No. 16-1495

# In the Supreme Court of the United States

CITY OF HAYS, KANSAS, PETITIONER

*v.*

MATTHEW JACK DWIGHT VOGT

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

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER**


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## QUESTION PRESENTED

Whether the Fifth Amendment's Self-Incrimination Clause is violated when a compelled statement is used to assess probable cause at a preliminary hearing, but not to adjudicate guilt or punishment at a criminal trial.

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## INTEREST OF THE UNITED STATES

This case involves whether the Fifth Amendment's Self-Incrimination Clause is violated when a compelled statement is used to assess probable cause at a preliminary hearing. The Court's resolution of that question will apply to similar claims in federal prosecutions. See Fed. R. Crim. P. 5.1 (providing in certain circumstances for a preliminary hearing to assess probable cause). Accordingly, the United States has a significant interest in the case.

## STATEMENT

1. Respondent worked as a police officer for petitioner City of Hays. Pet. App. 48a. In 2013, respondent sought employment with a different police department. *Ibid.* As part of the application process, respondent disclosed that he had kept a knife he obtained through his work as a Hays police officer. *Ibid.*

Respondent received a job offer conditioned on his reporting his possession of the knife and returning it to the Hays police department. Pet. App. 48a-49a. Respondent complied by telling the Hays police chief about the knife. *Id.* at 49a. The police chief opened an internal investigation and directed respondent "to document the facts related to his possession of the knife." *Ibid.* Respondent "wrote a vague one-sentence report related to his possession of the knife" and gave two weeks' notice of his resignation. *Ibid.*

Respondent subsequently participated in an interview with a Hays police officer responsible for internal investigations. Pet. App. 49a. Respondent disclosed information about the "type of police call [he] was handling when he came into possession of the knife," which enabled the officer to locate an audio recording that shed further light on the incident. *Id.* at 50a. The investigation indicated that respondent obtained the knife while responding to a report that a vehicle with slashed tires had been vandalized. C.A. App. 60 n.1.

The police chief requested that the Kansas Bureau of Investigation initiate a criminal investigation of respondent. Pet. App. 50a. The other police department subsequently withdrew respondent's employment offer. *Ibid.*

2. In 2014, Kansas charged respondent with two felony counts related to his possession of the knife. Pet. App. 50a. Because respondent was not charged by grand jury indictment, he was entitled to a probable cause hearing under state law. See Kan. Stat. Ann. § 22-2902(1) (Supp. 2016).

Kansas law provides that a probable cause hearing generally "shall be held * * * within 14 days after the arrest or personal appearance of the defendant."

Kan. Stat. Ann. § 22-2902(2). At that preliminary hearing, if "it appears that a felony has been committed and there is probable cause to believe that a felony has been committed by the defendant, the magistrate shall order the defendant bound over to the district judge having jurisdiction to try the case; otherwise, the magistrate shall discharge the defendant." *Id.* § 22-2902(3). In determining whether probable cause exists, "the judge * * * must draw inferences favorable to the prosecution from the evidence presented and should not be concerned with sufficiency of the evidence to support a conviction." *State* v. *Washington*, 268 P.3d 475, 477 (Kan. 2012).

At respondent's hearing, his statements about the knife "were used to support probable cause." Pet. App. 20a n.17. The magistrate judge and a state district court judge nevertheless "determined that probable cause did not exist to bind [respondent] over for trial." *Id.* at 50a-51a. The criminal charges against respondent accordingly were dismissed. *Id.* at 3a.

3. Respondent then filed this suit against petitioner under 42 U.S.C. 1983.[1] Respondent alleged that he had been compelled to give statements about the knife "as a condition of his employment," Pet. App. 49a, and he contended that petitioner was responsible for a violation of the Self-Incrimination Clause based on the use of those statements at his probable cause hearing. *Id.* at 4a, 52a-

[1] Respondent also sued the individual officers who questioned him and the city whose police department made him the conditional job offer. The district court granted those defendants' motions to dismiss, Pet. App. 44a, and the court of appeals affirmed, *id.* at 20a-26a. Those claims are not at issue here.

53a.[2] Petitioner moved to dismiss, arguing that respondent had not been "compelled to be a witness against himself in a criminal case" because his statements were not "admitted against him in a criminal trial." C.A. App. 61.

The district court granted petitioner's motion to dismiss. Pet. App. 35a-44a. Given the procedural posture, the court credited respondent's allegation that his statements were compelled, but the court concluded that no constitutional violation occurred because the statements "were never introduced against [respondent] at trial." *Id.* at 43a. The court relied on the statement in this Court's decision in *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), "that a 'constitutional violation [of the right to be free from compelled self-incrimination] occurs only at trial.'" Pet. App. 43a (quoting *Verdugo-Urquidez*, 494 U.S. at 264).

4. a. The court of appeals reversed the dismissal of the claim against petitioner. Pet. App. 1a-34a. The court reasoned that the Self-Incrimination Clause protects "more than a trial right" because its text refers to a "criminal case," which "appears to encompass all of the proceedings involved in a 'criminal prosecution.'" *Id.* at 10a-11a. The court drew further support for that holding from the history surrounding the Self-Incrimination Clause's ratification. *Id.* at 14a-20a. Because the court "conclud[ed] that the phrase 'criminal case' includes probable cause hearings," *id.* at 5a, it held that respondent had "adequately pleaded a Fifth Amendment violation," *id.* at 20a.

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[2] Respondent's complaint did not allege that he objected to the introduction of his statements at the probable cause hearing. See Pet. App. 46a-54a.

b. Judge Hartz concurred to highlight four issues implicated by the facts of the case that he understood the majority not to address. Pet. App. 33a-34a.

## SUMMARY OF ARGUMENT

The use of a compelled statement for the limited purpose of determining whether probable cause exists to bind a defendant over for trial does not violate the Self-Incrimination Clause.

A. The text of the Self-Incrimination Clause, interpreted in light of its purpose, prohibits reliance on a criminal defendant's compelled statements to convict or punish him. Such use "compel[s]" the defendant "to be a witness against himself" in a criminal case. U.S. Const. Amend. V. But a defendant does not stand as "a witness against himself" when his statements are used for other purposes in pretrial proceedings, such as to determine whether he is competent to stand trial or whether probable cause exists for the case to proceed. Those proceedings may remove procedural barriers to further prosecution, but they do not "enlist the defendant as an instrument in his or her own condemnation" because they do not resolve the ultimate questions of guilt and punishment. *Mitchell* v. *United States*, 526 U.S. 314, 325 (1999).

