No. 21-499

IN THE

Supreme Court of the United States

CARLOS VEGA,

Petitioner,

v.

TERRENCE B. TEKOH,

Respondent.

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

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the Constitution applies as robustly as its text and history require and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Officer Carlos Vega took Terrence Tekoh into a small windowless room and questioned him about a reported crime. By the time they emerged, Vega had obtained a confession that was used against Tekoh in his criminal trial. While Vega and Tekoh dispute what happened in that room, they agree that Vega never warned Tekoh of his right to an attorney or to refrain from speaking, or that his statements could be used against him—all contrary to this Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966).

By employing a custodial interrogation to extract a confession from Tekoh that was then used against him, Vega participated in the deprivation of Tekoh's Fifth Amendment rights. His arguments to the

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[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

contrary rest largely on the premise that the Amendment creates only a rule of evidence, not a direct limit on the interrogation of detained suspects. That premise is at odds with the Amendment's text and history.

1. Because Vega obtained incriminating testimony from Tekoh without alleviating the "inherently compelling pressures" of an in-custody police interrogation, *id.* at 467, and because that testimony was used in Tekoh's prosecution, Tekoh was "compelled in [a] criminal case to be a witness against himself," U.S. Const. amend. V. He was therefore deprived of a "right[]" and "privilege[] . . . secured by the Constitution." 42 U.S.C. § 1983.

Denying Vega's liability, Vega and the United States rely on two flawed assumptions. The first is that the Fifth Amendment's Self-Incrimination Clause "operates in the courtroom, not the interrogation room," providing only a "rule of evidence," U.S. Br. 4, rather than "imposing a direct constraint on officers," Pet. Br. 18. The second assumption is that *Miranda* goes further than the Fifth Amendment requires, suggesting that even a violation of *Miranda* at trial "does not mean that the defendant's Fifth Amendment rights have been violated." *Id.* at 20.

These arguments—like most arguments for limiting *Miranda*—are long on pronouncements about the Fifth Amendment but short on analysis of its text and history. The United States spends a single paragraph on the Amendment's text, relying exclusively on two decisions that do not even mention the Fifth Amendment. U.S. Br. 7. Vega does even less. Pet. Br. 18. Neither says a word about the Amendment's history.

The text and history of the Self-Incrimination Clause belie the assumptions made by Vega and the government. From its inception through the Framing

era, the common law right against self-incrimination functioned as a direct limit on how officials questioned suspected wrongdoers in their custody. Far from supplying only an "in-court right," U.S. Br. 4, the common law right served *primarily* to restrain officials from using improper methods of interrogation to secure confessions before trial. It was thus recognized as a critical check on the government's power to intrude on liberty when investigating crime.

Furthermore, the right against self-incrimination always prohibited, as a categorical matter, conditions of interrogation that were understood to be inherently coercive. Those conditions included not only physical abuse but also, notably, placing suspects under oath before requiring them to answer questions. Just as *Miranda* recognized the inherently coercive pressures of a modern custodial police interrogation, the common law reached the same conclusion about interrogation under oath (among other practices), which was seen as placing an intolerable threat of spiritual and secular penalties on the person questioned. It did not matter whether any particular individual actually felt psychologically compelled to confess by being put under oath. Instead, the practice was categorically forbidden as intrinsically coercive, "even if there was no actual coercion in real life." Pet. Br. 21.

This understanding of the right against self-incrimination was the same in England and America. As the American Revolution neared, one of the colonists' main grievances was the use of inquisitions in "prerogative" courts to secure confessions for violating revenue laws. Resisting that practice, Americans came to highlight the right against self-incrimination as a cornerstone of the common law protections for individual liberty, which they demanded on equal terms with the English. When the colonists separated from Britain

and established state declarations of rights—and later when the Framers adopted the Bill of Rights to restrain the new federal government—they enshrined this right in order to foreclose legislative innovations that would impinge on the common law guarantee they had come to cherish.

2. The most significant innovation affecting self-incrimination rights since the Framing has been "the advent of modern custodial police interrogation." *United States v. Dickerson*, 530 U.S. 428, 434 (2000). Today, armed law enforcement officers with a professional mandate to investigate crime, with broad powers of detention, and with career incentives to secure confessions, are allowed to interrogate suspects in secret, away from public view, before those suspects are charged with an offense and when no crime may even have occurred.

That scenario would have been unrecognizable to the Framers. In their era, professional investigative police forces did not exist. Peace officers, who served part-time and with limited powers of arrest, could not interrogate detainees. Instead, questioning before trial was limited to a single, well-defined process mandated by statute, in which witnesses and the accused were examined by a justice of the peace. Those examinations were triggered only by a grand jury indictment or by the sworn allegations of an accuser who was legally accountable for unfounded claims.

During such examinations, moreover, the common law prohibited modes of interrogation that were understood to be inherently coercive. As noted, that included both physical compulsion and the placing of suspects under oath. By the Framing era, the common law also recognized that offering promises or threats of any kind to an arrestee tainted any resulting confession. That rule similarly operated as a categorical

presumption that confessions given under particular circumstances were compelled. It was against this backdrop that the Framers inscribed the common law right against self-incrimination into the Constitution, securing it against future innovations.

