No.

In the Supreme Court of the United States

CITY OF HAYS, KANSAS, PETITIONER

v.

MATTHEW JACK DWIGHT VOGT

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Self-Incrimination Clause provides that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." As the court below recognized, a "circuit split [has] developed" over whether certain pretrial uses of compelled statements force a person "to be a witness against himself" within the meaning of that provision. Pet. App. 6a. The question presented is:

Whether the Fifth Amendment is violated when statements are used at a probable cause hearing but not at a criminal trial.

PARTIES TO THE PROCEEDINGS

Petitioner, the City of Hays, Kansas, was a defendant–appellee in the court below.

Respondent Matthew Jack Dwight Vogt was the plaintiff–appellant in the court below.

The City of Haysville, Kansas, Don Scheibler, Jeff Whitfield, Kevin Sexton, and Brandon Wright are not parties in this Court but were defendants–appellees in the court below.

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The opinion of the court of appeals (Pet. App. 1a–34a) is reported at 844 F.3d 1235. The district court's Memorandum and Order (Pet. App. 35a–44a) is unpublished but is available at 2015 WL 5730331.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 2017. A petition for rehearing was denied on January 30, 2017 (Pet. App. 45a). On April 21, 2017, Justice Sotomayor extended the time in which to file a petition for a writ of certiorari to and including June 29, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person * * * shall be compelled in any criminal case to be a witness against himself."

STATEMENT

A. Factual background

Petitioner is a city in Kansas; respondent is one of its former police officers. Pet. App. 47a. In 2013, while still employed by petitioner, respondent applied for a job with the police department in a different city. *Id.* at 48a. During an interview for that position, respondent revealed that "he had kept a knife for his personal use after coming into possession of it while working as a * * * police officer [for petitioner]." *Ibid.* The interviewing department extended respondent a job offer conditioned on respondent telling petitioner about the knife and returning it. *Id.* at 48a–49a.

Respondent told petitioner's chief of police about the knife. Pet. App. 49a. The chief directed respondent

to provide additional information and opened an internal investigation. *Ibid.* Respondent gave the chief a "vague one-sentence report related to his possession of the knife" and submitted his two weeks' notice of resignation. *Ibid.*[1] The lieutenant in charge of internal investigations asked respondent to provide additional information. *Ibid.* Respondent then made a further statement, which included "the type of police call [respondent] was handling when he came into possession of the knife." *Ibid.* Using this information, the lieutenant was able to locate "an audio recording which captured the circumstances of how [respondent] came into possession of the knife." *Id.* at 50a. At that point, the chief terminated the internal investigation, and gave respondent's statements and the resulting information to the Kansas Bureau of Investigation. *Ibid.* Because respondent had become the subject of a criminal investigation, the other city's police department withdrew its job offer. *Ibid.*

The State of Kansas (which is not a party to this case) later charged respondent with two felony counts related to the knife. Pet. App. 50a. Under state law, respondent was entitled to a probable cause hearing. Kan. Stat. Ann. § 22–2902(1). Respondent alleges that, at this hearing, his statements about the knife and the resulting information were "used against him." Pet.

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[1] According to respondent, this statement was "compelled" because the chief told respondent he would lose his job unless he provided additional information about the knife. Pet. App. 49a; see generally *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967) (holding statements "obtained under threat of removal from office" are compelled statements for purposes of the Self-Incrimination Clause).

App. 50a.[2] A state district court judge dismissed both charges based on lack of probable cause. *Ibid.*

B. Procedural background

1. Following dismissal of all criminal charges against him, respondent sued petitioner, the city with which he had sought employment, and four individual officers. Pet. App. 46a–54a. Respondent alleged that the defendants were liable under 42 U.S.C. § 1983 for violating his Fifth Amendment rights. *Id.* at 1a. Specifically, respondent alleged that: (1) by threatening to terminate his employment if he did not provide additional statements about the knife, the defendants compelled him to make incriminating statements; and (2) those statements were used against him in a criminal case when they were used at the probable cause hearing. *Ibid.*

The defendants (including petitioner) moved to dismiss respondent's complaint for failure to state a claim. Pet. App. 35a. The district court granted that motion, reasoning that because "the compelled statements were never introduced against [respondent] at trial," respondent "fail[ed] to state a violation of his Fifth Amendment rights." *Id.* at 43a–44a.

2. The Tenth Circuit affirmed in part and reversed in part. Pet. App. 1a–34a. The court affirmed the dismissal of respondent's claims against the four individual officers based on qualified immunity. *Id.* at 2a. The

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[2] Because respondent appealed a dismissal for failure to state a claim, the courts below were required to "credit the factual allegations in the complaint." Pet. App. 2a. Respondent's complaint is reproduced at Pet. App. 46a–54a.

court also affirmed the dismissal of respondent's claim against the other city because that city had not compelled respondent to incriminate himself. *Ibid.* But unlike the district court, the Tenth Circuit concluded that respondent had stated a valid Fifth Amendment claim against petitioner, the municipality that had employed him. *Ibid.*

The key question in this case, the Tenth Circuit recognized, is whether using a compelled statement at a probable cause hearing implicates the Fifth Amendment's Self-Incrimination Clause. The court of appeals determined it does. The Tenth Circuit noted that this Court's most recent Self-Incrimination Clause decision reserved judgment about "the precise moment when a 'criminal case' commences" for Fifth Amendment self-incrimination purposes. Pet. App. 22a (quoting *Chavez* v. *Martinez*, 538 U.S. 760, 769 (2003) (opinion of Thomas, J.)). The Tenth Circuit also acknowledged that, "[f]ollowing *Chavez*, a circuit split developed over the definition of a 'criminal case' under the Fifth Amendment." *Id.* at 6a. Ultimately, however, the court of appeals concluded that: (1) "the right against self-incrimination is more than a trial right," *id.* at 10a; and (2) the "Fifth Amendment is violated when criminal defendants are compelled to incriminate themselves and the incriminating statement is used in a probable cause hearing," *id.* at 2a.

REASONS FOR GRANTING THE PETITION

This case presents a significant and recurring question of constitutional law on which the lower courts are sharply divided: Is the Fifth Amendment violated when compelled statements are used at a probable

cause hearing but never at a criminal trial? Four circuits and one state supreme court have held that a person has not been "compelled * * * to be a witness against himself," U.S. Const. amend. V, unless and until compelled statements are used at a criminal trial. In contrast, four other circuits—including the court below—have held that the Self-Incrimination Clause is violated by any use of compelled statements at certain pretrial hearings. Federal constitutional rights should not vary by geography. Nor should a municipality's exposure to liability under 42 U.S.C. § 1983. This case presents a clean vehicle for resolving an entrenched conflict and warrants this Court's review.

A. This case deepens an acknowledged and entrenched conflict

The Self-Incrimination Clause provides that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In *Chavez* v. *Martinez*, 538 U.S. 760 (2003), the plaintiff alleged that his Fifth Amendment rights were violated when a police officer interrogated him, even though no criminal prosecution was ever initiated. *Chavez*, 538 U.S. at 764–765 (opinion of Thomas, J.). The Ninth Circuit found that the officer's "coercive questioning" of the plaintiff, in and of itself, "violated his Fifth Amendment rights." *Id.* at 765 (opinion of Thomas, J.). This Court reversed. Although there was no opinion for the Court, a majority of Justices concluded that there had been no violation of the Self-Incrimination Clause under the circumstances of that case. *Id.* at 763 (opinion of Thomas, J.); *id.* at 777 (Souter, J., concurring in the judgment). As a result,

the Court found it unnecessary to determine "the precise moment when a 'criminal case' commences" for purposes of the Fifth Amendment Self-Incrimination Clause." *Id.* at 767 (opinion of Thomas, J.).

Since *Chavez*, a widely acknowledged split has developed in the lower courts about whether various pretrial uses of allegedly compelled statements implicate the Self-Incrimination Clause.

1. Four circuits and one state supreme court have held that "[t]he Fifth Amendment privilege against self-incrimination is a fundamental *trial* right which can be violated only at *trial*." *Murray* v. *Earle*, 405 F.3d 278, 285 (5th Cir. 2005) (emphasis added).

In *Renda* v. *King*, 347 F.3d 550, 552 (3d Cir. 2003), for example, state troopers had interrogated the plaintiff without providing *Miranda* warnings. Based on her answers, the plaintiff was charged with making a false report to a law enforcement officer. *Id.* at 553, 558. At a preliminary hearing, the plaintiff's answers were suppressed and all charges were dropped. *Ibid.* The plaintiff then filed suit, alleging that the troopers violated her Fifth Amendment right against self-incrimination. *Id.* at 553. The Third Circuit affirmed the district court's dismissal of the plaintiff's claim. "[A]s long as the plaintiff's statements are not used against her at trial," the court held, "questioning a plaintiff in custody without providing *Miranda* warnings is not a basis for a § 1983 claim." *Id.* at 557–558. "[I]t is the use of coerced statements *during a criminal trial*, and not in obtaining an indictment," the Third Circuit held, "that violates the Constitution." *Id.* at 559 (emphasis added).

The Fourth Circuit's decision in *Burrell* v. *Virginia*, 395 F.3d 508 (4th Cir. 2005), is similar. In that case, the plaintiff alleged that city officials violated the Fifth Amendment by summoning him to court because he refused to provide proof of insurance after a car accident. *Id.* at 510. Because the plaintiff did "not allege any *trial* action that violated his Fifth Amendment rights," the Fourth Circuit held, "his claim fails." *Id.* at 514.

Other courts have reached the same conclusion. In *Winslow* v. *Smith*, for example, the Eighth Circuit concluded that the plaintiffs' self-incrimination claims failed "because Plaintiffs *did not proceed to a criminal trial*." 696 F.3d 716, 731 n.4 (8th Cir. 2012) (emphasis added); accord *Tinker* v. *Beasley*, 429 F.3d 1324, 1328 n.7 (11th Cir. 2005) ("[T]he Self-Incrimination Clause in the Fifth Amendment is not violated *until* a compelled statement has been used in a criminal trial or proceeding."); *State* v. *Mems*, 708 N.W.2d 526, 534 (Minn. 2006) ("Even assuming appellant's police statement was obtained in violation of *Miranda,* there was no Fifth Amendment violation where his statement was not admitted at trial."); see also *Smith* v. *Patterson*, 430 Fed. Appx. 438, 441 (6th Cir. 2011) ("[W]hen the government does not try to admit the confession *at a criminal trial*, the Fifth Amendment plays no role.") (emphasis added).

2. In contrast, the Second, Seventh, Ninth, and now Tenth Circuits have determined that "a coerced statement d[oes] not have to be introduced at trial to violate a plaintiff's Fifth Amendment rights." *Higazy* v. *Templeton*, 505 F.3d 161, 171 (2d Cir. 2007). In these courts' view, the Fifth Amendment also is violated

when compelled statements are used at various pretrial proceedings, including: (a) bail hearings, see *Higazy,* 505 F.3d at 173; (b) suppression hearings, see *Best* v. *City of Portland*, 554 F.3d 698, 702–703 (7th Cir. 2009); (c) bail hearings, arraignments, and probable cause hearings, see *Sornberger* v. *City of Knoxville*, 434 F.3d 1006, 1026–1027 (7th Cir. 2006); (d) affidavits supporting charging information, arraignments, and bail hearings, see *Stoot* v. *City of Everett*, 582 F.3d 910, 925 (9th Cir. 2009); and, now (e) probable cause hearings, Pet. App. 2a.

3. All of the decisions cited above post-date *Chavez* and a number of them specifically cite *Chavez*'s failure to identify when a "criminal case" begins as a source of difficulty. See, *e.g.*, *Sornberger*, 434 F.3d at 1026 ("*Chavez,* of course, did not determine whether pretrial proceedings such as these fall within the scope of a 'criminal case' for purposes of the Self–Incrimination Clause."); Pet. App. 6a ("The *Chavez* Court did not decide the precise moment when a 'criminal case' commences." (citation omitted)).

