No. 11-1062

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The certiorari petition should be granted. Respondent does not deny the existence of a circuit split over the first question presented, and although he attempts to downplay its magnitude, he does so only by misstating the relevant case law.

On the second question presented, respondent all but admits that the decision below is an outlier; he identifies no decision from any court holding that investigators violate a suspect's constitutional rights by lying about the evidence. And he offers no response to the argument that the Seventh Circuit's rule is unworkable in practice. Rather, he confirms that "a case-by-case factual determination" is necessary under his view of the law to decide whether a constitutional violation has occurred. Opp. Br. 21.

Finally, respondent interjects facts and argument that are irrelevant to petitioner's request for certiorari review. These efforts should not distract this Court from the pressing need for its guidance on issues of vital importance to the States.

1. The certiorari petition explained that the first question implicates two circuit splits in the wake of this Court's opinion in *Chavez v. Martinez*, 538 U.S. 760 (2003)—whether a *Miranda* violation, without coercion, may support a Self-Incrimination Clause claim; and whether pretrial proceedings constitute a "criminal

case" within the meaning of that Clause for purposes of § 1983 liability. Pet. 16-24. Respondent unsuccessfully seeks to diminish (but does not deny) each of these splits in federal appellate authority.

a. First, there is a conflict between decisions of the Second, Sixth, Eighth, Tenth, and Eleventh Circuits and the holding below that a *Miranda* violation is "actionable in a suit under section 1983." Pet. App. 15a; see Pet. 19-21. Respondent does not address *Hannon v. Sanner*, 441 F.3d 635 (8th Cir. 2006) (discussed at Pet. 20); thus, respondent apparently agrees that the Seventh and Eighth Circuits are in conflict.

Respondent argues that the remaining decisions the petition cites are not part of the circuit split because they (1) were decided prior to or without expressly considering *Chavez* and therefore are not good law; (2) address the existence of a § 1983 claim for *Miranda* violations only in non-precedential "dicta"; or (3) are superceded by decisions holding that police may be liable for violating the Self-Incrimination Clause by coercing a confession. Opp. Br. 7-9. None of these arguments withstands scrutiny.

First, respondent is wrong to argue that *Chavez* somehow undercuts *Jocks v. Tavernier*, 316 F.3d 128 (2d Cir. 2003), and *Marshall v. Columbia Lea Regional Hospital*, 345 F.3d 1157 (10th Cir. 2003). In *Chavez*, six

Justices would have held that technical *Miranda* violations are not actionable under § 1983. Pet. 25-26. Thus, *Chavez* supports decisions (including *Jocks* and *Marshall)* holding that *Miranda* violations, absent coercion, are never a basis for civil liability. Indeed, after *Chavez*, district courts have cited *Jocks* and *Marshall* for this proposition, confirming the vitality of their holdings. See *Goossens v. Dep't of Envtl. Conservation*, No. 08-CV-00446F, 2011 WL 1198934, at *13 (W.D.N.Y. Mar. 28, 2011); *Richardson v. Jones*, No. 1:10-cv-01015, 2011 WL 31533, at *4 (W.D. Ark. Jan. 5, 2011); *Parker v. New York*, No. 05 Civ. 1803, 2008 WL 110904, at *11 (S.D.N.Y. Jan. 7, 2008).

Respondent also mischaracterizes the Second Circuit's holding in *Jocks* as dicta. In fact, that court's statement that "a run-of-the-mill *Miranda* violation * * * is not independently actionable as a civil rights claim," 316 F.3d at 138, was essential to the resolution of the case. See *Tyler v. Cain*, 533 U.S. 656, 663 n.4 (2001) (holdings, unlike dicta, are "necessary to th[e] result") (internal quotations omitted). But even if this statement (or, as respondent suggests, the Tenth Circuit's statement in *Marshall*) *was* dicta, district courts in the Second and Tenth Circuits give such "'judicial dictum'" "'considerable weight.'" *Piscottano v. Murphy*, No. 3:04CV682, 2005 WL 1424394, at *3 (D. Conn. June 9, 2005) (quoting *United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975)); see also *United States v.*

Yanez-Vasquez, No. 09-40056-01-SAC, 2010 WL 411112, at *4 (D. Kan. Jan. 28, 2010) ("judicial dicta has much persuasive authority and may carry great weight"). Because *Jocks* and *Marshall*'s discussion of the *Miranda* issue is "not the kind of ill-considered dicta that [courts] are inclined to ignore," *Kappos v. Hyatt*, 132 S. Ct. 1690, 1699 (2012), respondent is wrong to suggest that these cases are not part of the circuit split.