The scope of the Fifth Amendment privilege—which protects a right to remain silent when incrimination is at issue, but not to avoid other unwanted consequences—demonstrates that the Self-Incrimination Clause focuses on exposure to criminal penalties, rather than procedural steps in a case apart from conviction and punishment. And this Court's interpretation of the Confrontation Clause, which uses the same phrase "witness against" to grant only a trial right, reinforces that conclusion: a defendant has not been compelled to

be a witness against himself when his statements are used solely at a pretrial proceeding, where the determination of his guilt and punishment are not at stake.

B. This Court's decisions support the conclusion that the use of a defendant's statements at a probable cause hearing does not implicate the Self-Incrimination Clause's protection. The Court has stated that "[a]lthough conduct by law enforcement officials prior to trial may ultimately impair [the Fifth Amendment] right, a constitutional violation occurs only at trial." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990). And the Court has approved the use of a defendant's compelled statements to determine his competency to stand trial, so long as the statements are not also used at the guilt or penalty phases of the case. See *Estelle* v. *Smith*, 451 U.S. 454, 465, 468-469 (1981). The consequence of being found competent, like the effect of a finding of probable cause, is that the criminal prosecution can proceed. But neither pretrial proceeding adjudicates criminal guilt or punishment—and so in neither proceeding does the use of a defendant's compelled statements violate the Self-Incrimination Clause.

C. Historical practice confirms that the Self-Incrimination Clause guards against using a defendant's statements to convict or punish him. From the medieval period until the 17th Century, suspects in England and continental Europe were routinely required to incriminate themselves, with coerced confessions introduced to determine the defendant's guilt and penalty. Under the inquisitorial system of justice employed in common-law and ecclesiastic courts, defendants were placed under oath, forced to confess their crimes, and convicted and punished on that basis. Those repressive practices prompted recognition of a privilege against self-

incrimination at America's Founding. But nothing in the historical record indicates that the Framers intended the Self-Incrimination Clause to extend beyond the principal evil that inspired its adoption—the use of a defendant's compelled testimony to determine his criminal responsibility.

D. Extending the Self-Incrimination Clause to pretrial hearings would fundamentally alter the nature and purpose of those proceedings. Courts would be required to adjudicate complicated and fact-intensive suppression questions before resolving other preliminary issues in a case, creating a host of practical problems about when suppression objections must be raised, which factfinders—magistrates or courts—have authority to adjudicate those objections, and how quickly other pretrial issues such as probable cause assessments and bail determinations can be resolved. The Self-Incrimination Clause does not mandate that disruption of the criminal process.

E. Because respondent's statements were used only to assess probable cause in a preliminary hearing, no Self-Incrimination Clause violation occurred in this case. The Clause protects against the use of a statement to convict or punish—not against the use of a statement to determine whether a trial should even occur.

## ARGUMENT

### THE USE OF RESPONDENT'S STATEMENTS AT A PRETRIAL PROBABLE CAUSE HEARING DID NOT VIOLATE THE SELF-INCRIMINATION CLAUSE

The Fifth Amendment's Self-Incrimination Clause, applicable to the States through the Fourteenth Amendment, see *Malloy* v. *Hogan*, 378 U.S. 1, 6 (1964), provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const.

Amend. V. As this Court has long recognized, "[t]he essence of this basic constitutional principle is 'the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.'" *Estelle* v. *Smith*, 451 U.S. 454, 462 (1981) (emphasis omitted) (quoting *Culombe* v. *Connecticut*, 367 U.S. 568, 581-582 (1961)).

That purpose defines the Self-Incrimination Clause's protection once criminal charges have been filed. To ensure that a criminal defendant is not "enlist[ed] * * * as an instrument in his or her own condemnation," the Clause protects against the use of a defendant's compelled statements to establish guilt or to inflict criminal penalties. *Mitchell* v. *United States*, 526 U.S. 314, 325 (1999). Those uses of a defendant's testimonial statements conscript him to "stand[] as a witness against himself." *Brady* v. *United States*, 397 U.S. 742, 748 (1970).

No similar incrimination occurs when a defendant's statements are used for other purposes in pretrial proceedings, such as to determine whether the defendant is competent to stand trial, whether evidence should be suppressed, whether and in what amount bail should be set, or whether probable cause exists to bind the defendant over for trial. The Self-Incrimination Clause's text, purpose, and history demonstrate that no constitutional violation occurs when a defendant's statements are used solely for those limited purposes and not to prove his guilt or fix his punishment.

### A. The Self-Incrimination Clause's Text, Interpreted In Light Of Its Purpose, Focuses On The Use Of A Defendant's Statements To Determine Guilt Or Punishment

The Self-Incrimination Clause bars using a defendant's compelled statements to render him "a witness against himself" in "any criminal case." U.S. Const. Amend. V. Although this Court has "not decide[d] * * * the precise moment when a 'criminal case' commences," *Chavez* v. *Martinez*, 538 U.S. 760, 767 (2003) (plurality opinion), the court of appeals concluded that such a case includes pretrial proceedings that occur after formal charges have been filed against the defendant. See Pet. App. 10a-20a; cf. *Rothgery* v. *Gillespie Cnty.*, 554 U.S. 191, 198 (2008) (observing that the Sixth Amendment right to counsel in "all criminal prosecutions" attaches at "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment") (citations and internal quotation marks omitted).[3]

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[3] Because the court of appeals considered only whether the Self-Incrimination Clause bars the use of a compelled statement in a post-charge probable cause hearing, this case provides no opportunity to consider whether the Clause prohibits the use of such a statement to charge a defendant in the first place, either in grand jury proceedings or in a complaint or information. Resolving that question would require consideration of whether the historical abuses addressed by the Self-Incrimination Clause included formally transforming a suspect into an "accused," even if the defendant's statements were not later used to determine guilt or punishment. A further question would arise whether grand jury proceedings and charging instruments are part of the "criminal case" contemplated by the Self-Incrimination Clause. Cf. *Counselman* v. *Hitchcock*, 142 U.S. 547, 562 (1892) (concluding that the possibility that a grand jury witness's testimony could expose him to criminal penalties meant that "[t]he case before the grand jury was * * * a

But the court of appeals did not go on to consider what uses of a defendant's statements within a criminal case render him a "witness against himself" within the meaning of the Self-Incrimination Clause. That text, construed in light of the Clause's purpose, focuses on the use of a defendant's statements to convict or punish him—neither of which occurs at a pretrial probable cause hearing.