3. In the latter half of the nineteenth century, law enforcement underwent a gradual but sweeping transformation with the rise of professional police forces, *see* Carol S. Steiker, *Second Thoughts About First Principles*, 107 Harv. L. Rev. 820, 831-38 (1994), whose stationhouse interrogations replaced the preliminary examinations once conducted by magistrates under the common law. *Miranda* was a belated application of the Fifth Amendment to the new phenomenon of "in-custody interrogation." 384 U.S. at 441. It "recognized that custodial interrogations, by their very nature, generate 'compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.'" *Moran v. Burbine*, 475 U.S. 412, 420 (1986) (quoting *Miranda*, 384 U.S. at 467).

"To combat this inherent compulsion, . . . *Miranda* imposed on the police an obligation to follow certain procedures," *id.*, prescribing "concrete constitutional guidelines for law enforcement agencies . . . to follow," *Miranda*, 384 U.S. at 441-42. The decision requires officers to give specific warnings to suspects about their rights, *id.* at 444-45, and, beyond this "duty to inform," obligates them to "respect the accused's decision to exercise the rights outlined in the warnings," *Moran*, 475 U.S. at 420; *see Butler v. McKellar*, 494 U.S. 407, 411 (1990) ("the Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel").

Miranda's requirements for custodial police interrogation were novel because "the routine practice of

such interrogation is itself a relatively new development." *Dickerson*, 530 U.S. at 435 n.1. But those requirements go no further than the Fifth Amendment demands. The point of *Miranda's* "constitutional requirement" is to create "circumstances allowing for a real choice between talking and remaining silent." *Missouri v. Seibert*, 542 U.S. 600, 604, 609 (2004). In other words, giving *Miranda* warnings and respecting the rights they describe negates the "inherently compelling pressures" of custodial interrogation, *Miranda*, 384 U.S. at 467, such that any incriminating statements that follow are not "compelled," U.S. Const. amend. V.

That *Miranda*'s rules can be characterized as "prophylactic," Pet. Br. 20, does not mean they are not required by the Fifth Amendment. *Miranda* recognized that "the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation," and that its warnings are just one means of negating the inherent coercion of such interrogation. 384 U.S. at 490. Other safeguards are permissible, "so long as they are fully as effective." *Id.* But without *Miranda* warnings or "an adequate substitute," *Dickerson*, 530 U.S. at 442, there has been no "solution for the inherent compulsions of the interrogation process," *Miranda*, 384 U.S. at 467.

The text and history of the Self-Incrimination Clause support that result. The Fifth Amendment sought to secure, against future incursions, the common law protection from self-incrimination as the Framers understood it. That protection operated before trial and directly prohibited interrogation methods that were deemed inherently coercive. Nothing in the text of the Clause reduces it to a "rule of evidence," U.S. Br. 4, applicable only in court.

ARGUMENT

I. At the Framing, the Right Against Self-Incrimination Directly Prohibited Interrogation Practices that Were Deemed Inherently Coercive.

A. Development of the Right in England

Tracing to the Middle Ages, protection from self-incrimination "sprung from the essential nature of accusatory Anglo-Saxon criminal procedure," Laurence A. Benner, *Requiem for* Miranda: *The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 Wash. U. L. Q. 59, 61 (1989), "which centers in the grand jury," unlike "the *inquisitorial* method of the canon law, in which accusation might be by rumor," Edward S. Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 Mich. L. Rev. 1, 8 (1930). "The original formulation of the privilege was embodied in the expression *nemo tenetur prodere seipsum*," that is, "no one is bound to bring forth (i.e. accuse) himself." Benner, *supra*, at 64 n.11, 74 n.50.

Protection from self-incrimination reflected common law limits on the prosecution of crime. "Central to the Anglo-Saxon system of that time was the necessity of a precise and properly substantiated accusation," and criminal proceedings were initiated only by a complaint sworn under oath or by the indictment of "an accusing jury." *Id.* at 71. In contrast, under canon law "a secret informant or the judge could institute a proceeding in ecclesiastical courts based upon suspicion." *Id.* "The hallmark of that inquisitional procedure was that persons were interrogated under oath to learn information which could then be used as a basis for a criminal prosecution." Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-*

Incrimination as a Trial Right in Chavez v. Martinez, 70 Tenn. L. Rev. 987, 1001 (2003).

From its inception, therefore, the right against self-incrimination regulated how officials built their cases against individuals who fell under suspicion—promoting "an accusatorial rather than an inquisitorial system of criminal justice" by requiring "the government to leave the individual alone until good cause is shown for disturbing him." *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964) (quotation marks omitted). It shielded people "from any interrogation at all in the absence of a formal charge based upon sufficient cause," as reflected in either "oath or indictment." Benner, *supra*, at 64. The protection thus governed "the initiation of criminal proceedings," Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 Mich. L. Rev. 2625, 2640 (1996), by restricting methods of seeking evidence from suspected wrongdoers. Officials could not "commence prosecutions by . . . conducting fishing expeditions, or by questioning on . . . slender suspicion." *Id.* at 2641.

This safeguard took on a prominent role and became "an established principle of justice" in the first half of the seventeenth century. Benner, *supra*, at 61. Increasingly, "the common-law courts issued writs of prohibition to prevent inquisitional interrogation . . . in the ecclesiastical courts." Davies, *supra*, at 1001. And they did so to stop interrogations during the preliminary stages of a prosecution under conditions that were regarded as inherently coercive.