4. The split is unlikely to resolve itself without this Court's intervention. The Tenth Circuit denied a petition for rehearing in this case, see Pet. App. 45a, and courts on both sides of the split have reaffirmed their position in recent decisions.[3] Within the Third, Fourth,

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[3] See, *e.g.*, *Brown* v. *SEPTA*, 539 Fed. Appx. 25, 28 (3d Cir. 2013) ("[The plaintiff] may not base a § 1983 claim for a violation of constitutional rights on the mere fact that the police questioned him in custody without providing *Miranda* warnings when there is no claim that [the plaintiff's] answers were used against him at trial.") (citing *Renda*); *Busick* v. *Neal*, 380 Fed. Appx. 392, 394

Fifth, and Eighth Circuits, district courts routinely apply the "trial only" construction to reject Fifth Amendment claims.[4] In contrast, district courts in the Second, Seventh, and Ninth Circuits have relied on those circuits' more expansive understanding of what qualifies as use in a "criminal case" in denying dispositive motions filed by defendants.[5]

(5th Cir. 2010) ("[T]he statement [the plaintiff] made to [the defendant] was not used against him at trial, and [the plaintiff] thus cannot raise a Fifth Amendment claim.") (citing *Murray*); *Crowe* v. *Cty. of San Diego*, 608 F.3d 406, 427 (9th Cir. 2010) (citing *Stoot* and applying its rationale to pre-trial juvenile offender hearings and grand jury proceedings), cert. denied, 562 U.S. 1135 (2011).

[4] See, *e.g.*, *Rodenbaugh* v. *Santiago*, No. 16-CV-2158, 2017 WL 194238, at *7 (E.D. Pa. Jan. 18, 2017) (citing *Renda* and rejecting a Fifth Amendment claim because the plaintiff failed to allege "that any [compelled] statement * * * was used against her at trial"); *Bowman* v. *Mann*, No. 315CV521, 2016 WL 6093489, at *3 (E.D. Va. Oct. 18, 2016) ("Here, [the plaintiff] 'does not allege any trial action that violated his Fifth Amendment rights; thus, ipso facto, his claim fails.'") (emphases omitted) (citing *Burrell*); *Vicknari* v. *La. Dep't of Wildlife and Fisheries*, No. 6:11–CV–184, 2013 WL 1180834, at *11 (W.D. La. Jan. 29, 2013) ("Here, it is undisputed that the plaintiffs' confessions were never used against them at any criminal trial. Accordingly, the Fifth Amendment was not violated."); accord *Brooks* v. *Luther*, No. 15-CV-6707 (JBS-KMW), 2017 WL 626711, at *3 (D.N.J. Feb. 15, 2017); *Smith* v. *Jerrome*, No. 3:13-CV-544, 2015 WL 1349661, at *3 (E.D. Va. Mar. 24, 2015); *Smart* v. *United States*, No. EP–10–CV–253–PRM, 2010 WL 4929107, at *9 (W.D. Tex. Nov. 30, 2010).

[5] See, *e.g.*, *Kenney* v. *Clay*, 172 F. Supp. 3d 628, 640–641 (N.D.N.Y. 2016) (denying summary judgment where plaintiff's Fifth Amendment claim was based on the use of compelled statements at a preliminary bail hearing and grand jury proceeding); *Saunders* v. *City of Chi.*, No. 12–cv–09158, 2013 WL 6009933, at

B. The decision below is wrong

As this Court has explained, the shorthand phrase "'privilege against self-incrimination' is not an entirely accurate description of a person's constitutional protection against being 'compelled in any criminal case to be a witness against himself.'" *United States* v. *Hubbell*, 530 U.S. 27, 34 (2000). "Mere compulsion" does not violate the Self-Incrimination Clause. *Chavez*, 538 U.S. at 772-773 (opinion of Thomas, J.) Rather, the Self-Incrimination Clause is a "*trial* right." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 259 (1990) (emphasis added), and is violated only when a criminal defendant's compelled statements are used *at trial*.

1. This Court consistently has described the right against self-incrimination as a trial right. In *Verdugo-Urquidez*, for example, the Court stated that even when law enforcement officials compel defendants to make incriminating statements "a constitutional violation only occurs at trial." 494 U.S. at 264. Similarly, in *Withrow* v. *Williams*, 507 U.S. 680 (1992), the Court stated that the *Miranda* doctrine safeguards "a fundamental *trial* right." *Id.* at 691 (citation omitted); accord

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*4 (N.D. Ill. Nov. 13, 2013) ("[A] defendant is compelled to be witness against himself in violation of the Fifth Amendment when his unlawful confession is introduced at a pretrial proceeding."); *Hall* v. *Idaho Dep't of Fish and Game*, No. 2:11–cv–00622, 2013 WL 2458537, at *11 (D. Idaho June 6, 2013) (holding that plaintiff's Fifth Amendment claim accrued when his compelled statement was used at a probable cause hearing); accord *Thomsen* v. *City of New York*, 15cv2668 (DLC), 2016 WL 590235, at *9–*10 (S.D.N.Y. Feb. 11, 2016); *Hurt* v. *Vantlin*, No. 3:14–cv–00092–JMS–MPB, 2017 WL 1021396, at *16 (S.D. Ind. Mar. 16, 2017).

Chavez, 538 U.S. at 777 (Souter, J., concurring in the judgment) (stating that the Fifth Amendment "focuses on courtroom use of a criminal defendant's compelled, self-incriminating testimony").

2. Well-established features of this Court's jurisprudence support the same conclusion. For example, a criminal defendant cannot challenge an indictment on the theory that the grand jury considered his own compelled, incriminating statements. See *United States* v. *Calandra*, 414 U.S. 338 (1974); *Lawn* v. *United States*, 355 U.S. 339 (1958). This result is hard to explain if the Fifth Amendment is violated the moment a defendant's compelled statements are used during pretrial proceedings. But it makes perfect sense if "[t]he Fifth Amendment privilege against self-incrimination is a fundamental trial right which can be violated only *at* trial." *Murray*, 405 F.3d at 285.

3. The Fifth Amendment's text—particularly its use of the word "witness"—is consistent with this understanding of the Self-Incrimination Clause as fundamentally a trial right. At the time of the founding, "witness" meant "a person who gives or furnishes evidence." *Hubbell*, 530 U.S. at 50 (Thomas, J. concurring); accord Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857, 900 (1995) ("Witnesses are those who take the stand and testify, or whose out-of-court depositions or affidavits are introduced at trial in front of the jury.").

This understanding of "witness" in the Fifth Amendment also is consistent with the use and construction of that same word in the Sixth Amendment.

The Sixth Amendment guarantees criminal defendants the right to confront opposing "witnesses" and "to have compulsory process for obtaining witnesses in [their] favor." Both of these rights are exercised at trial. In fact, this Court has specifically rejected the claim that a criminal defendant has any right to confront the people who testify against her before a grand jury or to present her own witnesses. See *United States* v. *Williams*, 504 U.S. 36, 52 (1992) (stating that a target of a grand jury inquiry has no right "to tender his own defense").

C. This issue is important and recurring

"[T]he Government, as an employer, must have wide discretion and control over the management of its personnel." *Arnett* v. *Kennedy*, 416 U.S. 134, 168 (1974). Municipalities employ more than 14 million people, more than those employed by state and federal governments combined.[6] The roles of municipal employees are also more varied. Local governments employ teachers, fire fighters, police officers, correctional officers, nurses, and transportation workers.[7]

Unlike nearly all government employers and employees, however, municipalities are neither immune

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[6] Bureau of Labor Statistics, *The Employment Situation– February 2017*, Table B-1 Employees on nonfarm payrolls by industry sector and selected industry detail 31 (Feb. 2017) https://www.bls.gov/news.release/archives/empsit_03102017.pdf.

[7] Elizabeth McNichol, Center on Budget and Policy Priorities, *Some Basic Facts on State and Local Government Workers* (Jun. 15, 2012), http://www.cbpp.org/research/some-basic-facts-on-state-and-local-government-workers.

from suit nor eligible for a qualified immunity defense.[8] For that reason, it is especially important that municipal employers have clear guidance about the scope of their constitutional obligations. Local governments must be able to manage their employees and discharge those who betray the public trust.

Whether pretrial use of allegedly compelled statements implicates the Self-Incrimination Clause is especially significant because of the growing importance of pretrial proceedings. This Court has recognized "the reality that criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler* v. *Cooper*, 566 U.S. 156, 170 (2012).[9] The lower courts' different approaches, therefore, have the potential to impact a great many cases other than this one and create uncertainty for local governments.

This issue has particularly broad ramifications for law enforcement. An officer in the field does not always know whether a court will later determine that a statement was compelled. In fact, courts hold preliminary hearings to decide that very question. *Jackson* v. *Denno*, 378 U.S. 368 (1964). The problem is only compounded by the fact that Self-Incrimination Clause analysis often depends on the totality of the circumstances, including factors such as age, education, prior

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[8] See *Owen* v. *City of Independence*, 445 U.S. 622 (1980) (holding that municipalities, unlike individuals, are not entitled to a qualified immunity defense).

[9] See also Lindsey Devers, *Research Summary: Plea and Charge Bargaining*, Bureau of Justice Statistics 1 (2011) ("90 to 95 percent of both federal and state court cases are resolved through [pleas]"), https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf.

criminal experience, the manner of interrogation, and the existence of threats or inducement.[10] Officers—and the municipalities that employ them—cannot always predict whether their actions will be found to have violated the Fifth Amendment. As a result, it matters a great deal which uses of allegedly compelled statements do—and do not—expose municipalities to liability under Section 1983.

D. This case presents a clean vehicle

This case presents a clean vehicle for clarifying the meaning of the Fifth Amendment's Self-Incrimination Clause. There is no dispute about the jurisdiction of either lower court. Because this is an appeal from the grant of a motion to dismiss for failure to state a claim, there are no disputed factual questions. All relevant issues were raised and preserved on appeal. The case was litigated on the assumption that the statements were compelled, so the only question is whether the use of the incriminating statements at the probable cause hearing violated the Self-Incrimination Clause. There are no alternative grounds of decision to support the judgment. Eight circuits and one state supreme court have considered the single issue presented in this petition for a writ of certiorari, and the court below expressly acknowledged the conflict, see Pet. App. 6a. This conflict is fully developed, squarely presented, and free from any threshold questions. It warrants this Court's immediate review.

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[10] See *Arizona* v. *Fulminante*, 499 U.S. 279, 286 (1991); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226 (1973).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2017

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 15-3266

MATTHEW JACK DWIGHT VOGT,
PLAINTIFF – APPELLANT

v.

CITY OF HAYS, KANSAS; CITY OF HAYSVILLE, KANSAS; DON SCHEIBLER; JEFF WHITFIELD; KEVIN SEXTON; BRANDON WRIGHT, DEFENDANTS – APPELLEES

Decided: January 4, 2017

Before: HARTZ, BACHARACH, and McHUGH, Circuit Judges.

BACHARACH, Circuit Judge:

Mr. Matthew Vogt alleges a violation of the Fifth Amendment through the compulsion to incriminate himself and the use of his compelled statements in a criminal case. Based on the alleged Fifth Amendment violation, Mr. Vogt invokes 42 U.S.C. § 1983, suing (1) the City of Hays, Kansas; (2) the City of Haysville, Kansas; and (3) four police officers. The district court dismissed the complaint for failure to state a claim, reasoning that

- the right against self-incrimination is only a trial right and

- Mr. Vogt's statements were used in pretrial proceedings but not in a trial.

