No. 09- 09-728

IN THE

Supreme Court of the United States

JON A. JENSEN, JANE DOE JENSEN
and the marital community thereof,

Petitioners,

v.

PAUL A. STOOT, SR. and TAMMIE L. STOOT,
husband and wife, and as parents and guardians of
Paul A. Stoot II; and PAUL A. STOOT II, a minor child,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fifth Amendment of the United States Constitution prohibits the use of involuntary confes-sions in a "criminal case." The question presented is whether "criminal case" means the entire criminal process beginning with the filing of charges or whether "criminal case" means the actual criminal trial.

PARTIES

The petitioners are defendants Jon A. Jensen, Jane Doe Jensen, and the marital community thereof.

The respondents are Paul A. Stoot, Sr. and Tammie L. Stoot, husband and wife, and as the parents and guardians of Paul A. Stoot II; and Paul A. Stoot II.

The City of Everett was also a party to the proceedings below, but the Ninth Circuit affirmed the dismissal of all claims against the City.

There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

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Detective Jon A. Jensen, retired, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Stoot v. City of Everett*, 582 F.3d 910 (9th Cir. 2009) (App. 1a). The order of the United States District Court for the Western District of Washington is unpublished (App. 47a).

JURISDICTION

The judgment of the Court of Appeals, as amended, was entered on September 18, 2009. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the United States Constitution provides in relevant part:

> No person . . . shall be compelled in any criminal case to be a witness against himself[.]

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 . . . , subjects, or causes to be

> subjected, any citizen of the United States . . . 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 . . . .

INTRODUCTION

Paul Stoot II ("Stoot") confessed to Detective Jon A. Jensen that he had molested a three-year-old girl. App. at 2a, 9a, 53a. Based in part on this confession, Stoot was charged with child molestation. App. at 2a, 12a. After a lengthy suppression hearing that included testimony from expert witnesses, a state trial court judge in juvenile court (the "Juvenile Court Judge") determined that Stoot did not understand his rights and his confession was involuntary. App. at 53a-54a. The Juvenile Court Judge also entered a finding that "it would have appeared to Detective Jensen that [Stoot] understood his rights[.]" App. at 13a, 70a-71a. The charges were subsequently dismissed, and Stoot was never taken into custody.

Stoot then filed a lawsuit against Detective Jensen and his employer, the City of Everett, which included a § 1983 claim alleging Stoot's Fifth Amendment rights had been violated. App. at 15a.

Detective Jensen was careful to respect Stoot's Fifth Amendment rights. He conferred with two county prosecutors before interviewing Stoot. App. at 7a-8a.

He read Stoot his *Miranda*[1] warnings and had Stoot read and sign a written waiver form. App. at 8a-9a. Stoot did not give any outward indication that he did not understand his rights and never asked for his parents or an attorney. See App. at 52a. When Stoot was writing out his confession, Detective Jensen even learned that Stoot was an honors student. App. at 51a. Detective Jensen included the confession in his report, which the county prosecutor used as part of the basis for filing charges against Stoot.

Despite this uncontested evidence, the Ninth Circuit held that Detective Jensen may have violated Stoot's Fifth Amendment rights and was not entitled to qualified immunity. App. at 3a. The Ninth Circuit's holding was based on its ruling that a "criminal case" under the Fifth Amendment begins once charges are filed. App. at 33a.

The Court should grant the petition for certiorari to review this holding for two reasons. *First*, there is a conflict between the federal circuits that the Court should resolve. *See* Sup. Ct .R. 10(a). The ruling by the Ninth Circuit (joining the Second and Seventh Circuits) conflicts rulings from three other federal circuits (the Third, Fourth, and Fifth), which have previously found that a "criminal case" means a "criminal trial." *Second*, this case involves an important undecided question of federal law about the meaning of a phrase in the U.S. Constitution – "criminal case" – that should be settled by the Court. *See* Sup. Ct. R. 10(c). If the Ninth Circuit's holding is allowed to stand, it will have a chilling effect on all law enforcement officers preparing to conduct custodial interrogations.

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1. *See Miranda v. Arizona*, 384 U.S. 436 (1966).

STATEMENT

This case originated from a complaint by a four-year-old girl, A.B., who reported to her mother that she had been molested by Stoot a year earlier when she was three years old and living with Stoot at his parents' home. App. at 4a. As part of his investigation, Detective Jensen interviewed Stoot, who confessed. After this confession was suppressed and the charges were dropped, Stoot filed a lawsuit against Detective Jensen and the City of Everett that included a § 1983 claim based on an alleged Fifth Amendment violation. This claim was dismissed on summary judgment by the district court, but re-instated by the United States Court of Appeals for the Ninth Circuit.

A. Detective Jensen Acted on Credible Evidence Showing that Stoot Had Molested a Three-Year-Old Girl

On December 23, 2003, the mother of the alleged victim A.B. first reported the alleged molestation to Everett Police Officer Anders, who interviewed A.B.'s mother and had her write out a formal complaint detailing how she had observed A.B. touching herself, how this behavior prompted her to question A.B. about her conduct, and how A.B. explained to her mother that Stoot had touched her. App. at 4a, 48a-49a. The written complaint and Officer Anders's report was then provided to Detective Jensen. App. at 49a.

At the time the case was assigned to Detective Jensen, he was a 24-year veteran of the Everett Police Department and had worked in the Special Assault Unit

for 5 years. App. at 5a. He had undergone approximately 280 hours of specialized training devoted to investigating child sexual assault cases. App. at 49a. He also had 32 hours of specialized training for child-interview techniques and had conducted numerous child interviews. App. at 49a.