The common law's resistance to ecclesiastical interrogations "focused upon the use of the oath *ex officio*." Benner, *supra*, at 69. This oath was administered to someone "whom rumor had brought under suspicion," Corwin, *supra*, at 5, and who was ordered,

on pain of penalty, to "swear an oath to answer any questions that the court might subsequently put to him," John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 Mich. L. Rev. 1047, 1073 (1994). Thus, the right enforced by the common law courts did not concern "persons under accusation by a proper mode of procedure," but rather "the preliminary question of what were the necessary incidents of such a procedure." Corwin, *supra*, at 8; *see* E.M. Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1, 2 (1949). The purpose of the right was to restrain interrogations that could lead to a formal accusation.

This right "became even more prominent as a response to the abuses associated with pretrial . . . interrogation in the Court of Star Chamber and, especially, in the Court of High Commission," where common law protections were withheld. Davies, *supra*, at 1001. Queen Elizabeth established the Court of High Commission to enforce religious conformity, and it "quickly adopted inquisitorial procedures. Upon mere rumor of heresy, the Commission would bring the suspect before it, force him to take the oath *ex officio* and then subject him to interrogation without giving him any details of the charge or the identity of his accuser." Benner, *supra*, at 74-75.

As the targets of these efforts "seized upon th[e] concept of immunity from self-accusation," Langbein, *supra*, at 1073, the "common law courts restricted the power of the High Commission to ask incriminating questions of suspected religious dissenters," Alschuler, *supra*, at 2638-39. These courts did not ask whether specific individuals actually felt coerced by such interrogations. Instead, protection from self-incrimination became entrenched as an unconditional "right not to

be interrogated under oath in the absence of well-grounded suspicion." *Id.* at 2640.

This emphasis on prohibiting improper interrogations was evident in the high-profile trials of John Lilburne, who, "more than any other individual . . . was responsible for the acceptance of the principle that no person should be compelled to be a witness against himself in criminal cases." Leonard W. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* 313 (1968). Hauled before the Star Chamber in 1637 and ordered to take the oath *ex officio* without "a bill of complaint specifying the charges against him" or "an opportunity to consult with counsel," Benner, *supra*, at 78, Lilburne refused to be "ensnared" by taking the oath, Corwin, *supra*, at 8. When he was later tried for treason, Lilburne lodged the same objection at his arraignment—i.e., before trial—where he proclaimed that "by the Laws of England, I am not to answer to questions against or concerning myself." *Lilburne's Case*, 4 Howell's State Trials 1269, 1293 (1641). The presiding judge responded, "You shall not be compelled," *id.*, thereby "acknowledging the right to remain silent to incriminating interrogatories," Levy, *supra*, at 304.

Lilburne's persecution "helped to spark a public outcry against the oath *ex officio* that ultimately led to the prohibition of the oath and the abolition of both the High Commission and the Court of Star Chamber." Benner, *supra*, at 79. Following these events, which were "among the most celebrated landmarks of English political and legal history," the courts "came to internalize a privilege against self-incrimination" in routine criminal proceedings. Langbein, *supra*, at 1074.

Initially, conventional practice stood in tension with that development. *Id.* at 1084. Pretrial questioning of criminal defendants had long been dictated by

the so-called Marian committal statute. *See* 2 & 3 Phil. & M. ch. 10 (1555). Eventually regarded as antithetical to the common law, *see infra* at 15, this statute provided that justices of the peace, before jailing a prisoner charged with a felony, "should take the examination of such prisoner and the information of those who brought him." Paul G. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 Mich. L. Rev. 1224, 1232 (1932). The record of those examinations could later be read at trial.

In the eighteenth century, however, "the rule against self-incrimination was . . . carried over to the preliminary examination," resulting in "a gradual abandonment of judicial interrogation of the accused." *Id.* at 1233. And even before those changes took root, preliminary examination under the Marian statute had important protections against the compulsion of self-incriminating statements.

First, the accusatory structure of criminal law in that era imposed high demands before a person was subject to examination. Pretrial interrogation required an arrest, which in turn required "a sworn allegation by a named complainant that he had personal knowledge that a crime had actually been committed, not just probable cause that a crime might have been committed." Davies, *supra*, at 1004. Thus, no one could be arrested—or interrogated—based merely on suspicion or unsworn allegations. And groundless accusations would leave complainants liable to trespass damages. *Id.* at 1005.

Together, these restrictions demanded "strong evidence of crime prior to the activation of government criminal justice power," *id.* at 1002, rather than allowing government power to be used to coerce that evidence from a suspect. Blackstone thus called it an established "rule of the common law" that "no man shall

be bound to accuse himself," 1 William Blackstone, *Commentaries on the Laws of England* 67-68 (1791 ed.), and that "his fault was not to be wrung out of himself, but rather to be discovered by other means, and other men," 4 *id.* at 296.

Even when the necessary procedural requirements were met, pretrial interrogation was limited to examination by a magistrate after arrest, which "is the only form of official interrogation regarding crime described by Blackstone." Davies, *supra*, at 1003. Peace officers "had no authority at all" to interrogate arrestees, *id.* at 1003, but rather were "under a duty to bring an arrested person before a magistrate immediately," Kauper, *supra*, at 1229; *see* 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 40 (1819 ed.) ("and if he be guilty of unnecessary delay, it is a breach of duty"); 4 Blackstone, *supra*, at 296. Notably, too, the justice of the peace conducting a preliminary examination was "a local gentleman active in civic affairs, not a career officer of the state." Langbein, *supra*, at 1060.

