No. 19-

IN THE

Supreme Court of the United States

MARK GRAF AND JOHN USTICH,

Petitioners,

v.

HYUNG SEOK KOH, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Seventh Circuit's renouncement of jurisdiction over Petitioners' interlocutory appeal misapplied *Johnson v. Jones,* 515 U.S. 304 (1995), where the denial of qualified immunity on Respondent's Fifth Amendment coercive interrogation claim was based solely upon competing characterizations of otherwise undisputed facts from a fully videotaped interview.

(2) Whether Petitioners were entitled to qualified immunity on Respondent's Fifth Amendment coercive interrogation claim based upon the absence of clearly established law prohibiting any of their interview tactics, either individually or collectively.

(3) Whether the state criminal court judge's fully informed determination to admit Respondent's statements at his criminal trial was a superceding event which severed the chain of causation on Respondent's coercive interrogation claim, entitling Petitioners to qualified immunity.

PARTIES TO THE PROCEEDING

Petitioners, Defendants-Appellants below, are Village of Northbrook, Illinois Police Department Detectives Mark Graf and John Ustich.

Respondent, Sung Phil Kim, a Village of Wheeling, Illinois Police Officer, is a Defendant-Appellant below.

Respondent, Hyung Seok Koh, is one of the Plaintiffs-Appellees below.

RELATED CASES

- *Koh v. Graf*, No. 11-cv- 02605, U. S. District Court for the Northern District of Illinois, Eastern Division. Judgment entered March 29, 2018.

- *Koh v. Ustich*, No. 18-1809 & 18-1821, U.S. Court of Appeals for the Seventh Circuit. Judgment entered August 13, 2019.

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Petitioners Mark Graf and John Ustich respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 933 F.3d 836 and reproduced at App. 1a-22a. The opinion of the United States District Court for the Northern District of Illinois is reported at 307 F.Supp.3d 827 and reproduced at App. 23a- 98a.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on August 13, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in pertinent part: "No person… shall be compelled in any criminal case to be a witness against himself[.]"

Section 1983 of Title 42 of the United States Code provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

> State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

Section 1291 of Title 28 of the United States Code provides in pertinent part:

> The court of appeals … shall have jurisdiction of appeals from all final decisions of the district courts of the United States[.]

STATEMENT OF THE CASE

I. Facts Leading To Respondent's Interview.

On April 16, 2009, around 3:45 a.m., Respondent Hyung Seok Koh ("Koh") called 911 after his wife discovered their 22-year-old son, Paul, lying in a pool of blood in the foyer of their Northbrook, Illinois home. App. 2a.[1] Responding Village of Northbrook Police Officers and Firefighter Paramedics found Paul lying dead next to a kitchen knife and Mrs. Koh huddling over his body. *Id.* Paul had suffered severe stab wounds to his throat and chest. App. 2a, 29a.

The Kohs were escorted to the front yard and "pushed" onto the grass while Northbrook officers

1. "App. _" references Petitioners' required appendix. "Dkt. " refers to the district court docket.

conducted a protective sweep of the house. App. 29a; Dkt. 311, ¶ 9. The Kohs remained on the lawn for 10-15 minutes and were watched by police who denied their requests to enter the house to see Paul, retrieve Koh's medications and cell phone, and travel to the hospital. App. 29a-30a. They were then transported to the Northbrook Police Department ("NPD") by officer Matt Johnson who "sort of shoved" them into his squad car. App. 30a.

Upon arrival at NPD, an officer asked Mrs. Koh to wash the blood from her hands in a restroom. App. 3a. The Kohs were kept in a conference room, first together and later separated. *Id.* They were given blankets and beverages. *Id.* Koh's request to make a phone call was denied but an officer reached his pastor, who arrived at NPD within hours. *Id.* Other friends and family also arrived but none, including the pastor, were allowed to see the Kohs. *Id.*

A Northbrook police commander, recognizing a language barrier, spoke with dispatchers about locating a Korean-speaking police officer to help facilitate communication with the Kohs. App. 33a. Officer Sung Phil Kim of the nearby Wheeling Police Department responded to Northbrook's request. App. 3a-4a. Kim spoke Korean socially, having learned Korean from his parents and at Sunday school as a child, but otherwise had no formal training in Korean or as a translator. App. 4a.

Northbrook Chief of Police Charles Wernick notified the North Regional Major Crimes Task Force ("NORTAF"), a regional police investigative team consisting of police representatives from several local municipalities, to assist. App. 33a. NORTAF forensic specialists responded to the

Koh residence and began processing the scene, while other NORTAF officers responded to NPD and interviewed the Kohs' friends and family, as well as Mrs. Koh. *Id*. at 33a,37a.

Koh was questioned at NPD in two sessions that totaled less than two and a half hours. App. 4a. The first session began at 7:30 a.m. and lasted 55 minutes, and the second session began at 11:30 a.m. and lasted 90 minutes. App. 34a, 38a; Dkt. 311, ¶ 78. Petitioners, Northbrook Detectives Mark Graf and John Ustich, were present for both sessions and Officer Kim was present to assist with translation. App. 4a, 38a. Graf primarily conducted the interview, though Ustich and Kim also posed questions. App. 4a. Both sessions were video recorded, however there was a brief discussion before the first session began and at the very end of the first session when the tape elapsed. *Id*.

Petitioners were trained on the Reid Technique of Interview and Interrogation, which is "the definitive police training school for interview and interrogation in the United States." Dkt. 311, ¶¶ 50-51. The Reid Technique utilizes a nine step approach to interrogations including: (1) confronting the suspect with his guilt; (2) offering face-saving scenarios that justify the crime; (3) interrupting all denials; (4) overcoming factual, moral, and emotional objections to the charges; (5) procuring and retaining a suspect's attention; (6) showing sympathy and understanding, and urging the suspect to tell the truth; (7) presenting alternative questions (one face-saving, one repulsive, but both incriminating); (8) getting the suspect to recount details of the crime; and (9) converting the statement into a full confession. Dkt. 311, ¶ 51. Petitioners employed these tactics during the second session of Koh's interview. App. 39a; Dkt. 285-1, Video 2.

Prior to Koh's interview, Ustich told Graf he was at the Koh residence and observed a trail of blood from an upper staircase down to the foyer where Paul's body was lying face up, his arm in a rigid posture, and a knife lying next to him. Dkt. 311,¶ 47; Dkt. 281, Ex. 8B. Just before the video started, Koh asked Graf for his medications (which he used to control diabetes, high blood pressure, and ammonia level disorder). App. 4a, 34a-35a. Graf responded that someone would bring the medications. App. 4a. Also before the video began, Graf asked Koh if he had a lawyer. *Id*. Koh said he had an attorney but could not remember the phone number. *Id*. Koh asked to see his pastor, his daughter, and his church friend but Graf told him "the only person I could see was a lawyer. And since I didn't have any phone numbers, so that was the end." App. 4a-5a.

II. The First Interview Session.

The first videotaped session began at 7:30 a.m. with Graf reading Koh his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) in English. App. 4a-5a. Koh nodded up and down as Graf read. App. 5a. Graf passed Koh a printed waiver form which listed *Miranda* rights in English and asked Koh to sign and date the form. *Id*. Koh asked Kim to "transfer this one" which the officers understood as a request to translate. *Id*. Kim then spoke with Koh in Korean and thereafter signed an English-language *Miranda* form "at Graf's and Kim's directions." App. 5a-6a.

Graf offered Koh beverages and food, but Koh only requested water. App. 6a. Graf began asking questions in English with little intervention or assistance from Kim. *Id*. Koh answered some questions and communicated at a basic level in English, but some of his answers

were confusing or unresponsive. *Id.* Graf nevertheless continued questioning Koh who recounted the events of the night of Paul's death. *Id.* Graf and Koh also discussed Paul's drug use and depression. *Id.* A little over halfway through the interview, Graf asked about Paul's injuries and whether they had an altercation that would have caused them, to which Koh shrugged his shoulders, stated "no," and offered no further response. Dkt. 285-1, Video 1 at 34:27 to 34:35.

III. Petitioners Learn Information From NORTAF Which Establishes Probable Cause To Believe Koh Murdered Paul.

After Koh's first interview, Petitioners spoke with NORTAF representatives about the interview and received investigative updates which led the district court to determine at summary judgment that "a jury must conclude that there was probable cause to arrest Koh after the debriefing." App. 58a, 61a. Specifically, Ustich noted Koh had not vehemently denied involvement in Paul's death, the manner of his denial seemed oddly casual, and he appeared evasive and not forthcoming. App. 58a. Additionally, NORTAF forensic specialists told Petitioners that physical evidence from the Kohs' home demonstrated Paul was murdered. App. 7a-8a. First, they found blood in the upstairs master bathroom which suggested an effort to clean up the crime scene. Second, they found a bloody metal cross and broken necklace chain on the floor, suggesting Paul was attacked and a struggle had ensued. *Id.* Third, they explained that Paul's extensive stab wounds to the chest and throat demonstrated Paul was murdered, because he could not have inflicted those injuries upon himself. App. 7a, 8a, 59a.

NORTAF investigators who interviewed the Kohs' family and friends also provided Petitioners with motive evidence. App. 59a. Petitioners learned Koh and Paul had a highly confrontational relationship. App. 59a-60a. Paul's youth pastor informed investigators that Koh made Paul enter into a "Family Agreement" which prohibited drug use and provided for random drug tests, and that Koh and Paul recently had an altercation. App. 7a, 59a-60a. Investigators also discovered that Paul was out the night of his death smoking marijuana with friends. App. 7a, 59a, n 27. Petitioners further learned Paul was previously seen by NPD officers wandering the neighborhood in the middle of the night after arguing with his father. App. 60a.

Finally, Petitioners and their supervisors discussed inconsistencies in the Kohs' stories. App. 60a. Graf was suspicious of the blood in the master bathroom because it contradicted Mrs. Koh's statement to NORTAF that neither she nor her husband washed up in the bathroom after discovering Paul's body. App. 58a, 60a. Mrs. Koh also contradicted Koh's statement that she had turned Paul's body over. App. 60a. And Petitioners learned a neighbor heard a scream from the Koh house about a half hour before police arrived, which raised skepticism that Koh could have slept through Paul's death. App. 60a-61a.

IV. The Second Interview Session And Petitioners' Use Of Reid Interrogation Techniques.

With the information demonstrating homicide, Petitioners' superiors instructed them to press Koh harder. App. 8a. The videotape was activated at 11:30 a.m. and Graf again offered Koh food, coffee, juice, and water. *Id*. Koh responded: "Yeah, what I need is I'll let you

know." *Id.* Graf reminded Koh "of the rights that we read you before" and asked if he "still understood these rights and [was] willing to talk with us?" Koh stated "Yes." *Id.* The second session lasted about 90 minutes and was briefly interrupted once to change the tape during which no conversation occurred. Dkt. 311, ¶ 78; Dkt. 285-1, Video 2.

The second session questioning was more aggressive in "tone, volume, and tempo." App. 8a. Graf, implementing Reid techniques, pressed Koh hard about the night before, confronting him with inconsistencies (some real and some created by Graf) in his story. App. 8a, 39a. Koh initially denied involvement in Paul's death, repeating his story that after going to bed he slept until Mrs. Koh's screams woke him around 3:45 a.m. App. 39a. Graf intensified his questioning, eventually moving to a chair next to Koh. *Id.* Graf raised his voice, yelled at Koh, and touched Koh on his arms and legs. App. 71a. Graf theorized Koh was mad that Paul was out doing drugs and had waited for him to return home. App. 9a. Graf once stated, "[w]e can be here for days and days and days, okay, but we don't want that." *Id.* Graf repeatedly accused Koh of lying. App. 70a. The Seventh Circuit found that "[a]t various points, Koh was hunched over and beat his chest and head with his hands." App. 9a.

Eventually, Koh agreed to Graf's suggestion that he stayed up until 1:00 a.m. waiting for Paul; Koh was mad Paul was out late smoking marijuana with friends; and they argued when Paul finally came home, which culminated in Koh stabbing Paul in the chest and slitting his throat in self-defense. App. 40a. Graf presented Koh the self-defense storyline and accompanying details. *Id.*

About three minutes before the end of the interview, Graf stepped out to talk with Northbrook Commander Scott Dunham, who told him Koh's attorney was at the station. App. 41a; Dkt. 285-1, Video 3. While Dunham went to get the attorney, Graf re-entered the conference room and increased the intensity by asking Koh quick, successive, leading questions without leaving time for translation. App. 11a. In this time period, Koh made statements that "could be interpreted as an admission that he had stabbed Paul". App. 41a. Koh made "stabbing or slashing motions with his hands in response to Graf's questioning about whether and how he had cut Paul". App. 41a-42a. The interview ended when Koh's attorney arrived a few minutes before 1 p.m. App. 11a. Koh was given his medication after the second interview. App. 35a, n. 8.

During both interviews, Kim offered translation assistance, but the translations were either partial, or in a few instances, inaccurate. App. 9a. Early in the second interview, Kim translated Koh's use of a Korean idiom, "gachi jooka" as "let's die together", without explaining to Petitioners that it was an idiom not to be taken literally. App. 10a. Additionally, Kim and Graf sometimes asked "overlapping questions" where it was unclear to which question Koh was responding. *Id.* "[A]t a critical point in the second interview, Graf asked Mr. Koh if he was angry. Before Mr. Koh responded…Kim asked Mr. Koh in Korean whether Mr. Koh acted in self-defense. Kim did not translate Graf's question. Mr. Koh responded, 'I think so,' prompting Kim to state, 'He said it was in self-defense.'" *Id.* It was unclear which question Koh was answering because the officers posed two separate questions. *Id.*

V. The Cook County State's Attorney's Office (CCSAO) Charges Koh With Murder.

After the second session, Graf again met with Northbrook supervisors and NORTAF representatives. App. 42a. They decided to call the CCSAO to see whether it wanted to seek criminal charges. *Id.* Assistant State's Attorneys ("ASA") Rick Albanese and Diane Sheridan responded to NPD and reviewed portions of Koh's videotaped confession. App. 42a-43a. Sheridan also spoke with the NORTAF Commander and Graf. App. 43a. The next morning, a supervising ASA, Bob Heilengoetter, approved first-degree felony murder charges against Koh based upon his review of information in a "felony review folder" which included the Cook County medical examiner's post-autopsy finding that Paul's death was a homicide, Albanese's notes about Koh's videotaped statements, and Heilengoetter's own notes from a phone conversation he had with Detective Graf earlier that day. *Id.*; Dkt. 328, ¶ 59.

On May 13, 2009, a grand jury indicted Koh for first-degree murder. App. 44a. On July 23, 2010, Cook County Circuit Court Judge Garritt Howard denied Koh's motion to quash arrest his arrest, finding after reviewing Koh's entire videotaped interview and holding a full adversarial hearing, that probable cause existed to arrest Koh when he demonstrated on video how he cut Paul. Dkt. 311, ¶ 119.

On August 25, 2010, Koh moved to suppress his videotaped statements, alleging they were involuntarily coerced by Petitioners. Dkt. 311, ¶ 120. Hearings occurred over several months and included stipulated testimony from Koh's motion to quash, and live testimony from

Graf and several other witnesses. *Id*. On January 13, 2012, Judge Howard ruled, based upon his own review of Koh's entire videotaped interview, the parties' briefs, and witness testimony, that Koh knowingly and voluntarily waived his *Miranda* rights, there was no undue delay in giving Koh's attorney access to his client, and Koh's will was not overborne because he "was perfectly capable of standing up for himself and not just accepting being spoon-fed" information Graf provided. Dkt. 311, ¶ 121. As a result, the court ruled Koh's statements were voluntary under the Fifth Amendment and could be presented to the jury. *Id*.

After a three week trial in December 2012—during which Koh presented expert testimony suggesting Paul committed suicide—a jury acquitted Koh and he was released after being held in jail for 3 years and 9 months. App. 11a, 44a.

VI. The Proceedings Below.

On April 18, 2011, the Kohs filed their initial suit, amended the complaint on February 21, 2013, and filed a second amended complaint on September 16, 2014. Dkts. 1, 40, and 133. The second amended complaint alleged, *inter alia*, a due process fabrication of evidence claim[2], a Fourth Amendment claim of false arrest, Fifth and Fourteenth Amendment claims for coercive interrogation, and a state law malicious prosecution claim. Dkt. 133, pp.

2. The district court found that certain allegations within the second amended complaint plausibly alleged a fabrication of evidence claim despite Koh not specifically identifying the due process claim. App. 80, n 39. The parties were nevertheless able to brief the issue at summary judgment.

9-20. On March 1, 2016, Petitioners moved for summary judgment. App. 27a. As to the Fifth Amendment coercive interrogation claim, Petitioners asserted qualified immunity, maintaining they utilized no interrogation tactic that was clearly unconstitutional. App. 65a-79a. Alternatively, Petitioners sought qualified immunity because Judge Howard's fully informed decision to admit the videotaped interview into evidence was a superceding cause of Koh's injuries. Dkt 279, pp. 32-33.

On March 30, 2018, federal district court Judge Edmond E. Chang denied qualified immunity on the Fifth Amendment coercive interrogation claim, holding "a reasonable officer would have known that verbally and physically intimidating a suspect, as well as manipulating him, lying to him, and coaching him on the details of the confession, all while knowing he was not fluent in English and was operating without food, medications, or sleep, violates the Fifth Amendment." [3] App. 75a-76a. The district court also rejected, without considering, Petitioners' alternative qualified immunity argument, stating that Petitioners' superceding cause contention was not appropriate for qualified immunity because it had "nothing to do with *legal* uncertainty." *Id*. at 79a, n 38 (emphasis in original).

Judge Chang granted Petitioners summary judgment on Koh's due process/unfair trial claim, finding they did not fabricate any evidence. App. 80a-86a. The court also granted summary judgment on Koh's common law

3. The Court dismissed Koh's substantive due process coercive interrogation claim based on a lack of "conscience shocking" police misconduct. App. 65a.

malicious prosecution claim on the grounds that probable cause was present for the prosecution. App. 86a-88a. The court denied summary judgment on the false arrest claim against all defendants, finding an issue of fact on whether probable cause existed prior to the debriefing session which occurred after Koh's first interview session. App. 49a-64a.

Petitioners appealed the denial of qualified immunity on the Fifth Amendment coercive interrogation claim on the grounds that (1) they did not engage in any clearly unconstitutional conduct during Koh's interview, and (2) Judge Howard's denial of Koh's motion to suppress following Petitioners' disclosure of the videotaped interview to prosecutors, and absent any evidence that Petitioners misled the prosecutors, was an independent, superceding cause of any alleged Fifth Amendment violation. App. 14a-15a.

The Seventh Circuit dismissed for lack of jurisdiction under principles of *Johnson v. Jones*, 515 U.S. 304 (1995). The court found that Petitioners' "assert[ion] in their reply brief that they have taken all of the district court's factual determinations and reasonable inferences in the light most favorable to Mr. Koh," belied "'a back-door effort to contest the facts,' namely the nature of Mr. Koh's confusion and lack of understanding due to the language barrier, the impact of the lack of medication and sleep, and the threat Graf leveled against Mr. Koh." App.15a-16a (internal citation omitted).

Further, the Seventh Circuit rejected Petitioners' alternative superceding cause argument because "this court has not 'accepted this argument in a Fifth

Amendment coerced confession claim,' and since this 'superceding cause issue…is not a pure legal question related to qualified immunity,' the court lacks jurisdiction under the collateral order doctrine." App. 24a, citing *Jackson v. Curry*, 888 F.3d 259, 266 (7th Cir. 2018).

REASONS FOR GRANTING THE PETITION

This Court should review the decision below for three reasons. First, this case presents an excellent vehicle for the Court to resolve the deep conflict and confusion among the courts of appeals as to whether *Johnson* prohibits jurisdiction over interlocutory appeals of qualified immunity denials based on differing characterizations of otherwise undisputed facts. Some courts appropriately apply *Johnson* to bar appellate review of evidentiary disputes concerning the who, what, where, when, and how of a litigated incident. Others apply *Johnson* far more broadly to bar interlocutory review whenever different inferences or characterizations are discernable from otherwise undisputed facts. But only the narrower approach is true to *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985) and *Plumhoff v. Rickard*, 572 U.S. 765, 772 (2014), which teach that interlocutory review is critical to official immunity from trial; an immunity which is effectively lost if a case is erroneously permitted to survive summary judgment. The broader approach, by contrast, effectively renders qualified immunity from trial unreviewable whenever parties dispute the materiality of or inferences to be drawn from undisputed facts. This case presents a perfect opportunity to resolve this long-simmering conflict because Koh's entire two-and-a-half-hour interview was videotaped. As a result, consideration of whether Petitioners' conduct violated clearly established

constitutional rights does not require the burdensome interlocutory record evaluation condemned in *Johnson*; but rather, only a simple application of the body of controlling case law to a clear and unequivocal record, which the appellate courts are obligated to perform under *Mitchell* and *Plumhoff*.

Second, the Court's review is needed because the videotaped account of Koh's interview established that none of Petitioners' challenged interrogation tactics, on which Petitioners were specifically trained, have ever been deemed unconstitutional by this Court or any court of appeals. To the contrary, the most closely analogous circuit cases have established that the very tactics Petitioners employed were not clearly unconstitutional. *Dassey v. Dittmann*, 877 F.3d 297, 312-314 (7th Cir. 2017) (*en banc*), *cert. denied*, 138 S. Ct. 2677 (2018); *Gill v. City of Milwaukee*, 850 F.3d 335, 341 (7th Cir. 2017).

Third, this case presents an excellent vehicle for resolution of an inter-circuit conflict on the availability of interlocutory review from a qualified immunity denial that turns on the purely legal question of whether a state court judge's admission of a suspect's statement can sever the chain of causation on a Fifth Amendment coerced confession claim premised upon a prosecutor's use of that statement in a criminal proceeding. Several appeals courts have reversed qualified immunity denials based on a superceding cause where state court judges admitted evidence obtained by police, so long as there was no evidence the officers misled prosecutors and judges as to the true facts. *See, e.g., Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005). As a result, the Seventh Circuit's refusal to review the same question in this case has created an inter-circuit conflict which requires the Court's guidance.

The exceptional importance of this proximate causation issue is apparent. Fifth Amendment coercive interrogation claims seek damages from police officers for the decisions of prosecutors to rely upon, and judges to admit, suspect statements in criminal proceedings. *See, e.g., Chavez v. Martinez*, 538 U.S. 760, 770 (2003) (explaining that Fifth Amendment coercion claims are premised upon use of involuntary statements in criminal proceedings). Such civil rights claims are sound when police withhold or fabricate evidence, or otherwise deceive decisionmakers so that errors in those decisions are properly attributed to the responsible parties. But where, as here, the district court has found that the police did not mislead prosecutors or judges, or otherwise fabricated or withheld evidence, holding police officers responsible for those decisions misapplies tort principles of causation in order to permit an impermissible end-run around principles of prosecutorial and judicial immunity, which prohibit suits against the decision-makers themselves.

I. Review Is Needed To Resolve The Conflict And Confusion In The Circuit Courts As To Whether *Johnson v. Jones* Prohibits Interlocutory Review Of Qualified Immunity Denials Premised On Competing Characterizations Of Undisputed Facts.

A. The Petition Presents An Issue Of Exceptional Importance Concerning The Scope Of An Official's Right To Interlocutory Review Of The Denial Of His Claim To Immunity From Trial.

In *Mitchell*, the Court held "to the extent that it turns on an issue of law," a defendant may immediately appeal

the denial of a pre-trial assertion of qualified immunity. 472 U.S. at 530. "This is so because qualified immunity—which shields Government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights'— is both a defense to liability and a limited 'entitlement not to stand trial or face the other burdens of litigation." *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009) (internal citations omitted). Qualified immunity is "both important and completely separate from the merits of the action, and this question could not be effectively reviewed on appeal from a final judgment because by that time the immunity from standing trial will have been irretrievably lost." *Plumhoff*, 572 U.S. at 772.

Johnson created a limited exception to *Mitchell* and prohibited interlocutory review of "a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson,* 515 U.S. at 319-320. *Johnson* involved an appeal of a denial of qualified immunity to three police officers who contended the evidence against them was insufficient to warrant trial on an excessive force claim. *Id.* at 307-308. The Court held the order which "determine[d] only a question of 'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial", was not immediately appealable. *Id.* at 313.

