrhages consistent with

"shaken baby syndrome." App. 27a. According to Dr. Seigle, the hemorrhages appeared "fresh," by which he meant they had "just occurred." App. 27a, 48a-49a.

Finally, Dr. Albert Hasson, Joshua's regular pediatrician, stated that he had seen Joshua one day earlier, on September 8. App. 28a. Dr. Hasson explained that he had examined Joshua's eyes and found no problems, that Joshua "looked great," and that he had diagnosed Joshua with a standard viral infection. *Ibid.* Police transmitted the information obtained from Joshua's doctors to investigators at the Hanover Park police station, including petitioner. App. 24a-25a, 30a.

The officers at the hospital also interviewed Joshua's mother, Danielle Schrik. App. 28a. She stated that Joshua had been ill for several days and that she had taken him to see his pediatrician. *Ibid.* She denied having ever hit or struck Joshua, a denial the officers found credible. *Ibid.* The officers also interviewed Danielle's mother, Nancy Schrik. App. 51a-52a. Although asked whether she knew if anyone had abused Joshua, Nancy did not tell police that Danielle had been violent toward Joshua, as Nancy would later allege at her 2008 deposition. App. 50a, 52a.[3]

---

[3] Danielle has not been charged in connection with Joshua's death. App. 52a n.14.

4. Petitioner and Hanover Park Officer Villaneuva interviewed respondent. App. 29a. First, petitioner told respondent that he would read him his *Miranda* rights. Pet. 55a. The following recorded exchange occurred:

Micci: Before I get started . . . uh I do this for every single person I talk to so there's never a mistake with anybody. And I'm sure you've heard these on T.V. a million times before.

Aleman: Oh here we go.

Micci: I know, well, this is State Police policy.

Aleman: I know, but before I do that I gotta call my guy. Just give me one phone call real quick and let me call him and tell him I'm about to do this so he knows.

App. 55a-56a. Petitioner filled out a *Miranda* waiver form and read respondent his rights. App. 56a-57a. He gave respondent permission to call his lawyer, App. 57a ("if you want to call your attorney first that's fine with me"), and respondent replied, "Yeah. It will just take a second," *ibid.*

Respondent called his attorney from a telephone in the hallway outside the interview room. *Ibid.* Respondent's attorney advised him not to sign a waiver of his *Miranda* rights. App. 57a. Respondent put Officer Villanueva on the phone with his attorney, and the attorney told Villanueva that respondent would not

talk without his attorney present. App. 57a-58a. Villanueva then took respondent back to the interview room. App. 58a. Petitioner had no knowledge of Villanueva's conversation with respondent's attorney. Doc. 129, Ex. A, Micci Dep., pp. 52, 119-120.

Back in the interview room, the following exchange occurred:

Micci: How we doing?

Aleman: Not good. I called him and he told me not to do this right now and to offer to come back tomorrow or whatever. Said you've been there all day, you've done above and beyond and cooperated. I told him I was tired and didn't feel real comfortable right now, you know, I honestly, I mean I was, you know, more alert and ready for this like hours ago. I've been stressing and asking to see my wife and this and that and I've just been making myself sick. I told him that, I didn't tell him all that, but briefly I told him that. And he said well then tell them that and tell them you'd love to come back. He said a couple other things, but I'm not trying to be like you know. . . .

Micci: I'm not trying to be the bad guy myself, but if I don't get to talk to you, you're not going home, okay? The information I have right now is leading me to believe that something

> happened at that house. After speaking with three doctors at the hospital with the information they gave me that's what I need to clear up. But if I can't speak with you about that, then you're going to be staying here.

App. 58a-59a.

Respondent continued to express uncertainty about what he should do and requested permission (stating, "can I call numbnuts back?"), which was granted, to again call his attorney. App. 59a; DVD 17:28:56-17:29:21. After speaking with his attorney, respondent made several phone calls in an attempt to reach his wife. App. 5a. At this point, Officer Villanueva confirmed that respondent had spoken with his attorney and asked him not to use the phone again "until we decide what we're gonna do." *Ibid.* Respondent returned to the interview room, where this exchange took place:

Micci: Okay, where are we at?

Aleman: Um, I, you know, I talked to a lawyer and you know, I, you know, I tried to talk him into doing it, you know, and, you know, he's telling me to go ahead, you know, he's—

Micci: He said to go ahead?

Aleman: Yeah, you know, I mean I really don't have a problem doing it. It's just you know he said [inaudible], so I just followed—

Micci: So he said go ahead, then do it, then?

Aleman: I can do it, yeah.

App. 59a.

5. Respondent signed the *Miranda* waiver form. App. 60a. After signing the form, respondent called his wife. *Ibid.* Then, in response to police questioning, respondent stated that after Danielle arrived with Joshua at eight o'clock that morning, she stayed for approximately 15 minutes, during which respondent observed Joshua, who had been sick all week, "crying to his mom" at some point. DVD 18:15:35-18:16:30; 19:25:49-19:25:54. Because Joshua began crying again after Danielle left, respondent carried him to the door to watch her leave. DVD 18:17:20-18:17:47. Joshua then calmed down and put his head on respondent's shoulder. DVD 18:17:52-18:17:54. Respondent also stated that at one point during the morning, Joshua "was just looking around, not real familiar with his surroundings still, and not too happy." DVD 18:49:40-18:49:49.

