No. 16-1495

IN THE

Supreme Court of the United States

CITY OF HAYS, KANSAS,

Petitioner,

v.

MATTHEW JACK DWIGHT VOGT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF STATE AND LOCAL GOVERNMENT EMPLOYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. The Tenth Circuit's decision pressures government employers to be less vigilant in discovering and correcting employee misconduct	5
II. The Court should make clear that government employers are not liable for the decisions of prosecutors over whom they have no control	12
A. Municipal liability cannot be imposed under § 1983 because the City of Hays did not control the prosecutorial decision to use Vogt's statement in the criminal case	12
B. The sole and exclusive remedy for the alleged violation is the exclusion of the compelled statement	14
CONCLUSION	18

TABLE OF AUTHORITIES

CASES Page(s)

Arnett v. Kennedy,
416 U.S. 134 (1974)..... 10

Ashwander v. Tenn. Valley Auth.,
297 U.S. 288 (1936)..... 4, 14

Boynton v. Virginia,
364 U.S. 454 (1960)..... 14

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

City of St. Louis v. Praprotnik,
485 U.S. 112 (1988)..... 4, 13, 17

Collins v. City of Harker Heights,
503 U.S. 115 (1992)..... 13

Connick v. Myers,
461 U.S. 138 (1983)..... 10

Ex parte Curtis,
106 U.S. 371 (1882) 10

Gardner v. Broderick,
392 U.S. 273 (1968)..... 7, 8

Garner v. United States,
424 U.S. 648 (1976)..... 7

Garrity v. New Jersey,
385 U.S. 493 (1967)..... 6, 8

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.,
510 U.S. 27 (1993)..... 14

Jackson v. Denno,
378 U.S. 368 (1964)..... 9

TABLE OF AUTHORITIES—Continued

Page(s)

Lefkowitz v. Cunningham,
431 U.S. 801 (1977)..... 8

Minnesota v. Murphy,
465 U.S. 420 (1984)..... 6, 7

Miranda v. Arizona,
384 U.S. 436 (1966)..... 15, 16

Monell v. New York City Dept. of Soc. Servs.,
436 U.S. 658 (1978)..... 4, 12, 13, 17

Neese v. S. Ry. Co.,
350 U.S. 77 (1955)..... 14

Owen v. City of Independence,
445 U.S. 622 (1980)..... 11

Pembaur v. City of Cincinnati,
475 U.S. 469 (1986)..... 12, 13, 17

Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.,
467 U.S. 138 (1984)..... 14

Uniformed Sanitation Men Ass'n., Inc. v. Comm'r of Sanitation of N.Y.,
392 U.S. 280 (1968)..... 8

United States v. Kordel,
397 U.S. 1 (1970)..... 7

United States v. Patane,
542 U.S. 630 (2004)..... 16

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Verdugo–Urquidez, 494 U.S. 259 (1990) 3

Wood v. Georgia, 450 U.S. 261 (1981) 14

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V ..... *passim*

U.S. Const. amend. XIV 16

STATUTES

42 U.S.C. § 1983 ..... *passim*

MISCELLANEOUS

James Higdon, *Another investigation into misuse of funds adds to University of Louisville's recent turmoil*, Wash. Post (Dec. 23, 2015) https://goo.gl/XgsLvz 9

Vivian Ho, *Ex-health inspectors charged in S.F. bribe scheme*, S.F. Gate (Dec. 15, 2011), https://goo.gl/xutNZ5 10

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Page(s)

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Dan Weikel, *Two San Francisco police officers convicted of theft and conspiracy*, L.A. Times (Dec. 5, 2014), https://goo.gl/JnXRBz 10

INTEREST OF AMICI[1]

The Tenth Circuit's ruling permits a damages action to proceed against the City of Hays, under 42 U.S.C. § 1983, based on the conduct of Kansas prosecutors over whom the City had no control. Permitting government employers to be held liable for damages in this situation threatens to chill *all* government employers from properly supervising their employees in the performance of their official duties.

Amici have a substantial interest in the outcome of this case because they collectively represent the nation's 90,000 State and local government employers who supervise more than 19 million workers, approximately 72% at the local level and 28% at the State level.[2]

- The National Association of Counties is the only national organization that represents the nation's 3,069 county governments.
- The National League of Cities represents the nation's 19,000 cities, towns, and villages.