Five years ago, this Court clarified the distinction between nonreviewable orders based on evidentiary disputes and reviewable orders based on abstract issues of law in *Plumhoff,* an excessive-force claim arising out of a videotaped high-speed police chase. 572 U.S. at 773. The district court denied summary judgment based on

qualified immunity, finding a fact dispute as to whether the use of force was excessive and contrary to clearly established law. In reversing the Sixth Circuit's dismissal of the officers' interlocutory appeal for lack of jurisdiction, the Court explained:

> The District Court order in this case is nothing like the order in *Johnson*. Petitioners do not claim that other officers were responsible for shooting Rickard; rather, they contend that their conduct did not violate the Fourth Amendment and, in any event, did not violate clearly established law. Thus, they raise legal issues; these issues are quite different from any purely factual issues that the trial court might confront if the case were tried; deciding legal issues of this sort is a core responsibility of appellate courts, and requiring appellate courts to decide such issues is not an undue burden. *Id.*

The Court then applied the objective reasonableness standard to the facts as depicted on the video, notwithstanding the parties' competing characterizations of those facts, and held the officers' response to the car chase was reasonable under the circumstances and granted them qualified immunity. *Id.* at 775. [4]

4. Several years earlier, in *Scott v. Harris*, the Court considered a similar claim of excessive force during a videotaped high-speed chase. 550 U.S. 372, 375 (2007). The Court reversed both lower courts' denials of summary judgment on the basis of a dispute as to the degree of danger posed by plaintiff's driving, ruling that plaintiff's story was "utterly discredited" by the videotape. *Id.* at 380. The Court observed that although "there is no obvious way to quantify the risks on either side, it is clear from

The instant case presents an even stronger case for interlocutory review than was presented in *Plumhoff,* where the Court needed to make at least some assessment of the extent to which the videotaped events posed risks to the officers and others in order to decide the legal issue of reasonableness. Here, by contrast, resolution of Petitioners' legal question involves no such judgment calls. The video of Koh's interview presents a perfect perspective of the conversation at issue and the Court need only review Petitioners' depicted actions, and then determine whether the law prohibited anything they did or said.

The Seventh Circuit misinterpreted *Johnson* and ignored *Plumhoff* in dismissing for lack of jurisdiction based on competing characterizations of the videotaped interrogation. Indeed, the parties' unsurprising disagreements about whether Petitioners' conduct was overzealous (as Koh contends) or appropriate (as Petitioners believe) should not have interfered with the lower courts' ability to determine whether the conduct was constitutionally prohibited under governing law.

To defeat jurisdiction, Koh argued, and the Seventh Circuit agreed, that the district court's identification of factual disputes regarding Koh's subjective understanding and the degree of his confusion based on a lack of medicine, sleep, and English proficiency, defeated interlocutory

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the videotape that [plaintiff] posed an actual and imminent threat to the lives of [others]." *Id.* at 383–84. *Johnson* was neither raised nor considered an impediment to interlocutory review, because the reasonableness of the officer's actions was a legal question and the video established that plaintiff "posed a substantial and immediate risk of serious physical injury to others." *Id.* at 386.

review under *Johnson*. App. 15a-16a. But Petitioners conceded those disputes for purposes of appeal (App. 15a) because Koh's particular susceptibilities, while important to the voluntariness of his confession, were immaterial to the separate qualified immunity question of whether Petitioners engaged in any clearly unconstitutional conduct.

The Seventh Circuit disregarded Petitioners' contention that Koh's susceptibilities were immaterial to qualified immunity, which itself disregarded *Behrens v. Pelletier,* which necessarily requires appellate courts to decide the materiality of a fact in assessing whether challenged police conduct violated clearly established law. As *Behrens* stated: "[d]enial of summary judgment often includes a determination that there are controverted issues of material fact, see Fed. Rule Civ. Proc. 56, and *Johnson* surely does not mean that *every* such denial of summary judgment is nonappealable." 516 U.S. 299, 312–13 (1996) (emphasis in original). To that end, Petitioners' assertion that they were entitled to qualified immunity because they did not employ clearly impermissible interrogation techniques was unrelated to, and should not have been weakened by, fact questions as to whether Koh's lack of sleep, medication and/or sustenance, rendered his statement involuntary under the Fifth Amendment's totality of the circumstances test governing the statement's admissibility at Koh's criminal trial. *Compare Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (In determining whether a defendant's will was overborne "the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation") *with Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982) (qualified immunity protects government officials "from

liability for civil damages insofar as their conduct does not violate clearly established" law).

Koh's entire interrogation was videotaped and Petitioners conceded Koh was not given medicine, suffered from a language barrier, did not understand his *Miranda* rights, was told once he could be there "for days and days and days," and was generally confused. App. 15a. But the inference drawn by the district court from these undisputed facts - that Koh's statement was arguably involuntary under the Fifth Amendment - was divorced from Petitioners' qualified immunity assertion, which conceded involuntariness, and only posited the purely legal question of whether any of their acts during the interview violated clearly established law. *Id.* at 65a.-79a. As a result, the Seventh Circuit incorrectly "detect[ed] a back-door effort to contest the facts" regarding Koh's confusion and Graf's "threat" because Petitioners only challenged the relevancy of those facts to the qualified immunity inquiry, not whether Koh was in fact confused or Graf made the cited statement. App. 15a. Under *Mitchell*, *Johnson* and *Plumhoff,* Petitioners were entitled to interlocutory review of the district court's denial of their claim to qualified immunity.

B. The Circuit Courts Are In Disarray On The Scope Of Interlocutory Jurisdiction Under *Johnson*.

The Seventh Circuit's decision below directly contradicts the Tenth Circuit's decision in *Walton v. Powell,* 821 F.3d 1204 (10th Cir. 2016) where the court aptly explained why *Mitchell* and *Plumhoff* require interlocutory jurisdiction over qualified immunity denials so long as the appeals court is not asked to engage in

fact-finding relating to evidence sufficiency. In *Walton*, the district court denied qualified immunity upon finding a fact dispute as to whether plaintiff was discharged in retaliation for First Amendment protected conduct. *Id.* at 1207. Then Circuit Judge Gorsuch, writing for the court, explained that, as here, appellate courts are tasked with assessing the legal significance of undisputed facts on *Mitchell* appeals. This is true whether such facts are identified by the district court, apparent from video evidence, or conceded by the movant. *Id.* 1208. Holding that *Mitchell* required interlocutory review, the court elaborated: "[u]nder *Johnson,* it is for the district court to tell us what facts a reasonable jury might accept as true. But under *Plumhoff,* it is for this Court to say whether those facts, together with all reasonable inferences they permit, fall in or out of legal bounds—whether they are or are not enough as a matter of law to permit a reasonable jury to issue a verdict for the plaintiff[.]" *Id.* at 1209-10.

Similarly, decisions from the Third and Fourth Circuits hold that *Johnson* permits appellate courts to review inferences drawn by a district court from otherwise undisputed facts. *Schieber v. City of Philadelphia*, 320 F.3d 409, 420 (3d Cir. 2003); *Winfield v. Bass*, 106 F.3d 525, 534 (4th Cir. 1997) (*en banc*). By contrast, decisions from the First, Sixth, and Ninth Circuits, have broadly read *Johnson* to renounce jurisdiction whenever district courts identify competing characterizations of undisputed facts. *See Penn v. Escorsio*, 764 F.3d 102, 105 (1st Cir. 2014); *George v. Morris*, 736 F.3d 829, 836 (9th Cir. 2013); *Romo v. Largen,* 723 F.3d 670, 673-74 (6th Cir. 2013).

While the Sixth Circuit held in *Romo*, prior to *Plumhoff*, that an appellate court cannot review inferences drawn by a district court from undisputed facts, Judge

Sutton explained in concurrence that "nearly twenty years after *Johnson*" widespread confusion prevails within and between "every circuit in the country" over whether *Johnson* prohibits interlocutory review of a qualified immunity denial each time the parties dispute inferences drawn from undisputed facts, *Id.* at 686 (collecting cases):

> I submit that there are two ways to read *Johnson*. One applies it only to prototypical "he said, she said" fact disputes, in which the defendants (usually government employees) refuse to accept the truth of what the plaintiffs (usually individual claimants) say happened. When the appeal boils down to dueling accounts of what happened and when the defendants insist on acknowledging on appeal only their accounts, the underlying basis for an interlocutory appeal disappears.
>
> The other applies the decision not just to whether the defendant officers accept the plaintiff's evidence-supported version of what happened but also to whether the defendants accept the *district court's* reading of the *inferences* from those facts: here, whether Officer Largen lied about seeing a Dodge Ram on the road. Under that view (and the majority's view), when a district court determines that there is a "genuine issue of fact" for trial by drawing an inference in favor of the plaintiff, the appellate court may not second-guess that inference, indeed lacks jurisdiction to do so. I favor the former reading.

Id. at 678.

Yet even after *Plumhoff*, the Sixth Circuit in *Barry v. O'Grady*, 895 F.3d 440, 443 (6th Cir. 2018) recently reaffirmed its broad view of *Johnson*, stating that "a defendant may not challenge the inferences that the district court draws from those facts, as that too is a prohibited fact-based appeal."[5] But that expansive interpretation of *Johnson* undermines basic principles of qualified immunity and, as Petitioners contend, should be put to rest.

The disarray created by and significance of this issue has not been lost on the Court. In the five years since *Plumhoff*, the Court has ordered responses to at least four petitions for writs of certiorari questioning the breadth of *Johnson*. *See Raines v. Counseling Assocs., Inc.*, 883 F.3d 1071, 1075 (8th Cir. 2018), as corrected (Mar. 6, 2018), *cert. denied sub nom. Burningham v. Raines*, 139 S. Ct. 787 (2019); *Franklin for Estate of Franklin v. Peterson*, 878 F.3d 631, 638 (8th Cir. 2017), *cert. denied sub nom. Peterson v. Franklin*, 139 S. Ct. 411 (2018); *Stinson v. Gauger*, 868 F.3d 516, 525 (7th Cir. 2015), *cert. denied sub nom. Johnson v. Stinson*, 138 S. Ct. 1325 (2018); *Kindl v. City of Berkley*, 798 F.3d 391, 398 (6th Cir. 2015), *cert. denied sub nom. Herriman v. Kindl*, 136 S. Ct. 1657 (2016). In each of those cases, certiorari was denied, but all four were poor vehicles for review, as it was apparent that evidential facts were in dispute, and as a result, *Johnson*

5. This time dissenting, Judge Sutton questioned how the majority's broad reading of *Johnson* on summary judgment could square with qualified immunity review at the pleadings stage, where courts must accept a complaint as true but can "review whether the district court's pro-plaintiff inferences are 'plausible.'" *Barry,* 895 F.3d at 448 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

appropriately prohibited interlocutory review under either a narrow or broad view of its scope. Specifically, *Raines* and *Franklin,* both Eighth Circuit excessive force cases presented classic *Johnson*- like disputes over evidence sufficiency. *Raines*, 883 F.3d at 1075; *Franklin*, 878 F.3d at 637-638. Similarly, *Stinson* concerned an appeal of a fabrication claim where defendants challenged the district court's fact-finding, a prime example of a he said-she said dispute. *Stinson*, 868 F.3d at 525. And, in *Kindl*, the Sixth Circuit specifically noted that the jail cell video defendants relied upon was black and white, lacked sound, repeatedly froze, and as a result, did not necessarily contradict inmate accounts of occurrences within decedent's cell. 798 F.3d at 396, 400-402. Moreover, the court explained that the video in some instances supported, rather than refuted, plaintiff's claim that decedent was seeking help for a serious medical condition well in advance of her death. *Id*. at 400.

As explained above, there is no dispute over evidence sufficiency here. This case presents only the purely legal question of whether any of Petitioners' actions, as fully depicted on the videotaped interview, were clearly prohibited under controlling law. As such, this case presents the perfect vehicle for this Court to finally resolve the conflict and confusion, and provide necessary guidance on a question which is critical to the right of public officials to assert qualified immunity and avoid trial in the absence of evidence that they engaged in clearly unconstitutional conduct.

II. Petitioners Were Entitled To Qualified Immunity Because There Is No Clearly Established Law Holding Their Interrogation Tactics, Either Individually Or In Combination, Unconstitutional.

"Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *White v. Pauly,* 137 S.Ct. 548, 551 (2017) (internal quotations omitted). Although "caselaw does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *Id*. (internal quotations omitted). Recently, in *Kisela v. Hughes*, 138 S. Ct. 1148, 1151 (2018), this Court again cautioned lower courts "not to define clearly established law at a high level of generality." (internal quotations omitted). The "dispositive question is whether the violative nature of *particular* conduct is clearly established." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (internal quotations omitted) (emphasis in original).

The undisputed evidence establishes that Petitioners did not violate any clearly established law. Petitioners indisputably had probable cause to believe Koh had killed his own son (App. 58a-61a), and during the ninety-minute second session of his interview, utilized legal interrogation techniques on which they were specifically trained. Dkt. 311, ¶ 50. In these circumstances, courts permit interrogators in custodial settings "considerable latitude in playing on the guilt and fears of the person interrogated in order to extract a confession that he will shortly regret having given." *Johnson v. Trigg*, 28 F.3d 639, 641 (7th Cir. 1994). And, contrary to the district

court's conclusion, detectives are permitted to "pressure, and cajole, conceal material facts and actively mislead", and lie about the evidence they have against the suspect. *United States v. Rutledge,* 900 F.2d 1127, 1131 (7th Cir. 1990); *See also*, *U.S. v. Ceballos*, 302 F.3d 679, 695 (7th Cir. 2002) (explaining that "a lie that relates to the suspect's connection to the crime is the least likely ['police trickery'] to render a confession involuntary") (quoting *Holland v. McGinnis,* 963 F.2d 1044, 1051 (7th Cir. 1992).

Petitioners did not impermissibly use force, threats of force, promises of leniency or threats to family members, all tactics which have been constitutionally condemned. *See e.g., Brown v. Mississippi*, 297 U.S. 278, 287 (1936) (physical violence); *Arizona v. Fulminante,* 499 U.S. 279, 287-88 (1991) (credible threats of violence); *Hadley v. Williams*, 368 F.3d 747, 749 (7th Cir. 2004) (false promise to set suspect free)*; Rogers v. Richmond*, 365 U.S. 534, 543-45 (1961) (threat to arrest suspect's wife). Instead, Petitioners' interrogation tactics, including offering a theory of the crime, implying that witnesses had implicated Koh, rejecting Koh's denials, pleading to his sense of faith, and minimizing the seriousness of the crime by offering a self-defense alternative, have never been found to be impermissible by any court of appeals. Indeed, neither Koh nor the district court cited a single controlling decision that would have put Petitioners on notice that the Reid-based interrogation tactics they employed, either individually or in combination, were constitutionally prohibited. *See Mullenix*, 136 S. Ct. at 308 (a clearly established right is one that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right.") (internal citation omitted).

To the contrary, the Seventh Circuit's own decisions in *Dassey v. Dittmann*, 877 F.3d 297, 312-314 (7th Cir. 2017) (*en banc*) *cert. denied*, 138 S. Ct. 2677 (2018) and *Gill v. City of Milwaukee*, 850 F.3d 335, 341 (7th Cir. 2017) establish that Reid-based interrogation methods used on vulnerable suspects with limited intellectual abilities are not clearly established unconstitutional tactics. While the *Dassey* court debated whether Reid interrogation tactics led to false confessions on persons with limited intelligence, it determined "these debates over interrogation techniques have not resulted in controlling Supreme Court precedent condemning the techniques[.]" 877 F.3d at 318. Similarly, in *Gill*, taking into account plaintiff's intellectual disability and the same Reid interrogation techniques used by Petitioners here, the Seventh Circuit stated, "Gill has not cited and we have not identified, any precedent from the Supreme Court or this Circuit that puts the unconstitutionality of the officers' conduct here 'beyond debate.'" *Gill,* 850 F.3d at 341 (citing *Mullenix*, 136 S.Ct. at 308).

Without addressing *Gill* or *Dassey*, the district court denied qualified immunity based on *Hurt v. Wise*, because, in addition to Reid techniques, Graf once told Koh "we can be here for days and days and days." 880 F.3d 831, 835 (7th Cir.), *cert. denied sub nom. Vantlin v. Hurt*, 139 S. Ct. 412 (2018), and *overruled in part by Lewis v. City of Chicago*, 914 F.3d 472 (7th Cir. 2019); App. 72a, 77a. But that isolated statement was not of a character that has ever been held by any court to be unconstitutional. Furthermore, even if the 2018 ruling in *Hurt* could support the extreme proposition that any kind of threat is clearly prohibited, the ruling should not have impacted Petitioners' entitlement to qualified immunity because *Hurt* was decided almost ten years after Koh's 2009 interrogation. *See D.C. v. Wesby*,

138 S. Ct. 577, 589 (2018) ("To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent").

Ultimately, the videotaped interrogation irrefutably demonstrates that Petitioners did not use a single prohibited tactic, and instead only employed tactics on which they had been specifically trained, all of which are permitted by case law, and all of which occurred within a two-and-a-half-hour time frame. *See, e.g., Ceballos*, 302 F.3d at 694 (describing two forty-five-minute sessions as "relatively short"). As there was no case law prohibiting Petitioners' conduct, they were entitled to qualified immunity against Koh's Fifth Amendment claim.

III. The Lower Courts' Refusal To Address Petitioners' Claim To Qualified Immunity Based Upon The State Court Judge's Intervening Decision To Admit Koh's Statements Has Created An Inter-Circuit Conflict On An Issue of Exceptional Importance.

Petitioners alternatively sought summary judgment on the Fifth Amendment coercive interrogation claim on grounds of qualified immunity based upon the absence of proximate cause, and more specifically, that "the state court's denial of Mr. Koh's motion to suppress [his video recorded statement] is a superceding, intervening cause of his Fifth Amendment claim." App. 24a. In a one sentence footnote, the district court stated: "qualified immunity is a doctrine designed to respond to legal uncertainty, but causation (a factual matter) has nothing to do with *legal* uncertainty." App. 79a, n 38. The Seventh Circuit then renounced jurisdiction over the appeal of that decision, stating, again without explanation, that it has

not "accepted this [causation] argument in the context of a Fifth Amendment coerced-confession claim" and moreover, it is not a purely legal question related to qualified immunity. App. 24a. The lower courts' refusal to address the causation argument as outside the ambit of qualified immunity was incorrect, in conflict with the decisions of several sister courts of appeals, and deprived Petitioners of full consideration of their entitlement to avoid trial on the basis of qualified immunity.

The Seventh Circuit's refusal to address the causation argument on interlocutory review on the basis that it was "not a pure legal question related to qualified immunity" was incorrect. App. 24a. Though generally a fact issue, proximate cause is, in fact, a legal issue where the facts are not in dispute. *See, e.g., Lockwood v. Bowman Const. Co.*, 101 F.3d 1231, 1235 (7th Cir. 1996) ("Although the existence of proximate cause is often an issue for the fact finder to decide, when the undisputed facts lead to only one reasonable inference it is a question of law for the court to decide.") Moreover, Judge Gorsuch's opinion in *Walton* specifically stated that "questions of causation" are plainly open to interlocutory review of the denial of a claim to qualified immunity under *Johnson* as it is "precisely the sort of question *Plumhoff* preserves for appellate review." 821 F.3d at 1209. Here, it was undisputed, as a result of the district court's order granting Petitioners summary judgment on Koh's fabrication of evidence claim, that Petitioners did not mislead prosecutors or the criminal court. App. 86a. As a result, tort principles of causation, which apply in all claims under 42 U.S.C. §1983,[6] could

6. *See Malley v. Briggs*, 475 U.S. 335, 345 n. 7 (1986) ("§ 1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his

not be satisfied so as to permit Petitioners to be held liable for the acts of those decisionmakers on Koh's Fifth Amendment coercive interrogation claim. App. 86a; Dkt. 311, ¶ 113-122.

Indeed, prior to the Seventh Circuit's decision below, several circuit courts had reviewed the identical argument on an interlocutory basis without even a jurisdictional challenge. Most particularly, in *Murray v. Earle,* 405 F.3d 278 (5th Cir. 2005), plaintiff filed a Fifth Amendment coerced confession claim after her homicide conviction was reversed because she was coerced into confessing to child abuse. On appeal from the denial of qualified immunity on summary judgment, the Fifth Circuit agreed that plaintiff's injury was proximately caused by the trial judge's decision to admit her confession into evidence, not defendants' allegedly unlawful interrogation. In so holding, the court relied on the absence of any evidence "that the state judge who presided over her juvenile trial failed to hear (or was prevented from hearing) all of the relevant facts surrounding her interrogation before deciding to admit her confession into evidence." *Id.* at 293. The Fifth Circuit explained that this rule of causation applies so long as the police provide "accurate information to a neutral intermediary, such as a trial judge." *Id.*

The Second Circuit aligned with the Fifth Circuit in *Wray v. City of New York*, where plaintiff sued a police officer for conducting a suggestive lineup. 490 F.3d 189, 194 (2d Cir. 2007). On interlocutory review of a denial of

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actions.'") (internal citation omitted); *Whitlock v. Brueggemann*, 682 F.3d 567, 582 (7th Cir. 2012) (causation is a standard element of a Section 1983 tort liability claim).

qualified immunity, the appeals court reversed and found that absent evidence that the officer "misled or pressured the prosecution or trial judge," the prosecutor's decision to rely on the lineup, and the judge's decision to permit it as evidence, constituted superceding causes so that a police officer was not liable for plaintiff's conviction and incarceration. *Id.* at 193-195.

Similarly, the Fourth Circuit, in *Evans v. Chalmers*, also on appeal from the denial of qualified immunity at summary judgment, reversed and held that constitutional torts require both but-for and proximate causation, and that "subsequent acts of independent decision-makers" can constitute superceding causes that break the causal chain between the officers' conduct and an unlawful seizure. 703 F.3d 636, 647–48 (4th Cir. 2012). *Evans* held that police officers were not liable on a federal malicious prosecution claim following indictments in the absence of evidence that one of the officers misled or pressured the prosecutor. *Id.* at 649. *See also Barts v. Joyner*, 865 F.2d 1187, 1196-1197 (11th Cir. 1989) (explaining that "[c]riminal procedure from arrest to sentencing involves a division of power and duties among several entities, each of which has the responsibility to make its own decisions….[and] [t]o hold that the decisions of the prosecutor, juries and judge do not break the chain of proximate causation trivializes the importance of these post-arrest decisions").

Standing alone against this precedent is the Seventh Circuit's refusal here to even address the causation issue as an aspect of Petitioners' claim to qualified immunity. But there was no factual impediment to review because it was undisputed that: (1) the interrogation was videotaped, (2) the videotape was presented to the prosecutors, (3)

the prosecutors deemed it appropriate to bring charges, (4) a motion to suppress was filed, (5) a state court judge viewed the videotape and heard arguments on that motion, and (6) the state court judge found Koh's statements were voluntary and admissible under the Fifth Amendment. Dkt. 311, ¶¶ 113-122. Moreover, in granting summary judgment on the fabrication of evidence claim, the district court specifically held that the facts did "not give rise to an inference that Graf and Kim were deliberately falsifying evidence to mislead the prosecutors, and that "[n]one of Mr. Koh's theories of evidence fabrication hold up, so summary judgment is granted on the evidence fabrication claim." App. 86a.

Viewed against that backdrop, common law tort principles governing all Section 1983 claims do not permit Fifth Amendment coercive interrogation claims, which by nature target decisions made by prosecutors and judges, to reach trial against police officers, absent evidence that the officers misled those decisionmakers. *See, e.g. Chavez,* 538 U.S. at 760. ("a violation of the constitutional right against self-incrimination occurs only if one has been compelled to be a witness against himself in a criminal case") (emphasis omitted). A contrary framework would permit a Fifth Amendment coercive interrogation claim against police to operate as an impermissible circumvention of principles of absolute prosecutorial and judicial immunity, which prohibit such claims against the decisionmakers directly responsible for the introduction of a statement at trial. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) (prosecutors absolutely immune for deciding what evidence to rely on in criminal case); *Forrester v. White*, 484 U.S. 219, 219 (1988) (judges absolutely immune for judicial decisions).

CONCLUSION

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

Respectfully Submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED AUGUST 13, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 18-1809 & 18-1821

HYUNG SEOK KOH, *et al.*,

Plaintiffs-Appellees,

v.

JOHN USTICH, *et al.*,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:11-cv-02605 — **Edmond E. Chang**, *Judge.*

February 22, 2019, Argued
August 13, 2019, Decided

Before RIPPLE, MANION, and BRENNAN, *Circuit Judges.*

MANION, *Circuit Judge.* Hyung Seok and Eunsook Koh, husband and wife, brought a § 1983 suit arising out of the investigation of and the Kohs' arrests in connection with their son's death. They sued the Northbrook Police Department, various Northbrook officers, the Wheeling

Police Department, and a Wheeling officer asserting state and federal claims. The district court granted in part and denied in part the defendants' motions for summary judgment. Northbrook Detectives John Ustich and Mark Graf and Wheeling Officer Sung Phil Kim have filed interlocutory appeals on the issue of qualified immunity concerning Mr. Koh's Fifth Amendment coerced confession claim. Because appellants' arguments are inseparable from the questions of fact identified by the district court, we dismiss these appeals for lack of jurisdiction.

I.

Around 3:45 a.m., on April 16, 2009, Mr. Koh was awakened by his wife's screams. Mrs. Koh had just found their 22-year-old son, Paul, lying down in a pool of blood next to a knife in the entryway of their home.[1] After calling 911, the couple got dressed, anticipating going to the hospital after help came because they thought Paul was still alive. Paramedics and officers from the Northbrook Police Department (Defendants Roger Eisen, Matt Johnson, Brian Meents, and Keith Celia, none of whom are appellants) arrived at the Koh home soon after. There, they found Mr. Koh with a phone near the front door of the house and Mrs. Koh crouched over Paul's body. Paul had been stabbed in the throat and chest and was declared dead at the scene. Officers initially stated there was a possibility Paul committed suicide.