We draw four conclusions:

1. The Fifth Amendment is violated when criminal defendants are compelled to incriminate themselves and the incriminating statement is used in a probable cause hearing.
2. The individual officers are entitled to qualified immunity.
3. The City of Haysville did not compel Mr. Vogt to incriminate himself.
4. Mr. Vogt has stated a plausible claim for relief against the City of Hays.

Accordingly, we (1) affirm the dismissal of the claims against the four police officers and Haysville and (2) reverse the dismissal of the claim against the City of Hays.

I. Mr. Vogt alleges that his compelled statements were used in a criminal case.

Because this appeal is based on a dismissal for failure to state a valid claim, we credit the factual allegations in the complaint. *Brown v. Montoya*, 662 F.3d 1152, 1162 (10th Cir. 2011).

Mr. Vogt was employed as a police officer with the City of Hays. In late 2013, Mr. Vogt applied for a position with the City of Haysville's police department. During Haysville's hiring process, Mr. Vogt disclosed that he had kept a knife obtained in the course of his work as a Hays police officer.

Notwithstanding this disclosure, Haysville offered the job to Mr. Vogt. But his disclosure about the knife led Haysville to make the offer conditional: Mr. Vogt could obtain the job only if he reported his acquisition

of the knife and returned it to the Hays police department. Two Haysville police officers said that they would follow up with Hays to ensure that Mr. Vogt complied with the condition.

Mr. Vogt satisfied the condition, reporting to the Hays police department that he had kept the knife. The Hays police chief reacted by ordering Mr. Vogt to submit a written report concerning his possession of the knife. Mr. Vogt complied, submitting a vague one sentence report. He then provided Hays with a two-week notice of resignation, intending to accept the new job with Haysville.

In the meantime, the Hays police chief began an internal investigation into Mr. Vogt's possession of the knife. In addition, a Hays police officer required Mr. Vogt to give a more detailed statement in order to keep his job with the Hays police department. Mr. Vogt complied, and the Hays police used the additional statement to locate additional evidence.

Based on Mr. Vogt's statements and the additional evidence, the Hays police chief asked the Kansas Bureau of Investigation to start a criminal investigation. In light of this request, the Hays police department supplied Mr. Vogt's statements and additional evidence to the Kansas Bureau of Investigation. The criminal investigation led the Haysville police department to withdraw its job offer.

Mr. Vogt was ultimately charged in Kansas state court with two felony counts related to his possession of the knife. Following a probable cause hearing, the state district court determined that probable cause was lacking and dismissed the charges.

This suit followed, with Mr. Vogt alleging use of his statements (1) to start an investigation leading to the

discovery of additional evidence concerning the knife, (2) to initiate a criminal investigation, (3) to bring criminal charges, and (4) to support the prosecution during the probable cause hearing. Mr. Vogt argues that these uses of his compelled statements violated his right against self-incrimination.

II. Standard of Review

We engage in de novo review of the district court's dismissal. *Mocek v. City of Albuquerque*, 813 F.3d 912, 921 (10th Cir. 2015). To survive the motion to dismiss, Mr. Vogt had to plead enough facts to create a facially plausible claim. *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012). The claim is facially plausible if Mr. Vogt pleaded enough factual content to allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

III. The Meaning of a "Criminal Case" Under the Fifth Amendment

The Fifth Amendment[11] protects individuals against compulsion to incriminate themselves "in any criminal case." U.S. Const. amend. V. This amendment prohibits compulsion of law enforcement officers to make self-incriminating statements in the course of employment. *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). As a law enforcement officer, Mr. Vogt enjoyed protection under the Fifth Amendment against use of his compelled statements in a criminal case.

The district court held that Mr. Vogt had not stated a valid claim under the Fifth Amendment because the incriminating statements were never used at trial. We

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[11] The Fifth Amendment applies to the states through incorporation of the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

disagree, concluding that the phrase "criminal case" includes probable cause hearings.

A. Our precedents provide conflicting signals on whether the term "criminal case" includes pretrial proceedings as well as the trial.

The U.S. Supreme Court has not conclusively defined the scope of a "criminal case" under the Fifth Amendment. In dicta, the Supreme Court suggested in a 1990 opinion, *United States v. Verdugo-Urquidez*, that the right against self-incrimination is only a trial right. 494 U.S. 259, 264 (1990).

But the Supreme Court later appeared to retreat from that dicta. In *Mitchell v. United States*, for instance, the Court held that the right against self-incrimination extends to sentencing hearings. 526 U.S. 314, 320–21, 327 (1999). The Court reasoned that "[t]o maintain that sentencing proceedings are not part of 'any criminal case' is contrary to the law and to common sense." *Id.* at 327.

Even more recently, the Court again addressed the scope of the Fifth Amendment in *Chavez v. Martinez*, 538 U.S. 760 (2003). In *Chavez*, the plaintiff sued a police officer under § 1983, alleging coercion of self-incriminating statements in violation of the Fifth Amendment. 538 U.S. at 764–65. Writing for himself and two other justices, Justice Thomas concluded that (1) the plaintiff had failed to state a valid claim because he had not been charged with a crime and (2) the plaintiff's statements had not been used in a criminal case. *Id.* at 766.

Though the Court did not produce a majority opinion on the Fifth Amendment issue, Justice Thomas's plurality opinion explained that "mere coercion does not violate the text of the Self-Incrimination Clause

absent use of the compelled statements in a criminal case against the witness." *Id.* at 769. Justice Thomas added that "[a] 'criminal case' at the very least requires the initiation of legal proceedings." *Id.* at 766. Two other justices agreed with the outcome, reasoning that the Fifth Amendment's text "focuses on *courtroom use* of a criminal defendant's compelled, self-incriminating testimony." *Id.* at 777 (Souter, J., concurring in the judgment) (emphasis added).

The *Chavez* Court did not decide "the precise moment when a 'criminal case' commences." *Id.* at 766–67. Justice Thomas cited *Verdugo-Urquidez*, but apparently did not read it to limit the Fifth Amendment to use at trial. *See id.* at 767.

Three other justices stated that a violation of the Self-Incrimination Clause is complete the moment a confession is compelled. *Id.* at 795 (Kennedy, J., concurring in part and dissenting in part). Thus, even in light of *Verdugo-Urquidez*, these three justices concluded that the Fifth Amendment extended beyond use of a compelled statement at trial. *Id.* at 792.

Following *Chavez*, a circuit split developed over the definition of a "criminal case" under the Fifth Amendment. The Third, Fourth, and Fifth Circuits have stated that the Fifth Amendment is only a trial right.[12] *See Renda v. King*, 347 F.3d 550, 552 (3d Cir. 2003) ("[A] plaintiff may not base a § 1983 claim on the mere fact that the police questioned her in custody without

[12] The defendants contend that the Sixth Circuit Court of Appeals has also held that the Fifth Amendment is only a trial right. Appellees' Br. at 20–21. But the court did so only in an unpublished opinion. *Smith v. Patterson*, 430 F. App'x 438, 441 (6th Cir. 2011). The court's unpublished opinions do not constitute binding precedent even in the Sixth Circuit. *Graiser v. Visionworks of America, Inc.*, 819 F.3d 277, 283 (6th Cir. 2016).

providing *Miranda* warnings when there is no claim that the plaintiff's answers were used against her at trial."); *Burrell v. Virginia*, 395 F.3d 508, 514 (4th Cir. 2005) ("[The plaintiff] does not allege any *trial* action that violated his Fifth Amendment rights; thus, *ipso facto*, his claim fails on the [*Chavez*] plurality's reasoning."); *Murray v. Earle*, 405 F.3d 278, 285 (5th Cir. 2005) ("The Fifth Amendment privilege against self-incrimination is a fundamental trial right which can be violated only *at* trial, even though pre-trial conduct by law enforcement officials may ultimately impair that right.").

In contrast, the Second, Seventh, and Ninth Circuits have held that certain pretrial uses of compelled statements violate the Fifth Amendment. For example, the Second Circuit has applied *Chavez* to hold that a bail hearing is part of a criminal case under the Fifth Amendment. *Higazy v. Templeton*, 505 F.3d 161, 171, 173 (2d Cir. 2007). The Seventh Circuit has similarly held that a criminal case under the Fifth Amendment includes not only bail hearings but also suppression hearings, arraignments, and probable cause hearings. *Best v. City of Portland*, 554 F.3d 698, 702–03 (7th Cir. 2009) (suppression hearing); *Sornberger v. City of Knoxville*, 434 F.3d 1006, 1027 (7th Cir. 2006) (bail hearings, arraignments, and probable cause hearings). And the Ninth Circuit has concluded that a Fifth Amendment violation occurs when "[a] coerced statement . . . has been relied upon to file formal charges against the declarant, to determine judicially that the prosecution may proceed, and to determine pretrial custody status." *See Stoot v. City of Everett*, 582 F.3d 910, 925 (9th Cir. 2009).

Different approaches have emerged because the *Chavez* Court declined to pinpoint when a "criminal case" begins. *See Koch v. City of Del City*, 660 F.3d

1228, 1245 (10th Cir. 2011) (noting that "the plurality in *Chavez* explicitly declined to decide 'the precise moment when a "criminal case" commences'"). Like the Supreme Court, we have not yet defined the starting point for a "criminal case." *See id.* at 1246 (avoiding this issue by holding that at the time of the plaintiff's arrest, "it was not clearly established that an individual has a Fifth Amendment right to refuse to answer an officer's questions during a *Terry* stop"); *Eidson v. Owens*, 515 F.3d 1139, 1149 (10th Cir. 2008) (declining to define the scope of the right against self-incrimination because the plaintiff "never incriminated herself during a custodial interrogation").

The defendants argue that we have consistently held that the Fifth Amendment right is only a trial right. We disagree.

In support of their argument, the defendants cite our opinions in *Bennett v. Passic*, 545 F.2d 1260 (10th Cir. 1976), and *Pearson v. Weischedel*, 349 F. App'x 343 (10th Cir. 2009) (unpublished). These opinions do not help in answering our question. In *Bennett*, we held that civil liability may not arise from (1) failure to give *Miranda* warnings or (2) testimony about compelled statements. 545 F.2d at 1263–64. These scenarios are not involved here. And in our unpublished opinion in *Pe*arson, we rejected a Fifth Amendment claim, stating that the plaintiff had pleaded guilty and had never gone to trial. *Pearson*, 349 F. App'x at 348. Our analysis was brief and omitted discussion of *Chavez*. Thus, *Pearson* does not aid our inquiry.

In addition, the defendants read *In re Grand Jury Subpoenas Dated Dec. 7 & 8 (Stover)*, 40 F.3d 1096 (10th Cir. 1994), to suggest that a violation of the right against self-incrimination occurs only at trial. This suggestion is based on a questionable interpretation of

the opinion. In *Stover*, the parties agreed that a Fifth Amendment violation occurs when a grand jury returns an indictment based on a compelled statement. 40 F.3d at 1100–01. Notwithstanding the parties' agreement on this issue, we quoted language from an earlier opinion describing the Fifth Amendment as a trial right. *See id.* at 1103 ("The time for protection [of the right against self-incrimination] will come when, if ever, the government attempts to use [allegedly incriminating] information against the defendant at trial." (quoting *United States v. Peister*, 631 F.2d 658, 662 (10th Cir. 1980))).

Though we quoted this restrictive language, we also suggested in dicta that the parties had correctly assumed that the Fifth Amendment is triggered when a compelled statement is used during grand jury proceedings. *See id.* at 1103 ("If an officer, whose compelled statement has been considered by the grand jury, ultimately is indicted, that officer will be able to challenge the indictment and the government will be required to prove that its evidence derives entirely from legitimate sources or that the grand jury's exposure to the officer's statement was harmless."). Thus, *Stover* arguably suggests that the right against self-incrimination is not simply a trial right.