1. A Self-Incrimination Clause violation occurs only by the use of a statement that is "testimonial, incriminating, and compelled," *Hiibel* v. *Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 189 (2004)—that is, use that "compel[s]" the criminal defendant "to be a witness against himself." U.S. Const. Amend. V. A defendant qualifies as a "witness" when he provides evidence that is "'testimonial' in character." *United States* v. *Hubbell*, 530 U.S. 27, 34 (2000); see *id.* at 50 (Thomas, J., concurring) (interpreting "witness" to mean a person who "gives or furnishes evidence"). But the defendant is only a witness "against himself" when that testimonial evidence is incriminating. See *Doe* v. *United States*, 487 U.S. 201, 208 n.6 (1988) (observing that "the requirement that the compelled communication be 'testimonial'" should not be confused with "the separate requirement that the communication be 'incriminating'").

Incrimination focuses on proof of facts that will establish a defendant's criminal responsibility—his guilt

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criminal case" in which the privilege to remain silent could be invoked), overruled on other grounds, *Kastigar* v. *United States*, 406 U.S. 441 (1972). It would also be necessary to evaluate decisions concluding that a defendant may not challenge an indictment on the ground that the grand jury considered compelled statements that would violate the Self-Incrimination Clause if used to convict or punish. See, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338, 345-346 (1974); *Lawn* v. *United States*, 355 U.S. 339, 348-350 (1958).

and his punishment. See 8 John Henry Wigmore, *Evidence in Trials at Common Law* § 2279, at 481 (John T. McNaughton rev. 1961) ("Legal criminality consists in liability to the law's punishment."). Thus, the risk of incrimination ceases, as does the Fifth Amendment privilege, when "the sentence has been fixed and the judgment of conviction has become final." *Mitchell*, 526 U.S. at 326. And incrimination does not occur at all in pretrial proceedings because those proceedings do not adjudicate guilt or punishment. Ascertaining probable cause, assessing competence, setting bail, and suppressing or admitting evidence *in limine* are important preliminary issues to resolve in a criminal prosecution. But those proceedings do not expose a defendant to the risk of conviction or punishment—and reliance on his statements for those limited purposes accordingly does not make him a "witness against himself."

That interpretation reflects the core purpose of the Self-Incrimination Clause. See, *e.g.*, *Davis* v. *United States*, 328 U.S. 582, 608 (1946) (the "language of the Amendment has been consistently construed in the light of its object"). This Court has long recognized that the Clause's "sole concern is to afford protection against being 'forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts.'" *Kastigar* v. *United States*, 406 U.S. 441, 453 (1972) (quoting *Ullmann* v. *United States*, 350 U.S. 422, 438-439 (1956), in turn quoting *Boyd* v. *United States*, 116 U.S. 616, 634 (1886)) (some internal quotation marks omitted). "Although the Clause serves a variety of interests in one degree or another, * * * at its heart lies the principle that the courts of a government from which a witness may reasonably fear prosecution may not in fairness compel the witness to furnish testimonial evidence that

may be used to prove his guilt." *United States* v. *Balsys*, 524 U.S. 666, 682-683 (1998).

As this Court has emphasized, "any compulsory discovery by extorting the party's oath * * * to convict him of crime * * * is contrary to the principles of a free government." *Boyd*, 116 U.S. at 631-632. Because "the American system of criminal prosecution is accusatorial, not inquisitorial," prosecutors must "establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." *Malloy*, 378 U.S. at 7-8. The Self-Incrimination Clause's "central purpose" is thus "to protect a defendant from being the unwilling instrument of his or her own condemnation." *Mitchell*, 526 U.S. at 329.

That principle makes clear that the Self-Incrimination Clause does not bar all use of statements in any stage within a criminal case, but only in those proceedings that adjudicate guilt or affix punishment. Because a preliminary hearing does neither, no constitutional violation occurs by the use of a statement solely to assess probable cause to bind a defendant over for trial.

2. The scope of the Fifth Amendment privilege to remain silent reinforces the Self-Incrimination Clause's focus on guilt and punishment. Although the Clause's "text * * * suggests that 'its coverage [is limited to] compelled testimony that is used against the defendant in the trial itself,'" *United States* v. *Patane*, 542 U.S. 630, 638 (2004) (plurality opinion) (quoting *Hubbell*, 530 U.S. at 37) (brackets in original), an individual can invoke the *privilege* "in any * * * proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz* v. *Turley*, 414 U.S. 70, 77 (1973). As this Court has explained, "the availability of the privilege does not turn

upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *In re Gault*, 387 U.S. 1, 29 (1967).

The limits on a person's ability to invoke the Fifth Amendment privilege illustrate that proof of guilt and punishment is the central focus of prohibited incrimination. To claim protection under the Self-Incrimination Clause, a person's testimony must "tend to subject [him] to criminal responsibility." *McCarthy* v. *Arndstein*, 266 U.S. 34, 40 (1924). Thus, if a person's testimonial statements do not supply "links in a chain of facts imperiling [him] with conviction," he cannot invoke a right to remain silent. *Hoffman* v. *United States*, 341 U.S. 479, 488 (1951). Similarly, if the individual faces no threat of criminal penalties—for example, because double jeopardy protections apply, the statute of limitations has run, or he has been pardoned—the privilege does not shelter him from answering even those questions that could expose his guilt. See, *e.g.*, *Brown* v. *Walker*, 161 U.S. 591, 598-599, 603-604 (1896). And this Court has rejected constitutional challenges to immunity statutes that override the privilege because the Self-Incrimination Clause's "sole concern is, as its name indicates, with the danger to a witness forced to give testimony leading to the infliction of 'penalties affixed to the criminal acts,'" and "[i]mmunity displaces the danger." *Ullmann*, 350 U.S. at 438-439 (citation omitted); see *Balsys*, 524 U.S. at 692 ("If the Government is ready to provide the requisite use and derivative use immunity, * * * the protection goes no further: no violation of personality is recognized and no claim of privilege will avail.").