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[1] In accordance with Rule 37.6, counsel for *amici* represents that no party authored any portion of this brief and no person or entity other than *amici* or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Petitioner and Respondent have consented in writing to the filing of this brief and have notified the Clerk that they consent to the filing of *amicus* briefs in support of either or neither party.

[2] United States Census, *Annual Survey of Public Employment & Payroll Summary Report: 2013*, at 1, 9 (2014), https://www.census.gov/library/publications/2014/econ/g13-aspep.html.

- The U.S. Conference of Mayors represents all United States cities with a population of more than 30,000 people, which at present includes more than 1,200 cities.
- The International City/County Management Association represents more than 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities.
- The International Municipal Lawyers Association serves as an advocate and resource for local government attorneys.
- The National Public Employer Labor Relations Association represents agencies employing more than 4 million federal, state, and local government workers in a wide range of areas.
- And the International Public Management Association for Human Resources represents over 8,000 human-resource professionals and human-resource departments at the federal, state, and local levels of government.

INTRODUCTION AND SUMMARY OF ARGUMENT

The dispute between the parties focuses on the specific juncture in a criminal case at which the Fifth Amendment right against self-incrimination requires the exclusion of a witness's compelled statement. But the real problem is that a government employer should not be liable for the admission of a statement at *any* juncture of a criminal case over which the employer has no control.

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. That right is not violated unless and until a person's compelled statement is "admitted as testimony against him in a criminal case." *Chavez v. Martinez*, 538 U.S. 760, 767 (2003) (Opinion of Thomas, J.); *id*. at 777 (Souter, J., concurring in the judgment). The Tenth Circuit held that petitioner Matthew Vogt stated a § 1983 claim for money damages against the City of Hays when Vogt's allegedly compelled statement to the City was later offered as evidence at the preliminary hearing of a criminal case, and that the bar on admission of a compelled statement "in a criminal case" includes its introduction at a preliminary hearing. Pet. App. 28a. The City, by contrast, argues that "the Fifth Amendment is 'a fundamental trial right of criminal defendants' that can be violated '*only at trial*.'" Br. 1 (quoting *United States v. Verdugo–Urquidez*, 494 U.S. 259, 264 (1990)).

The most disturbing aspect of this case, however, is that the City of Hays did not control the decision of Kansas authorities to bring criminal charges against Vogt, let alone to introduce the allegedly compelled statement in the criminal case, whether at trial or at the preliminary hearing. So even if the Court were to rule that the Fifth Amendment forbids the introduction of a compelled statement only at trial, it would not address the larger problem with the Tenth Circuit's ruling. Government employers would continue to be vulnerable to § 1983 liability based on the conduct of prosecutors over whom they have no control.

Amici suggest two alternative grounds for reversal that would better protect government employers on whom the nation depends to ensure an honest and

faithful workforce. First, the Court could hold under the *Monell* line of cases that liability under 42 U.S.C. § 1983 cannot be imposed on a municipality that does not control the decision to use an allegedly compelled statement in a criminal case. *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 694 (1978); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127-30 (1988). Although not within the question presented, a decision on this basis is warranted on constitutional-avoidance grounds. *See, e.g.*, *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Deciding the case based on the well-established statutory limits of § 1983 liability would allow the Court to avoid answering an unresolved constitutional question.

Alternatively, the Court could decide the case on the ground supported by six Justices in *Chavez*: that the privilege against self-incrimination entitles the holder only to the exclusion of evidence in a criminal case, not to money damages under § 1983 for the violation of prophylactic rules designed to protect the privilege. 538 U.S. at 771-72 (plurality opinion by Thomas, J., joined by Rehnquist, C.J., and O'Connor and Scalia, JJ.); *id.* at 777-79 (Souter, J., concurring in the judgment, joined by Breyer, J.); *id*. at 780 (Scalia, J., concurring in part in the judgment). Because a decision on that ground would be based on the limits of the Fifth Amendment itself, the issue is fairly subsumed within the question presented (as it was in *Chavez*).

The fundamental flaw in the Tenth Circuit's decision is that it permits liability to be imposed on a government employer for prosecutorial conduct over which the employer has no control. If not corrected, that aspect of the court of appeals' decision beckons litigation against government employers that they

cannot prevent, except by being less vigilant in rooting out employee misconduct.

ARGUMENT

I. The Tenth Circuit's decision pressures government employers to be less vigilant in discovering and correcting employee misconduct.