* * *

These precedents supply conflicting signals on whether the term "criminal case" extends beyond the trial itself. The dicta in *Verdugo-Urquidez* suggests that the term "criminal case" refers only to the trial. This dicta would ordinarily guide us, for Supreme Court dicta is almost as influential as a Supreme Court holding. *Indep. Inst. v. Williams*, 812 F.3d 787, 798 n.13 (10th Cir. 2016). But after deciding *Verdugo-Urquidez*, the Supreme Court interpreted the term

"criminal case" in *Mitchell* to include sentencing proceedings. And even later, the Supreme Court declined in *Chavez* to define when a "criminal case" begins.

Like the Supreme Court, we have declined until now to unequivocally state whether the term "criminal case" covers pretrial proceedings as well as the trial. Precedents like *Stover* provide conflicting signals without squarely deciding the issue. Nonetheless, today's case requires us to decide whether the term "criminal case" covers at least one pretrial proceeding: a hearing to determine probable cause.

B. The right against self-incrimination applies to use in a probable cause hearing as well as at trial.

To decide this issue, we join the Second, Seventh, and Ninth Circuits, concluding that the right against self-incrimination is more than a trial right. In reaching this conclusion, we rely on

- the text of the Fifth Amendment, which we interpret in light of the common understanding of the phrase "criminal case," and
- the Framers' understanding of the right against self-incrimination.

The Fifth Amendment provides that no person shall be "compelled in any *criminal case* to be a witness against himself." U.S. Const. amend. V (emphasis added). The text of the Fifth Amendment does not contain

- the term "trial," which appears in the next two amendments, or
- the term "criminal prosecution," which is used in the next amendment.

See U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and

public trial . . . ."); *id.* amend. VII ("In suits at common law . . . the right of trial by jury shall be preserved . . . .").

The Supreme Court discussed the distinction between the language of the Fifth and Sixth Amendments in *Counselman v. Hitchcock*, 142 U.S. 547 (1892), *overruled in part on other grounds by Kastigar v. United States*, 406 U.S. 441 (1972). In *Counselman*, the government argued that a witness could not invoke the Fifth Amendment in a grand jury proceeding because a "criminal case" did not exist. 142 U.S. at 562–63. The Supreme Court rejected this argument. After analyzing the Fifth Amendment's text and underlying purpose, the Court held that the witness could plead the Fifth Amendment during a grand jury proceeding. *Id.* In the course of its analysis, the Court reasoned that the language "criminal case" is broader than the Sixth Amendment's phrase "criminal prosecution." *Id.*

We agree with the *Counselman* Court that the term "criminal case" is broader than the term "criminal prosecution." Indeed, on its face, the term "criminal case" appears to encompass all of the proceedings involved in a "criminal prosecution."

"The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning . . . ." *United States v. Sprague*, 282 U.S. 716, 731 (1931). To determine the commonly understood meaning of the phrase "criminal case" at the time of ratification (1791), we examine dictionary definitions from the Founding era. *See* Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 Geo. Wash. L. Rev. 358, 365 (2014); *see also*

William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. Davis L. Rev. 1311, 1338 n.99 (2007) (stating that contemporaneous dictionaries "obviously . . . provide some guidance to the commonly understood meaning of a particular word at the time that word was used in the constitutional text").

The most authoritative dictionary of that era was Noah Webster's 1828 dictionary, *An American Dictionary of the English Language*. *See* John A. Sterling, *Above the Law: Evolution of Executive Orders (Part One)*, 31 UWLA L. Rev. 99, 107 (2000) (stating that most historians use Noah Webster's 1828 dictionary when trying to determine the meaning of words during adoption of the Constitution); *see also* Charles Wood, *Losing Control of America's Future—The Census, Birthright Citizenship, and Illegal Aliens*, 22 Harv. J.L. & Pub. Pol'y 465, 478 (1999) (stating that Noah Webster's 1828 dictionary was "the first and for many years the authoritative American dictionary"); Steven G. Calabresi & Andrea Matthews, *Originalism and* Loving v. Virginia, 2012 B.Y.U. L. Rev. 1393, 1425 (2012) (describing Noah Webster's 1828 dictionary as "an incredible achievement" and as a "dominant" source since its publication); Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 Geo. Wash. L. Rev. 358, 389–90 (2014) (stating that the Supreme Court often cites Noah Webster's 1828 dictionary as evidence of the original meaning of the Constitution, perhaps based on a belief "that the dictionary may reflect better the ways in which Americans used and understood the words in the Constitution"). Webster's 1828 dictionary defines "case" as "[a] cause or suit in court," stating that the term "is nearly synonymous with *cause*." Noah Webster, *Case*, *An*

American Dictionary of the English Language (1st ed. 1828). And the dictionary defines the "nearly synonymous" term "cause" as "[a] suit or action in court." *Id.*, *Cause*. Similarly, N. Bailey's 1789 dictionary broadly defines "case" as a "thing, matter, question." N. Bailey, *The Universal Etymological English Dictionary*, *Case* (26th ed. 1789).[13]

The Founders' understanding of the term "case" suggests that the Fifth Amendment encompasses more than the trial itself. *See* Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down that Wrong Road Again,"* 74 N.C. L. Rev. 1559, 1627 (1996).[14] "If the Framers had meant to restrict the right to 'trial,' they could have said so."

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[13] The Founders recognized that a word's meaning often changes over time. *See* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. Chi. L. Rev. 519, 534 (2003) ("Americans of the founding generation tended to agree with [Samuel Johnson, the 18th century's leading lexicographer] that language change was inevitable."). But modern legal dictionaries define "case" much as our Founders did. *See Black's Law Dict.* 258 (Bryan A. Garner ed., 10th ed. 2014) (defining "case" as "[a] civil or criminal proceeding, action, suit, or controversy at law or in equity"); *A Handbook of Criminal Law Terms* 84 (Bryan A. Garner ed., 2000) (defining "case" as "[a] proceeding, action, suit, or controversy at law or in equity"); *Dict. of Legal Terms* 70 (Steven H. Gifis, 4th ed. 2008) (defining "case" as "an action, cause, suit, or controversy, at law or in equity"); *see also* Martin H. Redish & Adrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. Chi. L. Rev. 545, 565 (2006) ("[C]urrent-day legal dictionaries define 'case' as a justiciable 'action or suit,' or an 'argument.'" (footnotes omitted)).

[14] Professor Dripps stated:

> A "case" in any event is not necessarily identical to a "prosecution." The Sixth Amendment uses the latter term, in dealing with the criminal trial. The Fifth Amendment, by contrast, con-

Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in* Chavez v. Martinez, 70 Tenn. L. Rev. 987, 1014 (2003).

This interpretation is supported by the Supreme Court's opinion in *Blyew v. United States*, 80 U.S. 581 (1871). In *Blyew*, the Supreme Court addressed the meaning of the word "cases" in Article III's reference, "all cases affecting ambassadors, other public minsters, and consuls." 80 U.S. at 594. The *Blyew* Court explained that "[t]he words 'case' and 'cause' are constantly used as synonyms in statutes and judicial decisions, each meaning a proceeding in court, a suit, or action." *Id.* at 595. Like the dictionary definitions from 1828 to now, Blyew defines "case" broadly, suggesting that a "criminal case" is not limited to the criminal trial.

We are aided not only by Founding-era dictionary definitions and *Blyew* but also by the Framers' understanding of the phrase "in any criminal case." We have few contemporaneous clues of that understanding, for "references to the privilege [against self-incrimination] are scarce in the literature and debates surrounding the ratification of the Constitution and the Bill of Rights." Michael Edmund O'Neill, *The Fifth Amendment in Congress: Revisiting the Privilege Against Compelled Self-Incrimination*, 90 Geo. L.J. 2445, 2486

> tains a miscellany of rights, some against criminal and some against civil liabilities. We speak routinely of police investigators working on a case before they have a suspect. If we think of a "case" as a potential "prosecution" we can square the text of the Fifth Amendment with its history.

Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down that Wrong Road Again,"* 74 N.C. L. Rev. 1559, 1627 (1996) (footnotes omitted).

(2002). But the few existing clues suggest that the Framers viewed the Fifth Amendment as a right in pretrial proceedings as well as at trial.

One clue involves the changes in the Fifth Amendment from drafting to ratification. The amendment had been drafted by James Madison, who omitted the phrase "criminal case":

> No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence; *nor shall be compelled to be a witness against himself*; nor be deprived of life, liberty, or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without just compensation.

James Madison, Remarks in Debate in the House of Representatives (June 8, 1789) (emphasis added), *reprinted in* 1 *Debates and Proceedings in the Congress of the United States* 448, 451–52 (Joseph Gales ed., 1834); United States Congress, *Debates and Proceedings in the Congress of the United States* 451–52 (Washington, D.C. 1834). This language "applied to civil as well as criminal proceedings and in principle to any stage of a legal inquiry, from the moment of arrest in a criminal case, to the swearing of a deposition in a civil one." Leonard W. Levy, *Origins of the Fifth Amendment* 423 (1968).

In the floor debate on whether to adopt the Bill of Rights, Representative Laurance expressed concern that Madison's wording would conflict with "laws passed." Statement of Representative John Laurance (Aug. 17, 1789), *reprinted in* 1 *Debates and Proceedings in the Congress of the United States* 782, 782. To

avoid this conflict, Representative Laurance proposed to add the phrase "in any criminal case." *Id.* Representative Laurance's language was accepted in the House and Senate. Leonard W. Levy, *Origins of the Fifth Amendment* 424–26 (1968).

It is unclear which "laws" Representative Laurance was talking about. One possibility was the proposed Judiciary Act, which would allow the judiciary to compel production of documents in civil cases.[15] *See United States v. Hubbell*, 530 U.S. 27, 53–54 n.3 (2000) (Thomas, J., concurring). Another possibility was the Collections Act, which allowed officials to require oaths in customs declarations. Act of July 31, 1789, ch. 5 section 13, 1 Stat. 29, 39–40; see Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 705 n.450 (1999). But whichever law was at risk, Representative Laurance was apparently trying to distinguish between potential criminal liability and civil liability. *See* Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in* Chavez v. Martinez, 70 Tenn. L. Rev. 987, 1017 (2003) ("[R]egardless of which provision Laurance referred to, it is still the case that his concern was not to limit the right to criminal trials as such but only to preserve the distinction that the right applied only to potential criminal liability rather than civil liability.").

When Representative Laurance proposed to confine the Fifth Amendment to a "criminal case," there

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[15] When Representative Laurance proposed to add the phrase "in any criminal case," the Judiciary Act of 1789 had passed in the Senate and remained pending in the House of Representatives. Michael Edmund O'Neill, *The Fifth Amendment in Congress: Revisiting the Privilege Against Compelled Self-Incrimination*, 90 Geo. L.J. 2445, 2484 (2002).

was a consensus that the right against self-incrimination was not limited to a suspect's own trial. To the contrary, "the historical sources show that the right against self-accusation was understood to arise primarily in pretrial or pre-prosecution settings rather than in the context of a person's own criminal trial." *Id.* at 1017–18. If this right were limited to one's own trial, the right would have served little purpose, for criminal defendants were then unable to testify in their own criminal cases. *See Ferguson v. Georgia*, 365 U.S. 570, 574 (1961) (stating that when the United States was formed, "criminal defendants were deemed incompetent as witnesses").

The most natural place for concern about compelled testimony would have been in proceedings outside of criminal trials, such as grand jury proceedings. *See* David Rossman, *Conditional Rules in Criminal Procedure: Alice in Wonderland Meets the Constitution*, 26 Ga. St. U.L. Rev. 417, 488 (2010).