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1. Because this appeal reviews a denial of motions for summary judgment, we take the facts in the light most favorable to the Kohs, the nonmoving parties. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Mr. Koh wanted to drive to the hospital. Instead, both Mr. and Mrs. Koh were confined in their front yard and pushed to the ground, where they sat while officers watched over them. The Kohs asked to see Paul, get Mr. Koh's medicine[2] and cell phone, and go to the hospital. The officers denied those requests.

At some point, the officers forced the Kohs into a squad car and drove them to the Northbrook Police Department. (The Kohs were not asked if they wanted to go there.) Mrs. Koh was allowed to wash the blood from her hands in a restroom at the station while officers kept an eye on her. The Kohs were then given blankets and beverages. They were kept in a conference room, first together and then later separated. Mr. Koh asked to make a phone call, but was not allowed to do so. The police contacted the Kohs' pastor who arrived at the station around 6 a.m. Other family and friends came to the station as well, but their requests to see the Kohs were denied.

While still at the Koh home, a Northbrook police officer spoke with dispatch about contacting local law enforcement agencies to request a Korean translator who could assist with speaking with the Kohs because of the apparent language barrier.[3] Responding to the request at the direction of one of his superiors, Officer Sung Phil Kim

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2. Mr. Koh took medication for diabetes, high blood pressure, and hyperammonemia.

3. The officer declined using Language Line, a telephonic interpretation service used by police, and instead requested someone who could be physically present for the Kohs' interviews.

of the nearby Wheeling Police Department went directly to the Northbrook Police Department. Kim spoke Korean in social settings, having learned Korean from his parents and at Sunday school as a child, but otherwise having no formal training in the Korean language. Kim also had no training as a translator.

Mr. Koh was questioned at the Northbrook police station in a two-part interview that lasted a total of two and a half hours. Detectives John Ustich and Mark Graf,[4] and Kim were present for both sessions, and they all questioned Mr. Koh during his interviews. Graf primarily conducted the interview, and Ustich and Kim each posed questions at different points. Kim also provided some Korean translations during the interview, but not to each question. Each interview was video recorded, though there was discussion between Graf and Mr. Koh before the recording began and at the end of the first interview when the tape ran out.

The first interview began around 7:30 a.m. Before the video recording began, Mr. Koh asked Graf for his medication. Graf responded that someone would bring him his medicine. Also before the recording commenced, Graf asked Mr. Koh if he had a lawyer. Mr. Koh told Graf that he had an attorney, but he could not remember the attorney's phone number. Mr. Koh also asked to see his pastor, his daughter, and his friend from church. According to Mr. Koh, Graf "told me that the only person I could see was

4. While not one of the responding officers, Ustich came to the Koh home shortly before 6 a.m. and relayed to Graf the information that he learned while there prior to the interview.

a lawyer. And since I didn't have any phone numbers, so that was the end."[5]

Graf administered *Miranda* warnings in English. While Graf was reading Mr. Koh the *Miranda* warnings, Kim provided some translation assistance. Kim, however, did not translate after Graf stated, "Anything you say can and [sic] be used against you in a court of law, okay?"[6] Mr. Koh gently nodded his head while Graf was reading the warnings. Once finished reading the warnings, Graf passed Mr. Koh a printed waiver form listing the *Miranda* rights in English asking him to sign and date the form. It was then that Mr. Koh asked, "Can you ask (inaudible) this one transfer this one?"[7] The officers understood this as a request for Kim to translate, and Kim proceeded to speak to Mr. Koh in Korean. The parties dispute, though, the accuracy of Kim's translation and whether Mr. Koh understood it. According to Mr. Koh, Kim did not tell him that his statements could be used against him or that

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5. District Ct. Docket Entry 289-1, Pretrial Hr'g Tr. at 15:23-16:1.

6. District Ct. Docket Entry 285-3, Interview Tr. at 2. (In addition to the three video recordings of Mr. Koh's interviews (District Ct. Docket Entry 285-1 (Interview Video)), the parties and, in turn, the district court relied on a transcript of Mr. Koh's videotaped interviews in support of their summary judgment motions (District Ct. Docket Entry 285-3 (Interview Tr.)). The Kohs did not stipulate to the accuracy of the transcript, but agreed to its use at summary judgment. We rely on the recordings and transcript as well.)

7. District Ct. Docket Entry 285-1, Interview Video 1 at 1:35, Interview Tr. at 2.

he had a right to an attorney if he could not afford one. Mr. Koh also asserts that Kim advised that he did not need an attorney. After Kim completed his translation, Mr. Koh began to date and time the form stating, "This one happens [early morning]."[8] It was then that Graf instructed Mr. Koh to write "[t]he date and time right now."[9] As the district court described it in its summary judgment opinion, "Mr. Koh ultimately executed an English-language *Miranda* waiver form *at Graf's and Kim's directions*." *Koh v. Graf*, 307 F. Supp. 3d 827, 837 (N.D. Ill. 2018) (emphasis added).

After Mr. Koh signed the waiver form, Graf offered Mr. Koh beverages and food, but Mr. Koh only requested water. Graf began asking questions in English with little intervention by or assistance from Kim. Mr. Koh answered some questions and communicated in basic English, though some of his responses to Graf's questions were confusing or non-responsive. For instance, at the beginning of the interview when Graf asked Mr. Koh, "Why don't you tell us briefly about your son and what he does, his friends, what type of person he was," Mr. Koh responded by explaining what he did the day before.[10] Throughout the first interview, Mr. Koh repeatedly denied any involvement in Paul's death, including when Graf asked him if he had an argument with Paul. During that first session, Graf asked Mr. Koh about Paul's depression and marijuana use. This first interview lasted about 55 minutes.

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8. Interview Tr. at 2; Interview Video 1 at 2:21.

9. Interview Tr. at 2; Interview Video 1 at 2:24.

10. Interview Tr. at 3-4.

After the first interview, Ustich and Graf thought Mr. Koh was being evasive, and they found his denials of any involvement in Paul's death unbelievable. Ustich and Graf then met with their superiors and members of the team investigating Paul's death. Kim did not participate in that meeting. At the meeting, Ustich and Graf learned about evidence obtained up to that point in the investigation. There was evidence suggesting there was a struggle (e.g., there was a small metal cross and broken chain discovered in blood on the floor). There was also evidence of a cleanup in the master bedroom, which contradicted Mrs. Koh's statement to police that neither she nor her husband cleaned up in the bathroom after finding Paul's body. Ustich and Graf also learned that while Mr. Koh had told them that he and his wife had turned Paul's body over, Mrs. Koh told police that she had not moved Paul's body. Also, a neighbor had heard a scream, which prompted skepticism by Graf that Mr. Koh, who had told Graf that he was a light sleeper, could have slept through Paul's death.

Ustich and Graf also learned that Mr. Koh and Paul's relationship was marked by tension. Northbrook police officers had previously seen Paul walking in the Kohs' neighborhood late at night because he had gotten into a fight with Mr. Koh. Additionally, Paul's youth pastor told officers that the Kohs had a family agreement with Paul, which included no tolerance for drugs and allowed the Kohs to randomly test Paul for drugs. And there was also evidence that Paul had been smoking marijuana the night before he died. The forensic team told Ustich and Graf that it believed Paul's death was a homicide because, in its

estimation, his injuries could not have been self-inflicted. Graf's and Ustich's superior instructed them to press Mr. Koh harder.

Ustich and Graf returned to the conference room along with Kim to continue interviewing Mr. Koh around 11:30 a.m. Graf once again offered Mr. Koh food, coffee, juice, and water. Mr. Koh responded, "Yeah, what I need is I'll let you know." [11] Graf also reminded Mr. Koh "of the rights that we read you before" and asked if he "still understood these rights and [was] willing to talk with us?" Mr. Koh responded, "Yes."[12]

As he had done throughout the entire first interview, Graf sat across the conference room table from Mr. Koh. Ustich sat on the same side as Graf and interjected with questions occasionally. Kim sat on the same side of the table as Mr. Koh to his left. Graf's questioning in this second interview was more aggressive in both tone, volume, and tempo. He focused on inconsistencies between Mr. Koh's first interview and what Graf claimed had been learned through the investigation (some of the inconsistencies were real and some were created by Graf). At one point, Graf walked around the conference room table and sat next to Mr. Koh, stating, "I'm gonna move over here because I don't know if you can understand me, okay. Okay."[13] Mr. Koh turned and looked toward Kim, and Graf responded,

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11. Interview Tr. at 58.

12. *Id.* at 59.

13. *Id.* at 103.

"I just want to talk to you."[14] At that point, Mr. Koh was on the same side of the conference room table between Graf and Kim, facing toward Graf.

While Graf continued questioning Mr. Koh, he repeatedly touched Mr. Koh's arms and legs. Graf presented the theory that Mr. Koh was mad that Paul had been out doing drugs and waited for him to return home. Despite Mr. Koh's repeated denials, Graf continued to push, telling him, "We can be here for days and days and days, okay, but we don't want that."[15] During this second interview, Graf asked successive questions at a rate that precluded translation by Kim. Graf repeatedly accused Mr. Koh of lying and presented storylines about what happened, suggesting that other information that the police had gathered or would gather supported those theories. At various points, Mr. Koh was hunched over and beat his chest and head with his hands.

During both interviews, Kim either did partial or mistranslations of Mr. Koh's statements and Graf's questions, including providing a partial, but inexact, translation of Graf's question about whether Mr. Koh had stabbed Paul in self-defense.[16] Also, at another point

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14. *Id.*, Interview Video 2 at 45:20-32.

15. Interview Tr. at 117-18.

16. According to the Kohs' language expert's report, this particular exchange was as follows:

> Graf: . . . was it in defense? Or was it in . .
> Kim: [Korean characters] Was it self-defense?

during the second interview, Kim translated literally a Korean idiom, *gachi jooka* ("let's die together"), without explaining that it was an idiom and not to be taken literally. According to the Kohs, the expression is like the English phrase, "you're killing me." Also, Kim sometimes interjected in the interview with questions in both English and Korean. Kim and Graf asked overlapping questions at times making it unclear to which question Mr. Koh was responding. For instance, at a critical point in the second interview, Graf asked Mr. Koh if he was angry. Before Mr. Koh responded to Graf's question, Kim asked Mr. Koh in Korean whether Mr. Koh acted in self-defense. Kim did not translate Graf's question. Mr. Koh responded, "I think so," prompting Kim to state, "He said it was in self-defense." As the district court correctly noted, though, it was unclear which question Mr. Koh was answering because the officers posed two, separate questions and Mr. Koh responded in a way that did not indicate to which question he was responding. *See Koh*, 307 F. Supp. 3d at 852.

> Graf: that you were anger/angry?
> Kim: [Korean characters] Did you do/engage in self-defense?
> Koh: I think so yeah maybe it's a
> Graf: Tell me how it happened
> Kim: He said it was in defense. He said it was in defense.
> Graf: I know you did it.
> Koh: I did it?
> Graf: You did it. Yes, didn't you?
> Kim: [Korean characters] (I know you) were engaged in self-defense.

District Ct. Docket Entry 308-73 at 5.

About three minutes before the second interview ended, Graf stepped out of the room to talk with another officer who had come to tell him Mr. Koh's attorney had arrived at the station. While Mr. Koh's attorney was being escorted back to the conference room, Graf increased the intensity of the interview by asking quick, successive, leading questions and leaving no time for translation. Mr. Koh responded to Graf's questioning with one or two-word responses that could be interpreted as agreeing with Graf's self-defense theory: Mr. Koh had waited up until 1 a.m. for Paul to return home, was mad that Paul was out smoking marijuana, argued with Paul upon his return, and stabbed Paul in self-defense. The interview ended when Mr. Koh's attorney came into the room a couple minutes before 1 p.m. Sometime after the interview ended, Mr. Koh was finally given his medication.

Mr. Koh was charged with murder in state court. After the trial court denied his motion to suppress his confession, the case went to trial where Mr. Koh was acquitted by a jury.[17] Prior to his acquittal, Mr. Koh spent nearly four years in the Cook County Jail.[18]

The Kohs then sued several Northbrook police officers, including Ustich and Graf, Kim, and the Villages of Northbrook and Wheeling under 42 U.S.C. § 1983. They asserted federal constitutional claims. The Kohs set forth a

17. Among other evidence, Mr. Koh presented evidence at the criminal trial that Paul had committed suicide.

18. In response to a question from the Court at oral argument, the Kohs' counsel stated that Mr. Koh was held on a $5 million bond.

Fourth Amendment claim for their arrests and a Fifth and Fourteenth Amendment claims for Mr. Koh's confession. They also brought a failure to intervene claim, a *Monell* claim against the Village of Northbrook for their unlawful detention and coercive interrogation, and a conspiracy claim. Finally, the Kohs asserted some state law claims, specifically malicious prosecution, intentional infliction of emotional distress, loss of consortium, and respondeat superior. The defendants moved for summary judgment, claiming qualified immunity. Taking the evidence and reasonable inferences in the light most favorable to the Kohs, the district court denied the motion in part and granted the motion in part. Specifically, the district court denied summary judgment on the Kohs' Fourth Amendment false arrest claims, but it held that Mr. Koh's false arrest ended when the officers had probable cause to arrest him before his second interview based on the information conveyed during the debriefing. The court also denied summary judgment on Mr. Koh's Fifth Amendment coerced confession claim, his conspiracy and failure to intervene claims (with some limitations), his municipal liability claim against the Northbrook Police Department for false arrest, and Mrs. Koh's loss of consortium claim. The court also allowed the Kohs to proceed on their respondeat superior and indemnification claims against the Northbrook and Wheeling Police departments for the surviving claims. Summary judgment was granted on Mr. Koh's state law malicious prosecution, Fourteenth Amendment substantive due process claim, due process evidence-fabrication claim, and Fourth Amendment claim based on Mr. Koh's pretrial detention.

Appendix A

Ustich, Graf, and Kim filed separate appeals challenging the district court's denial of summary judgment on the Kohs' Fifth Amendment coercion claim on qualified immunity grounds.

II.

We review a denial of qualified immunity on summary judgment *de novo*. *Lovett v. Herbert*, 907 F.3d 986, 990 (7th Cir. 2018). We are unable to review an appeal from an interlocutory order such as a denial of a motion for summary judgment, but there is an exception—the collateral order doctrine—for us to review an order denying a claim of qualified immunity. *Dockery v. Blackburn*, 911 F.3d 458, 464 (7th Cir. 2018). Our review, though, is limited to pure legal issues. *Id.* at 464-65. Consideration of any factual questions is outside our jurisdiction. *Hurt v. Wise*, 880 F.3d 831, 839 (7th Cir. 2018) *overruled on other grounds by Lewis v. City of Chicago*, 914 F.3d 472 (7th Cir. 2019). For purposes of appeal, an appellant may take all facts and inferences in plaintiff's favor and argue "*those* facts fail to show a violation of clearly established law." *Id.* (emphasis in original). "When the district court concludes that factual disputes prevent the resolution of a qualified immunity defense, these conclusions represent factual determinations that cannot be disturbed in a collateral order appeal," such as this one. *Gant v. Hartman*, 924 F.3d 445, 448 (7th Cir. 2019) (internal quotation marks and citation omitted). Our review is further limited in that we may not "make conclusions about which facts the parties ultimately might be able to establish at trial, nor may [we] reconsider the district court's determination that

certain genuine issues of fact exist." *Id.* (internal quotation marks and citation omitted). To establish jurisdiction, appellants must present purely legal arguments, but if those arguments "are dependent upon, and inseparable from, disputed facts," we do not have jurisdiction to consider the appeal. *Id.* at 448-49 (quoting *White v. Gerardot*, 509 F.3d 829, 835 (7th Cir. 2007)). Finally, we will "consider[] only the facts that were knowable to the defendant officers." *White v. Pauly*, 137 S. Ct. 548, 550, 196 L. Ed. 2d 463 (2017).

If we determine we have jurisdiction, we then turn to the qualified immunity analysis. Once an officer asserts qualified immunity, a plaintiff can proceed with his case only if he can show (1) that the "facts, taken in the light most favorable to [him], make out a violation of a constitutional right," and (2) that right was "clearly established at the time of the alleged violation." *Gill v. City of Milwaukee*, 850 F.3d 335, 340 (7th Cir. 2017) (quoting *Allin v. City of Springfield*, 845 F.3d 858, 862 (7th Cir. 2017)). We may consider these prongs in any order we choose. *Id.* "'If *either* inquiry is answered in the negative, the defendant official' is protected by qualified immunity." *Reed v. Palmer*, 906 F.3d 540, 546 (7th Cir. 2018) (citations omitted) (emphasis in original).

The parties assert various arguments. Ustich and Graf argue that the district court erred in denying their claims for qualified immunity because there was no clearly established law to alert them that their conduct at the time of Mr. Koh's interrogation was unconstitutional. Alternatively, they argue that the state trial court's

denial of Mr. Koh's motion to suppress his confession was a superseding, intervening cause that entitled them to qualified immunity.

Kim also makes the "intervening cause" argument and asserts several of his own. First, he argues the facts fail to show he intended to violate Mr. Koh's right against self-incrimination and that Kim's conduct was the proximate cause of the violation of Mr. Koh's Fifth Amendment rights. Second, Kim claims that there was no clearly established law at the time of Mr. Koh's interview that would have given Kim notice that his conduct as a language interpreter violated Mr. Koh's Fifth Amendment rights. And third, Kim argues that the district court erred by not considering his claim for qualified immunity separately from Graf's claim.

A. Ustich and Graf

Turning now to Ustich and Graf's appeal, they argue they are entitled to qualified immunity because it was not clearly established in June 2009 that their conduct during Mr. Koh's interrogation was unconstitutional. While on its face this is a legal argument, we do not have jurisdiction to address it because the appellants' legal arguments "depend[] upon and [are] inseparable from disputed facts." *Gutierrez v. Kermon*, 722 F.3d 1003, 1010-11 (7th Cir. 2013). While Ustich and Graf assert in their reply brief that they have taken all of the district court's factual determinations and reasonable inferences in the light most favorable to Mr. Koh, "we detect a back-door effort to contest the facts," namely the nature of

Mr. Koh's confusion and lack of understanding due to the language barrier, the impact of the lack of medication and sleep, and the threat Graf leveled against Mr. Koh. *Jones v. Clark*, 630 F.3d 677, 680 (7th Cir. 2011). "The voluntariness of a confession depends on the totality of the circumstances, including both the characteristics of the accused and the nature of the interrogation. If those circumstances reveal that the interrogated person's will was overborne, admitting the resulting confession violates the Fifth Amendment." *Jackson v. Curry*, 888 F.3d 259, 265 (7th Cir. 2018) (quoting *Hurt*, 880 F.3d at 845). Had Ustich and Graf "accepted all historical facts favorably to the [Kohs] and argued that those facts did not show that [Mr. Koh's] confession was involuntary, we would be in a position to answer the ultimate legal question." *Hurt*, 880 F.3d at 846. But since these challenged facts are an integral part of the totality of the circumstances considered by the district court, we lack jurisdiction over Ustich and Graf's appeal.

1. The Language Barrier

It was clear that Mr. Koh did not speak fluent English. While all the parties admit that, Ustich and Graf's characterization of the extent and effect of Mr. Koh's language barrier challenges the district court's factual determinations at summary judgment. Ustich and Graf describe Mr. Koh as having "limited English language proficiencies," but they contend that they "recruited an interpreter to eliminate or lessen the language barrier."[19]

19. Ustich and Graf Appellate Br. at 24, 33.

In so doing, they challenge the district court's factual determination that Mr. Koh did not just suffer from a language barrier, but rather that Mr. Koh suffered a lack of understanding and confusion and that the officers were aware of this. *Koh*, 307 F. Supp. 3d at 856. Taking the facts in the light most favorable to Mr. Koh, this lack of understanding was obvious. As the district court aptly pointed out,

> Many of Mr. Koh's answers were altogether nonsensical, showing (or so a reasonable jury could find) that he did not understand what was going on. For example, Mr. Koh responded to Graf's question about what kind of person Paul was by narrating what happened yesterday morning. At another point in the interview, Koh answered a question about whether he saw a weapon by telling Graf about the tools he kept for his vending machine business. During one tense moment, Graf asked Mr. Koh[,] "Would God want Paul to [ ] have his father sitting here and telling us a story that's not true?"—a question that should obviously have been answered "no"—but Mr. Koh said "yeah." As the interview went on, Mr. Koh largely defaulted to giving one word or unintelligible answers, or responding that he did not know or could not remember.

Id. at 851. (citations omitted and second alteration in original). Moreover, the district court again noted that Mr. Koh's confusion was evident when Graf had more or

less gotten Mr. Koh to admit that he stabbed Paul in self-defense: Mr. Koh's responses to follow-up questions made it clear that he may have been speaking about an earlier incident when Paul swung a golf club at Mr. Koh. *Id.* at 856 n.37 (quoting Interview Tr. at 136-37). The extent of Mr. Koh's understanding and the degree of his confusion are key to determining whether his confession was involuntary and coerced. Therefore, Ustich and Graf's characterization of Mr. Koh's language problem as a "limited English language proficiency" overcome by the presence of an interpreter, rather than accepting the district court's conclusions concerning Koh's lack of understanding, precludes our jurisdiction. *See Jackson*, 888 F.3d at 264 ("[D]ifferences in the parties' charaterizations of the same evidence are the essence of fact disputes, over which we presently lack jurisdiction.") (internal quotation marks omitted); *Jewett v. Anders*, 521 F.3d 818, 822 (7th Cir. 2008) (internal quotations and citations omitted) ("In reviewing a district court's denial of qualified immunity, we cannot make conclusions about which facts the parties ultimately might be able to establish at trial. Nor may we reconsider the district court's determination that certain genuine issues of fact exist.").

Ustich and Graf's challenge regarding the impact and extent of Mr. Koh's language barrier also extends to their description of the administration of *Miranda* warnings to Mr. Koh. While they concede that Mr. Koh did not subjectively understand the warnings, their characterization of the facts surrounding the administration of the *Miranda* warnings is limited and selective. Any reasonable officer would have known at

the time of Mr. Koh's interview that *Miranda* warnings are critical to protect a suspect against coercion. *United States v. Gupta*, 183 F.3d 615, 617 (7th Cir. 1999) ("Potential coercion or compulsion is vital to *Miranda*'s application, because the clause underlying its framework is the privilege against compulsory self-incrimination."). They note that Graf read Mr. Koh his rights, Mr. Koh nodded that he understood, and when Mr. Koh requested that Kim translate, Graf agreed to allow that. According to Ustich and Graf, Kim then spoke to Mr. Koh in Korean and then Mr. Koh signed the *Miranda* waiver form. A reasonable officer would have known that he could not rely upon Mr. Koh's nodding without speaking when he was first read the *Miranda* warnings after Mr. Koh asked Kim to translate. A person typically asks for something to be translated when he does not understand what was said to him in another language. When such a request is made, any prior nodding is more likely a polite acknowledgment that he was listening to what the speaker was saying rather than affirming. Ustich and Graf also leave out the important fact that Mr. Koh was going to date the written waiver form with "early in the morning," presumably that being the time Paul was found at his home. Taking this fact in the light most favorable to Mr. Koh, a reasonable officer would conclude that Mr. Koh did not understand what he was executing when he signed the English *Miranda* waiver form. As the district court stated, Mr. Koh executed the written "*Miranda* waiver form *at Graf's and Kim's directions*." *Koh*, 307 F. Supp. 3d at 851 (emphasis added). So even if Ustich and Graf did not understand what Kim said to Mr. Koh in Korean, Mr. Koh's conduct when executing the English *Miranda* waiver

form would prompt a reasonable officer to conclude that Mr. Koh did not understand what he was signing. Finally, Ustich and Graf's contention that Mr. Koh agreed at the beginning of the second interview that he was advised of his rights and understood is unavailing because it further disregards the district court's conclusions regarding Mr. Koh's lack of understanding due to the language barrier. More importantly, it presupposes that Mr. Koh understood his rights in the first instance.

2. Lack of Sleep and Medication

Similarly, Ustich and Graf challenge the district court's factual determinations regarding Mr. Koh's lack of sleep and medication. Both sleep and medication are relevant to the inquiry of whether an individual is susceptible to coercion. *See Greenwald v. Wisconsin*, 390 U.S. 519, 521, 88 S. Ct. 1152, 20 L. Ed. 2d 77 (1968); *United States v. Huerta*, 239 F.3d 865, 871 (7th Cir. 2001). Regarding Mr. Koh's lack of sleep, Ustich and Graf argue Mr. Koh had slept for five hours the night prior and he did not assert he was prohibited from resting between interviews. They go on stating, "[N]o reasonable police officer would think that a person who had just lost his son in such a violent manner would want more rest, under such circumstances, before trying to help police solve the crime."[20] With such characterizations, though, Ustich and Graf are not taking the facts in the light most favorable to Mr. Koh and are ignoring the district court's conclusion that throughout the interviews Mr. Koh displayed signs of physical exhaustion

20. Ustich and Graf Appellate Br. at 36.

when "he sat hunched over in his chair" and hit himself in the head and chest. *Koh*, 307 F. Supp. 3d at 837. This is a factual challenge that precludes our jurisdiction. Similarly, Ustich and Graf acknowledge that Mr. Koh did not receive his requested medication until *after* his second interview, but they argue that they did not intentionally delay providing the medicine.[21] They do not state how their intent is relevant to Mr. Koh's Fifth Amendment claim, and to the extent that it may be relevant, it is outside the scope of our jurisdiction over this interlocutory appeal. *Stinson v. Gauger*, 868 F.3d 516, 526-27 (7th Cir. 2015) (holding that the existence of intent is an issue of fact that cannot be decided on an interlocutory appeal of a denial of qualified immunity).

