No. 16-1495

IN THE
Supreme Court of the United States

CITY OF HAYS, KANSAS,
Petitioner,

v.

MATTHEW JACK DWIGHT VOGT,
Respondent.

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

BRIEF AMICUS CURIAE OF AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES AND AMERICAN FEDERATION OF TEACHERS IN SUPPORT OF RESPONDENT VOGT

DAVID J. STROM
General Counsel
American Federation of Teachers, AFL-CIO
555 New Jersey Ave., N.W.
Washington, D.C. 20001

ANDRES M. GRAJALES*
Deputy General Counsel
DAVID A. BORER
General Counsel
American Federation of Government Employees, AFL-CIO
80 F Street, N.W.
Washington, D.C. 20001
Grajaa@afge.org
(202) 639-6426

**Counsel of Record*

Mosaic - (301) 927-3800 - Cheverly, MD

QUESTION PRESENTED

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself[.]" To give necessary force to the fundamental right of a person to be free from governmental coercion, this Court has long-recognized that once a public employee has been compelled by his government employer to provide a statement under threat to his livelihood, that statement may not be used against him in subsequent criminal proceedings. *See*, *e.g.*, *Garrity v. State of New Jersey*, 385 U.S. 493, 500 (1967).

The question presented is whether the Fifth Amendment privilege against self-incrimination prohibits the government from using a criminal defendant's compelled statement against him in a post-charge, in-court probable cause hearing.

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INTEREST OF THE AMICI[1]

The American Federation of Government Employees, AFL-CIO (AFGE) is a national labor organization that, on its own and in conjunction with affiliated councils and locals, represents over 650,000 civilian employees in agencies and departments across the federal government and in the District of Columbia. AFGE's representation of these employees includes collective bargaining and direct representation in unfair labor practice proceedings and grievance arbitrations arising under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq*. AFGE's representation of federal employees also extends to litigation before the United States Merit Systems Protection Board, the United States Equal Employment Opportunity Commission, and before federal district and appellate courts across the United States.

The American Federation of Teachers (AFT), also an affiliate of the AFL-CIO, was founded in 1916 and today represents approximately 1.7 million members. AFT represents a variety of employees in the public sector, including in K-12 and higher education, healthcare, and local, state, and federal government. AFT has long advocated for the rights of its members and the communities they serve through organizing,

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[1] The parties have filed blanket letters of consent to *amicus* briefs in support of either party or neither party. No counsel for a party authored this brief in whole or in part, and no person or entity other than AFGE and AFT or their counsel made a monetary contribution to the preparation or submission of this brief.

litigation, legislation, and collective bargaining. AFT staff and members are also involved in protecting the constitutional, statutory, and contractual rights of its members through direct representation. AFT's public service members' ability to invoke their constitutional rights is directly impacted by the scope of the *Garrity* doctrine, and therefore AFT has a strong interest maintaining the integrity of the doctrine.

In this regard, both AFGE and AFT frequently represent employees in employer-initiated interviews or investigations. *See generally N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). AFGE, for example, routinely represents federal civilian employees in formal discussions concerning personnel policies or practices or other general conditions of employment, and in disciplinary examinations "in connection with an investigation[.]" 5 U.S.C. § 7114(a)(2). AFGE also assists federal employees in circumstances in which the employees may be deprived of a union representative during an employer interview or investigation. *See Dep't of the Air Force, Hill AFB, and AFGE, Local 1592*, 68 F.L.R.A. No. 80 (2015), *aff'd*, 836 F.3d 1291 (10th Cir. 2016) (finding employees have no right to union representation in interviews conducted by the Air Force Office of Special Investigations); *see also Conyers v. Merit Sys. Prot. Board*, 388 F.3d 1380, 1383 (Fed. Cir. 2004) (finding that Transportation Security Officers represented by AFGE are not subject to the employment appeal protections granted by 5 U.S.C. § 7701(a)).

Public employees represented by amici are, moreover, subject to the "obey now, grieve later" rule. They are required as a condition of their employment

to answer questions or provide statements when directed to do so by their government employer. The penalty for refusal is the potential termination of their employment or other administrative discipline. Public employees, in other words, are compelled under threat to their livelihood to answer employment-related questions and provide employment-related statements when so commanded by the government.