Nor, finally, is there anything to respondent's discussion of cases recognizing a "Fifth Amendment claim" under § 1983. Opp. Br. 7. Respondent cites *Higazy v. Templeton*, 505 F.3d 161 (2d Cir. 2007); *McKinley v. Mansfield*, 404 F.3d 418 (6th Cir. 2005); *Eidson v. Owens*, 515 F.3d 1139 (10th Cir. 2008); and *Sparado v. Boone*, 212 Fed. Appx. 831 (11th Cir. 2006) (*per curiam*), specifically, but these opinions address coerced confession claims (not *Miranda* violations), and thus in no way suggest that § 1983 provides a civil remedy for *Miranda* errors. See, *e.g.*, Pet. 24 (explaining that *Higazy* did not overrule *Jocks*). Thus, district courts in the Second, Sixth, and Eleventh Circuits continue to reject § 1983 liability for *Miranda* violations. See *supra* p. 3; *Fitzpatrick v. Cleveland*, No. 1:010 cv 00855, 2010 WL 1737592, at *3 (N.D. Ohio Apr. 27, 2010); *Shabazz v. Summers*, No. 1:07cv755-MHT, 2010 WL 653879, at *8 n.9 (M.D. Ala. Feb. 19, 2010); *Taylor v. Bartow*, No. 8:07-cv-1370-T-30TBM, 2008 WL 489560, at *4 (M.D.

Fla. Feb. 20, 2008); *Pennington v. Metro. Gov't of Nashville & Davidson County*, No. 3:05-1075, 2006 WL 2503605, at *5 (M.D. Tenn. Aug. 28, 2006).

b. Respondent likewise fails in his effort to minimize the second circuit split the petition identified—over whether an unlawfully obtained statement may be the basis for § 1983 liability under the Self-Incrimination Clause if the statement was never introduced at trial. Pet. 21-22. Respondent's argument that there is no "sufficiently mature" conflict on this issue, Opp. Br. 15, was refuted in *Stoot v. City of Everett*, 582 F.3d 910 (9th Cir. 2009). After careful review of the relevant decisions, the Ninth Circuit explained in *Stoot* that "[t]he Third, Fourth, and Fifth Circuits have applied *Chavez* to bar recovery under the Fifth Amendment unless the allegedly coerced statements were admitted against the defendant *at trial*," but "[t]he Seventh and Second Circuits disagree." *Id.* at 924. *Stoot* sided with the minority view, resulting in a three-to-three split. See *id.* at 925.

Respondent's effort to explain away this recognized and entrenched conflict falls short. He nitpicks at the Third, Fourth, and Fifth Circuit decisions that conflict with the opinion below, Opp. Br. 10-14, but he does so only by misdescribing those decisions. Thus, in *Renda v. King*, 347 F.3d 550 (3d Cir. 2003), the Third Circuit neither followed without analysis its pre-*Chavez* decision in *Giuffre v. Bissell*, 31 F.3d 1241 (3d Cir.

1994), nor failed to consider *Dickerson v. United States*, 530 U.S. 428 (2000), as respondent suggests. To the contrary, the Third Circuit expressly rejected the argument that *Dickerson* "overruled *Giuffre*" as foreclosed by *Chavez*. *Renda*, 347 F.3d at 557-558. To be sure, the court recognized that "unlike in *Chavez*, Renda's statement was used in a criminal case in one sense (*i.e.*, to develop probable cause sufficient to charge her)." *Id.* at 559. But the court explained that "[t]o the extent that *Chavez* leaves open the issue of when a statement is used at a criminal proceeding, * * * our prior decision in *Giuffre*" controls. *Ibid.* Thus, the Third Circuit considered both ensuing changes in the law and potential factual distinctions before following *Giuffre*.

Respondent also mischaracterizes the Fourth Circuit's holding in *Burrell v. Virginia*, 395 F.3d 508 (4th Cir. 2005), as dicta. Respondent accurately observes that *Burrell* examined Justice Souter's concurrence in *Chavez*, which focused on courtroom use of compelled testimony. But in granting judgment for defendants, the court carefully explained that the plaintiff did "not allege any *trial* action that violated his Fifth Amendment rights." *Burrell*, 395 F.3d at 514 (emphasis in original). District courts in the Fourth Circuit thus understand *Burrell* to preclude § 1983 liability unless the plaintiff's statement was used at "trial." *Bellamy v. Wells*, No. 5:07cv00035, 2007 WL

3070490, at *3 (W.D. Va. Oct. 19, 2007); *King v. Bossier City*, No. 06-1201, 2007 WL 1791215, at *3 (W.D. La. June 19, 2007). And although respondent is correct that the Seventh Circuit in *Sornberger v. City of Knoxville*, 434 F.3d 1006 (7th Cir. 2006), declined to recognize a conflict between its decision and *Burrell*, the Ninth Circuit could not reconcile these cases. See *Stoot*, 582 F.3d at 924.