Respondent further stated that, after discovering that Joshua, whom he had placed on the couch, was having difficultly breathing, "in a panic" he tried to

revive Joshua. DVD 19:38:04-19:38:34. Respondent admitted to holding Joshua under his armpits and shaking him. DVD 19:39:41-19:40:33. When petitioner suggested that respondent might have shaken Joshua violently out of frustration or anger, respondent denied having done so. App. 30a. He told petitioner that he had shaken Joshua in an attempt to revive him, but he insisted that Joshua was limp and lifeless before he picked him up from the couch. *Ibid.* After repeated denials, petitioner showed respondent photographs of Joshua's injuries and told respondent he had spoken with Joshua's doctors, who had stated that Joshua had been shaken in such a way that he would have become unresponsive immediately. *Ibid.*

Petitioner asked respondent how hard he shook Joshua, and respondent stated, "probably hard enough. * * * I'm ashamed of myself." *Ibid.* Respondent also stated, "I admit it. I did shake the baby too hard. But I didn't mean to. I didn't mean any harm." App. 31a. And respondent stated, "I know in my heart that if the only way to cause [the injury] is to shake that baby, then, when I shook that baby, I hurt that baby." *Ibid.*

6. Petitioner told respondent that he was under arrest and terminated questioning. DVD 21:58:10-21:58:22. The following day, when petitioner prepared to resume the interview, respondent asked for and obtained permission to call his lawyer. DVD 10:57:12-10:57:33. After talking to his lawyer,

respondent stated that he did not want to speak with police, and petitioner cut off questioning. DVD 11:11:36-11:25:55.

7. Respondent was charged with aggravated battery of a child, and, on September 12, 2005, the circuit court found probable cause to detain him and set bond (which respondent posted). App. 32a. Joshua died on September 13. *Ibid.* On September 15, respondent was charged with murder, and the circuit court found probable cause to detain him and set bond (which respondent again posted). App. 6a, 34a. On November 13, 2006, the charges were dismissed after the prosecution concluded that the evidence was insufficient to obtain a conviction. App. 34a. A prosecutor decided that the videotape of the interrogation was "more exculpatory than inculpatory," and the doctors who had examined Joshua revised their earlier opinions that he would have become unconscious immediately after the incident that caused his brain injury. App. 7a, 34a.

8. Respondent filed this lawsuit against petitioner and the other police officers who investigated Joshua's death, asserting violations of federal and state law and seeking damages under 42 U.S.C. § 1983. App. 1a, 21a. As relevant here, respondent alleged that petitioner and Officer Villaneuva unlawfully interrogated him. App. 55a. The district court granted summary judgment for all defendants on all claims. App. 22a.

At the threshold, the court held that respondent "never unambiguously invoked his right to counsel," and thus the police were free to question him. App. 60a-61a (citing *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010)). Although respondent expressed a desire to speak with his attorney, respondent did "not suggest, or even intimate, an unwillingness to answer questions without his attorney present." App. 61a. And because the privilege against compelled self-incrimination is a personal right, respondent's attorney (who told Officer Villaneuva that his client would not talk) had "no authority to assert [respondent's] Fifth Amendment rights." App. 62a. Instead, "it was up to [respondent] to decide whether he wished to make a statement." App. 63a. As for petitioner, he properly "refrained from asking any questions about the case until [respondent] signed the *Miranda* waiver" and even "stopped [respondent] on several occasions from volunteering information about the events in question until [respondent] had made a clear decision about whether to waive his rights." App. 62a.

The district court also held that respondent forfeited any claim that he involuntarily waived his *Miranda* rights because respondent did not cite authority supporting such an argument. App. 65a. Moreover, the argument would fail on the merits. App. 65a-66a. Respondent's "chief example of alleged coercion" was petitioner's truthful (because there was probable cause

for respondent's arrest) statement that, "If I don't get to talk to you, you're not going home." *Ibid.* But truthfully offering a suspect a "'choice between cooperation and freedom, on the one hand, and silence followed by custody and prosecution, on the other'" does not make a *Miranda* waiver involuntary. App. 66a (quoting *United States v. Miller*, 450 F.3d 270, 272 (7th Cir. 2006) abrogated on other grounds, *Kimbrough v. United States*, 552 U.S. 85, 93 n.4 (2007)). Rather, petitioner's "'clear articulation'" of respondent's options made respondent's waiver "'better informed and thus more rather than less involuntary.'" *Ibid.* (same).

9. The Seventh Circuit reversed. First, the court held that petitioner had violated respondent's *Miranda* rights because petitioner did not recognize respondent's requests to call his lawyer (which petitioner honored) as a request to have counsel present for questioning. App. 13a-15a. The court held that the statement "'I gotta call my guy'" was an unambiguous invocation of respondent's right to counsel, as was respondent's later request (also honored by police) to have a second conversation with his attorney. *Ibid.* And although immaterial to the questions presented here, the court also stated that petitioner had forfeited the argument (purportedly because petitioner had "fail[ed] to make it in the district court") that respondent's invocation of his right to counsel was ineffectual because ambiguous, App. 14a-15a—even though this argument was the basis

for the district court's decision, *e.g.*, App. 61a (district court's holding that "Aleman never unambiguously invoked his right to counsel").