Detective Jensen started his investigation by interviewing A.B.'s mother and determining that she had not used leading questions or planted any details about the alleged molestation. App. at 5a. He also confirmed with A.B.'s mother that A.B. had lived with Stoot and his family during the time period that the alleged molestation occurred.[2] App. at 4a, 7a. He then interviewed A.B.

During the interview, Detective Jensen evaluated A.B.'s ability to communicate. He determined that A.B. had an average to above-average intelligence and possessed excellent communication skills for a child of her age. App. at 49a. She also seemed truthful throughout the interview. App. at 49a.

A.B. provided details, expressed in age-appropriate terms, that suggested specialized sexual knowledge during the interview.[3] *See* App. at 6a, 49a-50a. She told

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2. While the Ninth Circuit criticized Detective Jensen for not confirming this fact with a third party, it is uncontested that A.B. did in fact live with Stoot's family during the period the molestation was alleged to have occurred. App. at 7a n.1.

3. *See State v. C.J.*, 63 P.3d 765, 772 (Wash. 2003) (noting specialized sexual knowledge expressed in age-appropriate terms and masturbatory behavior can serve as corroboration of a young child's testimony).

Detective Jensen that Stoot had molested her on several occasions. App. at 49a-50a.

B. Detective Jensen Consulted with Legal Counsel before Interviewing Stoot to Ensure He Complied with All Legal Requirements for Questioning Minors

Following the interview, Detective Jensen prepared to interview Stoot, then 13 years old.[4] App. at 48a. To make sure he was up-to-date on the legal requirements for interviewing child-suspects, Detective Jensen spoke with two Snohomish County prosecutors. App. at 7a-8a.

The prosecutors informed Detective Jensen that he could interview Stoot without his parents present, but that he must treat a request by Stoot to have his parents present just like a request for counsel, that he must read Stoot his *Miranda* warnings, and that he should proceed only if Stoot signed a written waiver of rights. App. at 8a.

This guidance accurately reflected Washington law at the time Detective Jensen interviewed Stoot. A minor over age 12 could be interviewed without his parents present and was deemed to have the capacity to waive his right to counsel. Wash. Rev. Code § 13.40.140(10) (2008); *Dutil v. State*, 606 P.2d 269, 272-75 (Wash. 1980).

With this guidance, on January 15, 2004,[5] Detective Jensen went to Stoot's school and interviewed Stoot in

4. He also notified Child Protective Services. App. at 7a.

5. The Ninth Circuit opinion erroneously states that this occurred on January 15, 2003. App. at 7a.

the principal's office. App. at 7a-8a. As instructed by the county prosecutors, Detective Jensen gave Stoot a copy of the Everett Police Department Constitutional Rights waiver form and read Stoot his *Miranda* warnings. App. at 8a-9a. Stoot signed the waiver form, and Detective Jensen proceeded to question Stoot about A.B.'s allegations. App. at 9a. At no time did Stoot ask for his parents or an attorney or give any outward sign that he was confused. App. at 52a.

Stoot originally denied any improper contact with A.B. App. at 52a. Detective Jensen, relying on his professional training, used an accepted interviewing tactic of "blaming the victim" in his questioning. App. at 52a-53a. Eventually, Stoot admitted to improperly touching A.B. on three occasions. App. at 53a. After confessing, Stoot agreed to write out his confession. App. at 53a. While Stoot was writing out his confession, Detective Jensen observed Stoot's name listed on the "Honor Roll," indicating that Stoot was an honors student. App. at 51a. Once Stoot finished, Detective Jensen contacted Stoot's mother to notify her about Stoot's confession. App. at 53a.

Stoot claims that during the interrogation, Detective Jensen threatened him with three to five months of jail if he did not confess, but offered that the charges would be dropped and Stoot would only have to see a counselor if he confessed. App. at 10a-11a. Detective Jensen denies that he ever made any promises or threats about what might happen if Stoot did or did not confess. App. at 53a.

C. Washington State's Mandatory Reporting Law Required Detective Jensen to Include Stoot's Confession and Required the Police Department to Forward the Report and Confession to the Prosecutor

Washington State's mandatory reporting law requires that:

> Any law enforcement agency receiving a report of an incident of alleged abuse or neglect . . . involving a child . . . who has been subjected to alleged sexual abuse, shall report such incident in writing as provided in RCW 26.44.040 to the proper county prosecutor . . . whenever the law enforcement agency's investigation reveals that a crime may have been committed.

Wash. Rev. Code § 26.44.030(5) (2008). The report "must contain" any and all information that "may be helpful in establishing . . . the identity of the alleged perpetrator[.]" Wash. Rev. Code § 26.44.040 (2008).

As mandated by this law, Detective Jensen included all of his investigative information in his police report, including Stoot's confession. State law then mandated that the Police Department forward this police report to the county prosecutor. Wash. Rev. Code § 26.44.030(5) (2008).

Five and a half months later, the Snohomish County prosecutor relied on A.B.'s accusations and Stoot's confession to file charges against Stoot in juvenile court. App. at 12a.

Stoot was never taken into custody. App. at 12a.

D. The Juvenile Court Judge Suppressed Stoot's Confession After Finding that Stoot Did Not Understand His Rights but that "it would have appeared to Detective Jensen that [Stoot] understood his rights"

Five months after the charges were filed, Stoot exercised his right to challenge the voluntary nature of his confession at a suppression hearing, held pursuant to Washington Criminal Rule 3.5. App. at 12a.