The decision below creates a perverse incentive to look away from employee misconduct. To see why, it is worth asking what City of Hays Police Chief Don Scheibler did wrong in his dealings with Vogt that could warrant § 1983 damages against the City.

Unbeknown to Chief Scheibler, Vogt had applied for a job with another police department and had revealed (in Vogt's guarded words) that he "kept a knife for his personal use after coming into possession of it while working as a Hays police officer." Pet. App. 48a. The prospective employer nonetheless offered Vogt a job on the condition that he tell the City of Hays about the knife. Vogt did so, which (not surprisingly) led Chief Scheibler to require that Vogt "document the facts related to his possession of the knife." Pet. App. 49a. Chief Scheibler "opened an internal investigation seeking only administrative policy violations." *Id*. Vogt says that he "wrote a vague one-sentence report related to his possession of the knife" and then promptly resigned, giving two weeks' notice to the City. *Id*. Scheibler's lieutenant followed up with Vogt during the two-week period, assuring Vogt that he was "seeking only policy violations and was not conducting a criminal investigation." *Id*. The lieutenant "elicited further information about [Vogt's] possession of the knife, including the type of police call Plaintiff was handling when he came into possession of the knife."

Pet. App. 49a-50a. That information led to "an audio recording which captured the circumstances of how [Vogt] came into possession of the knife." Pet. App. 50a.

With that new information, "Chief Scheibler requested the Kansas Bureau of Investigation to initiate a criminal investigation." *Id*. That investigation caused the other police department to withdraw Vogt's job offer. *Id*. And although criminal charges were subsequently filed against Vogt and a prosecutor offered the "compelled" statements at a preliminary hearing, the district judge found the evidence insufficient and dismissed the charges. Pet. App. 50a-51a.

What should Chief Scheibler have done differently? Vogt never claims that he was asked to waive his privilege against self-incrimination or told "that an assertion of the privilege would result in the imposition of a penalty." *Minnesota v. Murphy*, 465 U.S. 420, 438 (1984) (distinguishing *Garrity v. New Jersey*, 385 U.S. 493 (1967)). Indeed, it is hard to see what employment pressure Vogt faced from the City once he resigned. Nor does Vogt contend that Chief Scheibler had the power to cause criminal charges to be filed against him, let alone that Scheibler had any say in whether the prosecutor offered Vogt's "compelled" statements at the preliminary hearing. Yet the Tenth Circuit held that Vogt stated a § 1983 damages claim against the City, on account of Chief Scheibler's exercising final policymaking authority, based entirely on the *prosecutor*'s use of compelled statements at the preliminary hearing over which Scheibler had no control. Pet. App. 27a-28a.

There is much that is wrong with that ruling. First, even assuming that Vogt himself felt "compelled" to reveal that he had taken the knife, Chief Scheibler

could reasonably have relied on Vogt to assert his Fifth Amendment privilege if the answers might incriminate him. In a noncustodial setting like this one, answers "are not compelled within the meaning of the Fifth Amendment unless the witness is required to answer over his valid claim of the privilege." *Murphy*, 465 U.S. at 427. And an employee like Vogt is usually in the best position to know if his answers would be incriminating. *See Garner v. United States*, 424 U.S. 648, 655 (1976) ("Only the witness knows whether the apparently innocent disclosure sought may incriminate him, and the burden appropriately lies with him to make a timely assertion of the privilege. If, instead, he discloses the information sought, any incriminations properly are viewed as not compelled.").

"Without question," Vogt—a police officer presumably well acquainted with his own constitutional rights—"could have invoked his Fifth Amendment privilege against compulsory self-incrimination." *United States v. Kordel*, 397 U.S. 1, 7 (1970). Since he "revealed incriminating information instead of timely asserting his Fifth Amendment privilege, his disclosures were not compelled incriminations." *Murphy*, 465 U.S. at 440.

Second, Vogt was questioned only with regard to the performance of his official duties. This Court in *Gardner v. Broderick* distinguished between *proper* questions related to performance of the employee's official duties, and an *improper* insistence that the employee waive his Fifth Amendment rights:

> If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, *without being required to waive his immunity* with respect to the use of his

> answers or the fruits thereof in a criminal prosecution of himself, *the privilege against self-incrimination would not have been a bar to his dismissal*.