Most importantly, defendants could not be questioned at preliminary examinations under oath, because that was regarded as a form of intrinsic coercion. The "coercive force of an oath . . . derived from both the secular penalties for perjury and the supernatural sanctions for falsely invoking God's name," the latter entailing "a significance that modern observers may not fully appreciate." Alschuler, *supra*, at 2649, 2632. Once under oath, a refusal to answer was contempt, a false answer was perjury, and an incriminating truthful answer was self-condemnation. Thus, "lawyers of the seventeenth and eighteenth centuries regarded the threat of this punishment as compulsion." *Id.* at 2632; *see* Theodore Barlow, *The Justice of Peace: A Treatise Containing the Power and Duty of that Magistrate* 189 (1745) ("The Law of England . . . does not

use the Rack or Torture to compel Criminals to accuse themselves," and "for the same Reason . . . it does not call upon the Criminal to answer upon Oath.").

Because interrogation under oath was regarded as inherently coercive, "a man could not be required in England to accuse himself on oath in any proceeding," including "before a magistrate investigating an accusation against him." Morgan, *supra*, at 12. Justice-of-the-peace manuals consistently "declared that the *nemo tenetur* principle precluded the interrogation of suspects under oath," regarding that condition as "incompatible with his privilege." Alschuler, *supra*, at 2648, 2631; *e.g.*, Michael Dalton, *The Country Justice* 411 (1690 ed.) ("The Offender himself shall not be examined upon Oath: for by the Common Law, *Nullus tenetur seipsum prodere*.").

Not only were defendants exempt from being put under oath during pretrial examinations, they were not required to answer questions at all. *See* Chitty, *supra*, at 57 (while the Marian procedures "authorize an examination, they are not compulsory on the prisoner to accuse himself"). To be sure, defendants faced strong incentives to speak: a refusal to respond to the accusation might be reported by the examining magistrate at trial. Langbein, *supra*, at 1061. But the possibility of a jury later drawing an inference of guilt was the only penalty for silence. Alschuler, *supra*, at 2631; *see* Chitty, *supra*, at 57 ("there is no mode of extorting such confession or other statement from the prisoner").

Moreover, "English criminal procedure underwent a marked alteration" during the eighteenth century, furnishing even stronger protection from self-incrimination as the questioning of defendants before trial "ceased entirely." Corwin, *supra*, at 10. With defense counsel playing a greater role in proceedings, the focus shifted from a defendant's ability to rebut the

accusation against him toward an adversarial testing of that accusation under a rigorous standard of proof. That change eroded the informal inducements to testify. Langbein, *supra*, at 1066-71.

Meanwhile, the right against self-incrimination became intertwined with a related doctrine from the law of evidence, which barred the use of "confessions secured by threats or promises." Morgan, *supra*, at 18. This rule, for reasons of reliability, excluded confessions that were "induced to any degree by any promises of leniency or threats." Davies, *supra*, at 1021; *see Trial of Charles White*, 17 Howell's State Trials 1079, 1085 (1741) (a defendant's confession may not be "extorted by threats, or drawn from him by promises"); 2 Matthew Hale, *The History of the Pleas of the Crown* 284 (1736 ed.) (a confession may be read against a defendant only if "he did it freely without any menace").

This rule was categorical. Recognizing that "the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner," it "therefore exclude[d] the declaration if any degree of influence ha[d] been exerted." *Bram v. United States*, 168 U.S. 532, 543 (1897) (quoting 3 William O. Russell, *Treatise on Crimes and Misdemeanors* 478 (1896 ed.)). Thus, "the slightest degree of influence exerted upon the accused to speak gave rise to a presumption of compulsion that rendered the confession inadmissible." Benner, *supra*, at 65.

In response to these changes, "[t]he practice developed [in preliminary examinations] of taking only a voluntary statement by the accused after cautioning him as to his rights" and "of permitting the accused to have counsel at this examination." Kauper, *supra*, at 1233-34; *see* Chitty, *supra*, at 57 ("when the party is brought before the magistrate, he is generally cautioned that he is not bound to accuse himself, and that

any admission may be produced against him at his trial"). That practice migrated to America. *See* Wesley MacNeil Oliver, *Magistrates' Examinations, Police Interrogations, and* Miranda*-Like Warnings in the Nineteenth Century*, 81 Tul. L. Rev. 777, 790-92 (2007).

Ultimately, the pretrial examination of defendants under the Marian statute, even with the safeguards described above, came to be seen as anomalous—a statutory innovation that intruded on common law freedoms. *See* 4 Blackstone, *supra*, at 296 (the statute was "the first warrant given for the examination of a felon in the English law. For, at the common law, *nemo tenebatur prodere seipsum* . . . ."); Chitty, *supra*, at 56-57 (same). Americans inherited that understanding. *See* William Waller Hening, *The New Virginia Justice* 147 (1795) (examinations under the Marian statute "are repugnant to the common law").