Relying on *Sornberger v. City of Knoxville*, 434 F.3d 1006 (7th Cir. 2006), the Seventh Circuit next held that even though the charges against petitioner were dropped before trial, the violation of respondent's *Miranda* rights was "actionable in a suit under section 1983" because prosecutors used respondent's custodial statement to obtain his indictment. App. 15a.

Finally, the Seventh Circuit held that respondent's admission that he had shaken Joshua (albeit "gently" and "innocently") was "coerced" and thus unlawful even "apart from *Miranda*," because petitioner had "trick[ed]" respondent into believing he was responsible for Joshua's death "by lying to him about the medical reports." App. 15a-17a. Recognizing the traditional judicial "reluctan[ce] to deem trickery by the police a basis for excluding a confession," the court nevertheless held that petitioner's actions were unconstitutional because his false statement had "destroy[ed] the information required for a rational choice." App. 16a-17a.

10. Petitioner sought *en banc* review of the Seventh Circuit's holdings that (1) petitioner violated respondent's *Miranda* rights because petitioner did not recognize respondent's requests to speak to his lawyer

(which petitioner honored) as an unambiguous invocation of respondent's right to have counsel present for questioning; (2) a violation of *Miranda*'s prophylactic safeguards, absent coercion, may give rise to § 1983 liability; (3) petitioner coerced respondent's statements by allegedly lying about the strength of the case against respondent; and (4) an unlawful interrogation is actionable under § 1983 even though the resulting statements were never used against the suspect at trial. On the second and fourth points, petitioner argued that the Seventh Circuit's prior decision in *Sornberger* (on which the decision below relied to hold petitioner civilly liable) conflicts with decisions of other circuits and sought reconsideration of the rule *Sornberger* announced. The Seventh Circuit denied the rehearing petition on December 20, 2011. App. 72a-73a.

REASONS FOR GRANTING THE PETITION

The certiorari petition should be granted because the first question presented implicates a deep and recurring circuit split on an important question of constitutional law resulting from this Court's fractured decision in *Chavez v. Martinez*, 538 U.S. 760 (2003). *Chavez* left open the question whether police officers who obtain statements improperly, either through a *Miranda* violation or coercion, are subject to § 1983 liability for a violation of the Fifth Amendment where the statements are used to charge or detain a suspect but are never

used at trial. The Seventh Circuit chose a point on the far end of the spectrum of circuit court precedent on this issue, holding that statements obtained in violation of *Miranda* (with or without coercion) are actionable even if the suspect is never tried, so long as the statements are used in *any* criminal proceeding.

The Seventh Circuit's independent holding that petitioner coerced respondent's statements because petitioner allegedly misstated the evidence against him also warrants certiorari review. This Court approved the common police interview technique of lying to a suspect about the evidence against him in *Frazier v. Cupp*, 394 U.S. 731 (1969), and the federal courts of appeals have consistently upheld this practice. Yet the decision below throws this body of law into disarray, creating an ill-defined and impossible-to-administer exception for falsehoods that "destroy the information required for a rational choice." App. 17a. This Court's review is necessary to restore clarity and provide guidance to police departments as they train their officers.

1.a. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." In *Chavez*, this Court concluded that even though the police repeatedly interrogated a suspect who did not receive *Miranda* warnings and was suffering from life-threatening injuries, no Fifth Amendment violation (and therefore no § 1983 civil

liability) arose because the suspect was never charged with a crime. See 538 U.S. at 764, 766-767 (plurality op.); *id.* at 778-779 (Souter, *J.*, concurring).

Chavez reserved the question whether police officers who obtain statements through an unlawful interrogation are subject to Fifth Amendment liability where the statements are used in pre-trial proceedings but not at trial. The four-Justice plurality would have held that a Fifth Amendment violation arises if a suspect's statements were used against him in a "criminal case," which "at the very least requires the initiation of legal proceedings." *Id.* at 766-767. Because Martinez could not make this showing, however, the plurality did "not decide * * * the precise moment when a 'criminal case' commences." *Ibid.* Justice Souter, concurring in an opinion joined by Justice Breyer, agreed that Martinez had not stated a Fifth Amendment claim but said only that Martinez could not "make the 'powerful showing,' subject to a realistic assessment of costs and risks, necessary to expand the protection of the privilege against compelled self-incrimination to the point of civil liability he asks us to recognize here." *Id.* at 778.

The Court's fractured opinion has caused uncertainty in the lower courts. One court described "the gray area created by *Chavez*," *Stoot v. City of Everett*, 582 F.3d 910, 923 (9th Cir. 2009), and federal courts of appeals have split on two overlapping, vitally

important issues: whether a *Miranda* violation, without coercion, ever may support a self-incrimination clause claim under § 1983; and whether pretrial proceedings constitute a "criminal case" within the meaning of that clause for purposes of § 1983 liability.[4]

b. The decision below illustrates the deep and recurring split in the circuits over the relationship between unlawful interrogations and § 1983 actions. In *Sornberger v. City of Knoxville*, 434 F.3d 1006 (7th Cir. 2006), the Seventh Circuit held that if, as the plaintiff had alleged, her confession was elicited "without *Miranda* warnings," § 1983 liability would lie because the confession was used at a preliminary hearing to find probable cause to indict, arraign, and set bail. *Id.* at 1026-1027. The decision below relies on *Sornberger* to hold that petitioner's alleged "violation of *Miranda* [is] actionable in a suit under section 1983" because the results were used to obtain respondent's indictment,