Similarly, an individual cannot claim a Fifth Amendment privilege to avoid adverse consequences apart from guilt and punishment in a criminal case. Because "[t]he design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge," the Fifth Amendment does not "shield the witness from * * * personal disgrace or opprobrium." *Brown*, 161 U.S. at 605-606; see *Ullmann*, 350 U.S. at 430-431. A defendant is not relieved from being compelled to testify based on a fear for his or his family members' lives. See *Piemonte* v. *United States*, 367 U.S. 556, 559 n.2 (1961). He cannot invoke a privilege against answering questions in a psychiatric exam that will determine his competency to stand trial. See *Estelle*, 451 U.S. at 468-469. And he cannot claim the privilege in a proceeding to classify him as a sexually dangerous person for the purpose of imposing civil confinement, even though his liberty interest is at stake. *Allen* v. *Illinois*, 478 U.S. 364, 370, 372 (1986). In each of those circumstances, an individual's testimony can produce outcomes he wishes to avoid—but because his statements will not be used to adjudicate his criminal guilt or punishment, he is not compelled to incriminate himself within the meaning of the Self-Incrimination Clause.

3. That understanding of the Self-Incrimination Clause's scope draws additional force from this Court's interpretation of the Sixth Amendment's Confrontation Clause, which uses similar language in providing that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the *witnesses against him*." U.S. Const. Amend. VI (emphasis

added). "Ordinarily, a witness is considered to be a witness 'against' a defendant for purposes of the Confrontation Clause," this Court has explained, "only if his testimony is part of the body of evidence that the jury may consider in assessing his guilt." *Cruz* v. *New York*, 481 U.S. 186, 190 (1987); see *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 313 (2009) (observing that a drug analyst "certainly provided testimony *against* [the defendant]" by "proving one fact necessary for his conviction").

In line with that understanding of being a "witness against," the Court has repeatedly emphasized that "[t]he right to confrontation is basically a trial right." *Barber* v. *Page*, 390 U.S. 719, 725 (1968); see, *e.g.*, *Crawford* v. *Washington*, 541 U.S. 36, 42-43 (2004) ("One could plausibly read 'witnesses against' a defendant to mean those who actually testify at trial, * * * those whose statements are offered at trial, * * * or something in between.") (citations omitted).[4] An accused accordingly has no constitutional right to confront witnesses who provide adverse testimony in pretrial proceedings like probable cause hearings. See *Gerstein* v.

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[4] The Confrontation Clause's scope is narrower than the Self-Incrimination Clause insofar as it does not apply at sentencing. See, *e.g.*, *Williams* v. *New York*, 337 U.S. 241, 246 (1949). That contrast reflects the history and purpose of these guarantees. Sentencing courts traditionally relied on a wide range of information, including hearsay, to impose punishment, *ibid.* while the abuses that the Self-Incrimination Clause was designed to redress included using a defendant's compelled statements to impose punishment, see pp. 19-23, *infra*. But nothing in the historical record suggests that either the Confrontation Clause or the Self-Incrimination Clause was intended to apply to pretrial proceedings that did not involve issues of guilt or punishment. For Fifth and Sixth Amendment purposes, those proceedings do not involve "witness[es] against" the accused.

*Pugh*, 420 U.S. 103, 121-122 (1975). A parallel understanding applies to the Self-Incrimination Clause: a person is not, for constitutional purposes, a "witness against" the defendant when his statements are used only at a pretrial proceeding in which the determination of his guilt is not at stake.[5]

**B. This Court's Decisions Confirm That Incrimination Prohibited By The Self-Incrimination Clause Focuses On The Use Of A Statement At The Guilt Or Penalty Phase Of A Criminal Trial**

This Court has repeatedly stated that violations of the Self-Incrimination Clause can occur only at trial. And the Court has approved reliance on a defendant's statements in pretrial proceedings to adjudicate matters other than criminal responsibility. Both lines of decisions support the conclusion that no constitutional violation occurs by the use of compelled statements solely to establish probable cause in a preliminary hearing.

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[5] The use of the word "witness" in the Sixth Amendment's Compulsory Process Clause likewise focuses on evidence at trial that may affect the adjudication of guilt. See *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 55-56 (1987) (observing that the Compulsory Process Clause grants "criminal defendants * * * the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt"). Defendants have no constitutional right to compulsory process in pretrial proceedings like a probable cause hearing that do not determine guilt. See *Gerstein*, 420 U.S. at 121-122. The Constitution additionally uses the term "witness" in the Treason Clause, which expressly limits "witness[ing]" to testimony supporting guilt. See U.S. Const. Art. III, § 3, Cl. 1 ("No Person *shall be convicted* of Treason unless on the Testimony of two Witnesses to the same overt Act.") (emphasis added).

1. This Court has frequently emphasized that "[t]he privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental *trial right* of criminal defendants." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (emphasis added). The right does not "serve some value necessarily divorced from the correct ascertainment of guilt." *Withrow* v. *Williams*, 507 U.S. 680, 692 (1993). Rather, the Self-Incrimination Clause serves "to protect the fairness of the trial itself." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 240 (1973); see *Patane*, 542 U.S. at 637 (plurality opinion) (observing that the "core protection afforded by the Self-Incrimination Clause is a prohibition on compelling a criminal defendant to testify against himself at trial"); *Estelle*, 451 U.S. at 462-463 (declining "to distinguish between the guilt and penalty phases of [the defendant's] trial so far as the protection of the Fifth Amendment privilege is concerned").