During all this time, the common law protection from self-incrimination was never merely "an evidentiary rule for a criminal trial." U.S. Br. 6. As shown above, it directly prohibited the use of coercive interrogation methods during a defendant's pretrial examination. Indeed, it shielded people who were not even accused of a crime, much less on trial for it. The right extended to witnesses who testified in *someone else's* criminal trial and even in civil proceedings. When such witnesses invoked their rights, "the courts forbade other trial participants from asking them incriminating questions." Alschuler, *supra*, at 2659. Once again, that principle held sway on both sides of the Atlantic. *See, e.g.*, *Wilkes v. Wood*, 98 Eng. Rep. 489, 495 (C.P. 1763) (witness in trespass suit was "not bound to answer to any matter which may tend to accuse himself"); *Marbury v. Madison*, 5 U.S. 137, 144 (1803) (witness in mandamus suit was not "obliged to state any thing which would criminate himself"); *United States*

v. Burr, 25 F. Cas. 38, 41 (C.C.D. Va. 1807) (witness in criminal prosecution was not "compellable to accuse himself"); *see also* 3 Blackstone, *supra*, at 364 (1766 ed.) (prospective juror could not be forced to answer question that would "make him either forswear or accuse himself").

At the Framing, therefore, the right against self-incrimination was both firmly established and much more than a rule of evidence: it was a direct limit on how government officials questioned potential offenders in their custody. Its primary function was to prevent the use of improper methods of interrogation to secure confessions before trial—physical compulsion, the use of oaths, and, eventually, inducements or threats. In other words, the right against self-incrimination prohibited pretrial interrogation under conditions that were regarded as inherently coercive.

B. Reception of the Right in America

"When the Revolution began, colonies and mother country differed little, if at all, on the right against self-incrimination." Levy, *supra*, at 404. In America, as in England, the right developed as a restraint on interrogation practices that were understood as intrinsically coercive. And as in England, it first flourished in high-profile controversies of political significance before spreading to routine criminal prosecutions. To the Framers, this right represented a bulwark of individual liberty secured by the common law, which they sought to preserve from future innovations that would undermine its safeguards. Those safeguards, moreover, focused on barring coercive methods of securing evidence from potential offenders, not simply on excluding improperly gained evidence from trial.

English colonial settlement of North America took place at a time "when opposition to the ex-officio oath

of the ecclesiastical courts was most pronounced," and when "the insistence upon the privilege against self-incrimination in the courts of common law had begun to have decided effect." R. Carter Pittman, *Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 Va. L. Rev. 763, 769 (1934-1935). Despite their diversity, all the colonies "proclaimed an intention in principle to provide criminal justice in conformity with the laws of England," Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 Mich. L. Rev. 1086, 1091 (1994), and royal charters provided that colonists were to enjoy all the privileges of Englishmen, Pittman, *supra*, at 766.

American criminal procedure thus mirrored the English model. It included pretrial examinations under the Marian committal statute, as well as the grand jury and "other palladia of English liberties," Moglen, *supra*, at 1104, that confined the use of such examinations.

As in England, structural incentives encouraged arrestees to respond to the accusations against them during pretrial examinations. *Id.* at 1089. But "the American records also disclose a strong array of beliefs concerning the inappropriateness of physical and spiritual coercion to secure evidence of crime." *Id.* at 1104. Over time, "the history of preliminary examination follows a course parallel to that" in England. Kauper, *supra*, at 1235. "The establishment of the rule against self-incrimination" in England, "resulting in abolition of the practice of interrogating the accused, had the same effect in the American colonies." *Id.* at 1236.

From the beginning, Americans were averse to conditions of interrogation that they viewed as inherently coercive—a sentiment reflected in limits on pretrial questioning.

The 1641 Massachusetts Body of Liberties, a precursor to later bills of rights, "provided a rudimentary guarantee against compulsory self-incrimination." Benner, *supra*, at 86. Prohibiting the use of physical coercion to obtain confessions, it dictated that "[n]o man shall be forced by torture to confess any crime against himself." Mass. Body of Liberties, art. 45 (1641) (spelling modernized).

Americans also agreed that forcing suspects to answer questions about themselves under oath was unduly coercive. Indeed, "the ex officio oath . . . was more uniformly reprehended than in England," likely due to colonial Americans' particular religious sensibilities. Moglen, *supra*, at 1100-01. "Hence the great codes of Congregationalist New England specifically limited the use and wording of oaths to prevent the use of spiritual coercion." *Id.* at 1101 (footnote omitted).

Together, these prohibitions on physical and spiritual coercion "afforded the colonists complete protection against compulsion, either by torture or by an oath, to confess their own delinquency." Pittman, *supra*, at 776.

That protection was not limited to trials. From an early date, it shielded arrestees who were brought before magistrates for their preliminary examinations. In 1642, the governor of Massachusetts inquired of several ministers "[h]ow far a magistrate may extract a confession from a delinquent, to accuse himself of a capital crime, seeing *nemo tenetur prodere seipsum*." William Bradford, *Of Plymouth Plantation 1620–1647*, at 407 (Samuel E. Morison ed., 1952) (1651). The ministers agreed that no oath could be employed. As one wrote, a magistrate could use "force of argument" against a defendant "to draw him to an acknowledgment of the truth," but "may not extract a confession of a capital crime from a suspected person by any

violent means, whether it be by an oath imposed, or by any punishment inflicted or threatened to be inflicted, for so he may draw forth an acknowledgment of a crime from a fearful innocent." *Id.*; *see* Pittman, *supra*, at 777-79; Alschuler, *supra*, at 2650.