---

[4] In rejecting the Fifth Amendment claim in *Chavez*, a majority of the Court held that aggressive interrogation practices may be actionable as a violation of substantive due process under the Fourteenth Amendment, even if the results are not used in a "criminal case." See 538 U.S. at 773 (plurality op.); *id.* at 779 (Souter, *J.*, concurring). Although respondent alleged that his interrogation violated substantive due process, Doc. 43 ¶ 63, he later abandoned that claim, Doc. 147 at 21. This case thus involves a Fifth Amendment unlawful interrogation claim only.

even though the charges were subsequently dismissed. App. 15a. But at least five circuits (the Second, Sixth, Eighth, Tenth, and Eleventh) would have rejected respondent's claim that the *Miranda* violation entitled him to damages, as these courts have held that *Miranda* violations are never actionable under § 1983. To be sure, a coerced confession may give rise to civil damages (and the Seventh Circuit found coercion, App. 15a-18a), but three more circuits (the Third, Fourth, and Fifth) would have rejected respondent's *Miranda* and coerced confession claims because his statements were never used at trial. Of the nine circuits (other than the Seventh) to address these issues, only one (the Ninth) has not foreclosed the Seventh Circuit's broad rule—that an interrogation conducted in violation of *Miranda*, with or without coercion, is actionable under §1983 so long as the resulting statements are used at any point in a criminal proceeding—and even the Ninth Circuit has yet to embrace that rule.

i. First, in conflict with the Seventh Circuit's holding that a "violation of *Miranda* [is] actionable in a suit under section 1983," App. 15a, the Eighth Circuit has held—and the Second, Sixth, Tenth, and Eleventh Circuits agree—that *Miranda* violations, absent coercion, are *never* the basis for civil liability. In these circuits, the sole remedy for *Miranda* violations is the exclusion of evidence.

In a case materially indistinguishable from this one, the Eighth Circuit thus held that even if the police violated *Miranda* by interrogating the plaintiff after he invoked his right to counsel, and by obtaining statements that were used at trial to secure his conviction, the plaintiff's suit failed because "a litigant cannot maintain an action under § 1983 based on a violation of the *Miranda* safeguards." *Hannon v. Sanner*, 441 F.3d 635, 636 (8th Cir. 2006). The court reasoned that "[t]he text of the Fifth Amendment is focused on the use in a criminal case of a defendant's compelled, self-incriminating testimony." *Id.* at 637. "Statements obtained in violation of the *Miranda* rule are not 'compelled,' and the use of such statements in a criminal case does not amount to compelled self-incrimination." *Ibid.* Thus, "admission at trial of statements obtained in violation of *Miranda*" "does not result in the deprivation of a 'right[] * * * secured by the Constitution' within the meaning of § 1983." *Ibid.* (alterations in original).

The Second, Sixth, Tenth, and Eleventh Circuits have announced the same rule. See *Wright v. Dodd*, 438 Fed. Appx. 805, 807 (11th Cir. 2011) (*per curiam*) ("Wright's allegation that his *Miranda* rights were violated does not give rise to a cognizable claim under § 1983"); *McKinley v. City of Mansfield*, 404 F.3d 418, 432 n.13 (6th Cir. 2005) (plaintiff's claim that police "failure to read him the *Miranda* warnings at the outset

of the second interview is actionable under § 1983" is "squarely foreclosed"); *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1165 n.6 (10th Cir. 2003) ("violations of *Miranda* rights do not subject police officers to liability under § 1983"); *Jocks v. Tavernier*, 316 F.3d 128, 138 (2d Cir. 2003) ("*Miranda* violations, absent coercion, do not rise to the level of constitutional violations actionable under § 1983."). Thus, even if petitioner violated respondent's *Miranda* rights (and petitioner does not seek this Court's review of that fact-bound question), that violation would not give rise to § 1983 liability in the Second, Sixth, Eighth, Tenth, or Eleventh Circuits, as it does in the Seventh.

ii. In further conflict with the decision below, the Third, Fourth, and Fifth Circuits have held that an unlawful interrogation of any kind is actionable under §1983 only if the resulting statements are used against the plaintiff *at trial*. Accordingly, neither respondent's *Miranda* claim nor his coerced confession claim would have survived a motion to dismiss in these circuits. Thus, in *Renda v. King*, 347 F.3d 550 (3d Cir. 2003), the Third Circuit court held that the plaintiff could not sustain a § 1983 claim based on a violation of her *Miranda* rights, for although the resulting statements were used to arrest, arraign, and set bond, the charges were dropped before trial. See *id.* at 553, 557-559 ("questioning a plaintiff in custody without providing *Miranda* warnings is not a basis for a § 1983 claim as

long as the plaintiff's statements are not used against her at trial"); accord *Large v. County of Montgomery*, 307 Fed. Appx. 606, 607 (3d Cir. 2009) (*per curiam*).