Consistent with that understanding of the Self-Incrimination Clause's central purpose, this Court has stated that, "[a]lthough conduct by law enforcement officials prior to trial may ultimately impair [the Fifth Amendment] right, *a constitutional violation occurs only at trial*." *Verdugo-Urquidez*, 494 U.S. at 264 (emphasis added); see, *e.g.*, *Patane*, 542 U.S. at 641 (plurality opinion) ("Potential violations [of the Self-Incrimination Clause] occur, if at all, only upon the admission of unwarned statements into evidence at trial."); *Chavez*, 538 U.S. at 767 (plurality opinion) ("Statements compelled by police interrogations of course may not be used against a defendant at trial, * * * but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs.");

*New York* v. *Quarles*, 467 U.S. 649, 686 (1984) (Marshall, J., dissenting) ("All the Fifth Amendment forbids is the introduction of coerced statements at trial."). Accordingly, when the government "acquire[s] incriminating evidence" from the defendant, the Self-Incrimination Clause "at most * * * entitle[s] [him] to suppress the evidence and its fruits if they [a]re sought to be used against him *at trial*." *United States* v. *Blue*, 384 U.S. 251, 255 (1966) (emphasis added); see *id.* at 254 (holding that the district court had erred in dismissing the indictment on the ground that it was based on "past compulsory self-incrimination"). The court of appeals' conclusion that a constitutional violation can occur even when a defendant's statements are not introduced at the guilt or penalty phases of a criminal trial thus contradicts a long line of this Court's decisions.

2. This Court's decision in *Estelle*—which approved using a defendant's compelled statements in a pretrial proceeding to determine his competency to stand trial, see 451 U.S. at 468-469—further establishes that *how* a compelled statement is used in a criminal case may determine whether that use implicates the Self-Incrimination Clause's protection.

The defendant in *Estelle* was required to submit to a court-ordered competency exam, during which he made statements to a psychiatrist without receiving warnings that the statements could be used against him. 451 U.S. at 456-457, 461. The prosecutor ultimately introduced those statements "as affirmative evidence to persuade the jury to return a sentence of death" at the penalty phase of the trial, and this Court held that reliance on the statements for that purpose violated the Self-Incrimination Clause. *Id.* at 466; see *id.* at 462 (declining to find that "incrimination is complete once guilt

has been adjudicated" because the Self-Incrimination Clause not only "prevents a criminal defendant from being made 'the deluded instrument of his own conviction,'" but "protects him as well from being made the 'deluded instrument' of his own execution") (citations and some internal quotation marks omitted).

But *Estelle* further observed that "no Fifth Amendment issue would have arisen" if the use of the defendant's statements had been confined to the competency proceeding itself to "ensur[e] that [the defendant] understood the charges against him and was capable of assisting in his defense." 451 U.S. at 465. A defendant can be compelled to answer questions in a court-ordered competency exam even after he invokes his right to remain silent, the Court explained, so long as "the results would be applied solely for th[e] purpose" of determining his competency to stand trial. *Id.* at 468.

As *Estelle* illustrates, whether a statement constitutes prohibited incrimination can turn on how it is used in a criminal proceeding—and, specifically, whether it is relied upon to convict or punish the defendant. *Estelle*'s distinction between the different uses of a defendant's compelled statements strengthens the conclusion that prohibited incrimination does not occur in pretrial proceedings where guilt and punishment are not at issue.

### C. Historical Practice Supports The Conclusion That The Self-Incrimination Clause Does Not Extend To Uses Of A Statement In Pretrial Proceedings Where Guilt And Punishment Are Not Adjudicated

The privilege against self-incrimination arose out of the need to guard against an inquisitorial system of justice, where individuals were placed under oath, forced

to confess their guilt, and convicted and punished on that basis. That history does not support the court of appeals' conclusion that a violation can occur in pretrial proceedings with no use of a statement at any stage to determine criminal responsibility.

1. a. The historical abuses that prompted the privilege against self-incrimination trace to the medieval period, when ecclesiastical and secular courts in England and continental Europe required a defendant to demonstrate his innocence after he was formally accused by church leaders or private citizens. See *United States* v. *Gecas*, 120 F.3d 1419, 1436-1439 (11th Cir. 1997), cert. denied, 524 U.S. 951 (1998). The defendant generally had to perform a ritualistic test, such as a battle or ordeal, including trial by water and trial by fire. *Id.* at 1436-1437 & n.18. All "methods of proof relied entirely on the behavior of the defendant, under the threat of a penalty, to determine guilt," and "[i]n this sense, every conviction under the ancient methods of proof was a conviction based on self-incrimination." *Id.* at 1437; see, *e.g.*, 2 Frederick Pollock & Frederic William Maitland, *The History of English Law*: *Before the Time of Edward I* 598-602 (2d ed. 1898).

In the 13th Century, English common-law courts began to replace ritualistic tests with jury trials—but defendants continued to be compelled to incriminate themselves through a pretrial inquisition seeking confessions of guilt, with resulting compelled confessions providing the proof to convict and punish. See *Gecas*, 120 F.3d at 1440, 1442-1443. That practice was initially employed mainly in misdemeanor criminal cases, but it expanded to all felonies in the 16th Century when the British Parliament enacted the Bail Statute (An Act appointing an Order to Justices of Peace for the

Bailement of Prisoners, 1554, 1 & 2 Phil. & M., c. 13 (Eng.)) and the Committal Statute (An Acte to take thexaminacõn of Prysoners suspected of Manslaughter or Felonye, 1555, 2 & 3 Phil. & M., c. 10 (Eng.)). See *Gecas*, 120 F.3d at 1442. Those statutes authorized justices of the peace to interrogate suspects, obtain incriminating statements, and then present those statements to the jury at trial. See *ibid.* ("Reading the record of the examination was the first step in most criminal trials during the sixteenth and seventeenth centuries."); John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 Mich. L. Rev. 1047, 1059-1060 (1994) (*Historical Origins*). Ecclesiastical courts operating under the prerogatives of the monarchy, such as the Star Chamber and the High Commission, likewise compelled religious dissenters to reveal their religious beliefs under oath, with punishments imposed for those forced confessions of conscience. See, *e.g.*, *Gecas*, 120 F.3d at 1446-1449; John H. Langbein, *The Origins of Adversary Criminal Trial* 277-278 (2003); R. H. Helmholz, *The Privilege and the* Ius Communie: *The Middle Ages to the Seventeeth Century*, *in* The Privilege against Self-Incrimination: Its Origins and Development 42 (R. H. Helmholz et al. eds. 1997) (The Privilege); see 5 W. S. Holdsworth, *A History of English Law* 187 (rev. 2d ed. 1937).