Just like in England, therefore, the burgeoning protection from self-incrimination directly restrained interrogation practices. Indeed, numerous colonial legislatures declared that authorities could not use coercive modes of interrogation—primarily questioning under oath—to force people to accuse themselves. This protection was not limited to a person's own criminal trial, but applied to any sworn questioning. Thus, in 1677, Virginia's legislature resolved that compelling individuals to answer incriminating questions under oath was contrary to common law rights: "the law has provided that a person summoned as a witness against another, ought to answer upon oath, but no law can compel a man to swear against himself in any matter wherein he is liable to corporal punishment." 2 *Statutes at Large: Being a Collection of All the Laws of Virginia* 422 (William W. Hening ed., 1823) (spelling modernized); *see* Alschuler, *supra*, at 2651. Massachusetts likewise provided in 1692 that "any person duly summoned" to give evidence concerning a violation of the law must answer questions on pain of penalty, "other than the party himself." Pittman, *supra*, at 782 n.30. Connecticut in 1711 similarly prescribed that a witness must testify under oath only "so far as it concerns any other person besides himself." *Id.* at 781 (spelling modernized).

The right against self-incrimination became further entrenched throughout the colonies in the eighteenth century, due to the growth of the legal profession and the greater availability of English treatises. Benner, *supra*, at 87. And it continued to be understood

as a protection extending well beyond the trial phase of a prosecution. In 1754, for instance, the Massachusetts legislature passed an excise bill compelling residents to disclose to tax collectors, under oath, the amounts they spent on liquor. Denounced by pamphleteers, the bill was "thought to be a menace to freedom . . . because of its incriminating oath," Levy, *supra*, at 386, which threatened "an essential Part of our Constitution, that no Man is held to convict himself in any Affair whereof he is accus'd," *id.* (quoting pamphlet). Vetoing the bill, the governor called it a violation of "natural Rights." *Id.* As those sentiments reflect, the right against self-incrimination was understood to be violated when an incriminating statement was compelled through a coercive process—not merely when that statement was later admitted in court.

II. The Framers Adopted the Self-Incrimination Clause to Prevent Innovations that Would Undermine the Common Law's Protection from Coercive Interrogation Practices.

The right against self-incrimination gained new prominence amid the "explosion of constitutional polemic in British North America after 1760." Moglen, *supra*, at 1111. Insisting on their rights as Englishmen in response to affronts by royal authorities, including the use of inquisitorial tactics to obtain criminal confessions, Americans lauded a "closely interwoven" set of rights they believed "intrinsic to the common law tradition, unmodifiable by an increasingly sovereign British Parliament." *Id.* at 1111-12. Their campaign enshrined the right against self-incrimination as a fundamental safeguard from arbitrary interference with personal liberty. Later, the Framers adopted the Fifth Amendment to prevent legislative incursions on that safeguard.

A. The American colonists "were well educated as to their rights as Englishmen," Pittman, *supra*, at 769, and they viewed the common law as "protect[ing] security and property because it provided liberty," Moglen, *supra*, at 1113. Seeking "equality of treatment with the King's English subjects," Americans essentially "claimed a constitutional right to the common law." *Id.*

First and foremost, "Americans exalted the jury and all the common law rules and maxims ancillary to its function," *id.* at 1112, including protection from self-incrimination and other safeguards that ensured an accusatory system of justice. As the Continental Congress explained to its Quebec neighbors after Britain resolved to withhold common law protections from that territory, the right to jury trial ensured "that neither life, liberty nor property, can be taken from the possessor, until twelve of his unexceptionable countrymen and peers" passed sentence against him "upon a fair trial, and full enquiry, face to face, in open Court." *To the Inhabitants of the Province of Quebec* (Oct. 1774), *in* 1 *Journals of the Continental Congress* 107 (1904). Growing reverence for the jury heightened Americans' disdain for inquisitorial tactics that coerced confessions, thereby "short-circuit[ing] the accusatory role of the community" and depriving defendants of meaningful jury trials. Moglen, *supra*, at 1112.

Moreover, "American liberty seemed increasingly threatened by the same forces that earlier generations of Englishmen had resisted." *Id.* at 1113. Conflict swirled around attempts to extort confessions through the use of "prerogative" courts, where, "at the mere will of the royal Governor, an accused was called before the Governor and his council" and subjected to interrogation that was "inquisitional and ofttimes overbearing." Pittman, *supra*, at 783-84. As with modern

police interrogation, the goal was to "procure confessions upon which . . . convictions of the delinquents could be secured before a jury." *Id.* at 784.

Resisting these tactics, Americans sought direct protection from coercive pretrial interrogation. As early as the seventeenth century, Massachusetts residents objected in a pamphlet that the governor and council would "fetch up persons" before them, "not to receive their trial but only to be examined there, and so remitted to an inferior court to be farther proceeded against." *The Revolution in New-England Justified* 57 (1773 ed.) (1691) (spelling modernized). These examinations "were unreasonably strict, and rigorous and very unduly ensnaring to plain unexperienced men." *Id.*

In Pennsylvania, printer William Bradford was summoned before the governor, who sought his confession for publishing a controversial work. Refusing to answer, Bradford declared: "[I]f anything be laid to my charge, let me know my accusers. I am not bound to accuse myself." Pittman, *supra*, at 785; *see also id.* at 785-86 (describing similar incident in Massachusetts).