392 U.S. 273, 278 (1968) (emphasis added, citation omitted).

That distinction is crucial. Government employers must be permitted to question employees relating to the performance of their public duties because it effectuates "the important public interest in securing from public employees an accounting of their public trust." *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977).[3] That principle should have protected what Chief Scheibler did here. He asked Vogt specific questions about the knife that Vogt himself had brought to the chief's attention. He did not ask Vogt to waive his Fifth Amendment immunity.

Third, even assuming for argument's sake that Vogt's statements to the City were deemed "compelled" under an implied threat of losing his job, City officials could reasonably believe that his statements would not be used in any criminal case, either because the prosecutor would decline to offer that evidence (knowing it would be inadmissible under *Garrity*), or because Vogt could successfully move to suppress

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[3] *See also id.* ("Public employees may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity."*); Uniformed Sanitation Men Ass'n., Inc. v. Comm'r of Sanitation of N.Y.*, 392 U.S. 280, 285 (1968) ("[P]etitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights.").

it. *See Jackson v. Denno*, 378 U.S. 368, 395 (1964) (holding that "a proper determination of voluntariness [must] be made prior to the admission of the confession to the jury which is adjudicating guilt or innocence").

But the most glaring problem with letting a § 1983 case proceed against the City on these facts is that the City itself had no control over the prosecutor's decision to use Vogt's statements in the criminal case. Imposing liability on a government employer for the conduct of a prosecutor over whom it has no control significantly threatens to chill government employers from exercising prudent oversight in the workplace.

It is not hard to find real-world examples of misconduct that government employers should be encouraged to root out, not ignore. Recent events reflect reports of:

- employees charged with stealing government property or embezzling public funds;[4]
- public school teachers inappropriately touching their students;[5]
- university professors misappropriating grant moneys;[6]

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[4] *See* Andrea Isom, *Ex-government employee accused of stealing more than $300K from low income residents*, WXYZ.com (Aug. 8, 2017), https://goo.gl/aqaQP9.

[5] *See* Bill Lukitsch, *Richmond Public Schools substitute teacher accused of inappropriately touching children*, Richmond Times-Dispatch (June 15, 2017), https://goo.gl/VdHkC4.

[6] *See* James Higdon, *Another investigation into misuse of funds adds to University of Louisville's recent turmoil*, Wash. Post (Dec. 23, 2015), https://goo.gl/XgsLvz.

- public health inspectors taking bribes;[7] and
- police officers stealing property from crime scenes.[8]

Although the vast majority of government employees are honest, good governance requires supervisory vigilance. Government employers are in the best position to discover malfeasance and corruption. They should not be made to think twice before looking into misconduct for fear of being sued if an employee's statement is later used by prosecutors in a criminal case. Nor should they be chilled from reporting transgressions that they have discovered to the police. *See Connick v. Myers*, 461 U.S. 138, 150-51 (1983) (noting "the government's legitimate purpose in 'promot[ing] efficiency and integrity in the discharge of official duties, and . . . proper discipline in the public service' ") (quoting *Ex parte Curtis*, 106 U.S. 371, 373 (1882)); *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring in part and concurring in the result in part) (stating that "maintenance of employee efficiency and discipline . . . [is] essential if the Government is to perform its responsibilities effectively and economically," and "the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial").

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[7] *See* Vivian Ho, *Ex-health inspectors charged in S.F. bribe scheme*, S.F. Gate (Dec. 15, 2011), https://goo.gl/xutNZ5.

[8] *See* Dan Weikel, *Two San Francisco police officers convicted of theft and conspiracy*, L.A. Times (Dec. 5, 2014), https://goo.gl/JnXRBz.

Qualified immunity will not ameliorate the chilling effect. For one thing, municipalities do not have qualified immunity. *Owen v. City of Independence*, 445 U.S. 622, 657 (1980). Thus, under the Tenth Circuit's ruling, municipalities are "strictly liable under § 1983," *id*. at 669 n.10 (Powell, J., dissenting), if a statement elicited by a final policymaker from an employee is deemed "compelled" and later used by a prosecutor in a criminal case.