Those repressive practices generated a significant backlash, see *Miranda* v. *Arizona*, 384 U.S. 436, 458-460 (1966), and by the 17th Century, a consensus had emerged that suspects should not be questioned under oath. See Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*,

94 Mich. L. Rev. 2625, 2640 (1996) (*A Peculiar Privilege*). That right not to be compelled to testify under oath formed the early conception of the privilege against self-incrimination in England and colonial America. See *Doe*, 487 U.S. at 212 ("Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him," such as the "inquisitorial method" of "the ecclesiastical courts and the Star Chamber."). Violations of the privilege triggered exclusion of the evidence at trial, so that sworn confessions could not be used to convict or punish. See, *e.g.*, *Historical Origins* 1079 n.142; *A Peculiar Privilege* 2658-2659.

b. Although the Framing-era privilege guaranteed a right not to be compelled to testify under oath, defendants during that period in America and England routinely provided unsworn statements in pretrial interviews that were then introduced at trial. See, *e.g.*, *A Peculiar Privilege* 2654-2655; Eben Moglen, *The Privilege in British North America: The Colonial Period to the Fifth Amendment*, *in* The Privilege 112, 117. Scholars have attributed that practice to the absence of defense counsel in criminal trials. See, *e.g.*, John H. Langbein, *The Criminal Trial before the Lawyers*, 45 U. Chi. L. Rev. 263, 283 (1978). "Without counsel to shoulder the nontestimonial aspects of the defense, the accused's privilege would simply have amounted to the right to forfeit all defense." *Ibid.*

The development of the modern privilege in late 18th-Century England and America arose from the more active role defense counsel played during criminal trials. See *Historical Origins* 1071 ("Defense counsel

made the privilege against self-incrimination possible."). Once defense counsel could speak for a defendant at trial, he no longer needed to speak for himself to avoid conviction. *Id.* at 1069. Magistrates in England and the United States began warning defendants that they had a right to remain silent and that any statement they chose to provide could be "used against [them] on [their] trial." *Regina* v. *Arnold*, (1838) 173 Eng. Rep. 645, 645-646 (K.B.); see *A Peculiar Privilege* 2660-2661. By the end of the 18th Century, it was clear that the privilege against self-incrimination applied to all statements made by a defendant—whether under oath or not—that could be used to impose criminal punishment. See *A Peculiar Privilege* 2662-2663 & n.147.

c. As this history demonstrates, the historical practices that inspired the Framers to adopt the Self-Incrimination Clause involved convicting and punishing individuals based on their compelled testimony. By contrast, nothing in the historical record indicates that the Self-Incrimination Clause was intended to guard against the use of a defendant's compelled statements for the limited purpose of determining whether the case should go forward upon a showing of probable cause after charges were filed, with no subsequent use of the statements at the guilt or penalty stage of the case.

2. The court of appeals believed that history supported its application of the Self-Incrimination Clause to probable-cause hearings, but none of the evidence the court cited warrants extending the incrimination prohibited by the Fifth Amendment beyond the use of a statement to convict or punish a defendant.

a. The court of appeals' historical analysis focused on the meaning of a "criminal case" under the Self-

Incrimination Clause. Pet. App. 4a-20a. Relying on dictionary definitions and the Clause's ratifying history, the court of appeals concluded that "the phrase 'criminal case' includes probable cause hearings." *Id.* at 5a. But the court did not consider what uses of a defendant's statements make him "a witness against himself." U.S. Const. Amend. V. The court accordingly had no occasion to grapple with the historical evidence demonstrating that the Framers were concerned with the use of a defendant's statements to convict and punish him—and not with other potential consequences from an adverse ruling in a pretrial proceeding.

b. The court of appeals further cited "'historical sources [that] show that the right against self-accusation was understood to arise primarily in pretrial or pre-prosecution settings rather than in the context of a person's own criminal trial,'" because "criminal defendants were * * * unable to testify in their own criminal cases" at the Founding. Pet. App. 17a (citation omitted). But the court ignored that coerced confessions obtained in those pretrial interrogations were then used to convict the defendant *at trial*—which formed the primary evil the Self-Incrimination Clause redresses. See *Gecas*, 120 F.3d at 1442-1443; John H. Wigmore, *The Privilege Against Self-Crimination*; *Its History*, 15 Harv. L. Rev. 610, 628 (1902); *Historical Origins* 1055; *A Peculiar Privilege* 2653-2655.

The court of appeals' analysis at bottom confuses proceedings in which a self-incrimination *privilege* can be invoked with proceedings in which a self-incrimination *violation* occurs. Although testimonial statements were compelled in pretrial settings at the time of the Framing, as they can be today, prohibited incrimination does not occur until those statements are used against

a defendant to convict or punish him. See *Chavez*, 538 U.S. at 770-773 (plurality opinion); *Verdugo-Urquidez*, 494 U.S. at 264. The court's historical evidence confirms that the "inability to protect the right at one stage of a proceeding" through a privilege against self-incrimination "may make its invocation useless at a later stage," when a defendant's statements are introduced to prove his guilt. *Michigan* v. *Tucker*, 417 U.S. 433, 440-441 (1974). But the court cited no evidence to suggest that pretrial uses of a defendant's statements in and of themselves violate the Self-Incrimination Clause.

c. The court of appeals also observed that the Framers grouped a defendant's procedural trial rights into the Sixth Amendment, but placed the right against self-incrimination in "the Fifth Amendment with other rights that unambiguously extended to pretrial proceedings as well as the trial." Pet. App. 17a-18a. That drafting choice cannot bear the weight the court placed on it. No legislative history illuminates why the Self-Incrimination Clause was included in the Fifth Amendment. See *Balsys*, 524 U.S. at 674 & n.5. Perhaps the Framers intended to signal that the privilege applies to any "person" whose testimony may subject him to criminal sanction, and not solely to the "accused." Or perhaps the Self-Incrimination Clause fit more naturally into an amendment that lists negative prohibitions ("nor shall be compelled," U.S. Const. Amend. V) instead of positive rights ("shall enjoy the right," U.S. Const. Amend. VI).

In any event, the distinction the court drew between pretrial rights and trial rights cannot fully explain the Fifth and Sixth Amendments. Some Sixth Amendment rights attach and apply before trial. See, *e.g.*, *Rothgery*,

554 U.S. at 198 (right to counsel). And some Fifth Amendment rights have nothing to do with criminal proceedings. See, *e.g.*, U.S. Const. Amend. V (Just Compensation Clause). The placement of the Self-Incrimination Clause in the Fifth Amendment thus provides no reason to overlook the history demonstrating that its impetus was the use of compelled statements to convict and punish.