After the charges were filed, but prior to the suppression hearing, Stoot underwent an extensive psychological evaluation. App. at 53a.

First, Stoot offered the testimony from Dr. Elizabeth Robinson, who met with Stoot on three separate occasions. App. at 57a; Andrews Decl., docket no. 54, Ex. 10(i)(1), page 10. With the benefit of a variety of tests and information not available to Detective Jensen, Dr. Robinson concluded that Stoot had an I.Q. of 81, with the intellect of a ten-year-old child. Andrews Decl., docket no. 54, Ex. 10(i)(1), pages 11, 13. She also determined that Stoot was very obedient and, unlike most children, would provide responses to questions even if he did not know the answer. Andrews Decl., docket no. 54, Ex. 10(i)(1), page 14. Finally, she opined that Stoot did not understand his *Miranda* rights. Andrews Decl., docket no. 54, Ex. 10(i)(1) page 22.

Second, Stoot offered Dr. Mark Whitehill's testimony. App. at 57a. Based solely on his review of Dr. Robinson's evaluations, Dr. Whitehill testified that Stoot was "developmentally compromised" and susceptible to

demanding questioning and unable to understand his *Miranda* warnings. Andrews Decl., docket no. 54, Ex. 10(i)(2), page 68.

These evaluations, along with expert testimony, were introduced at the suppression hearing. App. at 13a. With the benefit of this detailed evidence, the Juvenile Court Judge found that, while it would have appeared to Detective Jensen that Stoot understood his rights, Stoot in fact lacked the capacity to understand or waive those rights:

> 18. At the time of the signing, it would have appeared to Detective Jensen that Defendant understood his rights; however, Defendant lacked the capacity to understand his rights and the Defendant could not make an intelligent or knowing waiver of his rights. The general rule is that a child over the age of 12 may be interviewed without presence of parents [sic] and may make a waiver of rights.

App. at 70a-71a.

Accordingly, the Juvenile Court Judge suppressed the confession. App. at 53a-54a. At a later hearing, a different juvenile court judge ruled that A.B. lacked the capacity to testify. App. at 54a. This led the county prosecutor to dismiss the charges against Stoot. App. at 14a.

E. In Stoot's Civil Damages Action, the District Court Dismissed All Claims on Summary Judgment

After the charges were dismissed, Stoot (along with his parents) filed a lawsuit against Detective Jensen and the City of Everett. The lawsuit alleged four § 1983 violations: (1) a Fourth Amendment violation for "seizing" Stoot in the principal's office for the interview; (2) a Fifth Amendment violation for obtaining the confession; (3) a Sixth Amendment violation for not providing counsel during the interview; and (4) a Fourteenth Amendment violation again for obtaining the confession. App. at 3a. The lawsuit also alleged the state tort of outrage for obtaining a false confession. App. at 3a. In addition, all of these claims were asserted against the City of Everett based on allegations that Detective Jensen's supposed illegal conduct was based on established City policy. App. at 3a.

On summary judgment, the District Court dismissed all of the claims. App. at 15a. The District Court dismissed the Fourteenth Amendment claim and the outrage claim after citing the Juvenile Court Judge's finding that "it would have appeared to Detective Jensen that [Stoot] understood his rights" and nothing Detective Jensen did would "shock the conscience" nor would it be considered "extreme and outrageous." App. at 70a-71a, 74a-75a. The Fourth Amendment claim was dismissed based on qualified immunity. App. at 68a-69a. The Sixth Amendment claim was dismissed because Stoot was never denied a lawyer. App. at 62a. The claims against the City of Everett were dismissed because Stoot failed to establish that the violation was caused

by a city custom or policy, and because child suspects do not have a constitutional right to be interrogated in any particular manner. App. at 72a-73a.

Finally, the District Court dismissed the Fifth Amendment claim because Stoot's statements were never used in a criminal trial. App. at 60a. In making this ruling, the District Court recognized that this exact issue, where presumably coerced statements were used in court proceedings but not a trial, was left open by the Court in *Chavez v. Martinez*.[6] App. at 58a. Nevertheless, the District Court found that "[t]he analysis of the plurality in *Chavez* strongly suggests that the Fifth Amendment privilege is a "trial right."[7] App. at 59a. The District Court stated:

> [At t]he CrR 3.5 hearing . . . the guilt of the defendant was ultimately not at issue. The Court finds "criminal case," as used in *Chavez*, means "criminal trial," a proceeding at which a defendant's guilt is determined. Accordingly, [Stoot] has failed to make out a cognizable § 1983 claim for violation of his Fifth

6. *Chavez v. Martinez*, 538 U.S. 760 (2003).

7. The District Court also cited language from the Court's opinions in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) ("The 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*.") (emphasis added, citations omitted); and *Withrow v. Williams*, 507 U.S. 680, 692 (1993) (describing the Fifth Amendment as a "trial right"). *See* App. at 59a.

> Amendment privilege against compelled self-incrimination, and Defendants are entitled to summary judgment on this claim.

App at. 60a-61a.