After adopting Representative Laurance's language, the Senate reorganized the cluster of rights that ultimately went into the Fifth and Sixth Amendments. "In what was to be the Sixth Amendment the Senate clustered together the procedural rights of the criminally accused after indictment." Leonard W. Levy, *Origins of the Fifth Amendment* 427 (1968); *see also* Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in* Chavez v. Martinez, 70 Tenn. L. Rev. 987, 1013 (2003) ("[T]he Sixth Amendment plainly deals with rights that protect 'the accused' during the court phase of prosecutions, including trials."). This grouping of Sixth Amendment rights omitted the right against self-incrimination, which was put into the Fifth

Amendment with other rights that unambiguously extended to pretrial proceedings as well as the trial:

> That the self-incrimination clause did not fall into the Sixth Amendment indicated that the Senate, like the House, did not intend to follow the implication of [Section 8 of the 1776 Virginia Declaration of Rights] . . . that the right not to give evidence against oneself applied merely to the defendant on trial. The Sixth Amendment, referring explicitly to the accused, protected him alone. Indeed the Sixth Amendment, with the right of counsel added, was the equivalent of Virginia's Section 8 and included all of its rights except that against self-incrimination. Thus, the location of the self-incrimination clause in the Fifth Amendment rather than the Sixth proves that the Senate, like the House, did not intend to restrict that clause to the criminal defendant only nor only to his trial. The Fifth Amendment, even with the self-incrimination clause restricted to criminal cases, still puts its principles broadly enough to apply to witnesses and to any phase of the proceedings.

Leonard W. Levy, *Origins of the Fifth Amendment* 427 (1968); *see also* Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in* Chavez v. Martinez, 70 Tenn. L. Rev. 987, 1009–13 (2003) ("[T]he right against compelled self-accusation is in the wrong amendment to be a

'trial right.'"); Michael J. Zydney Mannheimer, *Ripeness of Self-Incrimination Clause Disputes*, 95 J. Crim. L. & Criminology 1261, 1322 (2005) ("It appears that the placement of the Self-Incrimination Clause in the Fifth Amendment rather than the Sixth signifies that a 'criminal case' can exist before a 'criminal prosecution[]' commences." (alteration in original)).

In sum, there is nothing to suggest that the Framers were seeking to confine the right against self-incrimination to trial. The Founders apparently viewed the right more broadly, envisioning it to apply beyond the trial itself.

The defendants argue that this interpretation of the Fifth Amendment is impractical because pretrial proceedings are often used to determine whether evidence is admissible at trial. We disagree.

For this argument, the defendants contend that courts have held in other contexts that evidence may be used in pretrial proceedings even if the evidence would be inadmissible at trial.[16] The defendants attempt to import this practice into the Fifth Amendment context. This attempt avoids the question by assuming that the use of compelled statements in pretrial proceedings is not rendered inadmissible by the Fifth Amendment. If the Fifth Amendment applies to pretrial proceedings, the evidence would be considered inadmissible in pretrial proceedings as well as at trial. As a result, the defendants' argument does not help us decide whether the Fifth Amendment precludes use of compelled statements in pretrial proceedings.

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[16] The defendants also observe that the Fifth Amendment does not apply to physical evidence. Appellees' Br. at 25. But the defendants do not tie this observation to their argument for limiting the Fifth Amendment to a trial right.

* * *

Mr. Vogt alleged that his compelled statements had been used in a probable cause hearing. As a result, we conclude that Mr. Vogt has adequately pleaded a Fifth Amendment violation consisting of the use of his statements in a criminal case.[17]

IV. We affirm the dismissal of the claims against the individual police officers and the City of Haysville.

Though we conclude that Mr. Vogt has adequately pleaded the use of his compelled statements in a criminal case, we affirm the dismissal of the (1) claims against the four police officers based on qualified immunity and (2) claims against the City of Haysville based on its lack of compulsion in Mr. Vogt's making of a self-incriminating statement.

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[17] The defendants argue that Mr. Vogt

> is not entitled to rely upon an inference that his alleged admissions were "admitted into evidence through witness testimony." Aplt. Brief, p. 31. No facts have been pled regarding the admission of any self-incriminatory statements into evidence or any witness testimony based thereon, and such facts cannot be reasonably inferred, because they are flatly inconsistent with the fact that the charges against Vogt were dismissed. The only reasonable inference to be drawn from the fact of dismissal is that Vogt's admissions (if any) were not admitted into evidence by the court.

Appellees' Br. at 37. We disagree. Mr. Vogt's complaint states that the "compelled statements and fruits thereof were used against him in a criminal case." Appellant's App. at 15. At this stage, we can reasonably infer that these statements were used to support probable cause.

A. The four police officers are entitled to qualified immunity.

We conclude that the four police officers are protected by qualified immunity.

Qualified immunity would protect the officers from suit in the absence of factual allegations plausibly showing the violation of a clearly established constitutional right. *Schwartz v. Booker*, 702 F.3d 573, 579 (10th Cir. 2012).

We apply this test to the constitutional violation: compulsion of self-incriminating statements that were ultimately used in a probable cause hearing. We have already decided that Mr. Vogt's right against self-incrimination was violated when his compelled statements were used in a probable cause hearing in 2014.[18] For the sake of argument, we will also assume that this right was violated in 2013 and 2014 when Mr. Vogt's compelled statements were allegedly used to develop investigatory leads, initiate a criminal investigation, and bring charges. Thus, we must decide whether Mr. Vogt's Fifth Amendment right was clearly established when these violations took place. In our view, the state of the law was not clearly established when Mr. Vogt's compelled statements were allegedly used.

For a constitutional right to be clearly established, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as [Mr. Vogt] maintains." *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1108 (10th Cir. 2008).

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[18] We need not decide whether uses before the probable cause hearing would have constituted additional violations of the Fifth Amendment.

Until today, the applicability of the Fifth Amendment to pretrial proceedings remained unsettled, for the Supreme Court had declined to decide "the precise moment when a 'criminal case' commences"[19] and we had declined to decide whether the Fifth Amendment applied to pretrial proceedings.[20] And outside our circuit, courts had disagreed about the applicability of the Fifth Amendment to pretrial proceedings. *See Mocek v. Albuquerque*, 813 F.3d 912, 929 n.9 (10th Cir. 2015) ("A circuit split will not satisfy the clearly established prong of qualified immunity."). Thus, when the police officers acted, they could not have known that the Fifth Amendment would be violated by the eventual use of the compelled statement to develop investigatory leads, initiate a criminal investigation, bring charges, or support the prosecution in a probable cause hearing. As a result, the alleged constitutional violation was not clearly established.

In similar circumstances, the Ninth Circuit Court of Appeals took a different approach. That court interpreted the Fifth Amendment to apply in a pretrial hearing to determine whether to release or detain the defendant. *Stoot v. City of Everett*, 582 F.3d 910, 925 (9th Cir. 2009). This interpretation required the court to determine whether a police detective enjoyed qualified immunity after compelling a statement that was

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[19] *Chavez v. Martinez*, 538 U.S. 760, 766–67 (2003) (plurality opinion).

[20] *See Koch v. City of Del City*, 660 F.3d 1228, 1245 (10th Cir. 2011) (avoiding this issue by concluding that when the plaintiff was arrested, "it was not clearly established that an individual has a Fifth Amendment right to refuse to answer an officer's questions during a *Terry* stop"); *Eidson v. Owens*, 515 F.3d 1139, 1149 (10th Cir. 2008) (refraining from defining the scope of the right against self-incrimination because the plaintiff "never incriminated herself during a custodial interrogation").

later used in a hearing to determine release or detention. *See id.* at 927–28. To decide qualified immunity, the court considered the underlying purpose of qualified immunity, which was to prevent deterrence of reasonable officers trying to carry out their duties. *Id.* at 927. This purpose led the court to "focus on [the] officer's duties, not on other aspects of the constitutional violation." *Id.*

Focusing on the officer's duties, the court declined to permit qualified immunity because the police detective had been on notice that coercion of a confession could ripen into a Fifth Amendment violation. *Id.* And once the police detective coerced a confession and turned it over to the prosecutor, the detective's role in the constitutional violation was complete. *Id.* at 927–28. Thus, the Ninth Circuit did not tarry over whether the detective would have known which uses would violate the Fifth Amendment; he knew all along that coercing a confession could lead to a Fifth Amendment violation. *Id.* As a result, the Ninth Circuit determined that the detective was not entitled to qualified immunity. *Id.*

We respectfully disagree with this approach. The Ninth Circuit appeared to acknowledge that its test would allow police officers to incur personal liability for contributing to a constitutional violation that had not been clearly established. *See id.* at 913 ("[T]he aspects of the pertinent law not clearly established at the time of the confession did not affect [the detective]'s role in bringing about the violation."). But qualified immunity protects officers from liability when the misconduct did not violate a clearly established right. *See* pp. 26–27, above.

The four police officers allegedly compelled a statement used before trial but not in an actual trial. Until

now, the precedents had not clearly determined whether these uses would have violated the Fifth Amendment. Thus, even if the police officers could have anticipated the eventual use in a probable cause hearing, they could not have known that this use would violate the Fifth Amendment. Thus, we reject the approach taken in the Ninth Circuit.

* * *

Because it was not clearly established in 2013 or 2014 that the pretrial use of Mr. Vogt's statements would violate the Fifth Amendment, the four police officers are entitled to qualified immunity.

B. Mr. Vogt did not adequately allege that Haysville had compelled the making of a self-incriminating statement.

As noted, Haysville conditioned its job offer to Mr. Vogt: he would get the job only if he told the Hays police department that he had taken the knife. According to Mr. Vogt, this condition compelled him to make self-incriminating statements to the City of Hays; Haysville responds that the condition on the job offer was not coercive. We agree with Haysville, concluding that the condition on the job offer did not compel Mr. Vogt to make a self-incriminating statement. Thus, we affirm the dismissal of the claim against Haysville.

The issue stems from the Supreme Court's opinion in *Garrity v. New Jersey*, 385 U.S. 493 (1967). There the Court held that public employers cannot require their employees to waive the right against self-incrimination as a condition of continued employment. 385 U.S. at 497–98, 500. In that case, police officers under investigation faced discharge if they refused to answer incriminating questions without immunity from criminal prosecution. *Id.* at 494, 497. In the Court's view,

the officers faced a Hobson's choice amounting to compulsion: they had to decide between avoiding self-incrimination and losing their jobs. *Id.* at 497–98, 500. Because the incriminating answers had been compelled, they could not be used against the officers in a subsequent criminal proceeding. *Id.*

Garrity has been applied outside of the conventional employment relationship. *See, e.g.*, *Lefkowitz v. Turley*, 414 U.S. 70, 82–83 (1973) (extending *Garrity* to public contractors); *Spevack v. Klein*, 385 U.S. 511, 514, 516 (1967) (applying the Fifth Amendment to potential disbarment). Thus, the Fifth Amendment may be triggered even by the threatened loss of an unsalaried position. For example, in *Lefkowitz v. Cunningham*, the Supreme Court invalidated a state law requiring officers of political parties to either waive their right against self-incrimination or suffer automatic termination from office and a five-year disqualification from public office. 431 U.S. 801, 802–04 (1977). Though the political officers were unpaid, the Court held that the law had presented "grave consequences" because "party offices carry substantial prestige and political influence." *Id.* at 807. The Court also noted the law's potential economic consequences, for the claimant would suffer from the loss of professional standing and the possibility of holding future public offices. *Id.* In addition, the Court pointed out that the law was coercive because it impinged on an individual's right to participate in private, voluntary political associations—a key facet of the freedom guaranteed by the First Amendment. *Id.* at 807–08.

In each of these cases, individuals were threatened with the loss of some benefit or the infringement of an important right that they already enjoyed. These individuals already had a job, government contract, or right that was being threatened upon exercise of the

right against self-incrimination. Our circumstances are different. Mr. Vogt was never an employee of Haysville, and his conditional job offer did not threaten the loss of livelihood or an existing job.