3. Threatening Language

Ustich and Graf also assert that Mr. Koh's interrogation contained no "threats of consequences."[22] This, though, is in direct contravention of the district court's factual determination that a reasonable jury could find it was a threat when Graf told Mr. Koh that they could be there for "days and days and days." *Koh*, 307 F. Supp. 3d at 853 (quoting Interview Tr. at 117). Accordingly, we do not have jurisdiction to consider Ustich and Graf's legal argument that law was not clearly established at the time of Mr. Koh's interview because this argument is "dependent upon, and inseparable from, disputed facts." *Gant*, 924 F.3d at 448.

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21. *Id.* at 37.

22. *Id.* at 30

B. Kim

Turning now to Kim's arguments, we first address his argument that there was no clearly established law in June 2009 that would have put him, a language interpreter, on notice that this conduct was unconstitutional. This argument, though, contests the district court's factual determinations about Kim's role during the interrogation and, thus, is outside of the scope of our limited jurisdiction. *See Levan v. George*, 604 F.3d 366, 370 (7th Cir. 2010) ("If the legal issue being appealed is not significantly different than the factual issues underlying the claim, this separability requirement will be nearly impossible to satisfy.") It is true that the district court addressed Kim's role as an interpreter, but Kim's argument ignores the district court's factual determination that Kim participated in the interrogation itself and did not act as a mere interpreter. *Koh*, 307 F. Supp. 3d at 852 ("Officer Kim even joined in the interrogation by asking his own questions in English. . . . Officer Kim would . . . interject in Korean with questions of his own."). At this juncture, we must take the fact that Kim participated as an interrogator during the interview as true, and Kim's characterization of his role in the interrogation as a mere interpreter challenges that fact in such a way that precludes our jurisdiction. We are unable to address his purported legal claim because it is entangled with the factual question of his role during Mr. Koh's interview. *See Hill v. Coppleson*, 627 F.3d 601, 605-06 (7th Cir. 2010) (holding that a prosecutor was not entitled to absolute or qualified immunity because the "resolution depends on facts that the district court has properly determined to be in dispute").

Further, in light of the district court's factual determination about Kim's participation in the interview, the district court did not err in attributing to Kim a shared knowledge with Graf of the facts and circumstances of the interrogation. Kim argues that the attribution demonstrates that the district court failed to assess his entitlement to qualified immunity independently of its assessment of Graf's qualified immunity claim. While the district court's individual assessment of Kim's entitlement to qualified immunity was brief, given that Kim participated in the same, singular factual scenario as Graf, i.e., Mr. Koh's interrogation, the district court satisfied the individualized determination required when it concluded that Kim was not entitled to qualified immunity. This is particularly true given the district court's determination that Kim participated in the interrogation by posing questions of his own and not merely as a language interpreter. *Cf. Estate of Williams v. Cline*, 902 F.3d 643, 651-52 (7th Cir. 2018) (holding that the district court did not conduct the requisite individualized determination of officers' entitlement to qualified immunity on plaintiff's Fourth Amendment claim where officers had varying encounters with plaintiff at different times).

Kim further argues that had the district court made the appropriate individualized determination "it would have found [he] lacked requisite intent to coerce a confession from Koh in violation of the Fifth Amendment's self-incrimination clause."[23] Like Ustich and Graf, Kim has failed to assert how his intent is relevant to Mr. Koh's

23. Kim Reply Br. at 17-18.

legal claim and to the extent that it may be relevant, such a contention is a factual question over which we do not have jurisdiction. *Stinson*, 868 F.3d at 526-27. Kim's argument regarding intent also permeates his challenge of the district court's factual determination regarding the translations that he provided, namely the summary of the *Miranda* warnings, the Korean idiom *gachi jookja*, and other translational errors. He contends he "acted to the best of his ability" and had no intention to deceive or coerce Koh's confession.[24] Again, such an argument is outside the scope of our limited jurisdiction at this juncture.

C. Superseding, Intervening Cause

All three appellants contend that the state trial court's denial of Mr. Koh's motion to suppress is a superseding, intervening cause entitling them to qualified immunity. We do not have jurisdiction over the argument asserted by all appellants that the state court's denial of Mr. Koh's motion to suppress is a superseding, intervening cause of his Fifth Amendment claim. As we held in *Jackson*, 888 F.3d at 266, this court has not "accepted this argument in the context of a Fifth Amendment coerced-confession claim," and since the "superseding-cause issue . . . is not a pure legal question related to qualified immunity," the court lacks jurisdiction under the collateral order doctrine.

24. Kim Appellant Br. at 20.

III.

Because these appeals present factual challenges that are outside of our jurisdiction over an appeal of an order denying qualified immunity on summary judgment, we dismiss these appeals for lack of jurisdiction.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, DATED MARCH 30, 2018

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 11 C 02605

HYUNG SEOK KOH and EUNSOOK KOH,

Plaintiffs,

v.

MARK GRAF, *et al.*,

Defendants.

March 30, 2018, Decided

Honorable Edmond E. Chang, United States District Judge.

MEMORANDUM OPINION AND ORDER

Hyung Seok Koh and Eunsook Koh bring this civil rights lawsuit against Northbrook police officers Mark Graf, John Ustich, Charles Wernick, Roger Eisen, Matthew Johnson, Scott Dunham, Bryan Meents, and Keith Celia; Wheeling police officer Sung Phil Kim; and the Villages

of Northbrook and Wheeling.[1] R. 133, Second Am. Compl.[2] The Kohs' claims arise out of the Defendants' investigation into the death of their son, Paul Koh. Both the Northbrook Defendants and the Wheeling Defendants have moved for summary judgment on all of the Kohs' claims. R. 274, Wheeling Defs.' Mot. Summ. J.; R. 278, Northbrook Defs.' Mot. Summ. J; R. 362, Defendants' Joint Mot. Summ. J.[3]

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1. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 over the § 1983 claims, and supplemental jurisdiction over the state-law claims.

For convenience's sake, the Court will refer to the Northbrook officers and the Village of Northbrook collectively throughout the Opinion as the "Northbrook Defendants," unless context dictates otherwise. Likewise, the Court will refer to Officer Kim and the Village of Wheeling collectively as the "Wheeling Defendants," unless context dictates otherwise.

2. Citations to the record filings are "R." followed by the docket number and, when necessary, a page or paragraph number. Citations to the parties' Local Rule 56.1 Statements of Fact are "WDSOF" (for the Wheeling Defendants' Statement of Facts) [R. 276]; "NDSOF" (for the Northbrook Defendants' Statement of Facts) [R. 280]; "PSOF" (for the Kohs' Statement of Additional Facts) [R. 315]; "Pls.' Resp. WDSOF" (for the Kohs' Response to the Wheeling Defendants' Statement of Facts) [R. 309]; "Pls.' Resp. NDSOF" (for the Kohs' Response to the Northbrook Defendants' Statement of Facts) [R. 311]; "Wheeling Defs.' Resp. PSOF (for the Wheeling Defendants' Response to the Kohs' Statement of Additional Facts) [R. 323]; and "Northbrook Defs.' Resp. PSOF (for the Northbrook Defendants' Response to the Kohs' Statement of Additional Facts) [R. 328].

3. After briefing on the original summary judgment motions (R. 274 and R. 278) was complete, both sides moved to add additional authority. The Kohs' additional authority, *Manuel v. City of Joliet*, 137 S.Ct. 911, 197 L. Ed. 2d 312 (2017) opened the door for a new

For the reasons below, the motions are granted in part and denied in part.

I. Background

For purposes of the summary judgment motions, the facts are viewed in the light most favorable to the Kohs (because they are the non-movants), and all reasonable inferences are drawn in their favor. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

A. At the Scene

At around 3:45 a.m. on April 16, 2009, Eunsook Koh found her 22-year-old son, Paul Koh, lying in a pool of blood in the entryway of their family home. R. 280, NDSOF ¶ 1; R. 315, PSOF ¶ 2; R. 288-2, Exh. 82, Mar. 22, 2010 Pretrial Hr'g Tr. 42:9-43:14 (sealed).[4] Mrs. Koh's screams

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version of the Kohs' Fourth Amendment claim. *See* R. 356, Mar. 31, 2017 Order at 1. Because the defense had not had an opportunity to address the expanded Fourth Amendment Claim, the Court allowed the defendants to file a joint summary judgment motion against the *Manuel v. Joliet* claim. *Id.* at 1-2. This joint motion was filed accordingly. R. 362, Defs.' Joint Mot. Summ. J. The Court considers the joint motion as incorporating all prior summary judgment filings and briefs. *See* Mar. 31, 2017 Order at 2.

4. The exhibits to the parties' Rule 56.1 statements of fact are numbered sequentially. Exhibits 1-104 are attached to the Northbrook Defendants' Statement of Facts [R. 280], Exhibits 105-107 are attached to the Wheeling Defendants' Statement of Facts [R. 276], and Exhibits 108-184 are attached to the Plaintiffs' Statement of Facts [R. 315]. Exhibits 185-186 are attached to the Plaintiffs'

woke up her husband, Hyung Seok Koh, who frantically called 911. PSOF ¶¶ 2-3; NDSOF ¶¶ 1-2; R. 280-2, Exh. 1, 911 Call Tr. 1-3. While waiting for the police, the Kohs (thinking that Paul might still be alive) dressed to go to the hospital. PSOF ¶ 3; R. 282-2, Exh. 11, May 11, 2010 Pretrial Tr. 39:13-23. Mr. Koh then called 911 a second time and asked for help. PSOF ¶ 3; NDSOF ¶ 2; Exh. 1, 911 Call Tr. 4-5.

Within minutes, Northbrook police officers Eisen, Johnson, Meents, and Celia arrived at the Kohs' house. NDSOF ¶ 3; PSOF ¶ 4; Exh. 6, NPD Call Detail Report (sealed). The officers found Mr. Koh with a cordless phone in his hand near the front door of the house and Mrs. Koh crouched over Paul's body. NDSOF ¶ 4; R. 280-5, Exh. 4, Celia Dep. Tr. 35:6-37:10. Paul had suffered major stab wounds to his throat and chest. NDSOF ¶¶ 5, 29; Exh. 4, Celia Dep. Tr. 36:23-37:7. Mr. Koh was frantic and screaming for someone to help his son; Mrs. Koh was crying. PSOF ¶ 4; Exh. 4, Celia Dep. Tr. 36:5-38:7. Celia and Meents told Mrs. Koh to come out on to the lawn. Exh. 4, Celia Dep. Tr. 42:21-43:12. Meanwhile, Mr. Koh went out to try to start the family car, but Meents followed him and corralled him back to the front yard. R. 280-6, Exh. 5, July 15, 2010 Pretrial Hr'g Tr. 12:6-13:17. The Kohs were pushed to the ground on their lawn, and sat there for ten to fifteen minutes while Johnson and Meents watched over them. NDSOF ¶¶ 8, 11; PSOF ¶ 5; Exh. 5, July 15, 2010

Response to the Wheeling Defendants' Statement of Facts [R. 309], Exhibit 187 is attached to the Northbrook Defendants' reply brief [R. 329], and Exhibits 188-189 are attached to the Northbrook Defendants' Response to the Plaintiff's Statement of Facts [R. 328].

Pretrial Hr'g Tr. 15:19-21; NDSOF Exh. 7, Meents Dep. Tr. 71:1-19. At various times, the Kohs asked to go into the house to see their son, to gather Mr. Koh's medications, to get Mr. Koh's cell phone, and to go to the hospital. NDSOF ¶¶ 8, 12-13, 15; R. 283-6, Exh. 17, Hyung Seok Koh Dep. Tr. 354:4-355:8. These requests were denied. NDSOF ¶¶ 12-13, 15; Exh. 11, May 11, 2010 Pretrial Hr'g Tr. 76:8-20; Exh. 5, Meents Dep. Tr. 132:2-9.

At the direction of Commander Eisen, Officers Johnson and Meents took the Kohs to Johnson's squad car. R. 380-4, Exh. 3, Eisen Dep. Tr. 56:6-9; R. 282, Exh. 9, Johnson Dep. 67:22-68:7; Exh. 5, Meents Dep. Tr. 89:8-16. The Kohs maintain—and the Northbrook Defendants do not deny (at the summary judgment stage)—that the officers "pushed" and "sort of shoved" them into the squad car. R. 311, Pls.' Resp. NDSOF ¶ 16; Exh. 17, Hyung Seok Koh Dep. Tr. 363:16-364:17 ("[T]hey held our arm or twisted our arm, and then they sort of shoved us into the squad car."); R. 283, Exh. 12, Mar. 22, 2010 Pretrial Hr'g Tr. 57:24-58:7 ("I was asking to go to the hospital, but he said you don't have to go to the hospital and took me to the squad car, pushed me to the squad car."). Johnson drove the Kohs to the Northbrook Police Department. NDSOF ¶ 22; R. 282, Exh. 9, Johnson Dep. Tr. 76:19-21. Neither he nor any other officer ever asked the Kohs whether they wanted to go to the station. PSOF ¶ 6; Exh. 5, July 15, 2010 Pretrial Hr'g Tr. 41:18-42:12; Exh. 82, Mar. 22, 2010 Pretrial Hr'g Tr. 64:8-65:14 (sealed).

Appendix B

B. At the Police Station

When the Kohs arrived at the police station, Mr. Koh asked to sit in the station's chapel, but his requests were denied. PSOF ¶ 7; NDSOF ¶ 37; R. 287-21, Exh. 79, Nov. 13, 2009 Pretrial Hr'g Tr. 59:3-9 (sealed). Instead, Officers Johnson and Ochab escorted the Kohs to a conference room in the police station. NDSOF ¶¶ 34-35; Exh. 9, Johnson Dep. Tr. 85:20-87:20. On the way there, one of the officers asked Mrs. Koh to wash her bloodstained hands in the women's restroom. PSOF ¶ 8; NDSOF ¶ 34; Exh. 9, Johnson Dep. Tr. 85:20-86:23. The officers watched Mrs. Koh as she did so, and investigators inspected the bathroom after she finished. PSOF ¶ 8; Exh. 9, Johnson Dep. Tr. 87:3-11; R. 284-4, Exh. 28, Wasowicz Dep. Tr. 66:8-24.

The Kohs were taken to the conference room and were given blankets and beverages. NDSOF ¶ 44; Exh. 9, Johnson Dep. Tr. 89:1-19. Johnson or other officers watched over the Kohs throughout their time in the conference room.[5] NDSOF ¶ 44; Exh. 9, Johnson Dep.

5. The parties dispute how long the Kohs remained together in the conference room before Mr. Koh's first interview. All of the defendants maintain that the Kohs were together that morning until Mr. Koh was interviewed; the Kohs assert that they were separated after just 5 to 10 minutes together. *Compare* NDSOF ¶ 44 ("The Kohs remained in the investigative conference room until Mr. Koh was interviewed. ... [T]he Kohs were huddled together under a blanket, conversed in Korean and the television (with volume) was on."); R. 276, WDSOF ¶¶ 10-11 (When Officer Kim arrived around 6:00 a.m., he observed Mrs. and Mr. Koh "covered in a blanket and talking in Korean"); Exh. 9, Johnson Dep. Tr. 89:20-90:8 ("We were

220:2-13. Mr. Koh asked to make a phone call, but was not allowed to do so. PSOF ¶ 11; *see also* R. 328, Northbrook Defs.' Resp. PSOF ¶ 11 (noting that the Deputy Chief Ross "directed Officer Johnson to hold off on the phone call for a few minutes until a translator was present"); R. 308-27, Exh. 134, Transcript of NPD Audio Recordings at 11-12; R. 292-4, Exh. 103, Ross Dep. Tr. 82:17-84:6. Johnson did eventually contact Mr. Koh's pastor, who arrived at the station around 6:00 a.m. PSOF ¶ 10; Exh. 82, Mar. 22, 2010 Pretrial Hr'g Tr. 12:21-13:14 (sealed). Despite his repeated requests, however, Pastor Chang was not allowed to see Mr. Koh. PSOF ¶ 10; Exh. 82, Mar. 22, 2010 Pretrial Hr'g Tr. 17:20-18:8 (sealed). Other friends and family members came to the police station and asked to see the Kohs, but their requests were likewise denied. PSOF ¶¶ 12, 24; R. 286, Exh. 48, Hwang Dep. Tr. 102:17-103:7 (sealed); R. 288-3, Exh. 83, May 11, 2010 Pretrial Hr'g Tr. 147:12-149:19; Exh. 79, Nov. 13, 2009 Pretrial Hr'g Tr. 91:13-95:17 (sealed). Instead, the police interviewed these individuals about Mr. Koh's relationship with his son. PSOF ¶¶ 10, 12-13; Exh. 82, Mar. 22, 2010 Pretrial

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in there for quite some time."); R. 284-12, Exh. 34, Ochab Dep. Tr. 49:1-8 (Officer Ochab was with the Kohs in the conference room for "an hour, two hours"), *with* Pls.' Resp. NDSOF ¶ 44 ("The Kohs were separated after approximately 5-10 minutes; they did not talk to each other, and they weren't huddled together under a blanket speaking Korean to each other."); R. 288-3, Exh. 83, May 11, 2010 Pretrial Hr'g Tr. 96:12-22 ("Q: Isn't it true ... that it was more like three hours that you were together with your husband in that conference room? / A: Not that long, no. / Q: You're claiming it was more like five to ten minutes? / A: That's how I recall."). *But see* R. 284-15, Exh. 37, Eunsook Koh Dep. Tr. 248:20-22 (Mrs. Koh acknowledges that the police separated her from her husband after about three hours).

Hr'g Tr. 15:1-8 (sealed); Exh. 83, May 11, 2010 Pretrial Hr'g Tr. 150:8-151:11.

C. The Investigation

As the Kohs waited at the police station, the investigation into Paul's death progressed. Commander Eisen directed dispatchers at the station to locate a Korean-speaking police officer to help facilitate communication with the Kohs, who had difficulty communicating in English.[6] PSOF ¶ 16; Exh. 3, Eisen Dep. Tr. 151:7-155:3. A Wheeling police officer, Defendant Kim, responded to the request and arrived at the Northbrook police station to provide interpretation assistance. NDSOF ¶ 45; WDSOF ¶ 8; R. 284-17, Exh. 39, Kim Dep. Tr. 80:10-81:9.

At around 5:00 a.m., Northbrook's Chief of Police, Defendant Wernick, arrived at the Kohs' house. NDSOF ¶ 26; R. 280-7, Exh. 6, NPD Call Detail Report (sealed). Chief Wernick notified the North Regional Major Crimes Task Force (NORTAF), a regional team designed to assist with major crime investigations, about Paul's death. NDSOF ¶¶ 26-27; R. 284-1, Exh. 25, Wernick Dep. Tr. 58:15-19. In response to Chief Wernick's notice, NORTAF investigators arrived on scene. NDSOF ¶¶ 28-32; R. 284-3, Exh. 27, McEnerney Dep. Tr. 81:4-82:10; R. 284-4, Exh.

6. Though the Kohs did not notify the officers that they needed help in reading or understanding English, *see* NDSOF ¶ 39; Exh. 17, Hyung Seok Koh Dep. Tr. 398:24-399:3, officers who interacted with the Kohs recognized that there was a language barrier, PSOF ¶ 14; Exh. 34, Ochab Dep. Tr. 7:11-16 (noting that Mr. Koh's 911 call "was coming as also a language barrier").

28, Wasowicz Dep. Tr. 26:22-28:7. Later that morning, a group of NORTAF members and other law enforcement officers conducted a briefing on the Koh case at the Northbrook police station. *See* NDSOF Exh. 9, Johnson Dep. Tr. 153:12-16; NDSOF Exh. 28, Wasowicz Dep. Tr. 31:1-32:12. What happened at this meeting is not entirely clear—most of the attendees cannot remember exactly who was there or what information was shared—but it appears that NORTAF forensic supervisor Wasowicz presented his preliminary impressions of the scene, and that Officer Johnson shared information that he learned from the Kohs. Exh. 9, Johnson Dep. Tr. 160:10-161:10; Exh. 28, Wasowicz Dep. Tr. 32:13-34:8; R. 284-5, Exh. 29, Wasowicz Aff. ¶ 14; Exh. 27, McEnerney Dep. Tr. 116:13-117:11. The Kohs had informed Johnson that Paul Koh used marijuana, and that Paul was depressed and the Kohs believed he might have committed suicide. Exh. 9, Johnson Dep. Tr. 160:2-161:9; NDSOF ¶¶ 23, 41.

1. Mr. Koh's First Interview

At around 7:30 a.m., Mr. Koh was interviewed by Northbrook detectives Graf and Ustich—the first of two police interrogations he would undergo that morning. NDSOF ¶ 52; R. 285-1, Exh. 42, Video of Hyung Seok Koh Interview 1. Officer Kim was present to assist with Korean-language interpretation. NDSOF ¶ 52; Exh. 42, Video of Hyung Seok Koh Interview 1. This first interview lasted about 55 minutes. NDSOF ¶ 52; Exh. 42, Video of Hyung Seok Koh Interview 1. Before the start of the interview, Mr. Koh made another request for his medications (which he used to control his diabetes,

high blood pressure, and ammonia level disorder). PSOF ¶ 20; R. 289-1, Exh. 85, Mar. 16, 2010 Pretrial Hr'g Tr. 14:3-15:12.[7] Detective Graf responded that someone would bring him the medications, but that did not happen.[8] PSOF ¶ 20; R. 289-1, Exh. 85, Mar. 16, 2010 Pretrial Hr'g Tr. 14:3-15:12.

Before questioning Koh on the events of the night before, Graf administered *Miranda* warnings in English. NDSOF ¶ 54; R. 285-3, Exh. 44, Hyung Seok Koh Interview Tr. 1-3.[9] Koh nodded that he understood

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7. The Wheeling Defendants maintain that "[t]hroughout Mr. Koh's interview ... Mr. Koh never mentioned any need for medication or other provisions in the presence of Officer Kim." WDSOF ¶ 32; R. 284-17, Exh. 39, Kim Dep. Tr. 131:4-22. (Q: Why are you sure that he would tell you within hours of his son's death that he needed medication? / A: Well, if it's medication, you need to take it regularly, I mean."); *but see* R. 309, Pls,' Resp. WDSOF ¶ 32.

8. It does seem that Mr. Koh was eventually given his medications, but only after the end of his second interview, when it became clear that he was going to be detained indefinitely. *See* R. 285-2, Exh. 43, July 15, 2010 Pretrial Hr'g Tr. 72:17-73:13. According to Graf, this was the first and only time that Mr. Koh asked for his medications. *See id.* at 73:14-16. But Graf's version conflicts with Mr. Koh's testimony that he asked for his medications before the first interview, and at this stage the Court must take Mr. Koh's word as true.

9. The Northbrook Defendants rely on a transcript of Mr. Koh's videotaped interviews to support their summary judgment motion. *See* R. 285-3, Exh. 44, Hyung Seok Koh Interview Tr. Though the Kohs "do not stipulate to the accuracy of the entire transcript, [they] admit that its use at summary judgment is generally helpful and appropriate ... ." Pls.' Resp. NDSOF ¶ 54. Because the parties agree

the warnings, but then asked Officer Kim to "transfer" (apparently meaning to say "translate"). Exh. 42, Video of Hyung Seok Koh Interview 1 at 00:01:30-00:01:36. Kim did translate at least part of the *Miranda* warnings into Korean, but the parties debate whether Kim translated the warnings properly, and whether Mr. Koh understood them. *See* PSOF ¶ 102-105; WDSOF ¶ 36; R. 309, Pls.' Resp. WDSOF ¶ 36; R. 323, Wheeling Defs.' Resp. PSOF ¶¶ 102-105. Mr. Koh ultimately executed an English-language *Miranda* waiver form at Graf's and Kim's directions. Exh. 42, Video of Hyung Seok Koh Interview 1 at 00:02:13-00:02:36; NDSOF ¶ 54; R. 285-4, Exh. 45, *Miranda* Waiver Form; Exh. 44, Hyung Seok Koh Interview Tr. 1-3.

The first interview was conducted mostly in English, with little intervention from Kim. *See generally* Exh. 42, Video of Hyung Seok Koh Interview 1. Although Mr. Koh was able to answer some questions and communicate at a basic level in English, some of his answers were confusing or unresponsive to Graf's questions. *See, e.g.*, Exh. 44, Hyung Seok Koh Interview Tr. 3-4, 36. Graf nevertheless continued questioning Mr. Koh in English, and raised the possibility that Mr. Koh might have harmed Paul. *See, e.g., id.* at 36-37. Throughout this first interview, Mr. Koh repeatedly denied any involvement in Paul's death. PSOF ¶ 109; NDSOF ¶ 59; Exh. 44, Hyung Seok Koh Interview Tr. 36-37; 39-42; 45. Graf and Mr. Koh also discussed Paul's drug use and depression. NDSOF ¶ 63; Exh. 44, Hyung Seok Koh Interview Tr. 52-58.