F. The Ninth Circuit Found Detective Jensen Should Have Known He Was Violating Stoot's Fifth Amendment Rights and that a Fifth Amendment Violation Occurs when an Involuntary Confession Is Used in Any Criminal Proceeding

On appeal, the Ninth Circuit affirmed the District Court as to all claims except the District Court's ruling on the Fifth Amendment. The Ninth Circuit started its Fifth Amendment analysis by recognizing that the Court's ruling in *Chavez* "poses but does not decide" the issue before the Ninth Circuit: whether a confession is used in a "criminal case" when it is used in support of filing charges, and at arraignment, but is ultimately suppressed at the suppression hearing and never used at trial. App. at 28a.

The Ninth Circuit next recognized that five circuits had addressed this issue "with mixed results." App. at 30a-31a. After analyzing the decisions from the three circuits that require use at an actual trial – the Third, Fourth, and Fifth Circuits – and from the two that have held use in any criminal proceeding is sufficient – the Second and Seventh – the Ninth Circuit sided with the minority and held that Stoot's confession had been used in a "criminal case," even though it was suppressed, it was never used at trial, and the charges against Stoot were dismissed. App. at 33a.

The Ninth Circuit then concluded that the county prosecutor's decision to use the confession was not an intervening cause that would break any causal link between Detective Jensen's actions and the use in the "criminal case." App. at 36a-37a. According to the Ninth Circuit, Detective Jensen should have known that by including details about Stoot's confession in his police report, it would likely lead to charges being filed. App. at 36a.

Finally, the Ninth Circuit addressed the issue of qualified immunity. It held that the legal uncertainty surrounding what qualifies as use in a "criminal case" did not entitle Detective Jensen to qualified immunity because the illegal conduct alleged by Stoot – improper promises and psychological coercion – and Detective Jensen's decision to include details of the confession in his police report were unrelated to this legal uncertainty. App. at 38a-39a. Detective Jensen was on notice, according to the Ninth Circuit, that his conduct was clearly impermissible, and therefore he was not immune from suit. App. at 38a. Accordingly, the Ninth Circuit remanded the case for trial on Stoot's Fifth Amendment claim.

REASONS FOR GRANTING THE PETITION

Two separate reasons warrant Supreme Court review of this case.

First, review is warranted to resolve a conflict between the Ninth Circuit's decision and rulings in other United States Courts of Appeal. The Ninth Circuit, joining the Second and Seventh Circuits, held

that a "criminal case" begins once charges are filed. The Third, Fourth, and Fifth Circuits all hold that "criminal case" means a criminal trial.

Second, review is warranted because this case involves an important unsettled question about the meaning of the Fifth Amendment that the Court left open in *Chavez* and should now resolve. If the Ninth Circuit's decision stands, it will create a level of uncertainty that will have a chilling effect on every custodial interrogation conducted by law enforcement officers in the Ninth Circuit.

A. The Court Should Grant the Petition Because the Decision Below Conflicts with Opinions from the Third, Fourth, and Fifth Circuits of the Court of Appeals

The Court should grant certiorari to resolve the conflict between the Courts of Appeal regarding the meaning of the phrase "criminal case" in the Fifth Amendment of the U.S. Constitution. The six circuits that have addressed this question in § 1983 or *Bivens*[8] actions have split three-to-three on whether a "criminal case" means a criminal trial or begins when charges are filed:

> Second Circuit: a "criminal case" begins once charges are filed. *Higazy v. Templeton*, 505 F.3d 161 (2d Cir. 2007) (summary judgment reversed and remanded for trial);

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8. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (providing a cause of action for violations of constitutional rights by federal actors).

Third Circuit: a "criminal case" means a criminal trial. *Renda v. King*, 347 F.3d 550 (3d Cir. 2003) (summary judgment affirmed);

Fourth Circuit: a "criminal case" means a criminal trial. *Burrell v. Virginia*, 395 F.3d 508 (4th Cir. 2005) (summary judgment affirmed);

Fifth Circuit: a "criminal case" means a criminal trial. *Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005) (remanded for entry of summary judgment in favor of defendant because judge's decision to admit confession was superseding cause of violation);

Seventh Circuit: a "criminal case" begins once charges are filed. *Sornberger v. City of Knoxville*, 434 F.3d 1006 (7th Cir. 2006) (summary judgment reversed); and

Ninth Circuit: a "criminal case" begins once charges are filed. *Stoot v. City of Everett*, 582 F.3d 910 (9th Cir. 2009) (summary judgment reversed).

There are at least five reasons why the Court should resolve this conflict.

First, there can be no doubt that an actual, acknowledged conflict exists between the circuits. The Ninth Circuit recognized that Stoot's "Fifth Amendment claim in this case falls squarely within the gray area created by *Chavez*" and the five other circuit courts that had addressed the question had reached "mixed results." App. at 29a-30a. The Ninth Circuit then briefly

addressed the three circuit decisions finding that "criminal case" meant criminal trial before analyzing the remaining two circuits that found that a criminal case began once charges were filed. App. at 30a-31a. It noted that the Seventh Circuit had rejected the analysis of the Third and Fourth Circuits. App. at 31a-32a. Finally, the Ninth Circuit also rejected the analysis of Third, Fourth, and Fifth Circuits in favor of the analysis by the Second and Seventh Circuits. App. at 33a. Thus, the conflict is obvious and has been expressly acknowledged.

Second, the conflict presents an issue that is extremely narrow, so there is no need to allow the issue to percolate in the lower courts to fill in the intricacies of the law with different fact patterns and detailed interpretations of different language. This case only requires the Court to determine the meaning of a two-word phrase: "criminal case." This phrase first became part of the law over 200 years ago when the Fifth Amendment was adopted. Three circuits have interpreted this phrase to mean a criminal trial. With the Ninth Circuit's ruling, three other circuits have determined that a criminal case begins once charges are filed. The Court should determine what this term has meant for 200 years.