The Fourth and Fifth Circuits follow the Third Circuit's approach, for both require use of the confession at trial to sustain a coerced confession claim. See *Burrell v. Virginia,* 395 F.3d 508, 513-514 & n.4 (4th Cir. 2005) (§ 1983 suit barred because although plaintiff was served with summons and charged with obstruction of justice based on allegedly coerced statements, plaintiff "does not allege any *trial* action that violated his Fifth Amendment rights") (emphasis in original); *Murray v. Earle*, 405 F.3d 278, 285 & n.11 (5th Cir. 2005) (§ 1983 coerced confession claim cognizable because confession "was admitted at [plaintiff's] trial and did result in her conviction"). These circuits recognize that the Fifth Amendment privilege "is a fundamental trial right, which can be violated only *at* trial," and that a coerced confession does not give rise to a § 1983 claim where the plaintiff was not tried. *Murray*, 405 F.3d at 285 (emphasis in original); accord *Renda*, 343 F.3d at 559 ("it is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution"). Respondent was never tried, and thus his § 1983 claim premised on the allegedly unlawful interrogation would have failed as a matter of law in the Third, Fourth, or Fifth Circuits.

Of the nine circuits (besides the Seventh) to consider these issues, only the Ninth Circuit has yet to close the door definitively on the Seventh Circuit's broad rule—that an interrogation conducted in violation of *Miranda*, with or without coercion, may be the basis for civil liability if the resulting statements are used at any point in a criminal proceeding. In *Stoot v. City of Everett*, for example, the Ninth Circuit recognized a § 1983 claim based on the use of a suspect's allegedly coerced statements in the charging instrument and at a pretrial arraignment and bail hearing. See 582 F.3d at 923-925; see also *Crowe v. County of San Diego*, 608 F.3d 406, 429-430 (9th Cir. 2010) (recognizing § 1983 claim based on use of coerced statements at pre-trial proceedings, including grand jury proceeding).

The Ninth Circuit, like the Seventh, reads *Chavez* to limit Fifth Amendment liability only when the challenged statements are never used in any court proceeding. See *Stoot*, 582 F.3d at 925 n.15 (Fifth Amendment claim may lie whenever "government officials use an incriminating statement to initiate or prove a criminal charge"). And, as the Ninth Circuit expressly recognized, its rule in square conflict with that of the Third, Fourth, and Fifth Circuits. See *Stoot*, 582 F.3d at 924-925 (describing circuit conflict). But the Ninth Circuit has not gone so far as to hold (having never addressed the question) that an interrogation

conducted in violation of *Miranda* alone may be the basis for civil liability at all.

iii. Although the decision below purported to follow the Second as well as the Ninth Circuit, see App. 15a (citing *Higazy v. Templeton*, 505 F.3d 161 (2d Cir. 2007), and *Stoot*), respondent's *Miranda* claim would have failed as a matter of law in the Second Circuit. As explained, the law in that court is that *Miranda* violations, absent coercion, are not actionable under § 1983. See *Jocks*, 316 F.3d at 138. *Higazy* addressed a coerced confession claim only, holding that use of coerced statements at a suspect's bail hearing violated the Fifth Amendment and supported civil liability. See 505 F.3d at 170-173. *Higazy* did not hold that a *Miranda* violation, without coercion, may give rise to § 1983 liability; nor could it, for the Second Circuit had rejected precisely this proposition in *Jocks*. The Seventh Circuit is therefore unique in holding (now repeatedly) that a *Miranda* violation, absent coercion, may give rise to § 1983 liability even if the suspect is never tried.

Although petitioner disagrees with the Seventh Circuit's holding that petitioner violated respondent's *Miranda* rights because petitioner did not recognize respondent's requests to telephone his attorney (which petitioner honored) as an unambiguous request to have counsel present for questioning, petitioner does not seek this Court's review of that holding, which turns on facts

unique to respondent's police interview. This case thus presents a rare opportunity for the Court (unimpeded by arguments over whether a *Miranda* violation occurred at all) to resolve the question whether a *Miranda* violation, without coercion, is actionable under § 1983. The case also asks the related question, which the Ninth Circuit recognized as the source of a 3-3 circuit split, whether an unlawful interrogation of any kind may be the basis for § 1983 liability if the resulting statements are never used at trial. See *Stoot*, 582 F.3d at 924-925. Certiorari review is warranted to resolve these important and recurring issues—which have fractured the courts of appeals—regarding the availability of civil damages for unlawful interrogations.

c.i. The Seventh Circuit's rule not only is unusually broad, but it is incorrect on the merits. First, the court's holding that *Miranda* violations, absent coercion, may give rise to a § 1983 action disregards that *Miranda*'s procedural safeguards are "not themselves rights protected by the Constitution." *Michigan v. Tucker*, 417 U.S. 433, 444 (1974); see also *Maryland v. Shatzer*, 130 S. Ct. 1213, 1220 (2010) ("the *Edwards* rule"—requiring police to cease questioning if a suspect invokes his right to counsel, see *Edwards v. Arizona*, 451 U.S. 477, 484-485 (1981)—"is not a constitutional mandate, but judicially prescribed prophylaxis").