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to use the transcript at this stage in the proceedings, the Court will rely on it in deciding the motions.

Appendix B

2. Mrs. Koh's Interview

Two NORTAF detectives (not defendants in this case) interviewed Mrs. Koh as soon as Mr. Koh's first interview ended. NDSOF ¶ 73; R. 308-14, Exh. 121, Eunsook Koh Interview Tr. Officer Kim also provided interpretation assistance during Mrs. Koh's interview, which lasted around 55 minutes. NDSOF ¶ 73; R. 286-13, Exh. 54, Video of Eunsook Koh Interview. Mrs. Koh's version of events mostly corroborated Mr. Koh's. PSOF ¶ 111; Wheeling Defs.' Resp. PSOF ¶ 111; NDSOF ¶¶ 74-76; *see also* Exh. 54, Video of Eunsook Koh Interview; Exh. 121, Eunsook Koh Interview Tr.[10]

3. Meetings Before Mr. Koh's Second Interview

Before resuming their interrogation of Mr. Koh, Graf and Ustich met with several of their superiors to discuss how to proceed. PSOF ¶ 26; R. 284-14, Exh. 36, Graf Dep. Tr. 91:4-93:24; Exh. 28, Wasowicz Dep. Tr. 30:13-32:12. Present at these meetings[11] were Northbrook Chief of Police Charles Wernick, Investigations Unit

10. The Kohs rely on a transcript of Mrs. Koh's videotaped interview to support their Response to the Defendants' summary judgment motions. *See* R. 308-14, Exh. 121, Eunsook Koh Interview Tr. Like the transcript of Mr. Koh's interviews, the Court will also rely on this transcript in deciding the summary judgment motions.

11. It is a little unclear whether this was one meeting or multiple meetings, *see* Exh. 36, Graf Dep. Tr. 92:9-92:20; Exh. 40, Ustich Dep. 84:21-85:4, but that detail does not matter to the summary judgment analysis. For the sake of simplicity, the Court adopts the Kohs' assertion that there were multiple meetings. *See* PSOF ¶ 26.

Commander Scott Dunham, NORTAF Commander Dennis McEnerney, and NORTAF investigative team leader John Walsh. Exh. 36, Graf Dep. Tr. 91:23-92:12; NDSOF Exh. 40, Ustich Dep. Tr. 85:1-4. Graf and Ustich relayed their suspicions about Mr. Koh, noting that he did not vehemently deny his lack of involvement in Paul's death, and that they thought his answers were evasive. NDSOF Exh. 40, Ustich Dep. Tr. 85:21-86:4; 95:1-14. The group discussed various pieces of evidence that had been uncovered by the ongoing investigation, including crime scene evidence that seemed to indicate a struggle, and evidence of tension between Paul and Mr. Koh. NDSOF Exh. 40, Ustich Dep. Tr. 95:6-96:1; R. 285-5, Exh. 46, May 16, 2011 Pretrial Hr'g. Tr. 39:21-42:19. Dunham instructed Graf and Ustich to "press Mr. Koh a little bit harder." Ustich Dep. Tr. 96:16-19.

4. Mr. Koh's Second Interview

At around 11:30 a.m., Detectives Graf and Ustich, joined again by Officer Kim, began questioning Mr. Koh a second time. NDSOF ¶ 78; Video of Hyung Seok Koh Interview 2. Before reinitiating questioning, Detective Graf offered Mr. Koh food, coffee, juice, and water. NDSOF ¶ 80; Exh. 44, Hyung Seok Koh Interview Tr. 58. Although Mr. Koh had not recently eaten, slept, or taken his medications, PSOF ¶ 29; Exh. 17, Hyung Seok Koh Dep. Tr. 354:22-355:8, all he said in response was, "Yeah, what I need is I'll let you know," Exh. 44, Hyung Seok Koh Interview Tr. 59; *see also* NDSOF ¶ 80.

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As demonstrated on the video recording, the questioning in the second interview was more aggressive. Graf, implementing a particular law-enforcement interrogation technique, pressed Koh hard about the events of the night before, confronting him with inconsistencies (real and imagined) in his story. *See* NDSOF Exh. 36, Graf Dep. Tr. 105:2-110:15; *see also* NDSOF ¶¶ 50-51. At first, Mr. Koh denied any involvement in Paul's death, sticking to his story that he had gone to bed and had slept until he was awoken by Mrs. Koh at around 3:45 a.m. *See, e.g.*, Exh. 44, Hyung Seok Koh Interview Tr. at 68, 101-02. In response, Graf intensified his questioning, eventually moving to sit in a chair next to Mr. Koh (up until this point, Detective Graf had been sitting across the table from Mr. Koh). NDSOF ¶ 85; R. 286-14, Exh. 55, Video of Hyung Seok Koh Interview 2 00:45:11-00:45:24; Exh. 44, Hyung Seok Koh Interview Tr. 103. Detective Graf also began to raise his voice, yell at Mr. Koh, and touch Mr. Koh on his arms and legs. PSOF ¶ 33; Northbrook Defs.' Resp. PSOF ¶ 33; NDSOF ¶ 92; Pls.' Resp. NDSOF ¶ 92; Exh. 55, Video of Hyung Seok Koh Interview 2 00:55:20-01:09:53.

Graf began to present details of his theory of the crime, stating that he knew that Mr. Koh had called Paul the night before and stayed up waiting for Paul to come home. NDSOF ¶ 87; Pls.' Resp. NDSOF ¶ 87; Exh. 44, Hyung Seok Koh Interview Tr. 108-111, 114. Though Mr. Koh initially denied Graf's version of events (even despite Graf's repeated accusations that Mr. Koh was lying), he eventually began to go along with Graf's suggestions. *See* Exh. 44, Hyung Seok Koh Interview Tr. 111-144; *see also* PSOF ¶¶ 38, 45-50; Northbrook Defs.' Resp. PSOF

¶¶ 38, 45-50; NDSOF ¶¶ 87, 93; Pls.' Resp. NDSOF ¶ 87. As the questioning went on, Mr. Koh became visibly distressed, sitting hunched in his chair and occasionally hitting himself in the head or chest. Exh. 55, Video of Hyung Seok Koh Interview 2 00:44:03, 01:08:10-01:09:53; R. 286-16, Exh. 57, Video of Hyung Seok Koh Interview 3[12] 00:03:15-00:03:20, 00:10:50-00:10:52, 00:12:18-00:12:20; *see also* PSOF ¶ 32. For the most part, Kim did not provide translation assistance, and Graf did not leave time between questions to allow for translation. *See generally* Exh. 55, Video of Hyung Seok Koh Interview 2; Exh. 57, Video of Hyung Seok Koh Interview 3.

Eventually, Mr. Koh agreed (that is, the details of his story were suggested by Graf and Mr. Koh assented) that he stayed up until 1:00 a.m. waiting for Paul to come home; that Mr. Koh was mad because Paul had been out late smoking marijuana with friends; and that the two got into an argument when Paul finally came home, which culminated in Mr. Koh stabbing his son in the chest and slitting his son's throat with a knife in self-defense. Exh. 44, Hyung Seok Koh Interview Tr. 111-144; *see also* NDSOF ¶¶ 89-90; Pls.' Resp. NDSOF ¶¶ 89-90. As with most of the details in that version, it was Detective Graf who presented Mr. Koh with the self-defense storyline. *See* Exh. 44, Hyung Seok Koh Interview Tr. 135-136; *see also* PSOF ¶ 119; Wheeling Defs.' Resp. PSOF ¶ 119; NDSOF ¶ 94.

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12. There are two videotapes of the second interview, labeled "Video of Hyung Seok Koh Interview 2" and "Video of Hyung Seok Koh Interview 3." The tape labeled "Video of Hyung Seok Koh Interview 1" is the recording of Mr. Koh's first interview.

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About three minutes before what would be the end of the interview, Officer Dunham knocked on the door. PSOF ¶ 42; Exh. 57, Video of Hyung Seok Koh Interview 3 at 00:18:19. Graf stepped outside the interview room and told Dunham that Mr. Koh was in the middle of confessing to his son's murder. PSOF ¶ 42; R. 284, Exh. 24, Dunham Dep. Tr. 65:13-66:10. Dunham told Graf that Mr. Koh's attorney, Michael Shim, was at the police station[13] and would be brought back to the interview room. PSOF ¶ 42; Exh. 24, Dunham Dep. Tr. 66:21-68:18. While Dunham escorted Mr. Shim back to the interview room, Graf continued to question Mr. Koh. PSOF ¶ 43; Exh. 36, Graf Dep. Tr. 203:14-16. Graf picked up the pace of the interview and put more pressure on Mr. Koh to confess. PSOF ¶ 43; Exh. 44, Hyung Seok Koh Interview Tr. 144 ("Hyungseok, come on. Right now, let's be done, hurry up, fast."). Koh eventually made statements that could be interpreted as an admission that he had stabbed Paul.[14] *See* Exh. 44, Hyung Seok Koh Interview Tr. at 144-45. Mr. Koh

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13. Two of the Kohs' family members reached out to Shim for assistance earlier that morning once they realized that Mr. Koh was a suspect. PSOF ¶¶ 25, 40. Shim called the Northbrook Police Department to tell them he was Mr. Koh's attorney before arriving at the station. *Id.* ¶ 40. Once at the station, Shim had to wait twenty minutes before he was able to meet with Officer Dunham and go back to the interview room to see Mr. Koh. *Id.* ¶ 41.

14. Mr. Koh's inculpatory statements were ambiguous. *See* Exh. 44, Hyung Seok Koh Interview Tr. at 144-45. ("Q: Did you cut his-- / A: Oh, yeah. / Q: Did you cut his throat? / A:. Maybe, maybe it's -- / Q: Not maybe, what happened? / A: I grab -- okay." "Q: Was he in front—and then you went like this and you cut his neck (indicating)? / A: Yeah. / Q: Is that what you did, did you cut his neck? / A: But I'm not clear in my mind.").

also made stabbing or slashing motions with his hands in response to Graf's questioning about whether and how he had cut Paul. Exh. 57, Video of Hyung Seok Koh Interview 3 at 18:40-20:09. The interview terminated when Mr. Shim arrived and insisted that Graf stop the questioning. Exh. 57, Video of Hyung Seok Koh Interview 3 at 21:08-21:36.

D. Criminal Proceedings

As soon as the interview was over, Detective Graf met with Chief Wernick and Officers Dunham, Ustich, and McEnerney. PSOF ¶ 44. (Officer Kim was not present at this meeting, nor at the meetings that took place in between Mr. Koh's interviews earlier that morning. WDSOF ¶ 18.[15]) In light of Mr. Koh's inculpatory statements, the group decided to call the Cook County State's Attorney's Office to seek approval to file murder charges against him. PSOF ¶ 44; Exh. 36, Graf Dep. Tr. 327:11-329:18. In response to this call, two assistant Cook County State's Attorneys, Diane Sheridan and Rick Albanese, went to the Northbrook Police Department that afternoon and reviewed portions of Mr. Koh's videotaped

15. In their response to the Wheeling Defendants' Statement of Facts, the Kohs deny the Wheeling Defendants' statement that "Officer Kim was involved in no meetings with any NORTAF or Northbrook Police Officer[s] regarding the status of the investigation of Paul Koh" on the grounds that "Officer Kim had [] interactions with Northbrook police officers in connection with the death investigation of Paul Koh." *See* Pls.' Resp. WDSOF ¶ 18. But even if Kim was involved in some meetings or conversations with NORTAF or Northbrook officers during the investigation, there is no evidence that Kim was at the meetings that took place between Mr. Koh's two interviews, or the meeting after the second interview.

confession.[16] PSOF ¶¶ 44, 59-61; NDSOF ¶ 108; Pls.' Resp. NDSOF ¶ 108; R. 308-50, Exh. 157, Felony Review Folder. Sheridan also met with Graf and McEnerney. NDSOF ¶ 108; Pls.' Resp. NDSOF ¶ 108.

The next morning, Assistant State's Attorney Bob Heilengoetter approved first-degree felony murder charges against Mr. Koh. NDSOF ¶ 109; R. 287-9, Exh. 67, Felony Compl. In reaching that decision, ASA Heilengoetter relied on information contained in a "felony review folder" compiled by ASA Albanese. PSOF ¶¶ 59, 62; Northbrook Defs.' Resp. PSOF ¶¶ 59, 62; Exh. 157, Felony Review Folder. The folder included autopsy results, Albanese's notes about Mr. Koh's video-recorded statements, and ASA Heilengoetter's notes from a phone conversation he had with Detective Graf earlier that day. Exh. 157, Felony Review Folder; *see also* PSOF ¶¶ 59-60; Northbrook Defs.' Resp. PSOF ¶¶ 59-60. ASA Heilgoetter did not view any portion of the video himself. PSOF ¶ 60; R. 287-10, Exh. 68, Heilengoetter Dep. Tr. 78:21-79:6. The parties dispute whether ASA Heilengoetter relied on any other evidence or on anyone else's input when deciding whether to bring charges, *compare* PSOF ¶¶ 59, 65; Pls.' Resp. NDSOF ¶ 110, *with* NDSOF ¶ 110; Northbrook Defs.' Resp. PSOF ¶¶ 59, 65, as well as the extent to which ASA Heilengoetter knew about Paul's mental health

16. It is unclear how much of the videotapes Albanese reviewed that day. PSOF ¶ 63; Northbrook Defs.' Resp. PSOF ¶ 63; R. 308-50, Exh. 157, Felony Review Folder; R. 308-17, Exh. 124, Abanese Dep. Tr. 28:12-16 ("Q: Do you recall at all like how long the part or parts that you watched? / A: I don't recall if it was a part or the entire video.").

issues, *compare* PSOF ¶ 66, *with* Northbrook Defs.' Resp. PSOF ¶ 66. Detective Ustich filled out the felony complaint before Detective Graf signed off on it. NDSOF ¶ 109; Exh. 157, Felony Review Folder.

On May 13, 2009, the state obtained a grand jury indictment against Mr. Koh for first-degree murder. PSOF ¶ 73; *see also* R. 308-63, Exh. 170, Grand Jury Tr. Detective Graf testified before the grand jury. PSOF ¶ 73; *see also* Exh. 170, Grand Jury Tr. Charges were never brought against Mrs. Koh, and she was released on April 17, 2009 after spending the night in a jail cell. NDSOF ¶ 111; R. 287-11, Exh. 69, Eunsook Koh Prisoner Checklist. Mr. Koh, on the other hand, ultimately spent almost four years in Cook County Jail awaiting trial. R. 316, Pls.' Resp. Br. at 22; *see* PSOF ¶¶ 73-74. Finally, after a three-week trial in December 2012—during which the defense (that is, Mr. Koh) argued that Paul took his own life—a jury acquitted Mr. Koh of all charges. PSOF ¶ 74; NDSOF ¶ 122.

II. Standard of Review

Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In evaluating summary judgment motions, courts must view the facts and draw reasonable

inferences in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007). The Court may not weigh conflicting evidence or make credibility determinations, *Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 629 F.3d 697, 704 (7th Cir. 2011), and must consider only evidence that can "be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2) . The party seeking summary judgment has the initial burden of showing that there is no genuine dispute and that they are entitled to judgment as a matter of law. *Carmichael v. Vill. of Palatine*, 605 F.3d 451, 460 (7th Cir. 2010); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Wheeler v. Lawson*, 539 F.3d 629, 634 (7th Cir. 2008). If this burden is met, the adverse party must then "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256.

III. Analysis

Both sets of Defendants have moved for summary judgment on all the claims in the Kohs' Second Amended Complaint. In Count One of that complaint, the Kohs allege that the Defendants arrested them without probable cause (or, in Officer Kim's case, extended Mr. Koh's unlawful detention) in violation of the Fourth Amendment. R. 133, Second Am. Compl. ¶¶ 48-52. In Count Two, the Kohs allege that the Defendants violated Mr. Koh's right against self-incrimination and his right to due process under the Fifth and Fourteenth Amendments. *Id.* ¶¶ 53-56. Count Three alleges that the Defendants failed to intervene to prevent these constitutional violations, *id.* ¶¶ 57-60, Count

Four targets the Village of Northbrook, alleging that the Northbrook Defendants were acting pursuant to an unconstitutional municipal policy and practice, *id.* ¶¶ 61-65, and Count Five alleges that the Defendants conspired to violate the Kohs' constitutional rights, *id.* ¶¶ 66-70. Finally, in the wake of the Supreme Court's decision in *Manuel v. City of Joliet*, 137 S. Ct. 911, 197 L. Ed. 2d 312 (2017), the Kohs contend that Mr. Koh's pretrial detention violated the Fourth Amendment. R. 357, Pls.' Supp. Br. at 1-3.

The Kohs also bring a few state-law claims. Count Six is a malicious prosecution claim, which alleges that the Defendants fabricated evidence,[17] withheld exculpatory information, and subjected Mr. Koh to criminal proceedings without probable cause. Second Am. Compl. ¶¶ 71-75. Count Seven is (or was[18]) an intentional infliction of emotional distress claim, *id.* ¶¶ 76-80, and Count Eight alleges loss of consortium on behalf of Mrs. Koh, *id.* ¶¶ 81-84. Finally, Counts Nine and Ten allege *respondeat superior* and indemnification against the Villages of Northbrook and Wheeling. *Id.* ¶¶ 85-93. With the claims laid out, the Court analyzes each in turn.

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17. Although the Second Amended Complaint treated the evidence fabrication as part of the malicious prosecution claim, *see* Second Am. Compl. ¶ 73, the Kohs now argue that the fabrications also violated Mr. Koh's federal constitutional right to due process. *See* Pls.' Resp. Br. at 50. Both versions of the evidence fabrication claim are addressed below. *See* Parts III.D and III.E, *below.*

18. The Court already dismissed the Kohs' intentional infliction of emotional distress claim as untimely filed. *See* R. 82, Mot. to Dismiss Order at 13-16.

Appendix B

A. Conspiracy and Failure to Intervene

Before digging into the Kohs' substantive claims, their derivative claims for conspiracy and failure to intervene merit a brief discussion. The Northbrook Defendants assert that the Kohs have not established sufficient facts to demonstrate that individual defendants should be liable for conspiracy or failure to intervene. Northbrook Defs.' Br. at 37-38. In its prior opinion on the Defendants' motion to dismiss, the Court noted the complaint's[19] lack of clarity on which Defendants supposedly committed which violations, but held that this group pleading was appropriate at the pleading stage. R. 82, Opinion on Mot. Dismiss at 9. At the same time, the Court noted that the Kohs would eventually bear the burden of tying particular Defendants to particular injuries. *Id.* at 10. Northbrook now argues that the Kohs have not met that burden, and that summary judgment is therefore warranted on the conspiracy and failure to intervene claims.

There is a problem with this argument: the Northbrook Defendants do not explain which Defendants are entitled to summary judgment, on what claims, or (if it matters) at what point in time during the course of events particular Defendants ceased being even potentially liable. This is a fatal oversight. On summary judgment, the moving party carries the burden of demonstrating that there are no genuine issues of material fact and that it is entitled to summary judgment as a matter of law. Fed. R. Civ. P.

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19. This was the First Amended Complaint, but the Second Amended Complaint made similar allegations.

56(a). In this case, Northbrook's motion is so vague on the group-allegations argument that the Court is left to guess which Defendants Northbrook believes are entitled to summary judgment on which theories of liability. *See* R. 279, Northbrook Defs.' Br. at 37-38; R. 329, Northbrook Defs.' Reply Br. at 36-37.[20] Northbrook's vague arguments are especially troubling in this case, because there *is* evidence from which a reasonable jury could infer that at least some of the Defendants conspired to deprive the Kohs of their constitutional rights, and that some Defendants failed to intervene to prevent the violations. So, contrary to Northbrook's argument, it is not enough to simply point out to an absence of evidence to support the Kohs' claims. *See* Northbrook Defs.' Mot. Summ. J. at 38.

To be sure, the Kohs do have the ultimate burden of proving conspiracy and failure to intervene, and it is very unlikely that they will be able to do so for all Defendants when it comes to the trial. It seems clear, for example, that liability for the on-scene arresting officers—Meents, Johnson, Eisen, and Celia—must cut off at some point in time after the Kohs arrived at the police station and the interrogations began. Unsupported allegations of a conspiracy of which there is no evidence will not be

20. Northbrook argues in its Reply that its Rule 56.1 Statement of Facts provides adequate notice of the grounds for its motion for summary judgment on the conspiracy and failure to intervene claims. Northbrook Defs.' Reply Br. at 36. Northbrook's Statement of Facts does set forth Northbrook's version of the facts of the case in detail. But even with the facts laid out clearly, Northbrook is still asking the Court and the Plaintiffs to guess which defendants Northbrook believes are entitled to summary judgment and on what claims.

enough at trial (and indeed would not have been enough to withstand a properly detailed motion for summary judgment). Unfortunately, Northbrook has not made these arguments in enough detail to give the Kohs or the Court fair notice of the grounds for summary judgment. Northbrook's motion for summary judgment on the conspiracy and failure to intervene claims is denied.

B. False Arrest

Moving on to the substantive claims, the Kohs allege the Defendants arrested them without probable cause (or, in Officer Kim's case, extended Mr. Koh's unlawful detention) in violation of the Fourth Amendment.[21] To evaluate this claim, the Court must answer two key questions. First, at what point were the Kohs under arrest for Fourth Amendment purposes? Second, when, if ever, did the arresting officers have probable cause (or at least arguable probable cause) to detain the Kohs?

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21. The Kohs also asserted strip-search claims, arguably as free-standing independent claims. *See* Second Am. Compl. ¶ 50. They did not, however, respond to the part of the Northbrook Defendants' motion seeking summary judgment on those claims. *See* Northbrook Defs.' Br. at 25-28; *see also* NDSOF ¶¶ 98-105. So those claims are waived and summary judgment is granted against them. *See Sentinel Ins. Co. v. Serra Int'l*, 119 F. Supp. 3d 886, 891 (N.D. Ill. 2015) ("[A] party opposing summary judgment must inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered. ... If the opposing party fails to do so, the claim is deemed waived and the nonmoving party will lose the motion." (internal quotation marks and citation omitted)).

Appendix B

1. Timing of the Arrest

An arrest occurs when, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Tyler*, 512 F.3d 405, 409-10 (7th Cir. 2008) (quotations and citations omitted). This is an objective standard: the officer's and the suspect's subjective beliefs are not part of the legal analysis. *Carlson v. Bukovic*, 621 F.3d 610, 618-19 & n.15 (7th Cir. 2010). Relevant circumstances include the location of the arrest, the officers' statements and conduct, use of threats or threatening conduct, and whether the suspect was removed to another location. *United States v. Scheets*, 188 F.3d 829, 836-37 (7th Cir. 1999); *see also Fox v. Hayes*, 600 F.3d 819, 833 (7th Cir. 2010); *Tyler*, 512 F.3d at 410. The "characteristics" of the suspect, including whether the suspect "ha[s] problems understanding the English language," are also relevant to determining whether an arrest occurred. *United States v. Espinosa-Alvarez*, 839 F.2d 1201, 1205 (7th Cir. 1987); *see also United States v. Schumacker*, 577 F. Supp. 590, 595 (N.D. Ill. 1983). This is because individuals who have difficulty understanding English might feel "a greater compulsion to comply with the request of the police." *Espinosa-Alvarez*, 839 F.2d at 1205.

From the very beginning of their encounter with the Kohs, the Northbrook police officers acted in a way that would lead reasonable persons to think that they were not free to leave. The officers' first action upon arriving at the scene was to yell at Mrs. Koh to leave the house and sit down on the grass outside. NDSOF ¶ 8; Exh. 12, Mar.

22, 2010 Pretrial Hr'g. Tr. 51:23-52:2. Two Northbrook officers then grabbed Mrs. Koh by her arm and shoulder and forced her down onto the grass. NDSOF ¶ 8; Exh. 12, Mar. 22, 2010 Pretrial Hr'g. Tr. 52:15-22, 53:5-8. When Mr. Koh looked like he might be trying to leave the scene—he went to the driveway to try to start his car to take Paul to the hospital—Officer Meents told Mr. Koh that he had to go back to the front lawn. Exh. 5, July 15, 2010 Pretrial Hr'g Tr. 12:6-13:17. Meents then escorted Mr. Koh away from the car and back to the front lawn, despite Mr. Koh's protests that he wanted to go to the hospital. *Id.* at 13:11-17; R. 283-7, Exh. 18, Jan. 5, 2010 Pretrial Hr'g Tr. 21:15-22:7. The officers pushed Mr. Koh down onto the grass by his shoulders, and told him not to move. NDSOF ¶ 11; Exh. 10, Nov. 13, 2009 Pretrial Hr'g Tr. 35:11-16, 38:9-15; Exh. 11, May 11, 2010 Pretrial Hr'g Tr. 68:14-21. Officers also screamed at Mr. Koh to "shut up" and "be quiet." Exh. 18, Jan. 5 2010 Pretrial Hr'g Tr. 23:22-24:1-3. Once the Kohs were on the ground on the front lawn, Meents and Johnson stood over them in them for as long as fifteen minutes, remaining in "close proximity" to the Kohs the entire time. NDSOF Exh. 5, July 15, 2010 Pretrial Hr'g Tr. 15:19-21; R. 280-8, Exh. 7, Meents Dep. 71:1-19. During this time, the officers denied the Kohs' requests to go into the house for medications, to retrieve their cell phone, and to see their son.[22] NDSOF ¶¶ 12-13, 15; Exh. 11, May

22. Although this denial might have been prompted by the officers' *subjective* desire to preserve evidence at the crime scene, the officers' subjective intentions do not matter. *Carlson*, 621 F.3d at 618-19 & n.15 (7th Cir. 2010). To a reasonable person in the Kohs' position, the officers' refusal to allow them into their home would have been evidence that they were not free to leave.