Third, there is no reason to think this conflict will resolve itself. This does not involve a case where one circuit interpreted the law one way, and now there is a strong trend of the other circuits interpreting the law another way. Instead, the six circuits have split evenly on their interpretations and there is no reason to think that any will reconsider their rulings. Thus, absent a ruling from the Court, the conflict over the meaning of "criminal case" will remain unresolved.

Fourth, this case provides a clear opportunity for the Court to resolve the conflict. As the Ninth Circuit noted, Stoot's "Fifth Amendment claim in this case falls squarely within the gray area created by *Chavez*." App. at 29a. Because this case was resolved on summary judgment, there are no factual or procedural issues that would prevent the Court from resolving this conflict if the Court granted certiorari.

Fifth, the conflict between the circuits creates great inequities in different parts of the country that the Court should eliminate. As demonstrated in section B *infra*, the two different meanings will significantly affect a suspect's rights to bring a § 1983 action against an interrogating officer. Because of the conflicting rulings, law enforcement officers and suspects in different parts of the country have dramatically different exposure to federal civil rights claims. When federal courts interpret the Constitution in a manner that gives citizens different rights under the Constitution, based solely on where they happen to live, it is not only unfair, it also harms the integrity of the judicial system.

Law enforcement officers who work in Alaska, Arizona, California, Connecticut, Idaho, Illinois, Indiana, Hawaii, Montana, Nevada, New York, Vermont, Washington, and Wisconsin (the states that make up the Second, Seventh, and Ninth Circuits) must worry that every time they interrogate a suspect, there might be some unknown fact making the interrogation unconstitutional and thereby possibly subjecting the officer to a civil lawsuit that likely will not be dismissed on summary judgment. In contrast, law enforcement officers who work in Delaware, Louisiana, Maryland,

Mississippi, New Jersey, North Carolina, Pennsylvania, South Carolina, Texas, Virginia, and West Virginia (the states that make up the Third, Fourth, and Fifth Circuits) can carry out their duties, including interrogations, with confidence, knowing that as long as they act in good faith, they do not have to worry about former suspects dragging them into court.

A similar dichotomy exists for suspects subject to illegal interrogations. Those who live in the states that make up the Third, Fourth, and Fifth Circuits and are formally charged based on illegal confessions have no right to seek civil redress. In contrast, suspects subject to illegal interrogations who live in states that make up the Second, Seventh, and Ninth Circuits and who are formally charged based on illegal confessions have the right to file § 1983 actions.

This inequity is bad for the U.S. legal system. With respect to § 1983 law suits, most law enforcement officer-defendants and suspect-plaintiffs will not understand the purpose of having 13 different federal circuits. Instead, they will see that persons in one part of the country have one set of Constitutional rights while persons in another part have a different set of Constitutional rights, all based on a single phrase in the Constitution that presumably has had an actual, singular meaning since 1791. The circuit courts' conflicting interpretations of the Fifth Amendment is thus the exact type of conflict Supreme Court Rule 10(a) is designed to address. Accordingly, the Court should grant certiorari and resolve this conflict.

B. The Court Should Grant the Petition Because the Ninth Circuit's Interpretation of "Criminal Case" Creates an Unnecessary and Extreme Chilling Effect on Law Enforcement Officers Conducting Interrogations

Supreme Court review of the Ninth Circuit decision is also warranted because this case involves the constitutional phrase "criminal case," the meaning of which has a direct effect on every custodial interrogation. Only the Court can settle this clear conflict.

The Ninth Circuit has interpreted "criminal case" to encompass the entire legal process, beginning with the filing of charges. This means that if a confession is used as part of a charging document, or at arraignment, or at the bail hearing, a suspect will be able to file a Fifth Amendment § 1983 claim, even if the statements are never used at trial.

If "criminal case" encompasses the entire legal process, then law enforcement officers preparing to conduct custodial interrogations will have to proceed knowing that unforeseen facts may emerge in a suppression hearing that could greatly increase their exposure to civil liability.

By contrast, the Third, Fourth, and Fifth Circuits have interpreted "criminal case" to mean a "criminal trial." This means that a suppression hearing will occur before any Fifth Amendment § 1983 claim would ripen.

If "criminal case" means the criminal trial, then law enforcement officers preparing to conduct custodial

interrogations will know that a full suppression hearing will occur before any Fifth Amendment violation can be triggered, giving the officers assurance that they will not be judged on facts that are unknown to the officers prior to suppression hearings.

The Supreme Court should accept review to settle the meaning of "criminal case" because the meaning adopted by the Ninth Circuit (as well as the Second and Seventh Circuits) creates an unworkable standard that will expose law enforcement officers to unnecessary lawsuits and liability. This exposure will have a chilling effect on officers preparing to conduct custodial interrogations.

The Ninth Circuit's recognition of a Fifth Amendment § 1983 claim for allegedly improper interrogations not used during a criminal trial is not justified because existing remedies are sufficient to deter improper conduct. *First*, the plain language of the Fifth Amendment provides for suppression of involuntary confessions. *Second*, the Court has already recognized in *Chavez* that a suspect can file a Fourteenth Amendment § 1983 claim when an interrogator uses extremely abusive interrogation techniques. *Chavez*, 538 U.S. at 779-80.