Chavez provides further support. The four-Justice plurality would have held that the "failure to read

Miranda warnings to Martinez did not violate Martinez's constitutional rights and cannot be grounds for a § 1983 action," 538 U.S. at 772, and Justice Kennedy, joined by Justice Stevens, explained that "[t]he exclusion of unwarned statements * * * is a complete and sufficient remedy" for a *Miranda* violation, *id.* at 790 (Kennedy, *J.*, concurring in part and dissenting in part). This led Justice Scalia to summarize that "[s]ection 1983 does not provide remedies for violations of judicially created prophylactic rules, such as the rule of *Miranda v. Arizona*, as the Court today holds." *Id.* at 780 (Scalia, *J.*, concurring in part in the judgment) (internal citation omitted). The Seventh Circuit relied on *Dickerson v. United States*, 530 U.S. 428 (2000) (a pre-*Chavez* decision) for its contrary approach. See *Sornberger*, 434 F.3d at 1025. But the Second, Sixth, Eighth, Tenth, and Eleventh Circuits also rendered their above-cited decisions *after Dickerson*.

ii. Second, the Seventh Circuits's rule that pre-trial use of an unlawfully obtained statement violates the Fifth Amendment runs counter to Supreme Court pronouncements on which the *Chavez* plurality relied. In determining where along the spectrum of legal proceedings a Fifth Amendment violation can occur, the plurality quoted two decisions: *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); and *Withrow v. Williams*, 507 U.S. 680, 692 (1993), but both stand for

the proposition that the Fifth Amendment is a trial right that can be violated only *at trial*.

As the *Chavez* plurality recognized, *Verdugo-Urquidez* states that "'[t]he privilege against self-incrimination guaranteed by the Fifth Amendment is *a fundamental trial right* of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, *a constitutional violation occurs only at trial*.'" *Chavez*, 538 U.S. at 767 (quoting 494 U.S. at 264) (emphasis in original). *Withrow* likewise describes the Fifth Amendment as a "'trial right.'" *Chavez*, 538 U.S. at 767 (quoting 507 U.S. at 692). Although *Chavez* left open the question of when a criminal case begins, the rule most consistent with *Chavez*—at least for purposes of civil liability—is that a violation occurs only at a criminal trial. See *United States v. Antelope*, 395 F.3d 1128, 1141 (9th Cir. 2005) ("Critical to the reasoning of all six justices [in *Chavez*] was the simple principle that the scope of the Fifth Amendment's efficacy is narrower when used as a sword in a civil suit than when used as a shield against criminal prosecution.").

* * *

The decision below thus is inconsistent with *Chavez* in two significant ways. And *Chavez* itself has engendered a circuit conflict that shows no signs of abating. Public entities and law enforcement officials

regularly face lawsuits based on interrogations and the resulting testimony. Wherever the line should be drawn regarding civil liability for unlawful interrogations, the federal courts of appeal are deeply divided over where to draw it, and this Court's immediate intervention is needed on this important issue.

2. The Seventh Circuit's independent holding that petitioner coerced respondent's confession because he misstated the evidence against him also warrants this Court's review. The Seventh Circuit held that petitioner could be found to have coerced respondent's "confession" because petitioner falsely told him that "he'd talked to three doctors and all had told him that Joshua had been shaken in such a way that he would have become unresponsive (unconscious) immediately." App. 5a; see also App. 15a-17a. The Seventh Circuit's holding that police misrepresentation of the evidence against a suspect makes a confession involuntary appears to be unique among the federal appellate courts—and it throws into question a common (and effective) police interview tactic.

a. No decision of this Court and (until now, seemingly) no decision of any federal court of appeals has ever held that lying by police about the strength of the case against a suspect unlawfully coerced a confession. See*, e.g.*, *Frazier*, 394 U.S. at 739 (false statement that co-defendant had confessed); *Johnson v. Pollard*, 559 F.3d 746, 754-755 (7th Cir. 2009) (false

statement that suspect failed polygraph); *United States v. Bell*, 367 F.3d 452, 462 (5th Cir. 2004) (false statement that physical evidence connected suspect to crime); *United States v. Orso*, 266 F.3d 1030, 1039 (9th Cir. 2001) (*en banc*) (false statement that witness implicated suspect), abrogated on other grounds by *Missouri v. Siebert*, 542 U.S. 600 (2004); *Lucero v. Kerby*, 133 F.3d 1299, 1311 (10th Cir. 1998) (false statement about fingerprints found at crime scene); *Clanton v. Cooper*, 129 F.3d 1147, 1158 (10th Cir. 1997) (false statement that physical evidence connected suspect to crime); *Amaya-Ruiz v. Stewart*, 121 F.3d 486, 495 (9th Cir. 1997) (false statement linking suspect to crime); *Ledbetter v. Edwards*, 35 F.3d 1062, 1066, 1070 (6th Cir. 1994) (false statement that suspect's fingerprints were found at crime scene); *Holland v. McGinnis*, 963 F.2d 1044, 1051 (7th Cir. 1992) (false statement that witness saw suspect's vehicle at crime scene); *Evans v. Dowd*, 932 F.2d 739, 740, 742 (8th Cir. 1991) (*per curiam*) (false statement that nonexistent witness was found); *United States v. Velasquez*, 885 F.2d 1076, 1087-1089 (3d Cir. 1989) (false statement that accomplice implicated suspect); *Martin v. Wainwright*, 770 F.2d 918, 925-927 (11th Cir. 1985) (false statement that co-defendant had confessed), abrogation on other grounds recognized by *Coleman v. Singletary*, 30 F.3d 1420, 1423-1424 (11th Cir. 1994); *United States v. Castenada-Castenada*, 729 F.2d 1360, 1362-1363 (11th Cir. 1984) (same); see also Wayne R. LaFave, et al.,