If Mr. Vogt had not wanted to incriminate himself, he could have declined the job offer and continued working for Hays. With that alternative freely available, Mr. Vogt was under no compulsion to comply with Haysville's condition to its job offer.

Mr. Vogt argues that Haysville threatened his ongoing employment relationship with Hays by promising to verify his future disclosure to Hays. According to Mr. Vogt, this threat created an additional measure of compulsion. But the complaint does not suggest that Haysville would contact the City of Hays even if Mr. Vogt had declined the employment offer. In fact, the complaint alleges that the City of Haysville promised to "follow-up with Hays to ensure that [Mr. Vogt] had complied with this *condition of employment*." Appellant's App. at 14 (emphasis added).

Because the complaint characterizes the disclosure requirement as a condition of the job offer, the only reasonable inference is that Haysville would not verify anything if Mr. Vogt were to decline the job offer. Thus, Haysville's promise to follow up with Hays did not compel Mr. Vogt to make a self-incriminating statement.

* * *

We conclude that the conditional job offer was not coercive. On this basis, we affirm the dismissal of the claim against Haysville.

V. Mr. Vogt has stated a valid claim against the City of Hays.

Hays urges three additional grounds for dismissal: (1) Mr. Vogt has not adequately pleaded causation; (2) Hays cannot incur liability because no one with final policymaking authority violated the Constitution; and (3) violation of the Fifth Amendment cannot serve as the basis for a § 1983 claim.[21] We reject these arguments.

A. Mr. Vogt has adequately pleaded causation.

Hays argues that it did not cause a violation of the Fifth Amendment. Rather, Hays submits that it merely gave Mr. Vogt's compelled statements to the Kansas Bureau of Investigation, pointing out that Hays did not make the decision to pursue criminal charges or to use the statements in pretrial proceedings.

Section 1983 imposes liability on a state actor who "causes to be subjected . . . any citizen . . . to the deprivation of any rights." 42 U.S.C. § 1983. This language must be read against the backdrop of tort law, which makes individuals responsible for the natural consequence of their actions. *Martinez v. Carson*, 697 F.3d 1252, 1255 (10th Cir. 2012). Thus, causation exists if Hays initiated actions that it knew or reasonably should have known would cause others to deprive Mr. Vogt of his right against self-incrimination. *Id.* Accordingly, Hays could incur liability even if it had been

[21] Hays also argues that (1) witnesses in criminal proceedings enjoy absolute immunity from civil liability arising out of their testimony and (2) individuals testifying at trial do not act under color of law. But Mr. Vogt does not allege that the defendants acted unlawfully by testifying during the probable cause hearing. Rather, Mr. Vogt alleges that Hays unconstitutionally compelled him to incriminate himself. Though the use of those statements in the probable cause hearing would complete the alleged Fifth Amendment violation, the act of testifying does not serve as the basis of Mr. Vogt's claims.

someone else who used the compelled statements in a criminal case.

Mr. Vogt alleges in the complaint that Hays compelled self-incriminating statements, then initiated a criminal investigation that ended with use of the incriminating statements in a probable cause hearing. The complaint states that

- Mr. Vogt reported information to Hays concerning the knife,
- the Hays police chief conditioned Mr. Vogt's continued employment as a Hays police officer on his documenting the facts related to possession of the knife,
- Mr. Vogt wrote a vague one-sentence report, and
- a Hays police officer elicited further details about Mr. Vogt's possession of the knife.

The complaint adds that the Hays police chief then requested a criminal investigation of Mr. Vogt and furnished incriminating statements to investigators, which led to use of the incriminating statements in a probable cause hearing.

Taking these allegations as true, we conclude that Mr. Vogt adequately pleaded that Hays had started a chain of events that resulted in violation of the Fifth Amendment. *See Stoot v. Everett*, 582 F.3d 910, 926–27 (9th Cir. 2009) (concluding that a police officer, who allegedly coerced statements, may incur liability under § 1983 for violation of the Fifth Amendment when a prosecutor used those statements in a criminal case); *McKinley v. Mansfield*, 404 F.3d 418, 436–39 (6th Cir. 2005) (holding that police officers can incur § 1983 liability for allegedly coercing a suspect to make self-incriminating statements even though it was another person, the prosecutor, who used the statements in a

criminal case).

B. Mr. Vogt adequately pleaded that the Fifth Amendment violation had been committed by someone with final policymaking authority for the City of Hays.

Hays argues that it cannot incur liability for actions by the Hays police chief because he was not a final policymaker for the city. We disagree.

Cities cannot incur liability under § 1983 on a respondeat superior theory, but can be liable if a final policymaker takes unconstitutional action. *See Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691 (1978); *Dill v. City of Edmond*, 155 F.3d 1193, 1211 (10th Cir. 1998). "Whether an individual is a final policymaker for purposes of § 1983 liability 'is a legal issue to be determined by the court based on state and local law.'" *Dill*, 155 F.3d at 1210 (quoting *Randle v. City of Aurora*, 69 F.3d 441, 447 (10th Cir. 1995)). Mr. Vogt pleaded facts indicating that the Hays police chief was a final policymaker on the requirements for police employees.

This inquiry turns on whether the Hays police chief had authority to establish official policy on discipline of employees within the police department. *See id.* at 1211 (stating that whether the municipal police chief at the time of the alleged violation was "a final policymaker turns on whether he had the authority to establish official city policy on employee transfers and discipline within the police department"). To make this determination, we consider whether the police chief's decisions were constrained by general policies enacted by others, whether the decisions were reviewable by others, and whether the decisions were within the police chief's authority. *Randle*, 69 F.3d at 448.

The complaint alleges that the Hays police chief had final policymaking authority for the police department. There is nothing in the complaint to suggest that his decisions were subject to further review up the chain-of-command.

Hays argues that final policymaking authority rested with the City Manager and City Commission rather than the Police Chief. For this argument, Hays points to municipal ordinances stating that the city commission must hire a city manager, who appoints the police chief and administers city business. But the city ordinances do not specify who bears ultimate responsibility for discipline of police officers like Mr. Vogt.

We addressed a similar situation in *Dill v. City of Edmond*, 155 F.3d 1193 (10th Cir. 1998). That case involved a due process violation from a change in a police officer's position from detective to patrol officer. 155 F.3d at 1210. There the municipal charter designated the city manager as the municipality's administrative head, who had authority to appoint and remove the police chief and to hire and fire employees. *Id.* at 1211. Notwithstanding the city manager's powers, we concluded that the police chief was a final policymaker for disciplinary transfers of police officers. We had four reasons for this conclusion:

1. The city ordinances had not directly stated who was authorized to determine the policy on transfers and discipline.
2. Trial testimony had indicated that the transfer was based on a policy adopted by the police chief.
3. The city manager had testified that he did not involve himself with transfers.
4. The decision to transfer the plaintiff had fallen

within the authority of the police chief.

Id.

We took a similar approach in *Flanagan v. Munger*, 890 F.2d 1557 (10th Cir. 1989). There too the issue was whether the municipal police chief had final policy-making authority for disciplinary decisions within the police department. 890 F.2d at 1568. In that case, the municipality admitted that the police chief had final authority to issue reprimands for its officers—an admission that we described as effectively disposing of the municipal liability issue. *Id.* Notwithstanding this admission, we analyzed the municipality's argument that the police chief lacked final policymaking authority under the municipal code. The municipality pointed out that

- the city manager had to manage and supervise all matters related to the police department, its officers, and employees,
- the city manager could set aside any action taken by the police chief and "supersede any department head in the functions of his position," and
- "[t]he rules of the Civil Service Commission ... govern[ed] disciplinary matters relative to uniformed personnel [e.g., review by City Council] except as otherwise provided by charter or ordinance."

Id. (quoting the city's municipal code) (alterations in original).

We acknowledged that the police chief's decisions were subject to review by the city manager and city council. *Id.* Nonetheless, we held that the police chief had final policymaking authority for disciplinary decisions within the police department. *Id.* at 1568–69.

We had two reasons. First, the municipal code empowered the police chief to directly manage and supervise the force and made him "responsible for the discipline, good order and proper conduct of the Department, [and] the enforcement of all laws, ordinances and regulations pertaining thereto." *Id.* (quoting the city's municipal code) (alteration in original). Second, the municipal code did not create a mandatory or formal review of the police chief's action. *Id.* at 1569. Thus, we concluded that "for all intents and purposes the [police chief's] discipline decisions [were] final" and that "any meaningful administrative review [was] illusory." *Id.* at 1569. This conclusion led us to hold that the police chief had final policymaking authority even under the municipal code. *Id.*

Under *Dill* and *Flanagan*, we conclude that Mr. Vogt has adequately pleaded final policymaking authority on the part of the Hays police chief. As in *Dill* and *Flanagan*, the city has pointed to general supervisory responsibilities of the city manager. But there is nothing in the municipal ordinances suggesting that the city manager plays a meaningful role in disciplinary decisions within the police department. The absence of such provisions is fatal at this stage, where we must view all of the allegations and draw all reasonable inferences in favor of Mr. Vogt. *See Dias v. City and Cty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009). As a result, we conclude that Mr. Vogt has adequately pleaded final policymaking authority on the part of the Hays police chief.

C. Violation of the Fifth Amendment can serve as the basis for liability under § 1983.

In a single sentence, Hays contends that "*Chavez* held there is no claim for civil liability under the Fifth

Amendment and that claims related to securing compelled/coerced statements required egregious government action under a substantive due process analysis." Appellees' Br. at 20. Hays does not explain or support this sentence, and it is incorrect. *Chavez* did not make such a holding. Thus, Hays's single sentence does not support the dismissal.

VI. Disposition

We affirm the dismissal of the claims against the City of Haysville and the four police officers. We reverse the dismissal of the claim against the City of Hays and remand for further proceedings consistent with this opinion.

HARTZ, Circuit Judge, concurring:

I join Judge Bacharach's opinion for the panel. I write separately to emphasize the limits of what we are saying. We have addressed only issues raised by the parties. Some of the questions we have not answered are: (1) Even though the Fifth Amendment privilege against self-incrimination can be violated by use of the defendant's statements at a probable-cause hearing, can there be a violation when such use does not cause a criminal sanction to be imposed on the defendant (such as when, as here, the court does not find probable cause)? (2) When a person voluntarily discloses information to a government agency, does he or she thereby waive any Fifth Amendment objection to disclosing that same information to another government agency? (3) Under what circumstances can an employee who has given notice of resignation claim that a request for incriminatory information was coercive? And, most significantly, (4) In light of post-*Garrity* developments in Fifth Amendment doctrine, if a public employee believes that he or she is being coerced by

the employer into making self-incriminatory statements, must the employee invoke the privilege against self-incrimination by refusing to provide information, or can the employee still, as in *Garrity*, provide the information and then demand immunity from use of the information? *See* Peter Westen, *Answer Self-Incriminating Questions or Be Fired*, 37 Am. J. Crim. L. 97 (2010).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil No. 15–1150–MLB.

MATTHEW VOGT, PLAINTIFF

v.

CITY OF HAYS, KANSAS, ET. AL., DEFENDANT

Signed: Sep. 30, 2015.
Filed: Sep. 30, 2015.

MEMORANDUM AND ORDER

MONTI L. BELOT, District Judge.

This case comes before the court on defendants' motions to dismiss. (Docs. 11, 13, 15). The motions have been fully briefed and are ripe for decision. (Docs. 12, 14, 16, 26, 27, 28). Defendants' motions are granted for the reasons herein.