Finally, respondent argues that the Fifth Circuit's holding in *Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005), is dicta and lacks analysis, because the plaintiff's statements were used at trial and the case was resolved on qualified immunity grounds. In fact, however, it appears that the statements were used both to charge the plaintiff and, after an unsuccessful suppression hearing, again at trial. See *id.* at 284. This is critical, for the Fifth Circuit found that the trial judge's erroneous decision admitting the statements was a superceding cause relieving the defendants of liability for the statements' use at trial, see *id.* at 293, but the judge's actions could not have relieved police of liability for the statements' use in charging the plaintiff. Thus, the Fifth Circuit's ruling that trial use was required is not dicta; it was a central part of the analysis, and district courts in the Fifth Circuit have recognized this ruling as binding. See *Smart v. United States*, No. EP-10-CV-253-PRM, 2010 WL 4929107, at *9 (W.D. Tex. Nov. 30, 2010); *Holt v. Jefferson Parish Sheriff's*

Office, No. 07-3606, 2007 WL 4114357, at *4 (E.D. La. Nov. 16, 2007); *King*, 2007 WL 1791215, at *3.

In short, the first question presented has produced conflicting opinions from ten circuits and numerous district courts. Respondent is wrong when he claims that the question arises infrequently and that the conflict is insubstantial.

c. Respondent nevertheless contends that certiorari review is unwarranted because this Court has declined to accept prior cases that—like this one—asked whether pretrial proceedings constitute a "criminal case" for purposes of § 1983 liability. Opp. Br. 15. But those cases hurt rather than help respondent, for they confirm that the question is important and recurring. And while certiorari review was denied, those cases (unlike this one) suffered from significant vehicle problems or other defects.

Specifically, the petitioner in *Boone v. Sparado*, 552 U.S. 822 (2007) (*mem.*), did not identify a circuit split; rather, the petition argued that the two circuits to have addressed the meaning of a "criminal case" were in agreement, while others had not "squarely determined" the issue. Pet., *Boone v. Sparado*, No. 06-1639, 2007 WL 1670273, at *12-*13 (U.S. June 6, 2007). Moreover, the underlying opinion was unpublished. See *Sparado v. Boone*, 212 Fed. Appx. 831 (11th Cir. 2006) (*per curiam*). Here, by contrast, the circuit split is

well-developed, and the opinion on review is published and precedential.

In *Jensen v. Stoot*, 130 S. Ct. 2343 (2010) (*mem.*), and *Wrisley v. Crowe*, 131 S. Ct. 905 (2011) (*mem.*), the opposition briefs identified different, but equally fatal, vehicle problems. In both cases, the plaintiffs were juveniles when their custodial statements were obtained (and the *Jensen* plaintiff was developmentally disabled). See Opp. Br., *Jensen v. Stoot*, No. 09-728, 2010 WL 666231, at *17 (U.S. Feb. 22, 2010); *Wrisley v. Crowe*, Opp. Br., Nos. 10-376, 10-377, 10-420, 2010 WL 4776563, at *27-*28 (U.S. Nov. 19, 2010). Because interrogating minors presents "special problems," *In re Gault*, 387 U.S. 1, 55 (1967), this Court's resolution of the questions presented in those cases would have had limited application. See Opp. Br., *Jensen v. Stoot*, 2010 WL 666231, at *17; Opp. Br., *Wrisley v. Crowe*, 2010 WL 4776563, at *27-*29. Moreover, *Jensen* could have been resolved in respondent's favor on an alternate ground, and the use of juvenile rather than adult procedural rules to adjudicate the underlying criminal proceedings further limited its value as binding precedent. See Opp. Br., *Jensen v. Stoot*, 2010 WL 666231, at *16-*19. None of these vehicle problems—or any others—prevent this Court from reaching the questions presented here.

d. Finally, on the merits, even respondent does not defend the Seventh Circuit's holding that a *Miranda* violation, absent coercion, is the basis for § 1983

liability. And respondent's arguments that pretrial proceedings are part of a "criminal case" for § 1983 purposes are unpersuasive.

Respondent posits that the Seventh Circuit's definition of a "criminal case" is consistent with cases holding that the privilege against self-incrimination may be asserted in noncriminal cases. Opp. Br. 14-15. But the plurality opinion in *Chavez* refutes this argument. The plurality described the cases on which respondent relies (including *Kastigar v. United States*, 406 U.S. 441 (1972), which respondent quotes) as creating prophylactic "[r]ules designed to safeguard" the privilege against self-incrimination, rather than defining "the scope of the constitutional right itself." 538 U.S. at 770-772. Moreover, respondent ignores decisions holding that the Self-Incrimination Clause creates a trial right that may be violated only *at trial*. Pet. 26-27.