11, 2010 Pretrial Hr'g Tr. 76:8-20; Exh. 5, Meents Dep. Tr. 132:2-9; R. 283-6, Exh. 17, Hyung Seok Koh Dep. Tr. 354:4-355:8. Based on the officers' actions at the scene—shoving the Kohs around, standing guard over them for an extended period of time, ordering them to sit on the ground, screaming at them, and refusing their requests to leave the lawn—a jury could reasonably find that the Kohs were not free to leave when the officers stood over them on the lawn in front of their house.

Even if the Kohs were not arrested on the lawn, a reasonable jury could find that they were under arrest by the time they were taken to the police station in Johnson's squad car. Where "the police, without probable cause ... forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station ... for investigative purposes," courts will find a Fourth Amendment violation. *Hayes v. Florida*, 470 U.S. 811, 816, 105 S. Ct. 1643, 84 L. Ed. 2d 705 (1985); *see also Sornberger v. City of Knoxville, Illinois*, 434 F.3d 1006, 1018 (7th Cir. 2006) (holding that a reasonable jury could find that the plaintiff was under arrest when an officer told her that she "needed" to accompany him to the station, despite the lack of any overt threat of force). In this case, the shocked and grieving Kohs—who, according to their testimony, had already been yelled at, shoved, and loomed over by multiple uniformed police officers—were "escorted" to Johnson's squad car by two officers, who never asked whether the Kohs *wanted* to go to the police station. PSOF ¶ 6; Exh. 5, July 15, 2010 Pretrial Hr'g Tr. 41:18-42:12; Exh. 82, Mar. 22, 2010 Pretrial Hr'g Tr. 64:8-65:14 (sealed). The Kohs testified that this

"escort" involved yet more physical force, claiming that the officers held their arms while bringing them to the car and "shoved" or "pushed" them inside. NDSOF ¶ 16; Exh. 12, Mar. 22, 2010 Pretrial Hr'g Tr. 62:1-12; Exh. 17, Hyung Seok Koh Dep. Tr. 364:10-365:18. In the car, the Kohs even made explicit requests *not* to be taken to the police station (they asked again to go to the hospital) and were ignored. PSOF ¶ 4; Exh. 10, Nov. 13, 2009 Pretrial Hr'g Tr. 45:18-20, 52:11-14, 58:3-14; Exh. 11, May 11, 2010 Pretrial Hr'g Tr. 74:7-75:13; Exh 82, Mar. 22, 2010 Pretrial Hr'g Tr. 63:2-11, 73:21-24 (sealed).[23] All of these actions—particularly given the Kohs' apparent difficulty understanding and speaking English—would have given reasonable persons in the Kohs' position good reason to think that compliance was not optional, but required.

What's more, a reasonable jury could find that the Kohs continued to be under arrest throughout their time at the police station. If anything, the Kohs' inability to leave was reinforced during their time in the police station conference room. According to Mrs. Koh, the door of the conference room where the Kohs were held was kept closed while they were inside. Exh. 12, Mar. 22, 2010 Pretrial Hr'g Tr. 102:16-23. Johnson or other officers watched over the Kohs the entire time. NDSOF ¶ 44; Exh. 9, Johnson Dep. Tr. 220:2-13. The officers also denied the Kohs' requests to make phone calls—indeed, Deputy Chief Ross explicitly instructed Johnson not to allow the Kohs to make calls until a police translator could

23. Johnson denies that the Kohs asked to go to the hospital, *see* Exh. 9, Johnson Dep. Tr. 71:24-72:3, but at this stage, the Court must believe the Kohs over Johnson.

listen in. PSOF ¶ 11, Exh. 134, Transcript of NPD Audio Recordings at 11-12; Exh. 103, Ross Dep. Tr. 82:17-84:6 (Ross ordered Johnson to wait for a translator "[s]o the officers would be able to know what was said."). The Kohs' inability make calls effectively left them stranded at the police station. The Kohs were brought to the station in Johnson's police vehicle; when they arrived it was around 4:00 a.m. on a cold April morning.[24] If they could not call for a ride, the Kohs had no reasonable way to leave the station (short of asking the officers who arrested them for a lift). In view of these facts, a jury could easily find that the Kohs remained under arrest from the time the officers arrived at the house through the entirety of their time at the police station.

All of these facts also prevent the Court from finding that the arresting officers are entitled to qualified immunity as a matter of law. To avoid judgment on qualified immunity grounds, the Fourth Amendment right that the Defendants allegedly violated must have been "clearly established" as of the time of the alleged arrest. *Roe v. Elyea*, 631 F.3d 843, 858 (7th Cir. 2011). The "clearly established" inquiry entails examining the

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24. Johnson believes he arrived at the scene around 3:45 a.m., and that he took the Kohs to the station around twenty minutes later. *See* Exh. 9, Johnson Dep. Tr. 44:3-10, 83:8-14. It took only three or four minutes to drive to the station, *id.* at 76:19-21, meaning the Kohs must have arrived at the station around 4:00 a.m. Officer Meents noted that the weather that day was cold, but not freezing. Exh. 7, Meents Dep. Tr. 58:19-20. *See also* NDSOF ¶ 22 ("Johnson transported the Kohs to the Northbrook Police Department ... because it was dark outside [and] extremely cold.")

right "in a particularized sense, rather than at a high level of generality." *Alicea v. Thomas*, 815 F.3d 283, 291 (7th Cir. 2016). Ultimately, the question for qualified immunity "is whether the state of the law at the time that [the Defendants] acted gave [them] reasonable notice that [their] actions violated the Constitution." *Roe*, 631 F.3d at 858.

A reasonable officer would have known that pushing on the Kohs' shoulders and directing them to sit quietly on the ground outside of their house before taking them to a police car and driving them to a police station constituted an arrest under the Fourth Amendment. *See Hayes*, 470 U.S. at 815-16; *Sornberger*, 434 F.3d at 1017-18. Indeed, the officers' actions read like a checklist of the factors that the courts have set out for evaluating whether a suspect is under arrest. In *United States v. Scheets*, for example, the Seventh Circuit noted that factors to be considered in the arrest analysis include:

> [W]hether the encounter occurred in a public or private place; whether the suspect was informed that he was not under arrest and free to leave; whether the suspect consented or refused to talk to the investigating officers; whether the investigating officers removed the suspect to another area; whether there was physical touching, display of weapons, or other threatening conduct; and whether the suspect eventually departed the area without hindrance.

Scheets, 188 F.3d at 836-37. Running through the list, the Northbrook officers ordered the Kohs to leave their home; never suggested that the Kohs were free to leave; ignored the Kohs' requests to go to the hospital; removed the Kohs from their home to the police station; pushed and shoved the Kohs; yelled at Mr. Koh to "shut up"; and kept the Kohs under police supervision at the station instead of releasing them. On these facts, a reasonable officer would have known that the Kohs were under arrest even on their front lawn (by that time, the officers had verbally and physically intimidated the Kohs, restricted their freedom of movement using physical force, and denied their requests to move). And a reasonable officer certainly would have known that the Kohs were under arrest by the time they were taken to the police station and held there. So qualified immunity cannot shield the Defendants on this element of the false arrest analysis.

2. Probable Cause

The Fourth Amendment inquiry does not end with the conclusion that the Kohs were arrested. The Kohs' false arrest claim fails if the arresting officers had probable cause to detain them. Police officers have probable cause to arrest someone if "the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent [person] in believing that the [suspect] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964). The "totality of the circumstances" must establish a reasonable belief that criminal activity occurred. *Gibbs v. Lomas*, 755 F.3d 529,

537 (7th Cir. 2014). Whether or not probable cause exists then "is often a matter of degree, varying with both the need for prompt action and the quality of information available." *Maxwell v. City of Indianapolis*, 998 F.2d 431, 434 (7th Cir. 1993). Generally, the question of probable cause is a question for the jury. *See id.* (probable cause "is a proper issue for the jury if there is room for a difference of opinion concerning the facts or the reasonable inferences to be drawn from them").

Even where officers make an arrest without probable cause, qualified immunity may kick in to defeat a false-arrest claim. The doctrine of qualified immunity will protect the Defendants if they decided, "in an objectively reasonable fashion," that they had probable cause to arrest the Kohs. *Sornberger*, 434 F.3d at 1014-15. As discussed above, the ultimate question is whether the officers had "reasonable notice," given the state of the law at the time, that their actions violated the Constitution. *Roe*, 631 F.3d at 858.

Notably, the Defendants do not even try to argue that they had probable cause—or even arguable probable cause—to arrest the Kohs at their home. *See* Northbrook Defs.' Br. at 5-11. In fact, the Northbrook Defendants explicitly concede that there was no probable cause to arrest Mrs. Koh until, at the earliest, the end of Mr. Koh's second interview. *Id.* at 15. So, the question is when (if ever) in the course of the ongoing investigation the officers developed sufficient information to justify the continued detention of Mr. and Mrs. Koh.

Appendix B

a. Mr. Koh

For Mr. Koh, the NORTAF/NPD debriefing sessions held between Mr. Koh's two interviews mark a turning point in the probable cause analysis. In the time between Mr. Koh's first and second interviews, Officers Graf and Ustich met with NORTAF and NPD supervisors. *See* PSOF ¶ 26; Exh. 36, Graf Dep. Tr. 91:15-93:5. During these meetings, Graf and Ustich shared their impressions of the first interview. Exh. 36, Graf Dep. Tr. 93:21-94:11; Exh. 40, Ustich Dep. Tr. 85:15-86:15. Ustich noted that Mr. Koh did not vehemently deny involvement in Paul's death, and that the manner of his denial seemed oddly casual. Ustich also thought that Mr. Koh's answers were evasive or not forthcoming. Exh. 40, Ustich Dep. Tr. 85:21-86:4; 95:1-5.

The officers also discussed physical evidence from the house, which arguably suggested that Paul's death was a homicide. First, Graf and Ustich learned that investigators had found blood in Mr. and Mrs. Koh's master bathroom. Exh. 40, Ustich Dep. Tr. 95:13-14; Exh. 36, Graf Dep. Tr. 99:19-100:16. To Graf, this suggested that the Kohs had cleaned up the crime scene. Exh. 36, Graf Dep. Tr. 100:10-16. Second, there was a small metal cross and a broken necklace chain covered in blood and lying on the floor. *See* Exh. 40, Ustich Dep. Tr. 95:19-20; *see also* NDSOF ¶ 30; Exh. 28, Wasowicz Dep. Tr. 34:14-36:9; Exh. 29, Wasowicz Aff. ¶ 14; Exh. 29A, Wasowicz Aff. Exh. A at NB 369.[25] The broken necklace suggested that Paul had

25. The Kohs admit that Officer Wasowicz observed the metal cross covered in blood when he investigated the Kohs' house that

been attacked and that a struggle had ensued. Third, Graf and Ustich learned that the NORTAF forensic team, who by that time had been able to inspect the house, believed that Paul's death was a homicide, because, in their opinion, Paul would not have been able to inflict the injuries on himself.[26] NB SOF Exh. 46, May 16, 2011 Pretrial Hr'g Tr. 100:13-14, 102:1-5.

There also was some motive evidence that Graf and Ustich learned about during the debriefing sessions. Specifically, Paul and his father had an unusually confrontational relationship. NDSOF ¶ 68; Exh. 46, May 16, 2001 Pretrial Tr. 39:24-41:15; R. 339, Wasowicz Field Notes, NB 171-747 at NB 746. This information primarily came from Paul's youth pastor, who had told investigators earlier that morning about a written "Family Agreement"[27] and about a recent altercation between Paul

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morning. *See* Pls.' Resp. NDSOF ¶ 30. The observation does not appear in Officer Wasowicz's contemporaneous field notes, *see* R. 339, Wasowicz Field Notes, NB 171-747, but the fact is undisputed.

26. The Kohs' experts opine that Paul's death was, in fact, suicide. *See* R. 308-16, Exh. 123, Dr. Laposata Trial Tr. 55:17-22; PSOF Exh. 138, Moses Dep. Tr. 99:21-25. But the question for probable cause is not whether Paul's death was *actually* a suicide; the issue is what information the officers had, and whether they were reasonably entitled to rely on it. In this case, Graf, Ustich, and the other investigators were entitled to rely on the opinions of the NORTAF forensic investigators, even if those opinions turned out to be wrong.

27. One of the "expectations" that Paul had to abide by under the Koh Family Agreement related to Paul's drug usage: "I understand that there is NO tolerance in regards to smoking and drugs in the

and his father. *See* NDSOF ¶ 68; Exh. 46, May 16, 2011 Pretrial Hr'g Tr. 40:23-41:15, 104:24-105:11; R. 286-1, Exh. 49, Koh Family Agreement; R. 285-6, Exh. 47, Garner Aff.; R. 285-7, Exh. 47A, Garner Aff. Exh. A (sealed). Graf and Ustich also learned that Paul had previously been found wandering the neighborhood in the middle of the night after an argument with his father. Exh. 45, May 16, 2001 Pretrial Hr'g Tr. 100-101; Exh. 36, Graf Dep. Tr. 88:6:-89:6.

Finally, Graf and Ustich learned about some apparent inconsistencies in the Kohs' stories. Graf found the evidence of cleanup in the master bathroom suspicious, because it contradicted Mrs. Koh's version of events—during her interview, she stated that neither she nor her husband washed up in the bathroom after finding Paul's body. *See* Exh. 121, Eunsook Koh Interview Tr. at 12; *see also* Exh. 36, Graf Dep. Tr. 99:15-101:2. The detectives also learned that Mrs. Koh had maintained in her interview that she had not moved Paul's body, which was inconsistent with Mr. Koh's statement that they had turned the body over. Exh. 36, Graf Dep. Tr. 41:16-42:7; Exh. 44, Hyung Seok Koh Interview Tr. 23-24. Finally, Graf and Ustich learned that a neighbor had heard a scream from the Kohs' house. Exh. 46, May 16, 2011 Pretrial Hr'g Tr. 42:15-19. Mr. Koh had told Graf that he was a light sleeper, so Graf was skeptical that Mr. Koh could have slept through

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house. A random drug test will be conducted by my parents." R. 286-1, Exh. 49, Koh Family Agreement. Investigators learned from Paul's friend Neil Schnitzler the morning after Paul died that Paul had smoked marijuana the night before. NDSOF ¶ 71; R. 286-4, Exh. 51, Mazurkiewicz Aff.; R. 286-5, Exh. 51A, Mazurkiewicz Aff. Exh. A.

Paul's death. *See id; see also* Exh. 44, Hyung Seok Koh Interview Tr. 87.

Taking all of this evidence into account, a jury *must* conclude that there was probable cause to arrest Mr. Koh after the debriefing sessions. To be sure, this is a very close call, particularly when viewed through the lens of summary judgment. But probable cause is too low a bar for Mr. Koh to overcome after the debriefing session. *See Kaley v. United States*, 571 U.S. 320, 134 S. Ct. 1090, 1103, 188 L. Ed. 2d 46 (2014) ("Probable cause ... is not a high bar."). Probable cause requires nothing more than a "fair probability" on which "reasonable and prudent" people could act. *Kaley*, 134 S. Ct. at 1103. Although the Kohs point out that the officers also had evidence that pointed towards Mr. Koh's innocence—that is, evidence suggesting that Paul might have committed suicide—the existence of some contrary evidence does not defeat probable cause. *See District of Columbia v. Wesby*, 138 S. Ct. 577, 588, 199 L. Ed. 2d 453 (2018) ("probable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts"). The inference of the suspect's guilt need not be the most likely scenario, or even more likely true than not, for a reasonable officer to have probable cause to arrest. *See Gerstein v. Pugh*, 420 U.S. 103, 121, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) (contrasting probable cause with the preponderance of evidence and reasonable doubt standards). Nor does it matter that none of the facts Graf and Ustich learned, viewed in isolation, would be enough for probable cause. *See Wesby*, 138 S. Ct. at 588. Probable cause is a holistic, commonsense inquiry, and officers are allowed to draw reasonable inferences

based on their experience and judgment. *United States v. Williams*, 627 F.3d 247, 251 (7th Cir. 2010); *United States v. Bullock*, 632 F.3d 1004, 1022 (7th Cir. 2011). In this case, the officers were entitled to rely on Graf and Ustich's evidence-based suspicions about Mr. Koh's manner and the inconsistencies in the Kohs' stories. Considering these suspicions in combination with substantial physical and motive evidence, the Northbrook officers indisputably had enough information at that point to justify Mr. Koh's detention.

At the very least, qualified immunity would protect the individual defendants against the false arrest claim after the debriefing sessions. Graf and Ustich had "arguable probable cause" for purposes of applying the qualified immunity doctrine. *Abbott v. Sangamon Cty., Ill.*, 705 F.3d 706, 714-15 (7th Cir 2013). In other words, it would have been reasonable—even if mistaken—for an officer to believe that there was probable cause to arrest Mr. Koh based on the information divulged at the debriefing sessions. *See Abbott*, 705 F.3d at 714-15 ("[Q]ualified immunity in [the probable cause] context protects officers who reasonably but mistakenly believe that probable cause exists[.]" (citation omitted)); *see also Fox*, 600 F.3d at 834 (rejecting qualified immunity argument where the officers' theory of the case was "*absolutely unreasonable*"). As the Supreme Court emphasized in *District of Columbia v. Wesby*, existing precedent must place the lawfulness of the particular arrest "beyond debate" in order to defeat qualified immunity. *Wesby*, 138 S. Ct. at 590. In this case, the officers' decision to hold Mr. Koh after their debriefing sessions was at least arguably supported by probable

cause. Qualified immunity therefore mandates dismissal of Mr. Koh's false arrest claim from after the debriefings and onward.

b. Mrs. Koh

The probable cause inquiry is different for Mrs. Koh, mostly because the Northbrook Defendants unambiguously concede that there was no probable cause to hold her until at least the time of Mr. Koh's inculpatory statements at the end of his second interview. Northbrook Defs.' Mot. Summ. J. at 15 ("[I]t was not until Mr. Koh abandoned the Kohs' initial story, and then appeared to admit that he killed Paul, that probable cause was present."). But, as will be explained below, a reasonable jury could find that Mr. Koh's confession was coerced, and, more importantly, coerced in a way that made the reliability of his statements questionable. *See Hurt v. Wise*, 880 F.3d 831, 841 (7th Cir. 2018) (noting the importance of coercion to the question of a confession's reliability). A reasonable jury could find that Mr. Koh's confession was too unreliable to play a role in the probable cause analysis for Mrs. Koh. So in light of the Defendants' concession, Mrs. Koh's false arrest claim survives from the time of her initial detention until her release from the police station the next day. To be sure, the Defendants might be able to prove at trial that probable cause existed to detain Mrs. Koh at some earlier point in time. But as things stand, the Northbrook Defendants' motion for summary judgment is denied as to Mrs. Koh's false arrest claim.

c. Officer Kim

Although the Kohs' false arrest claims survive against the Northbrook Defendants, any false arrest claim against Officer Kim must fail. Kim was not on the scene when the Kohs were arrested, and there no evidence that he knew or should have known that they had been arrested without probable cause. Without that knowledge, Kim could not have conspired to further the false arrest. *See Scherer v. Balkema*, 840 F.2d 437, 442 (7th Cir. 1988) (noting that, for a § 1983 conspiracy claim, a plaintiff must establish "an express or implied agreement among defendants to deprive plaintiff of his or her constitutional rights"). Nor can Kim be liable for failure to intervene if he did not know that a false arrest had occurred. *See Gill v. City of Milwaukee*, 850 F.3d 335, 342 (7th Cir. 2017) ("[T]he detectives would not have known a constitutional violation was committed, and therefore, cannot be liable for failure to intervene."). The Wheeling Defendants' motion for summary judgement is granted on the false arrest claim.[28]

28. As discussed in Part III.A above, the Northbrook Defendants have not made clear which of them should be off the hook for which conspiracy and failure to intervene claims, so summary judgment is not granted to any of them on this claim. The Court does have significant questions about whether any of the Defendants except Meents, Johnson, Eisen, and possibly Celia could be liable for the initial false arrest, and about when the responsibility of those initial arresting officers must cut off. There are also individual defendants who do not seem to have been involved in the false arrest and detention in any way. But again, Northbrook has not made these arguments.

Appendix B

C. Involuntary Confession

Next, the Defendants move for summary judgment on Mr. Koh's coerced confession claim. Mr. Koh advances two versions of the coerced confession claim, one based on the Fifth Amendment right to be free of compelled self-incrimination, the other a substantive due process claim based on "conscience-shocking" police conduct. The substantive due process claim is readily rejected. As the Seventh Circuit recently noted, the bar for "conscience-shocking" conduct is extraordinarily high. *Hurt v. Wise*, 880 F.3d 831, 844 (7th Cir. 2018). What's more, "[w]hen there is an alleged violation of a specific constitutional provision, that provision should guide the court's analysis." *Id.* (citing *City of Sacramento v. Lewis*, 523 U.S. 833, 842, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)). In this case the *specific* alleged constitutional violation—the Fifth Amendment claim—precludes reliance on the more *general* substantive due process claim.

Moving on, the use of a coerced confession in a criminal proceeding violates the Fifth Amendment's guarantee against compelled self-incrimination. *Miller v. Fenton*, 474 U.S. 104, 109-10, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985); *Sornberger*, 434 F.3d at 1023-1027. A confession does not run afoul of the Fifth Amendment if, based on the totality of the circumstances, the confession was "free and voluntary," and "not [ ] extracted by any sort of threat or violence or obtained by any direct or implied promises however slight nor by the exertion of any improper influence." *Howell v. United States*, 442 F.2d 265, 272 (7th Cir. 1971) (citing *Malloy v. Hogan*, 378

U.S. 1, 7, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)); *see also Arizona v. Fulminante*, 499 U.S. 279, 285-86, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). This standard requires the Court to determine, after examining the totality of the circumstances, whether "[the suspect's] will was overborne in such a way as to render his confession the product of coercion." *Fulminante*, 499 U.S. at 288; *see also Hicks v. Hepp*, 871 F.3d 513, 527 (7th Cir. 2017) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)). The issue of coercion is determined from the perspective of a reasonable person in the position of the suspect. *Hicks*, 871 F.3d at 527. The characteristics of the suspect, the conditions of the interrogation, and the conduct of the interrogator are all part of the totality of the circumstances inquiry. *United States v. Brooks*, 125 F.3d 484, 492 (7th Cir. 1997). Relevant considerations include the suspect's age, intelligence and mental state; the length of the detention; the nature of the interrogations; whether the suspect received *Miranda* warnings; whether physical coercion occurred; and the deprivation of food or sleep. *Id.* The voluntariness of a confession must be analyzed based on the totality of the circumstances. *Hicks*, 871 F.3d at 527.

With those standards in mind, the Court turns to the circumstances surrounding Mr. Koh's confession. Officers Graf and Ustich interviewed Mr. Koh for a combined total of about 2 1/2 hours the morning after Paul died. *See* NDSOF ¶¶ 52, 78; Exh. 42, Video of Hyung Seok Koh Interview 1; Exh. 55, Video of Hyung Seok Koh Interview 2; Exh. 57, Video of Hyung Seok Koh Interview 3. Mr. Koh had not taken his medications for blood pressure, diabetes, and hyperammonemia since the day before (despite having

asked Detective Graf for them), *see* PSOF ¶ 20; Pls.' Resp. WDSOF ¶ 32; Exh. 85, Mar. 16, 2010 Pretrial Hr'g Tr. 14:3-15:12; *but see* WDSOF ¶ 32; Exh. 39, Kim Dep. Tr. 131:4-22, nor had he recently eaten[29] or slept, PSOF ¶ 29; Exh. 17, Hyung Seok Koh Dep. Tr. 354:22-355:8. By the start of the second interview, Mr. Koh had been held at the police station for almost eight hours, unable to call anyone and isolated from anyone other than his wife (who was also under arrest) and the police. PSOF ¶¶ 7, 10-12, 24; Northbrook Defs.' Resp. PSOF ¶ 11; NDSOF ¶ 37; Exh. 79, Nov. 13, 2009 Pretrial Hr'g Tr. 59:3-9 (sealed); Exh. 82, Mar. 22, 2010 Pretrial Hr'g Tr. 17:20-18:8 (sealed); Exh. 48, Hwang Dep. Tr. 102:17-103:7 (sealed). Throughout the interviews, Mr. Koh displayed signs of mental and physical exhaustion: he sat hunched over in his chair, occasionally hitting himself on the head and chest.[30] Exh. 55, Video of Hyung Seok Koh Interview 2 44:03, 55:20-1:09:53; Exh. 57, Video of Hyung Seok Koh Interview 3 00:03:15-00:03:20, 00:10:50-00:10:52, 00:12:18-00:12:20; *see also* PSOF ¶ 32.