### D. Extending The Self-Incrimination Clause To Pretrial Proceedings Would Have Adverse Consequences For The Criminal Process

A holding that "the Fifth Amendment precludes use of compelled statements in pretrial proceedings," Pet. App. 19a, would require courts to make complex determinations about the admissibility of a defendant's statements before resolving other preliminary issues in a case. That would change the nature and purpose of pretrial proceedings, which are frequently informal and intended to expeditiously resolve discrete issues unrelated to guilt and punishment. The Self-Incrimination Clause does not mandate that disruption to the criminal process.

1. If the Self-Incrimination Clause extends to uses of a statement in pretrial proceedings, courts will be required to assess the admissibility of a defendant's statements before resolving other preliminary issues in the case, such as whether probable cause exists to bind the defendant over for trial and whether and in what amount bail should be set. In many cases, resolution of the collateral Fifth Amendment question will be far more complicated than the bottom-line determination in the preliminary proceeding itself.

Evaluating whether a defendant's statements were voluntary, for example, requires assessment of the totality of the circumstances, including the length and circumstances of the interrogation and the defendant's individual characteristics. See, *e.g.*, *Schneckloth*, 412 U.S. at 224, 226-227 (observing that no "talismanic definition of 'voluntariness'" exists and courts must engage in "careful scrutiny of all the surrounding circumstances") (citation omitted). If *Miranda* warnings were required to admit statements in pretrial proceedings, that would likewise raise a host of factual questions—for example, "[w]hether the suspect was in 'custody,' whether or not there was 'interrogation,' whether warnings were given or were adequate, whether the defendant's equivocal statement constituted an invocation of rights, [and] whether waiver was knowing and intelligent." *Withrow*, 507 U.S. at 709-710 (O'Connor, J., concurring in part and dissenting in part) (footnotes omitted).[6] And determining whether a statement was compelled under *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), may implicate a variety of subsidiary factual and legal questions concerning whether the defendant believed his employer had threatened him with the loss of his job, whether that belief was objectively reasonable, and whether he voluntarily waived his Fifth Amendment privilege. See, *e.g.*, *United States* v. *Friedrick*, 842 F.2d 382, 396-402 (D.C.

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[6] *Miranda* has not been applied by this Court to bar anything but the use of unwarned statements to prove guilt in the government's case in chief. See, *e.g.*, *Dickerson* v. *United States*, 530 U.S. 428, 442 (2000). Consistent with its prophylactic purpose and limits, *Miranda* should not extend to preliminary proceedings, even if statements resulting from actual coercion cannot be introduced in such proceedings.

Cir. 1988) (addressing parties' disputes on several of those issues).

This case illustrates the point. Respondent alleges that his statements during the internal investigation were compelled because he made them "as a condition of employment." Pet. App. 49a. Under respondent's view of the Self-Incrimination Clause, if he had objected to the introduction of his statements, his preliminary hearing would have skidded to a halt while the parties fought over questions such as whether respondent was told he had to answer questions, whether his job was jeopardized, whether he received *Garrity* warnings, and whether he had already submitted his resignation letter and what effect thus would have on the *Garrity* analysis.

Interpreting the Self-Incrimination Clause to require such determinations even when a defendant's statements are not used to prove guilt or punishment would derail preliminary hearings with collateral suppression litigation and disrupt the procedures that apply in those hearings. Preliminary hearings frequently employ "informal procedure[s]" that are "justified not only by the[ir] lesser consequences * * * but also by the nature of the determination[s]" themselves. *Gerstein*, 420 U.S. at 121. Given the distinct function of pretrial proceedings and the limited issues they resolve, the rules of evidence generally do not apply. See Fed. R. Evid. 1101(d)(3); see also, *e.g.*, 18 U.S.C. 3142(f) (providing that evidentiary rules do not apply to pretrial bail determinations); *Brinegar* v. *United States*, 338 U.S. 160, 172, 174 n.12 (1949) (describing "the inappropriateness of applying the rules of evidence as a criterion to determine probable cause," and approving reliance on particular evidence to prove probable cause even though the

same evidence could not be "admi[tted] in evidence to prove the accused's guilt"). Requiring adjudication of suppression issues would thus fundamentally alter the nature of pretrial proceedings.

Indeed, the factfinder in a preliminary proceeding in the federal system will often lack authority to rule on the admissibility of a defendant's statements. The Federal Magistrates Act, 28 U.S.C. 631 *et seq.*, empowers magistrate judges (with enumerated exceptions) to "hear and determine any pretrial matter" designated by the district court, 28 U.S.C. 636(b)(1)(A), including preliminary examinations and bail determinations. 28 U.S.C. 636(a)(2) and (b)(1)(A); *Gonzalez* v. *United States*, 553 U.S. 242, 245 (2008); see Fed. R. Crim. P. 5.1(a) (providing that probable cause hearings should be conducted by magistrates). But the statute expressly withholds authority to resolve motions "to suppress evidence in a criminal case," instead limiting magistrate judges to "propos[ing] findings and recommendations" on such motions. 28 U.S.C. 636(b)(1)(A)-(C); see *Giordenello* v. *United States*, 357 U.S. 480, 484 (1958) (observing that "the Commissioner"—a magistrate judge's predecessor position—"had no authority to adjudicate the admissibility [of the evidence] at [the defendant's] later trial," as "[t]hat issue was for the trial court"). In recognition that preliminary hearings conducted by magistrate judges are not a proper forum to raise suppression issues, Federal Rule of Criminal Procedure 5.1 provides that a defendant in the preliminary proceeding "may not object to evidence on the ground that it was unlawfully acquired." Fed. R. Crim. P. 5.1(e).