Respondent also suggests that it would be "illogical" to limit the "criminal case" requirement to at-trial use, because that would preclude civil claims under § 1983 as to the most obviously unlawfully obtained statements, which would be suppressed pretrial. Opp. Br. 10. But trial rights often are not amenable to civil damages claims. For example, violations of the Fifth Amendment's Double Jeopardy Clause, and the Sixth Amendment's rights to a jury trial, confront witnesses, and counsel's assistance, rarely (if ever) give rise to actionable § 1983 claims.

2. Turning to the second question presented, respondent does not deny that the decision below is an outlier. Pet. 28-30. Not only has no other federal court held that investigators coerced a suspect's statements by lying about the evidence, but this Court sanctioned this common police practice in *Frazier v. Cupp*, 394 U.S. 731 (1969), and recently reconfirmed its constitutionality. See *Bobby v. Dixon*, 132 S. Ct. 26, 30 (2011) (*per curiam*) ("'[T]he Court has refused to find that a defendant who confesses, after being falsely told that his codefendant has turned State's evidence, does so involuntarily."') (quoting *Oregon v. Elstad*, 470 U.S. 298, 317 (1985)) (brackets in original).

Nor does respondent challenge petitioner's argument that the Seventh Circuit's rule is unworkable in practice and will interfere with effective investigations. Pet. 34-37. Respondent admits that, after the decision below, a court may find coercion if, "under the unique factual circumstances of [a] particular interrogation," "the officers' lies * * * prohibit the suspect from making a rational choice." Opp. Br. 19-20; see also *id.* at 21 ("whether police tactics during an interrogation cross the line and remove rational choice is a case-by-case factual determination"). Respondent does not explain, however, how investigators can predict which lies will be held to "cross th[is] line." *Id.* at 19.

Until now, investigators followed a bright-line rule: although the Constitution generally prohibits false promises and threats (which can induce false confessions), it allows police to deceive a suspect about the evidence against him as a means of obtaining truthful confessions. Pet. 33; Br. of Amici States 13-18. Petitioner followed this rule precisely, prompting respondent to admit that he had shaken Joshua. Pet. 35-36. The decision below throws this well-worn rule into doubt, chilling effective law enforcement nationwide. Br. of Amici States 1, 3, 12.

3. Finally, the Court should ignore respondent's interjection of irrelevant matter. Often without record citations, respondent peppers his "statement" with information that was unknown to police at the time of the interrogation and thus is legally immaterial.

Respondent thus describes Danielle Schrik (who has never been charged in her son's death) as "known to have regularly beaten" Joshua. Opp. Br. 1. But Danielle's mother, Nancy Schrik, made these allegations months after Joshua died; when interviewed at the hospital, Nancy did not tell police that Danielle had been violent toward Joshua. Pet. App. 51a-52a.

Respondent also claims that Joshua displayed "signs of shaken-baby syndrome" in the days before his death. Opp. Br. 1. But Joshua's pediatrician, who examined him the day before he collapsed, told police he had

nothing more than "an ordinary viral infection" on that day. Pet. App. 28a. And doctors who treated Joshua told police that his symptoms would have manifested immediately after he was shaken. Pet. App. 11a (police "quite naturally" interpreted doctors' statements to mean Joshua was injured on morning he became unconscious); see also Pet. App. 26a-27a, 37a-39a & n.8.

Thus, petitioner did not "falsely claim[]" that doctors stated that Joshua would have become nonresponsive at the time of shaking. Opp. Br. 4. Nor did prosecutor Crothers drop the case "because [respondent's] statement was coerced." Opp. Br. 4. The "single most important factor in [the prosecution's] decision" to drop the charges was the conclusion by Joshua's doctor and the medical examiner that—reversing their prior opinions—Joshua was injured before he arrived at respondent's home. Doc. 125-8, Crothers Dep., p. 156.

Next, respondent focuses on Hanover Park Police Officer Todd Carlson's actions in the days *after* the interrogation. Opp. Br. 2. But respondent has never claimed that petitioner (whose involvement in the investigation ended with the interrogation) had knowledge of or participated in Carlson's alleged misconduct. See, *e.g.*, Doc. 43 at 4-8 (amended complaint asserting single, unlawful interrogation, claim against petitioner). Carlson's actions thus are legally irrelevant here.

Lastly, respondent devotes the second part of his argument, Opp. Br. 16-18, to an issue that the certiorari petition does not present—whether petitioner violated his *Miranda* rights. Pet. 24-25 (explaining that petitioner does not seek review of Seventh Circuit's holding that he violated *Miranda* because that holding turns on facts unique to respondent's interrogation). Again, this legally extraneous information should be ignored.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2012