Mr. Koh also had difficulty understanding Detective Graf's questions. Many of Mr. Koh's answers were altogether nonsensical, showing (or so a reasonable jury could find) that he did not understand what was going on. For example, Mr. Koh responded to Graf's question about

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29. It is undisputed, however, that before Mr. Koh's *second* interview, Detective Graf offered him food, coffee, and water. NDSOF ¶ 80; R. 285-3, Exh. 44, Hyung Seok Koh Interview Tr. 58.

30. Mr. Koh's attorney also observed that upon entering the interview room, he found Mr. Koh disoriented, disheveled, and tired. PSOF ¶ 43; R. 308-41, Exh. 148, Shim Dep. Tr. 69:4-16.

what kind of person Paul was by narrating what happened yesterday morning. Exh. 44, Hyung Seok Koh Interview Tr. 3-4. At another point in the interview, Koh answered a question about whether he saw a weapon by telling Graf about the tools he kept for his vending machine business. *Id.* at 36. During one tense moment, Graf asked Mr. Koh "Would God want Paul to [ ] have his father sitting here and telling us a story that's not true?"—a question that should obviously have been answered "no"—but Mr. Koh said "yeah." *Id.* at 123. As the interview went on, Mr. Koh largely defaulted to giving one word or unintelligible answers, or responding that he did not know or could not remember, *see, e.g., Id*. at 108, 110-114, 116-119, 124, 126-135, 138-143.[31] The language barrier was obvious.[32] Graf exacerbated the problem by abruptly switching back and forth between topics, which further confused Mr. Koh. *See, e.g., id.* at 5-6, 68-70, 132-135, 135-137. Officer Kim, for his part, provided little translation assistance to Mr. Koh throughout the entirety of the interviews. Officer Kim's lack of assistance even prompted Mr. Koh to plead with Detective Graf, "I need this interpreter over here." *Id.* at 103.

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31. For example: "Q. Tell us what happened. / A. I can't I can't remember that one." "Q. Did he come after you? Did he have a knife, did he have a knife, did he have a knife and come after you? / A. No." "Q. Hyungseok, who had the knife? / A. I don't know." Exh. 44, Koh Interview Tr. at 132-33.

32. Nevertheless, Detective Graf accused Mr. Koh of lying about his inability to understand questions posed to him throughout the interview. *See* R. 285-3, Exh. 44, Hyung Seok Koh Interview Tr. 106, 117-18, 132; *see also* PSOF ¶ 36; Northbrook Defs.' Resp. PSOF ¶ 36.

What's more, the Kohs assert that what language assistance Officer Kim did provide made the circumstances even more coercive. For example, when translating the *Miranda* warnings into Korean, "Officer Kim did not advise Mr. Koh that his statements may be used against him, or that Mr. Koh had a right to an attorney if he could not afford one." PSOF ¶¶ 103-104; *see also* Pls.' Resp. WDSOF ¶ 36. And in fact, the Kohs argue, Officer Kim actually "advised Mr. Koh that he did *not* need a lawyer."[33] PSOF ¶ 105 (emphasis added). Likewise, Kim mistranslated a Korean idiom—"*gachi jookja*"—that Mr. Koh used when talking about his relationship with Paul. PSOF ¶¶ 115-118. Though Kim provided Graf a literal translation of the phrase—literally, "let's die together"—Kim did not explain that the phrase was in fact an idiom, not to be taken literally (like the English phrase "you're killing me"). *Id.* ¶¶ 117-118. *See also* Exh. 44, Hyung Seok Koh Interview Tr. at 62-63; R. 276-3, Exh. 106, Yoon Dep. Tr. 48:6-49:12, 54:12-57:8. Towards the end of the interview, Officer Kim even joined in the interrogation by asking his own questions in English. Exh. 57, Video of Hyung Seok Koh Interview 3 00:18:28-00:19:27.

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33. The Wheeling Defendants assert that "there is no Section 1983 cause of action available to Mr. Koh for any actual failure to inform Mr. Koh of his *Miranda* rights." R. 330, Wheeling Defs.' Reply Br. at 4. But Mr. Koh is not asserting that Officer Kim violated his constitutional rights on the basis that Officer Kim failed to properly translate the *Miranda* warnings. Rather, he is asserting that Officer Kim's mistranslation of *Miranda* is a relevant consideration in determining whether his confession was voluntary, which it is. *See Brooks*, 125 F.3d at 492.

Finally, there were instances where Officer Kim would translate (or mistranslate) some, but not all, of Mr. Koh's statements, or interject in Korean with questions of his own. *See, e.g.*, Exh. 42, Video of Hyung Seok Koh Interview 1 00:00:21-00:02:24; Exh. 57, Video of Hyung Seok Koh Interview 3 00:10:21-00:10:25, 00:12:24-00:12:36, 00:18:28-00:18:40. For example, during a key exchange, Graf tried to get Mr. Koh to admit that he had stabbed Paul in self-defense. At the same time, Kim started asking Mr. Koh questions in Korean, partially but not exactly translating Graf's words. *See* R. 308-73, Exh. 180, Yoon Report at 5; Exh. 57, Video of Hyung Seok Koh Interview 3 00:12:00-000:12:42. At the crucial moment, Graf and Kim asked overlapping questions: Graf asked in English whether Mr. Koh was angry, and before Mr. Koh could answer, Kim asked in Korean whether Mr. Koh acted in self-defense. Exh. 180, Yoon Report at 5. Mr. Koh said "I think so," leading Kim proclaim that "He said it was in defense"—even though Kim had not actually translated Graf's question about whether Mr. Koh was angry, so it was not clear which question Mr. Koh was answering. *See Id.* at 5; Exh. 44, Hyung Seok Koh Interview Tr. 136; Exh. 180, Yoon Report at 5; *see also* PSOF ¶ 119.

In addition to considering Mr. Koh's characteristics and the conditions of the interrogation, the interrogators' conduct is also relevant to the voluntariness inquiry. As soon as the second interview began, Graf continually accused Mr. Koh of lying and directed Mr. Koh to be "totally honest" in order "to get closure for [Paul]." *See* NDSOF ¶ 81; Pls.' Resp. NDSOF ¶ 81; Exh. 44, Hyung Seok Koh Interview Tr. 59-60; *id.* 97, 101 (Detective Graf

accusing Mr. Koh of lying because "there [was] a lot of stuff ... not adding up. ... There had to be, there had to be a struggle, okay"). Graf also introduced new storylines in the second interview, which he pressured Mr. Koh to adopt. *See, e.g.*, Exh. 44, Hyung Seok Koh Interview Tr. 97, 101-107 (pressing Mr. Koh to admit that he was angry Paul had gone out with his friends the night before and stayed up waiting for Paul to come home); *id.* 108 (Graf stating that he knew Mr. Koh had called Paul the night before and stayed up waiting for Paul to come home); *id.* 135 (Graf presents Mr. Koh with the story line that he had killed his son in self-defense). Graf implied that all of the evidence—both physical evidence and Mrs. Koh's statements during her interview—implicated Mr. Koh as Paul's killer, *see* Exh. 44, Hyung Seok Koh Interview Tr. 120 ("Listen to me, we know what happened. ... We know, okay. And we want you to tell us what happened. We need it with your words. ... Okay, cause we know and ... other people have told us what happened. We've talked to your wife, we know what happened, okay."); *id.* 125 ("You know what happened last night, okay. And we, we know what happened last night, Hyungseok, we know. We're ... gathering all the evidence at the station, okay."); *id.* 127 ("And only you can do that because everybody else is telling us stuff right now so let's get to it."); *id.* ("We know more than you think we know okay.").

It is important too that Detective Graf used coercive mental and physical tactics throughout the interviews. He raised his voice, yelled at Mr. Koh, approached Mr. Koh, and occasionally touched Mr. Koh on his arms and legs. PSOF ¶ 33; Northbrook Defs.' Resp. PSOF ¶ 33; NDSOF

¶¶ 85, 92; Pls.' Resp. NDSOF ¶ 92; Exh. 44, Hyung Seok Koh Interview Tr. 103; Exh. 55, Video of Hyung Seok Koh Interview 2 00:55:20-01:09:53. (It is also worth noting that Officer Kim's gun was visible throughout the entirety Mr. Koh's interviews. NDSOF ¶ 97; WDSOF ¶ 9.) Detective Graf implicitly threatened that the interview would not end until Mr. Koh confessed, telling him that they could be there "for days and days and days" in order to get "the whole truth." Exh. 44, Hyung Seok Koh Interview Tr. 117; *see also* PSOF ¶ 37; Northbrook Defs.' Resp. PSOF ¶ 37. When Mr. Koh resisted the officer's version of events, Detective Graf would say things like, "And you're not telling the truth. You're not telling me the truth. God wants this to be right for Paul. And Paul wants you to do this." Exh. 44, Hyung Seok Koh Interview Tr. 123; *id.* 126-127; *see also* PSOF ¶ 34; Northbrook Defs.' Resp. PSOF ¶ 34. Graf absolutely refused to accept any of Mr. Koh's denials, asking questions over and over until Mr. Koh finally agreed to Graf's story. *See, e.g.*, Exh. 44, Hyung Seok Koh Interview Tr. 34-35, 39-40, 102-103, 109-118, 124 ("Q: Tell us the truth. Tell us the truth. / A: My memory is -- / Q: No, your memory is good ... You just don't ... you don't want to--"), 127-128 ("Q: But did you get in the car and drive to go look for him? ... / A. I don't know. / Q: Hyungseok, you're, you're telling stories now. You're not telling me the truth. / A: No, I, I-- ... / Q: No, you're not. You would know if you went to the car and looked for him."), 132-145 ("A: Maybe. / Q: Not maybe. What happened?"). Detective Graf also ramped up the coercive tactics as soon as he learned that Mr. Koh's attorney was at the police station.[34] PSOF ¶¶ 42-43; Exh. 44, Hyung

34. It is true that "the law permits the police to pressure and cajole, conceal material facts, and actively mislead—all up to limits

Seok Koh Interview Tr. 144 ("Hyung Seok, come on. Right now, let's be done, hurry up, fast!").

Based on all of this evidence, a reasonable jury could infer that Mr. Koh's "will was overborne so as to render his confession the product of coercion." *Fulminante*, 499 U.S. at 288. The combined effect of Mr. Koh's vulnerabilities, the language barrier, the coercive atmosphere in the interrogation room, Detective Graf's interrogation tactics, and Officer Kim's deficient performance as translator is enough for a jury to find that Mr. Koh's confession was involuntary. Indeed, courts have recognized that circumstances like those under which Mr. Koh confessed may render a confession involuntary. *See Haynes v. Washington*, 373 U.S. 503, 504, 514-15, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963) (confession involuntary where the suspect was not given Miranda warnings, was held incommunicado for 16 hours, and was told he could not call his wife until he signed a confession); *Carrion v. Butler*, 835 F.3d 764, 776 (7th Cir. 2016) (observing that "evidence that Detective Delgadillo, in acting as translator, manipulated or mistranslated the prosecutor's questions or Mr. Carrion's answers is relevant to the extent that it demonstrates coercive conduct"); *Aleman v. Vill. of Hanover Park*, 662 F.3d 897, 906 (7th Cir. 2011) (reversing dismissal of involuntary confession claim where the defendant "forced on [the suspect] a premise that

... ." *United States v. Rutledge*, 900 F.2d 1127, 1131 (7th Cir. 1990). But here, Detective Graf's tactics—which included badgering Mr. Koh, pressuring him to confess, lying to him, and manipulating him—exceeded those limits, especially given all the other circumstances surrounding the confession, as discussed above.

led inexorably to the conclusion that he must have been responsible for Joshua's death; the lie if believed foreclosed any other conclusion"); *Andersen v. Thieret*, 903 F.2d 526, 530 (7th Cir. 1990) (reasoning that "[f]ood, sleep, and water deprivation and a mentally coercive interrogation would also have caused the state courts to conclude that [a] confession was involuntary" (citations omitted)); *United States v. Short*, 790 F.2d 464, 469 (6th Cir. 1986) (finding that "[t]here is a serious question whether Short's second confession was knowing and intelligent": "Short's English was broken and her understanding of English deficient. ... [S]he was separated from her children and subjected to an interrogation in English, even though one of the agents spoke some German"); *United States v. Preston*, 751 F.3d 1008, 1027-28 (9th Cir. 2014) (repetitive questioning, threats to continue interrogation indefinitely, pressure to adopt certain responses, use of two incriminating alternative questions, and false promises to an intellectually disabled suspect rendered a confession involuntary); *cf. Nazarova v. I.N.S.*, 171 F.3d 478, 484 (7th Cir. 1999) ("A non-English-speaking alien has a due process right to an interpreter at her deportation hearing because, absent an interpreter, a non-English speaker's ability to participate in the hearing and her due process right to a meaningful opportunity to be heard are essentially meaningless.").[35] Viewing

35. *See also, e.g., Grayson v. City of Aurora*, 157 F. Supp. 3d 725, 741-42 (N.D. Ill. 2016) (denying summary judgment on plaintiff's involuntary confession claim where plaintiff was "'starving,'" "kept from sleeping," did not "understand statements the same way an average person would," and had "a mental breakdown at one point"; the interrogation room was "hot and uncomfortable"; and the officers "lied to [the plaintiff] about evidence implicating him, manipulated

all of the evidence and all reasonable inferences in the Kohs' favor, there is a genuine issue of material fact as to whether the circumstances surrounding Mr. Koh's interviews, including the interrogation tactics employed by the Defendants, led to an involuntary confession.[36]

These circumstances also make clear that the interrogators are not entitled to qualified immunity. A reasonable officer would have known that verbally and physically intimidating a suspect, as well as manipulating him, lying to him, and coaching him on the details of the confession, all while knowing he was not fluent in

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him ... and fed him details of the crime"); *Hill v. City of Chi.*, 2009 U.S. Dist. LEXIS 5951, 2009 WL 174994, at *8 (N.D. Ill. Jan. 26, 2009) (concluding that "coercing a confession by abusive language and physical contact, along with coaching the suspect as to the details of the confession, clearly violates the suspect's constitutional right against self-incrimination"); *Campos v. Stone*, 201 F. Supp. 3d 1083, 1089-90 (N.D. Cal. 2016) (finding a confession involuntary where "confusion reigned" during the interview due to overlapping questioning in two languages and incomplete translations; and where officers continually interrupted and rejected the suspect's denials and falsely insisted that irrefutable evidence established his guilt).

36. There is also enough evidence for a jury to find against both Kim and Ustich on Mr. Koh's conspiracy claim, as well as sufficient evidence for a jury to find that Kim and Ustich failed to intervene while Detective Graf coerced Mr. Koh into confessing. (Given that Detective Graf was the lead interrogator, a failure to intervene claim against him does not make sense.) So even if Kim and Ustich are not directly liable for participating in Mr. Koh's interrogation—though each did ask Mr. Koh their own questions, *see* Exh. 42, Video of Hyung Seok Koh Interview 1 00:44:50-00:55:01; Exh. 57, Video of Hyung Seok Koh Interview 3 at 00:18:28-00:19:27—they are liable for either conspiracy or failure to intervene.

English and was operating without food, medications, or sleep, violates the Fifth Amendment. And a reasonable officer assigned to interpret for that suspect would have recognized that manipulating his deficient understanding of English, mistranslating the *Miranda* warnings, and altogether refusing to provide translation assistance, likewise violates the Constitution.

The Seventh Circuit's recent opinion in *Hurt v. Wise* is helpful here. In *Hurt*, the Seventh Circuit held that interrogating officers were not entitled to qualified immunity when they extracted a confession using tactics strikingly similar to Graf's. *Hurt*, 880 F.3d at 848. Like Graf, the interrogators in *Hurt* threatened to extend the plaintiffs' interrogations until they gave the "right" answer (where "right" meant "inculpatory"). 880 F.3d at 847-48. Also like Graf, the officers in *Hurt* "basically drafted the entire confession" by feeding the plaintiffs "every critical fact" and refusing to accept their denials until they finally agreed to the version proposed by the interrogators. *Id.* And, like Graf, the officers applied interrogation tactics designed to increase psychological pressure to confess, such as minimizing moral guilt to prime the plaintiffs for a confession, and telling one plaintiff that her co-defendant had already implicated her. *Id.* at 848.

The defendants attempt to distinguish *Hurt* on the grounds that the interrogators in *Hurt* "made obviously prohibited threats of lengthy prison sentences and untimely death, and that a suspect's entire family would be imprisoned if she did not confess." R. 380, Defs.' Resp. to Pl.'s Supp. Authority at 3, discussing *Hurt*, 880 F.3d at

848. But the cases are not so different, because threats were also made to Mr. Koh. *Hurt* noted the interrogator's threat that the pain of the coercive interrogation would continue until the suspect confessed. *Hurt*, 880 F.3d at 848 (quoting the investigator as saying that "none of the pain was 'going to go away until you tell me the truth.'"). Similarly, Graf told Koh (who by that point was visibly distressed and confused) that if he did not tell "the truth," his interrogation could continue for "days and days and days." Exh. 44, Hyung Seok Koh Interview Tr. at 117. Given Graf's refusal to take "I don't know" for an answer up to that point, Mr. Koh would have understood "the truth" to mean "what Graf wanted to hear." *Cf. Hurt*, 880 F.3d 831 ("[The interrogator] made it clear to [the suspect] that he and [his partner] were the ones who would decide if [the suspect] told the 'right' story."). Graf also made a comment about Mr. Koh's race, asking "Are you Korean or Filipino or Chinese" in a way that Mr. Koh found inappropriate and threatening. Exh. 17, Hyung Seok Koh Dep. Tr. 425:10-12. Finally, a jury might even find Graf's repeated physical touches and his close proximity to Mr. Koh to be an implied threat of physical violence. *See, e.g.*, Exh. 44, Hyung Seok Koh Interview Tr. 103; Exh. 55, Video of Hyung Seok Koh Interview 2 00:55:20-01:09:53.

But even assuming that Mr. Koh was not threatened with physical violence, the facts of this case are arguably *worse* than the facts of *Hurt*. Unlike the plaintiffs in *Hurt*, Mr. Koh had obvious difficulties understanding English—a vulnerability that, taking the facts in the light most favorable to the Kohs, Graf and Kim exploited. A reasonable jury could conclude that Graf *knew* that he was pressuring Mr. Koh to agree with statements that he did

not fully understand.[37] A reasonable jury could likewise conclude that Graf knowingly exploited Mr. Koh's mental and physical vulnerabilities. Mr. Koh had not taken his daily medications, and the Kohs' expert testified that the absence of these medications could cause confusion. *See* R. 290-2, Exh. 94, Galatzer-Levy July 27, 2011 Pretrial Testimony at 36:22-38:6; *see also* Exh. 17, Hyung Seok Koh Dep. Tr. 359:3-9 (Mr. Koh's testimony that without his medications, he experiences fatigue, shakiness, and confusion). According to Mr. Koh, as Graf was escorting Mr. Koh to a court hearing, Graf again threatened to extend the coercive interrogation if Mr. Koh did not play along: "If you say in the presence of the judge that you are either sick or dizzy, then we will take a week or even two to [ ] investigate you, so don't do that." Exh. 17, Hyung Seok Koh Dep. Tr. 425:13-17. It would be reasonable to infer from this comment that Graf knew that Mr. Koh was mentally and physically vulnerable at the time of the interrogation and that he exploited those vulnerabilities with aggressive tactics. In sum, there is evidence that Mr. Koh was even more vulnerable to coercion than even the young plaintiffs in *Hurt*, and that Graf's coercive tactics

37. Mr. Koh's confusion was obvious at crucial points in the interview. For example, when Graf had ostensibly gotten Mr. Koh to admit that he killed Paul in self-defense, follow-up questions made it clear that Mr. Koh might have been talking about a completely different incident. Apparently, a few weeks before Paul's death, Paul had swung a golf club at Mr. Koh, and this might have been what Mr. Koh was talking about during the selfdefense back-and-forth. Exh. 44, Hyung Seok Koh Interview Tr. 136-37 ("Q: Tell me why you did it, Hyungseok. / A: Weeks, weeks ago. / Q: Weeks ago? / A: He golf-- / Q: He took a golf club? / A: (inaudible) / Q: He hit you with a golf club? / A: Yeah.").

were correspondingly less reasonable. *See United States v. Sablotny*, 21 F.3d 747, 752 (7th Cir. 1994) ("If mental impairment of whatever kind should have reasonably been apparent to the interrogators, special care should have been exercised, and a lesser quantum of coercion would render the confession involuntary."); *Dassey v. Dittmann*, 877 F.3d 297, 304 (7th Cir. 2017) ("The interaction between the suspect's vulnerabilities and the police tactics may signal coercion even in the absence of physical coercion or threats."). These facts and circumstances show that Detective Graf was intent on coercing a confession out of Mr. Koh. Officer Kim is on the hook too: his shared knowledge of those facts and circumstances undermines his qualified immunity defense as well. Neither Detective Graf nor Officer Kim is entitled to qualified immunity, so Mr. Koh's involuntary confession claim must go to trial.[38]

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38. The Northbrook Defendants make two additional arguments that they assert warrant applying qualified immunity. First, they point to the fact that the state court judge in Mr. Koh's criminal case already determined that Mr. Koh's statements were voluntary. *See* Northbrook Defs.' Br. at 22-24. Second, they argue that the state court judge's decision to admit the confession is an "independent, superseding cause of any alleged violation of Mr. Koh's [constitutional] rights ... ." *Id.* at 24-25. The first argument fails. It is unclear whether the state court judge considered the same evidence at the suppression hearing that is currently before this Court on the Kohs' involuntary confession claim. And even if the state court judge had considered the same evidence, the evidentiary picture would have been different due to the procedural posture of this case. On a motion for summary judgment, the Court is *required* to credit the non-moving party's evidence and make all reasonable inferences in their favor. The state court judge, on the other hand, was free to make credibility judgments, weigh the evidence, and find facts, and did so. *See, e.g.*, R. 291-2, Exh. 97, J. Howard Oral Ruling on Mot.

Appendix B

D. Evidence Fabrication

Next up is another due process claim, this time based on the Northbrook Defendants' alleged fabrication of evidence.[39] The Due Process Clause of the Fourteenth Amendment forbids the state from depriving a person of her liberty on the basis of manufactured evidence. *Whitlock v. Brueggemann*, 682 F.3d 567, 580 (7th Cir. 2012); *Hurt*, 880 F.3d at 843 (*citing Avery v. City of Milwaukee*, 847 F.3d 433, 439 (7th Cir. 2017); *Alexander v. McKinney*, 692 F.3d 553, 557 (7th Cir. 2012)). False police reports can give rise to an evidence fabrication claim, as can procurement of false or fabricated witness testimony. *See Hurt*, 880 F.3d at 843-44; *Petty v. City of Chi.*, 754

Suppress at 3:12-13 (describing the tenor of Mr. Koh's interview as "low-key and very cordial"), 3:19-24 (finding that Mr. Koh had "a very good command of the English language"), 4:21-24 (finding the Kohs' expert witness unpersuasive). The second argument fails too—"qualified immunity is a doctrine designed to respond to legal uncertainty, but causation (a factual matter) has nothing to do with *legal* uncertainty." *Dominguez v. Hendley*, 545 F.3d 585, 589 (7th Cir. 2008) (emphasis in original).

39. In the Second Amended Complaint, the Kohs alleged that "[a]t the conclusion of the interrogation, the Defendant Officers fabricated a statement and falsely attributed it to Plaintiff, and then communicated the same to members of the Cook County State's Attorney's Office orally and in writing. Defendant Graf also testified falsely on this subject before the Grand Jury." Second Am. Compl. ¶ 40. The Northbrook Defendants did not specifically move for summary judgment on the Kohs' fabrication of evidence claim, and indeed maintain that those allegations are insufficient to advance such a claim. *See* Northbrook Defs.' Mot. Summ. J.; Northbrook Defs.' Br.; Northbrook Defs.' Reply Br. at 4-5.

F.3d 416, 422 (7th Cir. 2014). Mr. Koh has three different evidence fabrication theories. First, he argues that Graf and Kim prepared false police reports, which were then used as a basis for charging and detaining Mr. Koh. Pls.' Resp. Br. at 51-52. Second, he asserts that Graf invented incriminating statements and falsely attributed them to Paul Koh's youth pastor, Joon Hwang. *Id.* at 52. Third, he alleges that Graf induced Paul's friend Neil Schnitzler to give false testimony. *Id.* at 52-53.