In addition, a requirement that suppression issues be resolved in the course of preliminary proceedings

would delay those proceedings and raise difficult questions about what a defendant must do to preserve an argument that his statements were compelled. Many pretrial proceedings—including, in particular, preliminary hearings to assess probable cause—are intended to be completed soon after charges are filed. See, *e.g.*, Fed. R. Crim. P. 5.1(c) (preliminary hearing generally should occur within 21 days after arrest if the defendant is not detained); Kan. Stat. Ann. § 22-2902(2) (Supp. 2016) (preliminary hearing generally should occur within 14 days). This Court has indicated that defendants should not be required to raise suppression issues at such an early stage in the criminal proceedings. See *Giordenello*, 357 U.S. at 483 (holding that the defendant did not waive his right to file a suppression motion by waiving his probable cause hearing in part because a suppression claim "may involve legal issues of subtlety and complexity which it would be unfair to require a defendant to present so soon after arrest"). And adjudication of any suppression objections that are raised would delay resolution of the ultimate issues in the preliminary proceedings, creating substantial disruption of the pretrial process.

Even suppression hearings themselves could devolve into a series of subsidiary suppression issues on the use of statements that have nothing to do with a defendant's guilt or punishment. For example, a defendant could claim that statements showing that he had abandoned searched property were involuntary, creating a spin-off suppression question. Courts have correctly rejected extending the Self-Incrimination Clause to that context, reasoning that the Clause "preserv[es] the integrity of our criminal trials" and thus "should not be superimposed *ipso facto* to the wholly different considerations"

in adjudicating a suppression motion. *United States* v. *Garcia*, 496 F.2d 670, 675 (5th Cir. 1974), cert. denied, 420 U.S. 960 (1975).

In sum, the court of appeals' interpretation of the Self-Incrimination Clause would unsettle current practice and disrupt the timing and process of adjudication of pretrial matters. Those practical problems weigh against an extension of the Clause in proceedings that do not adjudicate guilt or punishment and are far afield from the Clause's textual focus and animating purpose.

2. A holding that the Fifth Amendment prohibits the use of compelled statements in pretrial proceedings would create the further anomaly that the prosecution's introduction of such statements in a suppression hearing to determine their admissibility would *itself* violate the Constitution. See Pet. App. 19a ("If the Fifth Amendment applies to pretrial proceedings, the evidence would be considered inadmissible in pretrial proceedings as well as at trial."). The Federal Rules of Evidence recognize and address the similar issue that can arise under the evidentiary rules by providing that courts are not "bound by" those rules when resolving "any preliminary question about whether * * * evidence is admissible." Fed. R. Evid. 104(a); see Fed. R. Evid. 1101(d)(1). But the text of the Self-Incrimination Clause offers no similar carve out if the concept of prohibited incrimination sweeps beyond the adjudication of a defendant's guilt and punishment.

Indeed, the plaintiffs in *Stoot* v. *City of Everett*, 582 F.3d 910 (9th Cir. 2009), cert. denied, 559 U.S. 1057 (2010), asserted precisely this theory of a Fifth Amendment violation in a suit for damages under 42 U.S.C. 1983. The Ninth Circuit in *Stoot* held that a Self-Incrimination Clause violation occurs when compelled

statements are used in probable cause hearings and bail determinations, but the court rejected the plaintiffs' argument that they suffered a further Fifth Amendment violation through the use of the statements "at the pretrial hearing to determine the admissibility of those same statements." 582 F.3d at 925 n.14. The Court offered no doctrinal or analytical basis to distinguish among those various uses, however. All of them expose the defendant to some potential adverse consequence within his criminal case, but none of them involves the determination of guilt or punishment. The extension of the Self-Incrimination Clause to pretrial proceedings has no logical end point—creating the risk that the introduction of a statement to determine its admissibility would in and of itself compel the defendant to be a witness against himself in a criminal case.

### E. The Use Of Respondent's Statements At A Probable Cause Hearing Did Not Constitute Incrimination Prohibited By The Self-Incrimination Clause

In this case, respondent's statements were never used against him to determine his guilt or punishment at a criminal trial. Instead, the statements were used only at a probable cause hearing to determine whether respondent should be "bound over to the district judge having jurisdiction to try the case." Kan. Stat. Ann. § 22-2902(3) (Supp. 2016). The use of respondent's statements for that limited purpose did not violate the Self-Incrimination Clause.

1. A preliminary hearing is not intended to adjudicate a defendant's guilt of a criminal offense. Instead, "its function is the more limited one of determining whether probable cause exists to hold the accused for trial." *Barber*, 390 U.S. at 725. Although a defendant who is bound over for trial experiences some restraint

on his liberty, this Court has rejected the argument that any deprivation of a liberty interest triggers the Self-Incrimination Clause's protection. See, *e.g.*, *Allen*, 478 U.S. at 372-373 (civil confinement). And pretrial restraints imposed pending trial cannot be punitive, see *United States* v. *Salerno*, 481 U.S. 739, 746-747 (1987), so no risk exists that introduction of a defendant's statements in such proceedings will result in the imposition of criminal punishment.

In recognition that probable cause determinations are far removed from the ultimate questions of guilt and punishment, "the Court has approved * * * informal modes of proof" in preliminary hearings and held that "adversary safeguards are not essential" to assess probable cause." *Gerstein*, 420 U.S. at 120. The Sixth Amendment right to counsel applies to preliminary hearings like those employed by Kansas to safeguard a defendant's trial rights, see *Coleman* v. *Alabama*, 399 U.S. 1, 9-10 (1970) (opinion of Brennan, J.), but the bottom-line determination in a preliminary hearing to assess probable cause focuses on the different question whether the prosecution can proceed. The "difference in standards and latitude allowed in passing upon the distinct issues of probable cause and guilt," *Brinegar*, 338 U.S. at 174, reflects the "lesser consequences of a probable cause determination," *Gerstein*, 420 U.S. at 121. A defendant faces no risk of prohibited incrimination in that pretrial proceeding, which is provided for his benefit to obtain early dismissal of charges in appropriate cases long before his guilt and punishment will actually be adjudicated.

2. The impact of a preliminary hearing on the subsequent course of a criminal case does not justify extend-

ing the Self-Incrimination Clause to that pretrial proceeding. A finding of probable cause, like a finding that the defendant is competent to stand trial, removes a procedural barrier to further prosecution. But neither finding alters the prosecutor's burden of proving guilt beyond a reasonable doubt in the subsequent trial in which the defendant will enjoy Self-Incrimination Clause protection. The interest in avoiding trial altogether is fundamentally different than the interest in avoiding conviction and punishment at the conclusion of a trial—and it accordingly is not a type of incrimination prohibited by the Self-Incrimination Clause.

**CONCLUSION**

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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