As a result, such employer-initiated interviews and examinations are predominantly mandatory in nature. It is established law, in this regard, that employees may be subject to discipline, such as the termination of their employment, if they refuse to cooperate and answer any questions to which they may be put. *See, e.g.*, *Weston v. U.S. Dep't of Housing and Urban Development*, 724 F.2d 943 (Fed. Cir. 1983) ("Nevertheless, when an employee is once granted immunity through this so-called *Garrity* exclusion rule, he may be removed for failure to cooperate with an agency investigation."); *Pedeleose v. Dep't of Defense*, 110 M.S.P.R. 508, 516 (2009) *aff'd*, 343 Fed. App'x 605 (Fed. Cir. 2009) (a federal employee must comply with an agency order to cooperate in an investigation or face discipline, even when the employee may have substantial reason to question the validity of the order).

Mandatory interviews and examinations are a part of nearly all employment relationships. The employees represented by amici therefore rely on the key constitutional protection embodied by the *Garrity* doctrine when cooperating in employment-related investigations. Consequently, amici have a strong interest in ensuring that public employees are not "relegated to a watered-down version of constitutional

rights." *Garrity*, 385 U.S. at 500; *see also Uniformed Sanitation Men Assn. v. Commissioner of Sanitation of the City of New York*, 392 U.S. 280. (1968).

SUMMARY OF THE ARGUMENT

Officer Vogt's statements were compelled and then used against him in a "criminal case." The use of Officer Vogt's statements against him in a criminal case contravened the Fifth Amendment.

Officer Vogt's statements were compelled because they were directed and required by his employer, the City of Hays, Kansas. Pursuant to the "obey now, grieve later" rule, his refusal to provide a statement would have subjected him to discipline, such as the termination of his employment. This compulsion rendered his statement involuntary. A finding to the contrary would, moreover, overlook the realities of the public workplace. It would also be contrary to this Court's settled precedent.

The power of the government to compel an employee to speak in the course of an employment-related investigation cannot be overstated. It is no mere subtle enticement. It is the overwhelming coercion brought to bear by the fact that a refusal to speak may deprive the employee of his livelihood, and yield the short- and long-term career and financial consequences that such deprivation entails. The prohibition on the use of compelled statements in criminal proceedings is thus a crucial check on the power of the state.

Officer Vogt's compelled statements were also clearly used against him in a criminal case. At the

time of the statements' use, Officer Vogt had already been charged with a crime; two felonies. Criminal prosecution had, in fact, commenced. To find otherwise would not only ignore the reality of the situation, it would deprive public employees of the full scope of their constitutional right to be free from compulsory self-incrimination. It would drastically weaken the check on government power that public employees and employers rely on for the efficient and orderly performance of their work.

The Court of Appeals correctly held that the Fifth Amendment right against self-incrimination is not limited to a trial right. *Vogt v. City of Hays, Kansas*, 844 F.3d 1235, 1241 (10th Cir. 2017). The Court of Appeals also correctly held that the government's use of Officer Vogt's compelled statements at a probable cause hearing violated his Fifth Amendment privilege against self-incrimination. Consequently, the Court should affirm the judgment of the Court of Appeals.

ARGUMENT

I. The Court of Appeals Should Be Affirmed Because Officer Vogt's Statements Were Compelled and Subsequently Used Against Him in a Criminal Case in Violation of the Fifth Amendment

a. Officer Vogt's Statements Were Compelled

Administrative coercion is one of the most effective and widespread tools used by public employers to compel an employee to make a statement during an investigation. This is why a clear-eyed understanding of the protection guaranteed by the *Garrity* doctrine is so important. Employees often rely on

Garrity's exclusionary doctrine when they choose to cooperate in an administrative investigation. This is not because these employees wish to conceal wrongdoing or impede a properly constituted employment investigation. Rather, they rely on *Garrity* because it is a settled rule that encourages the free-flow of information and preserves labor peace.

Looked at another way, an employee faced with the prospect of making a statement when confronted with an "obey now, grieve later" situation faces an immediate dilemma. The employee must cooperate or risk discipline. *See Sher v. Dep't of Veterans Affairs*, 97 M.S.P.R. 232 (2004) (discussing obey now, grieve later and the application of *Garrity*); *see also Sher v. Dep't of Veterans Affairs*, 488 F.3d 489, 501-02 (1st Cir. 2007) ("Thus, together, *Garrity* and *Gardner* stand for the proposition that a government employee who has been threatened with an adverse employment action by her employer for failure to answer questions put to her by her employer receives immunity from the use of her statements or their fruits in subsequent criminal proceedings, and, consequently, may be subject to such an adverse employment action for remaining silent."). This dilemma poses a serious question that does not cease to exist even for employees who are wholly innocent of any misconduct or criminal wrongdoing. All employees must weigh the possibility of criminal exposure in the moment or in the future.