Mr. Koh's first theory falls short. The Seventh Circuit has drawn a distinction between coerced testimony (which might be true, even if coerced) and false or fabricated testimony, "which is known to be untrue by the witness and whoever cajoled or coerced the witness to give it." *Fields v. Wharrie*, 740 F.3d 1107, 1110 (7th Cir. 2014). In this case, there is ample evidence that Graf and Kim *coerced* Mr. Koh's confession, but there is not enough evidence for a reasonable jury But those allegations are enough to plausibly allege a fabrication-of-evidence claim and to place the Defendants on notice that the Kohs were making that claim. What's more, discovery in this case would have been no different with or without these specific fabrication-of-evidence allegations. So, the claim is in. to find that Graf and Kim *knew* that the coerced confession was false.[40] Koh argues that Graf and Kim lied in their

40. If Mr. Koh is arguing that the confession's falsity was obvious because of the coercive nature of the interrogation, that line of argument is foreclosed by Seventh Circuit precedent. In *Petty v. City of Chicago*, the plaintiff alleged that police officers coerced a witness into giving false evidence by holding the witness in a locked room without food, water, or bathroom access for over 13 hours,

police reports recounting Mr. Koh's interrogation. *See* Pls.' Resp. Br. at 51-52. But this is not the case; the things Graf and Kim related in their reports were true, as a literal matter. Mr. Koh *did* eventually adopt the details proposed by Graf and recounted in the police reports, and he *did* make a hand gesture demonstrating cutting someone's throat in response to Graf's questions about how he killed Paul. *See* Video of Hyung Seok Koh Interview 3 18:40-20:09. Similarly, Kim did give Mr. Koh Miranda warnings (though with some translation errors), and Mr. Koh did say "kachi jookja,"[41] which literally translates to "Let's die together." *See* Exh. 106, Yoon Dep. 56:11-57:8; 57:13-58:16. It is true that these reports could have been more detailed, and that if they had been more detailed they would have presented a fairer picture of the interrogation. But the Constitution does not guarantee perfectly fair police reports (or perfectly accurate translations). To be sure, there must be some point where omissions become egregious enough to render a police report effectively false.[42] But in this case, the omissions in Graf's and Kim's

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and badgering and pressuring the witness until he incriminated the plaintiff. 754 F.3d at 417-18, 423. The Seventh Circuit held that even this extreme coercion was not enough to demonstrate that the witness's testimony was fabricated evidence. *Id.* at 423. *Petty* makes it clear that a claim that officers fabricated false statements cannot rest on the coercive nature of an interrogation alone. So the fact that Graf and Kim reported a coerced confession is not, on its own, enough to make out an evidence fabrication claim.

41. This phrase is sometimes rendered as "gachi jookja," *see, e.g.*, Yoon Dep. Tr. 48:6-49:12, 54:12-57:8, but the meaning is the same.

42. For example, in *Hurt*, a suspect told police that he had dumped a body in the river, then stopped at a convenience store

police reports were not so misleading as to give rise to an inference that Graf and Kim were deliberately falsifying evidence in order to mislead the prosecutors.[43] Indeed, Graf's report explicitly states that its account of Koh's statements is "summary, not verbatim," and notes that

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to buy snacks. 880 F.3d at 837. A police officer interviewed the convenience store clerk who was working that night, and prepared a police report stating that a store clerk had identified two of the suspects in a photo array. *Id.* at 838. The report neglected to mention "the most important details"—namely, that the clerk had told the officer that she did *not* remember the suspects coming into the store on the night in question, and that she might have recognized their faces from watching the news. *Id.* On these facts, the Seventh Circuit held that the plaintiffs had a valid evidence fabrication claim against the police officer who prepared the report. *Id.* at 844. That officer's report, although literally true, was so misleading as to be effectively false. *See also Jones v. City of Chi.*, 856 F.2d 985, 993 (7th Cir. 1998) (finding a constitutional violation where a jury could find that "the defendants systematically concealed from the prosecutors, and misrepresented to them, facts highly material to—that is, facts likely to influence—the decision whether to prosecute [the plaintiff] and whether (that decision having been made) to continue prosecuting him").

43. That makes this case different from *Jones*, where a forensic examiner's omission of relevant evidence was clearly designed to mislead prosecutors. In *Jones*, a police laboratory technician discovered physical evidence that would have exonerated the defendant, but omitted this information from her lab report. *Jones*, 856 F.2d at 991. On these facts, "[t]he jury was entitled to conclude that [the technician] ... had for whatever reason decided to help the officers ... who were determined to put away [the defendant] regardless of the evidence." *Id.* at 993. In contrast, Graf and Kim's actions are not so inexplicable that a jury could reasonably conclude that they were trying to obfuscate the truth and further a false prosecution.

the interrogation could be viewed in full on videotape. R. 308-46, Exh. 153, Graf Post-Interrogation Police Report. At the very least, qualified immunity would protect Graf and Kim on this facts.

Mr. Koh's next argument is that Graf fabricated a statement from Paul Koh's youth pastor, Joon Hwang. *See* Pls.' Resp. Br. at 51-52. Hwang was interviewed by two non-defendant police officers on the morning of April 16, 2009. Exh. 47, Garner Aff. ¶ 5. According to the officers' report of the interview, Hwang stated that Mrs. Koh told him that "maybe Paul was afraid that his father would not respect his privacy, *or perhaps feared his father*." Exh. 47, NORTAF Interview Report at 2 (emphasis added). Graf then told ASA Albanese, who was conducting the felony review of the case, that Hwang said that Paul Koh feared his father.[44] PSOF ¶ 67; *see also* Exh. 157, Felony Review Folder (reporting that Paul "made an outcry to a youth minister [ ] that he was scared of his father"). Hwang now denies that he ever told police that Paul was afraid of Mr. Koh, *see* Exh. 48, Hwang Dep. Tr. 173:5-74:23 (sealed). But even assuming (as the Court must) that Hwang is telling the truth, Mr. Koh's claim fails. The two officers who interviewed Hwang are not defendants in this case, and there is no evidence at all that Graf or any other defendant knew that the interviewing officers' account of Hwang's interview was false. So none of the Defendants is on the hook for the alleged falsehoods about Hwang's testimony.

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44. The Northbrook defendants dispute this, *see* Northbrook Defs.' Resp. PSOF ¶ 67, but the dispute does not matter. The Kohs' argument fails even if the Court accepts their version of events.

Mr. Koh's last theory is that Graf fabricated testimony by encouraging Paul Koh's friend Neil Schnitzler to make false statements that incriminated Mr. Koh. *See* Pls.' Resp. Br. at 52-53. In the course of the investigation into Paul's death, Schnitzler gave three different statements to the police, each with slightly different details.[45] See PSOF ¶¶ 68-69. Most importantly, in Schnitzler's third statement, Schnitzler told Graf that he had accidentally called the Kohs' home on the night of Paul's death (intending to call Paul's cell), and told whoever picked up the phone "I got the stuff, meet back at my house." R. 287-17, Exh. 75, Schnitzler Dep. Tr. 219:13-20. This testimony was important because it supported the police officers' theory that Paul had been out doing drugs on the night of his death, and that Mr. Koh knew about it and became angry at Paul. *See* PSOF ¶ 70.

Unfortunately for the Kohs, there is no evidence at all that Graf or any other officer falsified Schnitzler's testimony. Schnitzler affirms that he made this statement, and his story is backed up by the Kohs' home phone records, which showed a call from Schnitzler's number on the night in question. *See* Exh. 75, Schnitzler Dep. Tr. 219:13; 218:8-9; *see also* PSOF ¶ 69. The Kohs assert that Graf got Schnitzler to lie in exchange for lenience in Schnitzler's criminal drug case. *See* PSOF ¶¶ 69-70;

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45. Schnitzler's first statement to the police was late morning on the day of Paul's death, April 16, 2009. *See* NDSOF Exh. 75, Schnitzler Dep. Tr. 186:6-187:5. Schnitzler's next statement was given on May 2, 2009, after he was arrested for possession of marijuana. *See id.* at 199:20-200:3. Schnitzler's last statement was made during a phone call with Detective Graf on May 27, 2009. *See id.* at 216:10-20.

Pls.' Resp. Br. at 52-53. But there is no actual *evidence* to back up this assertion, only unsupported innuendo. *See Delapaz v. Richardson*, 634 F.3d 895, 901 (7th Cir. 2011) ("conjecture alone cannot defeat a summary judgment motion") (citation omitted). None of Mr. Koh's theories of evidence fabrication hold up, so summary judgment is granted on the evidence fabrication claim.

E. Malicious Prosecution and Pretrial Detention

The Kohs believe that the Defendants maliciously prosecuted Mr. Koh, and that Mr. Koh was detained without probable cause in the time leading up to his criminal trial in violation of the Fourth Amendment. The Fourth Amendment claim stems from the Supreme Court's recent decision in *Manuel v. City of Joliet*, which held that the Fourth Amendment prohibits detention without probable cause even after a defendant has received legal process.[46] *See* 137 S. Ct. 911, 918-19, 197 L. Ed. 2d 312 (2017). The malicious prosecution claim is based on Illinois tort law. To prevail on a malicious prosecution claim under Illinois law, a plaintiff must establish: "(1) the commencement or continuation of an original criminal or civil judicial proceeding by the defendant; (2) the termination of the proceeding in favor of the plaintiff; (3) the absence of probable cause of such proceeding; (4)

46. Defendants argue that the Kohs did not properly plead or pursue a Fourth Amendment claim stemming from Mr. Koh's extended pretrial detention; the Kohs disagree. *See* R. 362, Defs' Joint Mot. Summ. J at 4-5; R. 363, Pl. Resp. Defs.' Joint Mot. Summ. J. at 1. The Court need not resolve this dispute because the claim fails on the merits.

malice; and (5) damages." *Sang Ken Kim v. City of Chi.*, 368 Ill. App. 3d 648, 858 N.E.2d 569, 574, 306 Ill. Dec. 772 (Ill. App. Ct. 2006); accord *Cairel v. Alderden*, 821 F.3d 823, 834 (7th Cir. 2016) (applying Illinois law).

Both the malicious prosecution claim and the extended Fourth Amendment claim are stymied by the existence of probable cause. As discussed above, a reasonable factfinder would *have* to find that there was probable cause to detain Mr. Koh before the start of his second police interview. *See* Section III.B.2.a, *above*. No information later emerged to destroy probable cause. Indeed, some later-revealed facts actually *reinforced* the theory that Mr. Koh killed Paul. Interviews with Paul's friends, for example, confirmed that Paul and Mr. Koh fought frequently, and that Paul seemed to be afraid of Mr. Koh. *See* R. 308-13, Exh. 120. Mazurkiewicz Dep. Tr. 37:15-18; 65:22-66:1; R. 308-15, Exh. 122, Petersen Dep. Tr. 67:16-23; Exh. 75, Schnitzler Dep. Tr. 195:10-18, 213:18-23. Emerging physical evidence also suggested that Mr. Koh might be guilty. The Cook County Medical Examiner who performed Paul's autopsy concluded that Paul's death was a homicide, and found injuries that could be defensive wounds on Paul's hands. NDSOF ¶ 106; Pls.' Resp. NDSOF ¶ 106; R. 286-7, Exh. 52D, Helma Aff. Exh. D. Blood spatters were also found on Mr. Koh's boxer shorts. R. 308-5, Exh. 112, Trial Tr. 334:5-9.

It is true that some evidence also emerged to support the competing version that Paul (who by all accounts was suffering from serious mental health issues) committed suicide. The same friends who told police about Paul's conflict with his father also noted that Paul seemed sad,

depressed, and anxious. Exh. 120, Mazurkiewicz Dep. Tr. 35:17-36:14, 64:13-14. Interviews with the Kohs' family members confirmed that Paul was depressed and revealed that Paul had made comments suggesting that he was suicidal. R. 308-35, Exh. 142, NORTAF Report of Steven Cho Interview; Exh. 47, NORTAF Report of Joon Hwang Interview (reporting that Paul told Hwang, "I don't want to live sometimes."); Exh. 83, May 11, 2010 Pretrial Hr'g Tr. 152:8-10, 152:24-153:2.[47] The Kohs' experts also argue that the physical evidence was more consistent with suicide than with murder. *See* R. 291-3, Exh. 98, Dec. 11, 2012 Trial Tr. of Dr. Laposata Testimony 69:6-72:11; R. 308-31, Exh. 138, Moses Dep. Tr. 99:19-25. But it is worth reiterating that probable cause is a low bar. The inference of the suspect's guilt does not need to be more probable than competing alternatives; a fair probability of guilt is enough. *Kaley*, 134 S. Ct. 1103. On the undisputed facts, a reasonable jury would have to find that probable cause existed to believe that Mr. Koh killed Paul from the time of Mr. Koh's second interview all the way through his acquittal. Summary judgment is therefore granted to all the Defendants on Mr. Koh's state-law malicious prosecution and Fourth Amendment pretrial detention claims.

F. Municipal Liability

In addition to their claims against the individual defendants, the Kohs seek to hold the Village of

47. Some of this information might have been available even before Mr. Koh's second interview, but it is not clear how long it took for it to filter through to Graf, Wernick, and the other relevant defendants.

Northbrook liable for violating their constitutional rights. Municipal liability is permitted under Section 1983 "if the unconstitutional act complained of is caused by: (1) an official policy adopted and promulgated by its officers; (2) a governmental practice or custom that, although not officially authorized, is widespread and well settled; or (3) an official with final policy-making authority." *Thomas v. Cook Cty. Sheriff's Dep't*, 604 F.3d 293, 303 (7th Cir. 2009); *Monell v. N.Y. City Dept. of Social Servs.*, 436 U.S. 658, 690, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). The Kohs premise their *Monell* claims on the first and third grounds for municipal liability—namely, that a Northbrook Police Department General Order and Chief Wernick *himself* were the moving forces behind their alleged constitutional violations. *See* Pls.' Resp. Br. at 53-59. The Court addresses each basis for *Monell* liability in turn.

1. General Order 15.14

Section 15.14, Paragraph 4, of the NPD General Orders outlines department protocols for managing and communicating with witnesses at crime scenes:

> Unusual Occurrences, Major Crimes Response Protocol:
>
> 4. Witnesses
>
> a. Always use tact when dealing with citizens/ witnesses at crime scenes

Appendix B

i. Some may be potential witnesses with valuable information

ii. Secure and Separate all witnesses

a) Get names, addresses and telephone numbers

b) Arrange transportation to the station

c) Do not release them until they have been interviewed.

R. 292-3, Exh. 102, NPD General Order 15.14 ¶ 4 (emphasis added); *see also* NDSOF ¶ 124. According to the Kohs, Northbrook officers acted pursuant to this policy when they falsely arrested them the morning of Paul's death Pls.' Resp. Br. at 54-55. The Northbrook Defendants argue that no reasonable jury could find that Section 15.14 precipitated the Kohs' allegedly false arrest, and that the Order is only a general "guideline[] and [is] not to be interpreted in a manner inconsistent with the law." Northbrook Defs.' Br. at 34-35.

The express policy theory of municipal liability, as the name of the theory suggests, applies where a policy explicitly "violates the constitution when enforced." *Hahn v. Walsh*, 762 F.3d 617, 636 (7th Cir. 2014). The plaintiff must be able to point to "language in the ... policy that is constitutionally suspect, [or] he must provide enough evidence of custom and practice to permit an inference

that the [municipality] has chosen an impermissible way of operating." *Calhoun v. Ramsey*, 408 F.3d 375, 381 (7th Cir. 2005). Liability may attach even where just "one application of the policy result[s] in a constitutional violation," *Calhoun*, 408 F.3d at 379; *see also City of Oklahoma City v. Tuttle*, 471 U.S. 808, 822, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985); *Hahn*, 762 F.3d at 636-37.

There is ample evidence for a jury to reasonably infer that the Northbrook Defendants acted pursuant to an unconstitutional policy—Section 15.14—when they falsely arrested the Kohs the morning of Paul's death. Just looking at the language of the Order is enough to raise eyebrows. Section 15.14 orders officers to "[s]ecure," "[s]eparate," "arrange [for] transport[]," and hold all witnesses at the police station "until they have been interviewed." Exh. 102, NPD General Order 15.14. Tellingly, there is no prefatory language in Section 15.14 that tempers its application. It would be one thing if Section 15.14 contained a qualifier requiring officers to obtain the witnesses' consent, for example. But there is no language to this effect. That Section 15.14 on its face gives officers seemingly boundless authority to seize, transport, and detain a witness without their consent—and without stopping to consider the existence of reasonable suspicion or probable cause—is evidence that the order explicitly violates the Fourth Amendment.

And there is enough evidence that the officers acted pursuant to Section 15.14 when they secured and separated the Kohs at their house before driving them to the station and holding them there for hours on end. Both Commander

Eisen and Officer Johnson were aware of Section 15.14 in April 2009;[48] they have also admitted that they were aware of and followed NPD policies when they interacted with the Kohs the morning after Paul died. *See* R. 283-1, Exh. 13, Eisen Aff. ¶ 9 ("As of April 16, 2009, I was aware of Section 15.14 ... ."); R. 292-5; Exh. 104, Johnson Aff. ¶ 9 (same); R. 308-23, Exh. 130, Eisen and Johnson's Resp. to Pls.' March 6, 2015 Requests to Admit, Nos. 1-2 ("Subject to and without waiving ... objections, [the Defendants] admit [that they] acted pursuant to the policies of the Northbrook Police Department during [their] interactions with [the Kohs] on April 16, 2009."); *see also* NDSOF ¶ 125; Pls.' Resp. NDSOF ¶ 125. And even though the Northbrook Defendants claim that the NPD's General Orders were mere "guidelines," Northbrook Defs.' Br. at 34-35, Chief Wernick testified otherwise, *see* R. 284-1, Exh. 25, Wernick Dep. Tr. 168:17-21 ("Q: What does a general order mean in the Northbrook Police Department? / A: General order, how we are supposed to operate."). A reasonable jury could infer based on this evidence that the Northbrook officers who responded to Mr. Koh's 911 call and oversaw the Kohs' transport to, and detention at, the police station not only arrested the Kohs, but did so pursuant to Section 15.14. The problem, of course, is that doing so without probable cause violated the Fourth Amendment.[49] The Northbrook

48. Indeed, every officer is given a copy of the NPD's General Orders; supervisors review those orders with officers; and officers must attest to the fact that they have read and understand those orders. *See* R. 308-8, Exh. 115, Caruso Dep. Tr. 25:17-24; R. 284-1, Exh. 25, Wernick Dep. Tr. 169:5-23.

49. Chief Wernick has even testified that it was perfectly lawful to detain and investigate the Kohs just because they were the only two people in the house when Paul died. *See* R. 284-1, Exh. 25,

Defendants' motion for summary judgment on this *Monell* claim is denied.

2. Chief Wernick

The Kohs' second theory of municipal liability is that Chief Wernick—an official with final policy-making authority—directed officers to violate the Kohs' constitutional rights, or at the very least, ratified their misconduct.[50] Pls.' Resp. Br. at 56-58. The Northbrook Defendants move for summary judgment on this theory of municipal liability as well, asserting that there is no evidence from which a jury could infer that Chief Wernick

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Wernick Dep. Tr. 23:11-24:19 ("Q: So, anybody who is present in the home where a homicide takes place can be arrested for a felony; is that correct? ... / A: If there are only two people in the house, well, we're going to bring them both in where a homicide occurred."); *id.* 24:24-28:11 ("Q: What did Mrs. Koh do that you believe was enough to have her arrested for a felony / A: She was present when a homicide occurred. ... Q: And based on your understanding of the Illinois statutes, that was enough for an arrest; is that correct? ... / A: We brought her in with her husband, and we had her in the station until we could figure out what happened."). This course of action is precisely what Section 15.14 instructs Northbrook officers to do, but it does not square with the Fourth Amendment in this case, absent probable cause that the Kohs committed a crime.

50. The Second Amended Complaint states that in addition to "ratif[ying] and authoriz[ing] the[ir] unlawful detentions ... as well as the coercive interrogation of [Mr. Koh]," Chief Wernick also "ratified and authorized ... strip searches of [the Kohs]." *See* Second Am. Compl. ¶ 65. But the Kohs do not address the strip search issue in their response brief, *see* Pls.' Resp. Br., so the Court will treat that portion of their *Monell* claim as withdrawn.

directly caused any alleged constitutional violation. Northbrook Defs.' Br. at 35-36.

To proceed on a final policymaker theory of municipal liability, the Kohs must establish, among other things, that there is at least a genuine issue of fact as to whether Chief Wernick caused any of their alleged constitutional injuries. *See King v. Kramer*, 763 F.3d 635, 649 (7th Cir. 2014); *Estate of Sims ex rel. Sims v. Cty. of Bureau*, 506 F.3d 509, 515 (7th Cir. 2007). To be sure, Chief Wernick "need not [have] participate[d] directly in the deprivation [of civil rights]," in order for liability to attach. *Backes v. Vill. of Peoria Heights, Ill.*, 662 F.3d 866, 869-70 (7th Cir. 2011) (quotations and citations omitted). But there must be enough evidence from which a jury could infer that Chief Wernick "kn[e]w about the [mis]conduct and facilitate[d] it, approve[d] it, condone[d] it, or turn[ed] a blind eye for fear of what [he] might see." *Id.* at 870 (quotations and citations omitted).

Even assuming that Chief Wernick was Northbrook's final policymaker—an issue which the parties dispute, *see* Pls.' Resp. Br. at 56-57, Northbrook Defs.' Reply Br. at 35 n. 36—a reasonable jury could not find that Chief Wernick *caused* the Kohs' alleged constitutional violations. The Kohs cannot point to any evidence that Chief Wernick ordered their false arrest or that he directed Officers Graf, Ustich, and Kim to coerce a confession out of Mr. Koh. That Chief Wernick was one of the officers who responded to Mr. Koh's 911 call; investigated Paul's death; attended briefings on the investigation; viewed the videotape of Mr. Koh's interrogation; and oversaw the investigation as

both the executive director of NORTAF and Northbrook's Chief of Police, *see* Pls.' Resp. Br. at 57-58, is not enough. *See Jackson v. City of Chi.*, 645 F. Supp. 926, 928 (N.D. Ill. 1986) ("[A] single incident of constitutional deprivation resulting from a direct command by a municipal policymaker will satisfy the *Monell* 'policy' requirement if the enforcement of that command *directly caused* the constitutional violation." (emphasis added) (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986)). So, summary judgment on this *Monell* claim is granted.

G. Loss of Consortium

Last up is Mrs. Koh's state-law loss of consortium claim, which is premised on her loss of her husband's companionship during his years-long pretrial detention. Under Illinois law, when one spouse is tortiously injured, the other spouse may recover from the tortfeasor for the resulting loss of support, society, and companionship. *Pease v. Ace Hardware Home Ctr. of Round Lake No. 252c.*, 147 Ill. App. 3d 546, 498 N.E.2d 343, 349, 101 Ill. Dec. 161 (Ill. App. 1986). At this point, Mr. Koh's state-law tort claim for malicious prosecution has been dismissed, and all that remains are his constitutional claims.

Neither party has briefed whether a state-law loss of consortium claim can arise out of a constitutional claim.[51] *See* Pls.' Resp. Br. at 70 (arguing that the loss of

51. As opposed to the theory that a spouse has an independent *constitutional* consortium claim arising out of violations of her spouse's rights. *See Russ v. Watts*, 414 F.3d 783, 790 (7th Cir. 2005); *Niehus v. Liberio*, 973 F.2d 526, 534 (7th Cir. 1992).

consortium claim should survive if the underlying claims do, but not specifying the underlying claims). At least one court of appeals has held (albeit in unpublished decisions) that a state-law loss of consortium claim can arise from violation of a spouse's constitutional rights. *Gross v. City of Dearborn Heights*, 625 Fed. Appx. 747, 754 (6th Cir. 2015) (remanding husband's loss-of-consortium claim because wife's § 1983 excessive force claim survived); *Boyer v. Lacy*, 665 Fed. Appx. 476, 485 (6th Cir. 2016); *see also Kinzer v. Metropolitan Govt. of Nashville*, 451 F. Supp. 2d 931, 934-947 (M.D. Tenn. 2006). The Seventh Circuit implied in dicta that a state-law consortium claim can be joined to a spouse's constitutional claim. *See Niehus v. Liberio*, 973 F.2d 526, 530, 534 (7th Cir. 1992) ("We add that the authority newly conferred by Congress to join a state-law claim for consortium with the spouse's constitutional claim, and thus bring both in federal court, will enable persons similarly situated to the Niehuses to obtain full compensation in a single proceeding."). The Court will not decide the issue without the benefit of full briefing. The burden is on the Defendants to show entitlement to judgment as a matter of law, and they have not done so. The loss of consortium claim survives for now.

IV. Conclusion

For the reasons discussed, the following claims survive and may go to trial:

- The Kohs' Fourth Amendment false arrest claims against the Northbrook Defendants (Count One), although Mr. Koh's claim ends when officers had probable cause before his second interview.

- Mr. Koh's Fifth Amendment coerced confession claim (Count Two).

- Conspiracy and Failure to Intervene (Counts Three and Five), except as described in the Opinion, and with the warning that, at trial, some Defendants almost surely will not be subject to these claims.

- Municipal liability against Northbrook (Count Four) for false arrest.

- Mrs. Koh's loss of consortium claim (Count Eight).

- Respondeat superior and indemnification against Northbrook and Wheeling (Counts Nine and Ten) remain intact insofar as the underlying claims do.

Summary judgment is granted to Defendants on the remaining claims:

- Mr. Koh's state-law malicious prosecution claim (Count Six).

- Mr. Koh's substantive due process claim based on his coerced confession (Count Two).

- Mr. Koh's due process evidence fabrication claim (Count Six).

- Mr. Koh's Fourth Amendment claim based on his pretrial detention.

Appendix B

ENTERED:

/s/ Edmond E. Chang
Honorable Edmond E. Chang
United States District Judge

DATE: March 30, 2018