Criminal Procedure § 6.2c, pp. 629-633 & nn. 125-133 (3d ed. 2007 & 2011 Supp.).

b. This case offers no reason to abandon the general rule, relied on nationwide, that law enforcement may mislead a suspect about the evidence. Indeed, the Seventh Circuit departed from this well-established line only by bypassing the requirement that it assess a confession's voluntariness against the "totality of the circumstances." *Frazier*, 394 U.S. at 739; see generally *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). That petitioner allegedly misstated the evidence should have been but one part of the analysis: "Misleading a suspect about the existence or strength of evidence against him does not by itself make a statement involuntary." *United States v. Farley*, 607 F.3d 1294, 1328 (11th Cir. 2010). It is instead "one factor to consider out of the totality of the circumstances." *Velasquez*, 885 F.2d at 1088; accord *Frazier*, 394 U.S. at 739; *Johnson*, 559 F.3d at 755; *Orso*, 266 F.3d at 1039; *Lucero*, 133 F.3d at 1311; *Clanton*, 129 F.3d at 1158; *Ledbetter*, 35 F.3d at 1070; *Evans*, 932 F.2d at 742; *Martin*, 770 F.2d at 925; *Castenada-Castenada*, 729 F.2d at 1362-1363. Respondent's personal characteristics (including age, education, intelligence, and experience with police) and the circumstances surrounding the interrogation (such as the duration of questioning, whether respondent was physically abused or deprived of food or sleep, and whether he received

Miranda warnings) also should have been considered. See *Frazier*, 394 U.S. at 739; *Johnson*, 559 F.3d at 755; *Lucero*, 133 F.3d at 1311; *Ledbetter*, 35 F.3d at 1067; see also *Schneckloth*, 412 U.S. at 226.

Many of these factors weigh against coercion here. The Seventh Circuit stated that respondent, a mature adult, had "the requisite competence" to run a day-care service, App. 3a, but did not consider respondent's age, competency, or prior experience with the criminal justice system (including convictions for burglary, illegal acquisition of a controlled substance, and retail theft, as well as prison time), Doc. 129, Ex. I, Aleman Dep., pp. 25-35; Doc. 129, Ex. J, 9/12/05 Transcript, pp. 4-5; Doc. 129, Ex. K, 9/15/05 Transcript, pp. 7-8. And although the Seventh Circuit noted that respondent waited "[m]ore than five hours" to be questioned, and that the questioning lasted "four hours," App. 4a-5a, the record (but not the decision below) reflects that respondent's wife remained with him for more than two hours, DVD 10:58:49-13:16:46; he was offered food and twice allowed to go outside for air; and there were three breaks in the questioning totaling more than an hour, Doc. 129, Ex. I, Aleman Dep., pp. 131-33, 145-47, 297-98; DVD 18:56:00-19:16:50, 20:30:45-21:05:35, 21:47:22-21:56:41. The Seventh Circuit should have considered these circumstances, along with the fact that respondent was not physically abused, and that he received oral and written *Miranda* warnings. To be

sure, the Seventh Circuit identified a *Miranda* violation, but the court did not find that this one factor dictated its coercion holding. Nor should it have, for this Court has held that police lies about the evidence, even in combination with a *Miranda* violation, do not render a confession involuntary. See *Frazier*, 394 U.S. at 739 (only "partial" *Miranda* warnings given).

c. Thus, without considering the totality of the circumstances, the court below concluded that "a mature adult with ample prior experience in the criminal justice system" confessed involuntarily because an officer used the common interview tactic of misstating the evidence. *Holland*, 953 F.2d at 1052. The Seventh Circuit identified no cases finding coercion under similar circumstances, and most of the Seventh Circuit's cited cases found no coercion at all. See *Frazier*, 394 U.S. at 739; *Parker v. Allen*, 565 F.3d 1258, 1281 (11th Cir. 2009); *Holland*, 963 F.2d at 1052; *United States v. Rutledge*, 900 F.2d 1127, 1131 (7th Cir. 1990); *Velasquez*, 885 F.2d at 1089; *State v. Kelekolio*, 849 P.2d 58, 74 (Haw. 1993) (all cited at App. 16a-17a). The cases where coercion was found involved false threats or promises rather than misrepresentations about the strength of the evidence. See *Rogers v. Richmond*, 365 U.S. 534, 535 (1961) (police falsely threatened to take suspect's wife into custody); *Johnson v. Trigg*, 28 F.3d 639, 640, 646 (7th Cir. 1994) (police allegedly promised suspect, a 14-year-old of

below-average intelligence, that if he confessed police would release his mother, whom police had pretextually arrested); *Wilkins v. DeReyes*, 528 F.3d 790, 793, 800 (10th Cir. 2008) (police procured false testimony from witnesses, using threats and promises and taking advantage of their age and learning disabilities) (cited at App. 17a-18a).[5]