I. Facts

Plaintiff Matthew Vogt was employed by defendant City of Hays as a police officer. In late 2013, Vogt sought employment with defendant City of Haysville. During the hiring process, Vogt disclosed to Haysville that he had kept a knife that he obtained while working as a Hays police officer. Defendant Kevin Sexton, a police officer for Haysville, was directed by defendant Jeff Whitfield, Chief of Police for Haysville, to extend an offer of employment to Vogt. The offer of employment was conditioned on Vogt reporting his possession of the knife to the Hays police department.

On December 11, 2013, Vogt reported his possession of the knife to defendant Don Scheibler, Chief of Police for Hays. Scheibler told Vogt to document the facts related to the possession of the knife. Vogt complied and wrote a vague one-sentence report. Vogt then submitted his two weeks' notice of resignation to the Hays police department. Defendant Brandon Wright, a police officer for Hays, opened an internal investigation. Wright informed Vogt that he was only seeking policy violations and was not conducting a criminal investigation. Vogt gave Wright a statement concerning his possession of the knife. Scheibler suspended the internal investigation on December 22 and requested the Kansas Bureau of Investigation (KBI) initiate a criminal investigation. Wright turned all of the evidence over to the KBI.

Due to the criminal investigation, Hays withdrew its offer of employment. In early 2014, Vogt was charged with two felony counts related to his possession of the knife. At the probable cause hearing, Vogt's statements were used as evidence. The charges were dismissed after the court determined that there was no probable cause to support the charges.

Vogt brought this action pursuant to 42 U.S.C. § 1983 against defendants alleging that they violated Vogt's right to be free from self-incrimination. Defendants move to dismiss the complaint on the basis that it fails to state a claim.

II. Motion to Dismiss Standards: FRCP 12(b)(6)

The standards this court must utilize upon a motion to dismiss are well known. To withstand a motion to dismiss for failure to state a claim, a complaint must contain enough allegations of fact to state a claim to relief that is plausible on its face. *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (citing *Bell*

Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1974 (2007)). All well-pleaded facts and the reasonable inferences derived from those facts are viewed in the light most favorable to plaintiff. *Archuleta v. Wagner*, 523 F.3d 1278, 1283 (10th Cir. 2008). Conclusory allegations, however, have no bearing upon this court's consideration. *Shero v. City of Grove, Okla.*, 510 F.3d 1196, 1200 (10th Cir. 2007). In the end, the issue is not whether plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claims. *Beedle v. Wilson*, 422 F.3d 1059, 1063 (10th Cir. 2005).

III. Analysis

When law enforcement officers abuse their power, suits against them allow those wronged an effective method of redress. *See Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (citing *Harlowe v. Fitzgerald*, 457 U.S. 800, 814 (1982)). Pursuant to 42 U.S.C. section 1983, any person who "under color of . . . [law] . . . subjects, or causes to be subjected, . . . any [person] . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." Section 1983 was enacted to provide protections to those persons wronged by the misuse of power. While the statute itself creates no substantive civil rights, it does provide an avenue through which civil rights can be redeemed. *See Wilson v. Meeks*, 52 F.3d 1547, 1552 (10th Cir. 1995). To state a claim for relief in a section 1983 action, plaintiff must establish that he was (1) deprived of a right secured by the Constitution or laws of the United States and (2) that the alleged deprivation was committed under color of state law. *See Am. Mfr's. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999).[1]

[1] Defendants do not deny that they were acting under color of state law.

Vogt claims that defendants violated his Fifth Amendment right to be free from self-incrimination. Like other individuals, government employees enjoy the protection of the privilege against self-incrimination. The government, however, must ensure that its employees are lawfully performing their duties. The government therefore may "penalize public employees and government contractors (with the loss of their jobs or government contracts) to induce them to respond to inquiries, so long as the answers elicited (and their fruits) are immunized from use in any criminal case against the speaker." *Chavez v. Martinez*, 538 U.S. 760, 768, 123 S. Ct. 1994 (2003). What the government cannot do is both demand a potentially self-incriminating statement and reserve the right to use that statement in a later criminal proceeding. *Id.* at 768–69. Public employees cannot be given the "Hobson's choice between self-incrimination and forfeiting [their] means of livelihood." *Gardner v. Broderick*, 392 U.S. 273, 277, 88 S. Ct. 1913 (1968); *Gulden v. McCorkle*, 680 F.2d 1070, 1074 (5th Cir. 1982) (observing that "it is the compelled answer in combination with the compelled waiver of immunity that creates the Hobson's choice for the employee"). "If the State presents a person with the Hobson's choice of incriminating himself or suffering a penalty, and he nevertheless refuses to respond, the State cannot constitutionally make good on its threat to penalize him." *Grand Jury Subpoenas Dated Dec. 7 & 8, Issued to Bob Stover, Chief of Albuquerque Police Dep't v. United States*, 40 F.3d 1096, 1101 (10th Cir. 1994).

A. 5th Amendment Violation

All defendants contend that Vogt's claims fail because he cannot establish a Fifth Amendment violation. The Tenth Circuit has identified two ways a public employee's Fifth Amendment rights can be violated

in a case where an employee was compelled to give a statement. "First, a statement may not be obtained in violation of the Constitution. Thus, the State may not insist that public employees waive their Fifth Amendment privilege against self-incrimination and consent to the use of the fruits of the interrogation in any later proceedings brought against them." *Id.* "The second restriction placed on the government in this context is a complete prohibition on the use in subsequent criminal proceedings of statements obtained under threat of removal from office." *Id.* at 1102.

The facts alleged in the complaint show that Vogt is claiming defendants have violated his Fifth Amendment rights by using his compelled statement in the criminal case. There are no allegations that defendants forced Vogt to consent to the use of his compelled statements in the criminal case, i.e. requiring Vogt to waive his Fifth Amendment rights. Therefore, this case turns on whether the compelled statements were used in a criminal proceeding.[2]

Defendants contend that Vogt's statements were not used in a criminal case in violation of the Fifth Amendment because Vogt's case was dismissed prior to trial. Vogt, however, cites to language in the most recent Supreme Court case on this issue, *Chavez v. Martinez*, 538 U.S. 760, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003), and cases from the Ninth, Seventh and Second Circuits in support of his position that a Fifth Amendment violation occurs when criminal proceedings have commenced and the compelled statements

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[2] The Haysville defendants additionally contend that they should be dismissed because a conditional offer of employment is not sufficient to trigger a Fifth Amendment violation under *Garrity* and its progeny. Because the court finds that no constitutional violation has occurred, *infra*, it is unnecessary to resolve this issue.

are introduced in those preliminary proceedings. *Stoot v. City of Everett*, 582 F.3d 910, 925 (9th Cir. 2009); *Best v. City of Portland*, 554 F.3d 698 (7th Cir. 2009); *Higazy v. Templeton*, 505 F.3d 161, 170–73 (2nd Cir. 2007).

In *Chavez*, the Supreme Court addressed whether the right to be free from self-incrimination is violated when no criminal case is brought against the compelled individual. The plaintiff in *Chavez* was arrested after an incident, taken to the hospital, where the defendant police officer interrogated him while the plaintiff was receiving medical treatment. The plaintiff brought a section 1983 claim against the officer, alleging that the interrogation violated his Fifth Amendment right against self-incrimination. *Chavez*, 538 U.S. at 764–65. A four-member plurality of the Supreme Court held that a violation of the Fifth Amendment "occurs only if one has been compelled to be a witness against himself in a criminal case." *Id.* at 770. The Court accordingly held that the officer was entitled to qualified immunity because the plaintiff was never prosecuted for a crime. "However, the plurality in Chavez explicitly declined to decide 'the precise moment when a criminal case commences' for the purposes of the Fifth Amendment right against self-incrimination." *Koch v. City of Del City*, 660 F.3d 1228, 1245 (10th Cir. 2011) (quoting *Chavez*, 538 U.S. at 766–67).

After *Chavez*, the Tenth Circuit has not answered the question left open by the Supreme Court. In *Eidson v. Owens*, 515 F.3d 1139 (10th Cir. 2008), the Tenth Circuit was presented with the question of whether the plaintiff's Fifth Amendment rights were violated when her allegedly compelled statement was introduced during the preliminary proceedings of a criminal case. The Tenth Circuit stated that the "right

against compelled self-incrimination arguably has no application here because it is a trial right, *see Chavez v. Martinez*, 538 U.S. 760, 767, 123 S. Ct. 1994, 155 L. Ed.2d 984 (2003), and her criminal case never went to trial." *Id.* at 1149. The Circuit noted that the Supreme Court in *Chavez* "declined to decide whether use of compelled statements at some point before trial but after the initiation of criminal proceedings was actionable." *Id.* Ultimately, however, the Circuit determined that the plaintiff did not incriminate herself during a custodial interrogation and therefore, there was no Fifth Amendment violation. The Circuit declined to express its "agreement or disagreement with the Seventh Circuit." *Id.*

In *Sornberger v. City of Knoxville, Illinois*, 434 F.3d 1006 (7th Cir. 2006), the Seventh Circuit addressed the question of whether the plaintiffs had stated a violation of the Fifth Amendment after their compelled statements were used to support the criminal charges and introduced in a suppression hearing. The criminal charges against the plaintiffs were ultimately dropped. The Seventh Circuit determined that the statements were used in a criminal case in violation of the Fifth Amendment and, therefore, the plaintiffs could proceed on their claim. Both the Ninth and Second Circuit agree with the Seventh Circuit. *Stoot*, 582 F.3d 910; *Higazy*, 505 F.3d 161. The Circuits, however, are split on this issue.

In *Renda v. King*, 347 F.3d 550 (3d Cir. 2003), the Third Circuit held that a Fifth Amendment violation does not occur until the compelled statements are used at trial. In *Renda*, the plaintiff was charged with a crime and her statements were used in obtaining the indictment and during a suppression hearing. The Third Circuit noted that the Supreme Court did not answer the question of whether an individual's Fifth

Amendment right is violated when a compelled statement is used to initiate criminal proceedings but prior to trial. In light of the fact that this question was left open, the Third Circuit relied on past precedent which conclusively held that the Fifth Amendment right is not violated until a compelled statement is introduced at trial. *Id.* at 558–59.

The Fourth, Fifth and Sixth Circuits also hold that the Fifth Amendment right is not violated until a compelled statement is introduced at trial. *See Burrell v. Virginia*, 395 F.3d 508, 513–14 (4th Cir. 2005) ("He does not allege any trial action that violated his Fifth Amendment rights; thus, ipso facto, his claim fails on the plurality's reasoning [in *Chavez*] . . ."); *Murray v. Earle*, 405 F.3d 278, 285 (5th Cir. 2005)("The Fifth Amendment privilege against self-incrimination is a fundamental trial right which can be violated only at trial, even though pre-trial conduct by law enforcement officials may ultimately impair that right."); *Smith v. Patterson*, Nos. 10–1228, 10–1299, 10–1576, 2011 WL 2745807, *3 (6th Cir. July 14, 2011) ("But when the government does not try to admit the confession at a criminal trial, the Fifth Amendment plays no role.")

In light of the Tenth Circuit's silence on the question, the court holds that it is bound by Tenth Circuit precedent. The Tenth Circuit has consistently held that the Fifth Amendment right to be free from self-incrimination is a trial right. In *Pearson v. Weischedel*, No. 09–8058, 2009 WL 3336117 (10th Cir. Oct. 19, 2009), the plaintiff was allegedly forced by officers to reveal the location of evidence. The plaintiff was then charged in a criminal case based on the evidence which was obtained as a result of the allegedly coerced statement. The plaintiff plead guilty to the charges. The

Tenth Circuit held that "[a]lthough conduct by law enforcement officials prior to trial may ultimately impair the privilege against self-incrimination, a constitutional violation occurs only at trial." *Id.* (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264, 110 S. Ct. 1056 (1990)).