In Virginia, the lieutenant governor was accused of issuing orders "to examine witnesses against particular men ex parte," and "if witnesses do not swear up to what is expected, they are tampered with." Charges Against Governor Nicholson, *reprinted in* 3 *Va. Mag. Hist. & Bio.*, Apr. 1896, at 373, 378. "On the very eve of the Revolution," Virginia's governor "was hailing those accused of forging paper currency before himself and his Council and was there making examinations in a very inquisitorial manner." Pittman, *supra*, at 786. The House of Burgesses—which included many members who would soon safeguard protection from self-incrimination in America's first declaration of

rights—made "violent protests" against this departure from the "usual mode" of criminal examination. *Id.*

B. As the American dispute with Britain reached a crescendo, a central grievance was the expanded use of prerogative courts, particularly vice-admiralty courts, to enforce revenue measures against which the colonists protested. *See id.* at 786-87. Without juries or the accusatory requirements of the common law, vice-admiralty procedures were seen as "tyrannical and unconstitutional innovations," lacking the safeguards that "Englishmen had a right to expect." Moglen, *supra*, at 1115-16. Thus, amid resistance to the Stamp Act, residents of Providence explained that "we look upon our natural Rights to be diminished in the same Proportion, as the Powers of that Court are extended." *Id.* at 1116. Boston residents proclaimed that, after taxation without representation, "the Jurisdiction of the Admiralty" was "our greatest Grievance." *Id.* at 1116 n.108. One galvanizing incident was the "smuggling prosecution of John Hancock in the Boston vice-admiralty court, news of which was disseminated widely among the colonies" and "described as an inquisitorial 'fishing' procedure," Davies, *supra*, at 1001 n.77, marked by "tactics of examining men secretly and by 'odious' interrogatories," Levy, *supra*, at 398.

In their resistance to vice-admiralty and its inquisitorial methods, Americans "began to adopt rhetoric concerning the unconstitutionality of prerogative justice" first employed the previous century in England. Moglen, *supra*, at 1116. "While the Court of High Commission had been the primary target in the earlier era, Admiralty became the focus of hostility in America, primarily because of its alleged employment of the *ex officio* oath for coercive purposes." *Id.* Before long, "[t]he *ex officio* oath and the abuses of Star Chamber procedure again became staples of the

pamphlet literature." *Id.* The controversy thus "reopened old questions that had been settled," calling for "a reaffirmation of th[e] privilege against compulsory self-incrimination." Pittman, *supra*, at 787.

C. These trends culminated in the constitutions and declarations of rights the states adopted after separating from Britain, which included "various restatements of the traditional *nemo tenetur* maxim." Moglen, *supra*, at 1115. In these documents, Americans aimed to safeguard the full scope of this well-known common law right.

Virginia's widely emulated Declaration of Rights protected a cluster of safeguards later embodied in the Fifth and Sixth Amendments, including a prohibition on compelled self-incrimination. *See* Va. Decl. of Rights § 8 (1776) ("nor can he be compelled to give evidence against himself"). Because this protection attached "in all capital or criminal prosecutions," *id.*, it covered all custodial interrogations. Under common law, "a 'prosecution' began when there was an arrest." Davies, *supra*, at 1010 n.123; *see* Hale, *supra*, at 72 (describing the "arrests or apprehending" of suspects as "the first instance of their prosecution"). That was the same point at which custodial interrogation could begin. Thus, unlike today, there was no custodial interrogation before the initiation of a prosecution.

The Massachusetts Declaration of Rights, "drafted by John Adams, one of the most learned common law lawyers of his day," overtly linked the "right to be free at all times from compulsory self-incrimination" with the right "not to be subjected to interrogation prior to a substantiated formal charge." Benner, *supra*, at 87-88; *see* Mass. Const. of 1780, art. XII ("No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially, and formally, described to him; or be compelled to accuse, or furnish

evidence against himself."). Reflecting the traditional breadth of the right against self-incrimination, this protection was an affirmative limit on what officials could do when seeking evidence of a crime.

D. These constitutional provisions "were intended conservatively, protecting against . . . possible innovations by a tyrannical government." Moglen, *supra*, at 1089. Later, when a new and more powerful federal government was proposed by the Constitutional Convention, some statesmen perceived a threat of such innovations reemerging.

Patrick Henry warned in Virginia's ratifying convention that "Congress may introduce the practice of the civil law, in preference to that of the common law," authorizing its officials to "extort confession by torture." 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 447-48 (Jonathan Elliot ed., 1836). In Massachusetts, one delegate stressed that "[t]here is nothing to prevent Congress from passing laws which shall compel a man, who is accused or suspected of a crime, to furnish evidence against himself." 2 *id.* at 111. A New York delegate similarly urged that Congress might establish criminal proceedings at odds with the common law, invoking the Star Chamber. 2 *id.* at 400.