Not only is there no benefit to expanding Fifth Amendment rights by allowing § 1983 claims, the Ninth Circuit's interpretation of "criminal case" will discourage legitimate law enforcement activities. As Stoot's claim demonstrates, law enforcement officers will be subject to § 1983 claims based on information that may be

impossible for those officers to know, or unreasonable for the officer to acquire, at the time the officers take the actions that will create exposure to liability. Therefore, the only way an officer can assure that he will not face a § 1983 claim is to not conduct the interrogation.

The factual nature of Fifth Amendment claims exacerbates this chilling effect, increasing the likelihood that they will survive summary judgment. An officer in Detective Jensen's position preparing to conduct an interrogation will have to fear a § 1983 claim based on facts he knows, facts he should know, and facts he cannot know. He will also know that however frivolous that claim may be, it will still require the officer to endure discovery and a trial. Consequently, more officers will be sued and forced to endure the burdens of litigation.

By allowing a suspect to maintain a § 1983 claim based on the Fifth Amendment for an allegedly improper interrogation, the Ninth Circuit has created an unnecessary obstacle to legitimate law enforcement investigative activities without any substantive benefit. As Justice Souter warned in *Chavez*, allowing Fifth Amendment § 1983 actions for allegedly improper interrogations "would revolutionize Fifth and Fourteenth Amendment law." *Chavez*, 538 U.S. at 779 (Souter, J., concurring).

This problem does not exist if "criminal case" means "criminal trial" because the mandated suppression hearing will ensure that any involuntary confession is

not used at trial, preventing any violation from occurring in the first place.[9]

Thus, the Ninth Circuit decision places a sharper point on the direct conflict between the circuits on this fundamental point of Constitutional Law – this Court should settle when the use of an involuntary confession in a "criminal case" occurs that will trigger an actionable violation of the Fifth Amendment.

1. Allowing § 1983 Actions for Alleged Fifth Amendment Violations Is an Unnecessary Expansion of Fifth Amendment Rights

The Court has recognized that rules for the enforcement of constitution rights, including the Fourth and Fifth Amendment, are "primarily intended to regulate police in their day-to-day activities.". *New York v. Belton*, 453 U.S. 454, 458 (1981) (quoting Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Roberson Dilemma*, 1974 Sup. Ct. Rev. 127, 142). To provide meaningful guidance, these rules must be "readily applicable by the police in the context of" police investigations. *Belton*, 453 U.S. at 458 (quoting LaFave, *supra*, at 142); *see also Davis v. United States*, 512 U.S. 452, 460-61 (1994) (mandating bright-line guidance for interrogations to avoid creating "obstacles to legitimate police investigations").

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9. If the court rules the confession is admissible, it will serve as an intervening cause that will relieve the officer of any liability unless the officer provides false testimony at the suppression hearing. *Murray*, 405 F.3d at 292-93.

While § 1983 actions may sometime serve as the best tool for regulating police activity by deterring constitutional violations, this is not the case in the context of improper interrogations. The text of the Fifth Amendment and case law governing interrogation practices already provide sufficient guidance for officers and the deterrence to prevent improper interrogations.

If an officer preparing to conduct a custodial interrogation is motivated by a desire to solve the crime and convict the suspect, the suppression hearing mandated by the plain language of the Fifth Amendment is sufficient to deter officers from coercing involuntary confessions. *See Chavez*, 538 U.S. at 777-78 (Souter, J., concurring) (detailing existing scope of Fifth Amendment protections). In this case, Stoot's confession was suppressed and therefore never used against him at trial.

If, on the other hand, an officer acts egregiously, or is conducting the interrogation for some purpose other than to solve a crime, a suspect will already have a § 1983 claim under the Fourteenth Amendment. *Chavez*, 538 U.S. at 779-80 (remanding for consideration of whether conduct violated the Fourteenth Amendment). In fact, in *Chavez*, the claimant's Fourteenth Amendment survived summary judgment on remand. *Martinez v. City of Oxnard*, 337 F.3d 1091 (2003). Therefore, the additional deterrence of allowing a § 1983 claim under the Fifth Amendment is not necessary to curb abusive police interrogation. Indeed, Stoot also made a Fourteenth Amendment claim against Detective Jensen.

Thus, the ruling by the Ninth Circuit creating an additional cause of action for money damages does not provide any significant deterrence to officers conducting improper interrogations. Moreover, as explained in the next section, the Ninth Circuit's ruling creates an unworkable standard by subjecting officers to potential liability for facts the officers cannot know when they engage in conduct that can create § 1983 liability. The only thing the Ninth Circuit's ruling will deter is law enforcement officers from vigorously carrying out their legal duties.

2. The Ninth Circuit Ruling Will Have a Chilling Effect on Legitimate Law Enforcement Activities

Law enforcement officers must make difficult discretionary decisions often in very short time frames. To ensure officers can make these decisions, "[a] single, familiar standard is essential." *Belton*, 453 U.S. at 458 (alteration in original) (citation omitted); *see, e.g.*, *Edwards v. Arizona*, 451 U.S. 477 (1981) (establishing bright-line rule on the waiver of counsel to avoid confusion). Bright-line rules have "the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogations." *Arizona v. Roberson*, 486 U.S. 675, 681 (1988) (citation omitted). In contrast, when the rules are such that an officer in the field cannot apply them, it endangers everyone's rights and discourages officers from diligently carrying out their duties. *See Belton*, 453 U.S. at 458.