And although State and local officials enjoy qualified immunity from individual damage claims, that protection will not be enough to negate the chilling effect either. The Tenth Circuit held that the individual officers investigating Vogt had qualified immunity because the law was not clearly established that his compelled statement was inadmissible at the preliminary hearing. Pet. App. 21a-24a. But the chilling effect arises without regard to *when* in a criminal proceeding the employee's statement is offered. It arises because the employer generally has no control over *whether* a prosecutor will later use the allegedly compelled statement at all. A rule allowing an employee to sue his employer for damages if his admission is later used in a criminal proceeding chills employer vigilance regardless of when in a criminal case a prosecutor might offer it.

Government employers and supervisors must not be frightened by the prospect of § 1983 liability from responsibly investigating their suspicions of employee misconduct. They should be encouraged instead to ferret out corruption, to safeguard the public health, and to protect the public fisc.

II. The Court should make clear that government employers are not liable for the decisions of prosecutors over whom they have no control.

The Court's opinion in this case should address the serious chilling effect described above. The Court should make clear that government employers are not liable under § 1983 for the decisions of prosecutors over whom they have no control. *Amici* suggest two alternative grounds of decision that would directly solve this problem.

A. Municipal liability cannot be imposed under § 1983 because the City of Hays did not control the prosecutorial decision to use Vogt's statement in the criminal case.

The Court could rule that the City of Hays cannot be liable for violating Vogt's Fifth Amendment rights because the City was not responsible for the prosecutor's decision to use the compelled statement in the criminal proceeding. Section 1983 does not permit vicarious liability to be imposed on municipalities. *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 691 (1978). "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or *by those whose edicts or acts may fairly be said to represent official policy*, inflicts the injury that the government as an entity is responsible under § 1983." *Id*. at 694 (emphasis added). In other words, liability may not be imposed on municipalities on the theory that they failed "to control the conduct of *others*." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986).

Yet in this case, the Tenth Circuit allowed the § 1983 case to go forward against the City based on "the conduct of *others*," *id.*, namely, the prosecutor who introduced Vogt's allegedly compelled statement at the preliminary hearing. Municipal liability would be permissible here only if the prosecutor himself were clothed with final policymaking authority on the City's behalf. *Cf. Pembaur*, 475 U.S. at 484-85 (imposing municipal liability where the county prosecutor "was acting as the final decisionmaker for the county"). But Vogt does not claim that the prosecutor was even employed by the City, let alone that he acted as its final policymaker.

The Tenth Circuit thus plainly misapplied *Monell* by asking if Chief Scheibler "knew or reasonably should have known" that Vogt's statement might be used by a prosecutor in a later criminal case. Pet. App. 27a. That sidestepped the critical test for municipal liability because it cannot "be fairly said that the city *itself* is the wrongdoer." *Collins v. City of Harker Heights*, 503 U.S. 115, 122 (1992) (emphasis added). Nor did Vogt plead any facts to show that the City ratified the prosecutor's decision to use the compelled statement. That would require a showing that the City approved not only the prosecutor's decision but also "the [unconstitutional] basis for it." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988).

Although this issue admittedly is not subsumed within the question presented, the Court may properly resolve the case on this narrow statutory ground in order to avoid deciding what remains an unresolved question under the Fifth Amendment. Indeed, this case is a prime candidate for the constitutional-avoidance canon: "The Court will not pass upon a constitutional question although properly presented

by the record, *if there is also present some other ground upon which the case may be disposed of*." *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (emphasis added); *see also Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 157 (1984) ("It is a fundamental rule of judicial restraint, however, that this Court will not reach constitutional questions in advance of the necessity of deciding them.").

The absence of a valid basis for municipal liability under § 1983 is clear in the record and warrants deciding the case on that limited, non-constitutional ground. In doing so, the Court would simply follow what it once described as "the traditional practice of this Court of refusing to decide constitutional questions when the record discloses other grounds of decision, whether or not they have been properly raised before us by the parties." *Neese v. S. Ry. Co.*, 350 U.S. 77, 78 (1955) (per curiam).[9]

B. The sole and exclusive remedy for the alleged violation is the exclusion of the compelled statement.

Alternatively, the Court could decide the case by holding that Vogt's sole remedy is the exclusion of the

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[9] *See also Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 33 (1993) (per curiam) (stating that the Court may decide "a case on nonconstitutional grounds even though the petition for certiorari presented only a constitutional question") (citing *Boynton v. Virginia*, 364 U.S. 454, 457 (1960); *Neese*, 350 U.S. at 78); *see also id.* ("And we may. . . 'consider a plain error not among the questions presented but evident from the record and otherwise within [our] jurisdiction to decide.' ") (citing *Wood v. Georgia*, 450 U.S. 261, 265 n.5 (1981); R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* § 6.26 (6th ed. 1986)).

allegedly compelled statement in his criminal case and that he is therefore *not* entitled to pursue a money damages claim against the City. Indeed, this understanding of the privilege against self-incrimination garnered the votes of six Justices in *Chavez v. Martinez*, 538 U.S. 760 (2003).