In response, the Framers of the Bill of Rights safeguarded the right against self-incrimination, elevating it from a traditional common law protection to a fundamental constitutional guarantee. As the history above underscores, the Framers were not concerned only with rules of evidence governing trials. Instead, they were "focused upon improper methods of gaining information from criminal suspects," and specifically on prohibiting "forms of coercive interrogation." Alschuler, *supra*, at 2651-52.

E. The text of the Fifth Amendment reflects the Framers' broad goals. Nothing about it restricts the scope of the Self-Incrimination Clause to the work of "prosecutors and courts." Pet. Br. 17.

The Amendment provides that no person shall "be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Because this language was "but an affirmance of a common law privilege," 3 Joseph Story, *Commentaries on the Constitution* § 1782, at 660 (1833), the Framers "were content simply to use a phrase sufficient to invoke the settled common-law right and place it off limits to legislative change," Davies, *supra*, at 1007. In other words, the compact wording of the Clause was a "gesture in favor of a self-evident truth needing no further explanation," revealing "an intent to incorporate into the Constitution the whole scope of the common-law right." Levy, *supra*, at 430, 423.

The Clause's applicability beyond trial is clear from its placement alongside other rights that govern when and how the state may initiate action depriving individuals of legal entitlements: the Takings Clause, the Due Process Clause, the Grand Jury Clause, the Double Jeopardy Clause. The Framers carefully attended to the location of the Self-Incrimination Clause, *see id.* at 423-27, and if the Clause were concerned only with trial procedure, it would have been grouped with similar rights in the Sixth Amendment. Its inclusion in the Fifth Amendment "proves that the [Framers] did not intend to restrict that clause . . . only to [a person's] trial." *Id.* at 427.

Accordingly, the Clause's text is phrased "broadly enough to apply . . . to any phase of the proceedings." *Id.* The government claims that a person is a witness against himself in a criminal case "only when his compelled testimony is admitted against him at trial."

U.S. Br. 7. But neither of the government's textual hooks for this claim—the words "witness" and "case"—supports that limitation. Thus, even though a violation of the Clause may not be complete until the statement compelled from a person is actually used against him, *Chavez v. Martinez*, 538 U.S. 760 (2003), there is no textual basis for equating that requirement with the admission of testimony in a courtroom.

A "witness" is not limited to someone whose testimony is admitted in a judicial proceeding. As this Court has explained, a person becomes a "witness against himself" when making "incriminating communications . . . that are 'testimonial' in character," *United States v. Hubbell*, 530 U.S. 27, 34 (2000), which requires only "assertions of fact or belief," *id.* at 35. In ordinary usage, the word "witness" includes people who relay their knowledge of an incident to someone else, regardless of the location or forum. *E.g.*, *Ohio v. Clark*, 576 U.S. 237, 243 (2015) (referring to "statements by a witness during police questioning at the station house"). The same was true at the Framing. Indeed, the word "witness" was consistently used to describe people who gave information at Marian preliminary examinations—the antecedent to modern custodial police interrogations. *See* Hale, *supra*, at 52; 2 William Hawkins, *A Treatise of the Pleas of the Crown* 430 (1762 ed.); 1 Richard Burn, *The Justice of the Peace and Parish Officer* 760-61 (1810 ed.); James Parker, *Conductor Generalis: or the Office, Duty and Authority of Justices of the Peace* 174 (1764).

Likewise, the word "case" does not limit the Self-Incrimination Clause to the admission of evidence "at trial." U.S. Br. 7. Notably, the Sixth and Seventh Amendments both use the word "trial," but the Fifth Amendment conspicuously uses the broader word "case," which is general enough to refer simply to a

legal matter or question. *See* Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) (defining "case" among other things as a "[q]uestion relating to particular persons or things"); *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892) (construing the Clause as "limited to criminal matters" but covering any situation in which a person is "acting as a witness in any investigation").

When a person "is first subjected to police interrogation while in custody . . . . [i]t is at this point that our adversary system of criminal proceedings commences," *Miranda*, 384 U.S. at 477, and the process "is quite as much an official proceeding as the early English preliminary hearing before a magistrate," Morgan, *supra*, at 28. Significantly, the other use of the word "case" in the Fifth Amendment—in the Grand Jury Clause—likewise relates to a pre-trial proceeding. And another constitutional provision makes members of Congress, with certain exceptions, "privileged from Arrest" "in all Cases," U.S. Const. art. I, § 6, again referring to the initiation of a criminal matter, not to courtroom proceedings or a trial. Indeed, it seems that the only reason the phrase "in any criminal case" was added to the Clause was to make clear that it did not protect against compelled exposure to *civil* liability. *See Hubbell*, 530 U.S. at 53 n.3 (Thomas, J., concurring); Levy, *supra*, at 423-26.

Finally, for the Framers there was no in-custody interrogation without a "case." Preliminary examination by a magistrate, which by definition was a judicial proceeding, was the only form of custodial questioning before trial that the common law permitted. Modern rules of law enforcement, by contrast, permit detention and interrogation by government officers before the filing of criminal charges—and hence before the beginning of court proceedings. That is precisely the type of

deviation from historic common law safeguards that the Framers adopted the Self-Incrimination Clause to protect against. Whatever innovations in criminal procedure society chooses to embrace, the Fifth Amendment, like the Fourth, is meant to provide at least the level of protection against government power that existed when the Amendment was ratified. *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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