The concern over discouraging legitimate law enforcement conduct served as the basis for Justice Souter's concurrence in *Chavez*. Justice Souter wrote that there must be a "powerful showing" that allowing § 1983 liability was necessary to protect Fifth Amendment rights before the Court should provide for such claims based on an alleged Fifth Amendment violation. *Chavez*, 538 U.S. at 778 (Souter, J., concurring). Otherwise, Justice Souter was concerned that "whenever the police obtain any involuntary self-incriminating statement, or whenever the government so much as threatens a penalty in derogation of the right to immunity," § 1983 suits will follow. *Chavez*, 538 U.S. at 778 (Souter, J., concurring).

In this case, Detective Jensen went out of his way to ensure he was up to date on the laws governing interrogations of minors. Under the Ninth Circuit's decision, this is not enough. Instead, the Ninth Circuit relied on facts and expert testimony developed almost a year after the interrogation at the suppression hearing to find that Detective Jensen had violated Stoot's Fifth Amendment rights.

While new facts will often come to light in suppression hearings, those facts will lead to the remedy provision of the Fifth Amendment – suppression of the confession. Adding an additional financial remedy imposes liability based on 20/20 hindsight by exposing law enforcement officers to potential liability based on facts they may have no way of knowing prior to the suppression hearing. This will have an extreme chilling effect on law enforcement activities because officers may curtail their legitimate conduct out of fear of being dragged into court.

a. Detective Jensen's liability effectively arose when he filed his police report

Under the Ninth Circuit's definition of "criminal case," it acknowledged that officers can be exposed to § 1983 liability once the officer decides "to file a police report detailing [the suspect's] alleged confession[.]" App. at 35a. Once the report is filed, it is the prosecutor, not the officer, who will decide whether to use the confession as a basis for filing charges. Nevertheless, the officer is liable for the prosecutor's decision, according to the Ninth Circuit, because it should be "reasonably foreseeable" to the officer that the prosecutor will use a confession included in the police report to file charges. App. at 36a.

The Ninth Circuit's opinion illustrates the injustice of assuming it is reasonably foreseeable that the report may be used even when it was not reasonably foreseeable to Detective Jensen that Stoot was incapable of waiving his Fifth Amendment rights. App. at 13a.

Finally, in some cases, including this one, the officer will be required by law to file the report. This is because in cases, like Stoot's, that involve child abuse, Washington State's mandatory reporting law, like similar laws in most states,[10] will require the officer to file his report and include all information that "may" help identify the perpetrator. Wash. Rev. Code §§ 26.44.040, .030 (2008). This meant that once Stoot had confessed,

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10. To qualify for federal funding to assist with care for neglected children, states are required to adopt mandatory reporting laws. See 42.U.S.C. 5101 *et seq.*

Detective Jensen was required to detail that confession, even if he had doubts about its voluntariness.

b. When he filed his police report, Detective Jensen reasonably believed Stoot's confession was voluntary

Detective Jensen took time to educate himself on the existing law regarding the interrogation of juvenile suspects, and he held a good faith belief that Stoot voluntarily waived his Fifth Amendment rights when he filed his report.

Prior to including any information about Stoot's confession in his police report, Detective Jensen:

- Consulted with two legal advisors to ensure he understood the current law for interrogating a minor;[11]
- Read Stoot his *Miranda* warnings and obtained a written waiver;[12]
- Had Stoot put his confession in writing;[13] and
- Learned that Stoot was an Honors Student.[14]

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11. App. at 7a-8a.
12. App. at 8a-9a.
13. App. at 53a.
14. App. at 51a.

Based on the record, the Juvenile Court Judge entered a finding that "it would have appeared to Detective Jensen that [Stoot] understood his rights[.]" App. at 70a-71a.

c. The Juvenile Court Judge relied on information Detective Jensen did not and could not know to support his ruling that Stoot's confession was not voluntary

The Juvenile Court Judge who determined Stoot's confession was involuntary had significant information that was not available until the suppression hearing. This was well after Detective Jensen took his last act that supports liability under the Ninth Circuit decision – the filing of his police report. This is also, by definition, after the legal act of filing charges, the action that the Ninth Circuit held marked the start of the "criminal case."

The additional information before the Juvenile Court Judge at the suppression hearing included:

- Expert testimony explaining that Stoot had an IQ of 81;[15]

- Expert testimony that Stoot had the intellect of a 10-year-old child;[16]

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15. Andrews Decl., docket no. 54, Ex. 10(i)(1), page 13.

16. Andrews Decl., docket no. 54, Ex. 10(i)(1), page 13.

- Expert testimony that unlike most children his age, Stoot was likely to provide answers to questions he did not know;[17]

- Expert testimony that Stoot was developmentally compromised and therefore more susceptible to demanding questioning;[18] and

- Expert testimony that Stoot could not and did not understand his *Miranda* rights.[19]

If Detective Jensen had all of this information when he prepared his police report, he likely would have described Stoot's confession differently.

Under the Ninth Circuit's decision, if a law enforcement officer in the Ninth Circuit vigorously carries out his duties while conducting an interrogation, he will be exposed to possible § 1983 liability based on the outcome of a suppression hearing conducted with the benefit of 20/20 hindsight and information the officer could not have known at the time of the interrogation. This type of uncertainty is exactly what Justice Souter warned about in his *Chavez* concurrence and what the Court has tried to avoid by limiting § 1983 liability through qualified immunity. Furthermore, as explained below, for claims like Stoot's, a court will not be able to resolve the issue of qualified immunity on summary judgment because it involve factual issues.