Although the plurality in *Chavez* concluded that no Fifth Amendment violation occurred because the unwarned statement was not introduced in a criminal case, 538 U.S. at 767 (Opinion of Thomas, J.), Justice Thomas—joined by Chief Justice Rehnquist and Justices O'Connor and Scalia—agreed that a § 1983 claim cannot be brought for violating judge-made prophylactic rules intended to protect the self-incrimination privilege at trial:

> Rules designed to safeguard a constitutional right, however, do not extend the scope of the constitutional right itself, just as violations of judicially crafted prophylactic rules do not violate the constitutional rights of any person. . . . Accordingly, Chavez's failure to read *Miranda* warnings to Martinez did not violate Martinez's constitutional rights *and cannot be grounds for a § 1983 action*.

Id. at 772 (emphasis added).

Justice Souter agreed, joined by Justice Breyer, writing that a § 1983 damages action could not be used to remedy a *Miranda* violation because it was not "necessary to expand protection of the privilege against compelled self-incrimination to the point of the civil liability" requested there. *Id*. at 778 (Souter, J., concurring in the judgment). Permitting a § 1983 damages claim for the failure to give a *Miranda* warning would pose a "risk of global application in every instance of

interrogation producing a statement inadmissible under Fifth and Fourteenth Amendment principles, or violating one of the complementary rules we have accepted in aid of the privilege against evidentiary use." *Id*. They correctly saw "no limiting principle or reason to foresee a stopping place short of liability in all such cases." *Id*. at 779.

Justice Scalia treated the various opinions on this point as a holding of the Court:

> Section 1983 does not provide remedies for violations of judicially created prophylactic rules, such as the rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), *as the Court today holds*; nor is it concerned with "extensions" of constitutional provisions designed to safeguard actual constitutional rights.

Id. at 780 (Scalia, J., concurring in part in the judgment) (citations omitted, emphasis added).

Accordingly, the Court should rule that Vogt's sole remedy under the Fifth Amendment was the exclusion of his allegedly compelled statement—even assuming it was inadmissible at the preliminary hearing—and that Vogt therefore failed to state a claim against the City under § 1983 for money damages. A decision on this ground would comport with the Court's "continued insistence that the closest possible fit be maintained between the Self-Incrimination Clause and any rule designed to protect it." *United States v. Patane*, 542 U.S. 630, 640-41 (2004) (Opinion of Thomas, J.). Because "'[t]he exclusion of unwarned statements . . . is a complete and sufficient remedy,'" *id.* at 643 (quoting *Chavez*, 538 U.S. at 790 (Kennedy, J., concurring in part and dissenting in part)," the § 1983 damages claim must fail.

This alternative ground for decision is subsumed within the question presented, just as it was in *Chavez*. The question on which the Court granted review, as in *Chavez*, concerns the scope and application of the Fifth Amendment. A holding that the exclusion of evidence is a "complete and sufficient remedy" to effectuate the privilege against self-incrimination—and that a § 1983 damages claim is therefore not available—is fairly subsumed within the scope of that question.

* * *

The larger problem in the Tenth Circuit's ruling is not its holding that the self-incrimination privilege requires the exclusion of compelled statements at a preliminary hearing, but that a government employer can be held liable for money damages under § 1983 for the decision of a prosecutor over whom it has no control. That ruling is plainly wrong. As a matter of established § 1983 jurisprudence under *Monell*, *Pembaur*, and *Praprotnik*, the City cannot be liable for the actions of a prosecutor who does not exercise final policy-making authority on the City's behalf. And under *Chavez*, the remedy for the Fifth Amendment violation (if any) would be the exclusion of evidence in the criminal case, not a money damages claim against the City.

The Court should adopt one of those alternative grounds for decision in order to eliminate the chilling effect on government employers from a decision that makes them responsible for the conduct of prosecutors over whom they have no control. On behalf of the nation's State and local government employers, *Amici* urge the Court, at a minimum, to make clear that these defenses remain available to government employers.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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