But false threats and promises are "different[] than other somewhat deceptive police tactics (such as cajoling and duplicity)" because "a false promise has the unique potential to make a decision to speak irrational and the resulting confession unreliable." *United States v. Villalpando*, 588 F.3d 1124, 1128 (7th Cir. 2009). Thus, courts have held that deception that takes "the form of a coercive threat * * * or goes directly to the nature of the suspect's rights and the consequences of waiving them" makes a resulting statement involuntary, while deception about the evidence does not. *Farley*, 607 F.3d at 1328-1329; accord *Clanton*, 129 F.3d at 1158-1159; *Ledbetter*, 35 F.3d at 1070; *Kelekolio*, 849 P.2d at 71-74; LaFave, *Criminal Procedure*, § 6.2c, at pp. 621-29. Even *Rutledge*, on which the Seventh Circuit relied most

---

[5] The single exception is *Crowe* (cited at App. 18a), which bears no resemblance to this case. There, expert testimony established that police used "'psychological torture'" and "'emotional child abuse'" when interrogating minor suspects. 608 F.3d at 431-432.

heavily, did not suggest that deception about the evidence may "seriously distort[]" a suspect's "choice"; *Rutledge*'s example of unconstitutional duplicity was a promise that "if [the suspect] confesses he will be set free." 900 F.2d at 1129.

d. Easily administrable rules are essential in the Fifth Amendment context. "[L]aw enforcement officers need to know, with certainty and beforehand," how to interview suspects, *Shatzer*, 130 S. Ct. at 1222-1223, and clear rules have the "'virtue of informing police and prosecutors with specificity . . . what they may do in conducting [a] custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible,'" *Moran v. Burbine*, 475 U.S. 412, 426 (1986) (quoting *Fare v. Michael C.*, 442 U.S. 707, 718 (1979)) (internal alterations in original); see also *Davis v. United States*, 512 U.S. 452, 461 (1994) (recognizing importance of "a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information"). This is true even though the Amendment requires a "totality of the circumstances" analysis: in the related Fourth Amendment context (whose "reasonableness" test also suggests a case-by-case determination), this Court has stated that "the object in implementing [the Amendment's] command of reasonableness is to draw standards sufficiently clear and simple to be applied

with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001).

Against this backdrop, the decision below creates a rule that is impossible for police to administer in practice: that they may lie about the evidence against a suspect so long as the lie does not "destroy the information required for a rational choice." App. 17a. It is no answer that police departments could train their officers to, when in doubt, refrain from lying about the evidence. "Custodial interrogations implicate two competing concerns." *Burbine*, 475 U.S. at 426. On the one hand, there is the "risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion." *Ibid*. At the same time, however, "[a]dmissions of guilt * * * are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Ibid*. When police employ the interview tactic of deceiving suspects about the strength of the evidence, they further the latter interest without compromising the former concern, for such deception is an effective means of obtaining reliable confessions and rarely, if ever, produces involuntary statements.

Respondent's statements to police here illustrate that point, for his interview in fact did not produce a false confession. Respondent consistently maintained

that he shook Joshua after he found him unconscious, and then only in an attempt to revive him. Petitioner's report recounts these statements, R. 129, Ex. A, Micci Dep., Dep. Ex. 2 at 3; and the prosecutor told the court at the bond hearing nothing more than that respondent had "admitted to shaking" Joshua. Doc. 129, Ex. K, 9/15/05 Transcript, p. 7; Doc. 129, Ex. J, 9/12/05 Transcript, p. 4. The Seventh Circuit's view that police told the prosecutors who in turn "told the judge [respondent] had confessed to violently shaking Joshua and causing his injuries," App. 6a, misstates the record. Petitioner's alleged deception may have induced respondent to believe that he unintentionally injured Joshua, App. 6a, 17a, but that belief was never introduced in court.

By contrast, requiring police to adopt the least-restrictive alternative ("when in doubt, don't misrepresent the evidence") would come "at a substantial cost to society's legitimate and substantial interest in securing admissions of guilt" while "contribut[ing] to the protection of the Fifth Amendment privilege only incidentally." *Burbine*, 475 U.S. at 427. This Court has rejected similar proposals to constrain effective police practices, and it should do the same here. See *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010) (police may question suspect absent unambiguous invocation of right to counsel, because "society's interest in prosecuting criminal activity"

outweighed "marginal[]" Fifth Amendment benefit of alternate rule); *Atwater*, 532 U.S. at 350-351 (proposed "least-restrictive-alternative limitation" to police authority to arrest would "come at the price of a systemic disincentive" to effective police work); *Burbine*, 475 U.S. at 426-427 (proposed requirement that police must in all instances inform suspect of attorney's attempt to contact him is "unnecessary for the protection of the Fifth Amendment privilege and injurious to legitimate law enforcement"). "Multiplied many times over, the costs to society of such underenforcement could easily outweigh the costs to defendants." *Atwater*, 532 U.S. at 351.

* * *

Petitioner used a garden-variety police interview technique that has received decades of judicial approval. Certiorari review is warranted to resolve the doubt sown by the decision below. If the routine practice that petitioner used here now violates the Fifth Amendment, then law enforcement officers (and the departments that train and indemnify them) need to know, so that they can ensure that they obtain testimony that is admissible in court and avoid inadvertently violating a suspect's constitutional rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

LISA MADIGAN
Attorney General of Illinois
MICHAEL A. SCODRO*
Solicitor General
JANE ELINOR NOTZ
Deputy Solicitor General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698
mscodro@atg.state.il.us

* Counsel of Record

FEBRUARY 2012

APPENDIX