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17. Andrews Decl., docket no. 54, Ex. 10(i)(1), page 14.

18. Andrews Decl., docket no. 54, Ex. 10(i)(2), page 68.

19. Andrews Decl., docket no. 54, Ex. 10(i)(1), page 22; Andrews Decl., docket no. 54, Ex. 10(i)(2), page 68.

3. Fifth Amendment § 1983 Claims Will Often Involve Fact Issues that Cannot Be Subject to Dismissal Based on Qualified Immunity.

The factual nature of Fifth Amendment claims aggravates the chilling effect of the Ninth Circuit's decision: even obviously frivolous § 1983 claims will survive summary judgment.

The Court has recognized that there is a strong "public interest in encouraging the vigorous exercise of official authority." *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (citation omitted). To avoid interfering with this goal, the Court has developed the standards for qualified immunity to allow trial courts to dismiss most claims on summary judgment. *Harlow*, 457 U.S. at 807-08. Qualified immunity prevents § 1983 claims from having too great of a chilling effect on law enforcement officers charged with vigorously carrying out their official duties. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (carefully limiting liability under § 1983 claims so the "fear of personal monetary liability and harassing litigation will [not] unduly inhibit officials in the discharge of their duties").

The Ninth Circuit opinion undercuts this goal by allowing for § 1983 claims based on the Fifth Amendment that will turn on questions of fact that courts will not be able to dismiss on summary judgment. When there has been a constitutional violation, a court can only dismiss a § 1983 claim on summary judgment based on qualified immunity if the law regarding that violation is not well established. *Anderson*, 483 U.S. at 638-39.

It is well established, however, that it is unconstitutional for officers to use psychological coercion such as improper threats or promises to obtain a confession. *Malloy v. Hogan*, 378 U.S. 1, 7 (1964) (confession coerced with improper promises or threats was inadmissible); *Weaver v. Brenner*, 40 F.3d 527, 533-34 (2d Cir. 1994) (holding that it was "clearly established in 1989 that police could not lawfully coerce statements" using psychological coercion). When a plaintiff like Stoot alleges he was coerced into confessing by threats or improper promises, it will almost always create a "he-said-she-said" fact issue about whether any such threats or promises were actually made. Because the fact issue turns on the issue of credibility, the claim cannot be resolved on summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("[c]credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment"). While a cautious officer can seek additional protection by having a third party present or recording the interrogation, these steps will only affect the weight of the officer's testimony and will not eliminate a fact question.[20] *Scott v. Harris*, 550 U.S. 372, 380 (2007) (providing that "facts must be viewed in

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20. Although the Court held in *Scott* summary judgment could be granted based on a videotape, in the case of a confession, the suspect could simply claim that the recorder does not depict everything that happened because it was turned off when the improper threats or promises were made. *See Scott*, 550 at 378 (relying on videotape to hold summary judgment was proper when plaintiff did not make "any contention that what [the videotape] depicts differs from what actually happened").

the light most favorable to the nonmoving party" unless "blatantly contradicted by the record"). Taking these extra steps would also slow down investigations where time is otherwise of the essence and would add an extra burden to law enforcement. This would be especially pronounced with regards to smaller police forces with fewer resources available to them in the first place.

Therefore, if the Ninth Circuit decision is not reversed, a law enforcement officer like Detective Jensen who is preparing to interrogate a suspect will know that if the suspect confesses and then recants, the suspect will be able to file a § 1983 action and survive summary judgment simply by alleging the officer made threats or improper promises. An officer's concern over such a claim will have a chilling effect because there is very little an officer can do, short of not conducting the interrogation, to insulate himself from a § 1983 claim, discovery, and trial.

4. The Ninth Circuit Opinion Does Not Provide a Meaningful Limiting Principle for § 1983 Claims

The Ninth Circuit's ruling includes no true limiting principle and will affect all law enforcement officers preparing to conduct custodial interrogations.

In *Chavez*, Justice Souter noted that allowing Fifth Amendment § 1983 claims would create extensive liability that would not be subject to any reasonably limiting principle. *Chavez*, 538 U.S. at 778-79 (Souter, J., concurring). The Ninth Circuit held that linking liability to the filing of charges provided that limiting principle. App. at 34a n.15.

Contrary to the Ninth Circuit's claim, linking liability to the filing of charges does not provide a true limiting principle because the charging decision is not made by the interrogating officer. In fact, the Ninth Circuit held that Detective Jensen was liable because he "had no reason to believe that the statements would not be used against" Stoot, making such use a "reasonably foreseeable consequence[]" of Detective Jensen's actions. App. at 36a, 38a-39a. Because the Ninth Circuit held that an interrogating officer is on notice that every allegedly improper interrogation "*could* ripen into a Fifth Amendment violation," then the filing of charges is not a true limiting factor on the harmful chilling effect that concern over potential § 1983 liability causes. App. at 38a. It was precisely this chilling effect that Justice Souter was concerned about when he emphasized the need for a limiting principle in his *Chavez* concurrence. *See Chavez*, 538 U.S. at 778-79 (Souter, J., concurring).

5. The Meaning of "Criminal Case" Is an Important Question of Federal Law that the Court Should Settle

In conclusion, the Court should grant this petition for a writ of certiorari because it involves the unsettled question about what "criminal case" means and because the Ninth Circuit's interpretation of that phrase creates an unnecessarily chilling effect on legitimate law enforcement activities.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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