In *Stover*, 40 F.3d at 1101–03, the Tenth Circuit held that the protections of the Fifth Amendment are not realized until the government attempts to make use of compelled statements at trial. In *Stover*, officers were compelled to make statements to a grand jury. The Tenth Circuit recognized that their statements could potentially result in the initiation of a criminal case, however, the Circuit stated that the "time for protection will come when, if ever, the government attempts to use the information against the defendant at trial. We are not willing to assume that the government will make such use, or if it does, that a court will allow it to do so." *Id.* at 1103. In *Eidson*, 515 F.3d at 1149, the Circuit also reiterated that the Fifth Amendment is not implicated until trial.

In this case, the compelled statements were allegedly used in obtaining the criminal charges and in the probable cause hearing. The criminal charges, however, were dismissed by the district judge. Therefore, the compelled statements were never introduced against Vogt at trial. While *Chavez* may indicate that the Supreme Court *could* recognize a Fifth Amendment violation if a compelled statement is introduced during criminal proceedings before trial, the Supreme Court has yet to affirmatively state so. Therefore, this court is bound by Tenth Circuit and Supreme Court authority which conclusively hold that a "constitutional violation occurs only at trial." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264, 110 S. Ct. 1056 (1990).

Accordingly, the court finds that Vogt's complaint fails to state a violation of his Fifth Amendment rights.

IV. Conclusion

Defendants' motions to dismiss are granted. (Docs. 11, 13, 15).

A motion for reconsideration of this order is not encouraged. Any such motion shall not exceed 3 double-spaced pages and shall strictly comply with the standards enunciated by this court in *Comeau v. Rupp*, 810 F. Supp. 1172, 1174 (1992). The response to any motion for reconsideration shall not exceed 3 double-spaced pages. No reply shall be filed.

IT IS SO ORDERED.

Dated this 30th day of September 2015, at Wichita, Kansas.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 15-3266

MATTHEW JACK DWIGHT VOGT,
PLAINTIFF – APPELLANT

v.

CITY OF HAYS, KANSAS; CITY OF HAYSVILLE, KANSAS; DON SCHEIBLER; JEFF WHITFIELD; KEVIN SEXTON; BRANDON WRIGHT, DEFENDANTS – APPELLEES

Filed: January 30, 2017

Order

Before HARTZ, BACHARACH, and McHUGH, Circuit Judges.

Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MATTHEW JACK DWIGHT VOGT,

Plaintiff

v.

CITY OF HAYS, KANSAS,

CITY OF HAYSVILLE, KANSAS,

DON SCHEIBLER,

JEFF WHITFIELD,

KEVIN SEXTON,

BRANDON WRIGHT,

Defendant

No. 15-1939

COMPLAINT

JURY TRIAL DEMANDED

COMPLAINT

COMES NOW Plaintiff Matthew Vogt, by and through counsel, and for his causes of action against Defendants, states and alleges as follows:

INTRODUCTION

1. Plaintiff Matthew Jack Dwight Vogt sues through 42 U.S.C. § 1983 for violations of his Fifth Amendment right to be free from self-incrimination as guaranteed by the United States Constitution.

PARTIES

2. Plaintiff is an individual who was employed by the City of Hays, Kansas as a police officer until early 2014. Plaintiff currently resides in Derby, Kansas.

3. Defendant City of Hays, Kansas ("Hays") is a municipal corporation located within Ellis County, Kansas, and duly organized under the laws of the State of Kansas. The Hays Police Department provides police services for Hays.

4. Defendant City of Haysville, Kansas ("Haysville") is a municipal corporation located within Sedgwick County, Kansas, and duly organized under the laws of the State of Kansas. The Haysville Police Department provides police services for Haysville.

5. Defendant Don Scheibler ("Chief Scheibler") was, at all times relevant hereto, chief of the City of Hays Police Department. Chief Scheibler possesses final policy-making authority for the Hays police department. Chief Scheibler is sued in his official and individual capacity and, at all times relevant hereto, acted under color of state law.

6. Defendant Jeff Whitfield ("Chief Whitfield") was, at all times relevant hereto, chief of the City of Haysville Police Department. Chief Whitfield possesses final policy-making authority for the Haysville police department. Chief Whitfield is sued in his official and individual capacity and, at all times relevant hereto, acted under color of state law.

7. Defendant Kevin Sexton ("Lt. Sexton") was, at all times relevant hereto, a lieutenant for the City of Haysville Police Department. Lt. Sexton is sued in his official and individual capacity and, at all times rele-

vant hereto, acted under color of state law and pursuant to the directives of Chief Whitfield and the policies of the Haysville police department.

8. Defendant Brandon Wright ("Lt. Wright") was, at all times relevant hereto, a lieutenant for the City of Hays Police Department. Lt. Wright is sued in his official and individual capacity and, at all times relevant hereto, acted under color of state law and pursuant to the directives of Chief Scheibler and the policies of the Hays police department.

JURISDICTION AND VENUE

9. This Court has jurisdiction over Plaintiff's claims for violations of Plaintiff's rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution under 42 U.S.C. § 1983, 28 U.S.C. § 1331, and 28 U.S.C. § 1343.

10. Venue is proper in this Court because all of the acts and omissions giving rise to Plaintiff's causes of action occurred in this district, all individual defendants are believed to be residents of the State of Kansas, and Hays and Haysville are situated within the State of Kansas.

FACTUAL ALLEGATIONS

11. While still employed as a Hays police officer, Plaintiff sought employment with the Haysville police department in late 2013.

12. During his Haysville hiring process, Plaintiff disclosed that he had kept a knife for his personal use after coming into possession of it while working as a Hays police officer.

13. Lt. Sexton, at the direction of Chief Whitfield, extended Plaintiff a conditional offer of employment with

the Haysville police department which was conditioned upon Plaintiff reporting the above information, and tendering the knife, to the Hays police department.

14. Lt. Sexton and Chief Whitfield warned Plaintiff that they would follow-up with Hays to ensure that Plaintiff had complied with this condition of employment.

15. On or about December 11, 2013, Plaintiff complied with the condition of employment imposed by the Haysville police department in order to obtain employment with Haysville.

16. Chief Scheibler immediately compelled Plaintiff to document the facts related to his possession of the knife as a condition of his employment with the Hays police department and opened an internal investigation seeking only administrative policy violations.

17. In compliance with Chief Scheibler's order, Plaintiff wrote a vague one-sentence report related to his possession of the knife.

18. Having satisfied Haysville's conditions, Plaintiff submitted two weeks' notice of his resignation to the Hays police department so that he could accept employment with the Haysville police department.

19. Lt. Wright, who is responsible for internal investigations conducted by the Hays police department, compelled Plaintiff to give a statement while he was still employed by Hays as a condition of employment, during which Lt. Wright assured Plaintiff that he was seeking only policy violations and was not conducting a criminal investigation.

20. During the internal statement, Lt. Wright elicited further information about Plaintiff's possession of the

knife, including the type of police call Plaintiff was handling when he came into possession of the knife.

21. Lt. Wright used the additional detail elicited in Plaintiff's compelled internal statement as an investigatory lead to locate, among hundreds if not thousands of police calls handled by Plaintiff, an audio recording which captured the circumstances of how Plaintiff came into possession of the knife.

22. Using Plaintiff's compelled statements and fruits thereof against him, Chief Scheibler requested the Kansas Bureau of Investigation to initiate a criminal investigation and suspended the internal investigation on or about December 22, 2013.

23. Lt. Wright produced all evidence gathered in his internal investigation, including Plaintiff's compelled statements and fruits thereof, to the criminal investigator for use in the criminal proceedings against Plaintiff.

24. Because of the criminal investigation, the Haysville police department withdrew its offer of employment to Plaintiff.

25. Using Plaintiff's compelled statements and fruits thereof against him, Plaintiff was charged in early 2014 with two felony counts related to his possession of the knife in Case No 14CR-285 in the Ellis County, Kansas district court.

26. At Plaintiff's probable cause hearing in late 2014, Plaintiff's compelled statements and fruits thereof were used against him in a criminal case.

27. In separate rulings, a state magistrate judge and a state district court judge both determined that probable cause did not exist to bind Plaintiff over for

trial and Plaintiff was dismissed from the criminal charges in early 2015.

Count I: Fifth Amendment – Freedom from Self-Incrimination

(versus Haysville, Whitfield, Sexton)

28. Plaintiff hereby incorporates by reference paragraphs 1 through 27 above as if fully set forth herein.
29. 42 U.S.C. § 1983 provides for recovery of damages for constitutionally-protected rights under color of state law.

30. Under color of law, Defendants Haysville, Sexton, and Whitfield compelled Plaintiff to report his keeping of the knife and to tender the knife to the Hays police department as a condition of government employment, which violated Plaintiff's Fifth Amendment right to be free from self-incrimination when ultimately used against him in a criminal case.

31. As a result of Defendants' conduct, Plaintiff suffered, and continues to suffer, loss of income, emotional distress, pain and suffering, mental anguish, humiliation, loss of life enjoyment, damage to reputation, and inconvenience.

32. The acts, conduct and behavior of Defendants were willful, wanton, malicious, and outrageous, showed disregard for Plaintiff's rights, and were performed knowingly, intentionally and maliciously, by reason of which Plaintiff is entitled to an award of punitive damages in an amount to be proved at trial.

33. Plaintiff is entitled to recover from the Defendants reasonable attorneys' fees and expenses, as provided by 42 U.S.C. § 1988.

WHEREFORE, Plaintiff requests that this Court, after a trial by jury, enter judgment against Defendants for his actual damages, nominal damages, and punitive or exemplary damages as are proven at trial, for attorneys' fees and expenses pursuant to § 1988, for costs incurred herein, and for any such further legal and equitable relief as this Court deems appropriate.

Count II: Fifth Amendment – Freedom from Self-Incrimination

(versus Hays, Scheibler, Wright)

34. Plaintiff hereby incorporates by reference paragraphs 1 through 27 above as if fully set forth herein.

35. 42 U.S.C. § 1983 provides for recovery of damages for constitutionally-protected rights under color of state law.

36. Under color of law, Defendants Hays, Scheibler, and Wright:

> A. Compelled Plaintiff to submit a written report addressing his possession of the knife as a condition of government employment, which violated Plaintiff's Fifth Amendment right to be free from self-incrimination when ultimately used against him in a criminal case.
>
> B. Compelled Plaintiff to provide a purportedly internal statement as a condition of government employment, which violated Plaintiff's Fifth Amendment right to be free from self-incrimination when ultimately used against him in a criminal case, and
>
> C. Provided the purportedly internal investigation file containing compelled statements and fruits thereof to a criminal investigator for use

in criminal proceedings, which violated Plaintiff's Fifth Amendment right to be free from self-incrimination when ultimately used against him in a criminal case.

37. As a result of Defendants' conduct, Plaintiff suffered, and continues to suffer, loss of income, emotional distress, pain and suffering, mental anguish, humiliation, loss of life enjoyment, damage to reputation, and inconvenience.

38. The acts, conduct and behavior of Defendants were willful, wanton, malicious, and outrageous, showed disregard for Plaintiff's rights, and were performed knowingly, intentionally and maliciously, by reason of which Plaintiff is entitled to an award of punitive damages in an amount to be proved at trial.

39. Plaintiff is entitled to recover from the Defendants reasonable attorneys' fees and expenses, as provided by 42 U.S.C. § 1988.

WHEREFORE, Plaintiff requests that this Court, after a trial by jury, enter judgment against Defendants for his actual damages, nominal damages, and punitive or exemplary damages as are proven at trial, for attorneys' fees and expenses pursuant to § 1988, for costs incurred herein, and for any such further legal and equitable relief as this Court deems appropriate.

JURY TRIAL DEMAND

40. Plaintiff demands a jury trial on all issues.

DESIGNATION OF PLACE OF TRIAL

41. Plaintiff designates Wichita, Kansas as the place of trial.

Respectfully Submitted,

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