A robust exclusionary rule pursuant to *Garrity* thus strikes the right balance, consistent with the Fifth Amendment. It relieves the individual employee from having to make a protracted legal analysis

that he may be ill-equipped to make, especially in the absence of counsel or an experienced union representative. It ensures, at the same time, that the employer is able to conduct its investigation in a timely and thorough manner. Swift employee cooperation is fostered by the knowledge that any statement the employee is ordered to make is compelled and may not be used against him in a criminal case. Employees are more likely to be immediately and wholly forthcoming in personnel matters if they are secure in the knowledge that whatever specter of criminal prosecution may or may not exist, they will not face incrimination from their own mouths or the derivative fruits therefrom.

But if the efficacy of the *Garrity* doctrine were to be called into doubt, or weakened by a reduction in the scope of its protection, it is not hard to predict that employees would then second-guess the wisdom of unfettered cooperation in employment-related investigations. The calculation would become much more difficult and complex. Employees would be forced to consider to what extent or in what context their words might be used against them, and to grapple with the questions of which rules of criminal procedure might apply and what the parameters of those rules might be. In other words, employees would have to weigh the potential deprivation of liberty over the deprivation of property. Faced with such uncertainty, even the most erstwhile employee might choose silence and potential termination over the possibility of criminal prosecution.

A narrow rule against self-incrimination would thus not serve the public interest in efficient and

transparent government. For example, it would diminish the incentive for employees to blow the whistle and report misconduct, and imbue cooperation with the fear that the machinery of the government's criminal process might turn their earnest statements against them. It would, moreover, generate delay as employees would undoubtedly seek to consult with counsel when weighing whether to cooperate or risk the burden of prosecution.

Applied here, it is apparent that Officer Vogt's statements were compelled. The petitioner conditioned Officer Vogt's continued employment on providing statements about the very same subject matter that led to the probable cause hearing at which those statements were introduced against him. *Vogt*, 844 F.3d at 1250. This is the essence of compulsion.

b. Officer Vogt's Compelled Statements Were Subsequently Used Against Him in a Criminal Case

Adding to these policy and factual considerations, it is beyond cavil that the text of the Fifth Amendment's prohibition on the use of an accused's compelled statement against him is not limited to use at trial. By its plain language, the amendment contains no such limitation. The Fifth Amendment instead deliberately uses the broader phrase "in any criminal case." This is significant because the Framers well-knew the word "trial" and certainly knew how to use it, had they so intended. But they did not.

For example, in contrast to the Fifth Amendment, the Sixth Amendment, uses the phrase "speedy and public trial" to expound a right enjoyed by an ac-

cused within the context of a "criminal prosecution." Put differently, the constitution makes a "speedy and public trial" one discrete right that an accused enjoys when confronted with the larger burden of a "criminal prosecution." A speedy and public trial is, in other words, just a part of what an accused is entitled to when faced with a criminal prosecution. A "criminal case" is a larger concept still, and it is in the context of the overall criminal case that an accused has the right to be free from self-incrimination. That the two amendments originated with the same author, James Madison, only reinforces this reading.

Further, while it should be self-evident from both historical and legal precedent that a criminal case encompasses more than trial, the Court need not decide the exact moment that a criminal case commences in order to affirm the judgment of the Court of Appeals here. Officer Vogt had been charged criminally. Prosecution had commenced. He faced a hearing in open court. From every practical perspective, Officer Vogt was a defendant in an ongoing criminal case from the moment the probable cause hearing at issue in this case began.

Finally, there is nothing unjust or unworkable in adjudicating the voluntariness of a statement at the probable cause stage. On the one hand, courts resolve such questions all the time, before trial. Doing so before reaching the question of probable cause is no different. On the other hand, the consequences of a probable cause hearing may be severe. Following a finding of probable cause, a defendant may, for example, be remanded into custody while he awaits trial. To have such an incarceration occur on the

back of a compelled statement, even temporarily, offends the Fifth Amendment.

Simply put, a Fifth Amendment violation requires three elements: (1) the individual asserting the violation must have been **compelled t**o make a statement; and (2) that compelled statement must have been **used** by the government against the individual; and (3) the government's use of the compelled statement must have been in a **criminal case**. All three of these required elements are satisfied in this case.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

DAVID J. STROM
General Counsel
American Federation of Teachers, AFL-CIO
555 New Jersey Ave., N.W.
Washington, D.C. 20001

ANDRES M. GRAJALES*
Deputy General Counsel
DAVID A. BORER
General Counsel
American Federation of Government Employees, AFL-CIO
80 F Street, N.W.
Washington, D.C. 20001
Grajaa@afge.org
(202) 639-6426

**Counsel of Record*

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