No. 16-1495

In The Supreme Court of the United States

CITY OF HAYS, KANSAS,

Petitioner,

v.

MATTHEW JACK DWIGHT VOGT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE NATIONAL FRATERNAL ORDER OF POLICE, AS AMICUS CURIAE IN SUPPORT OF RESPONDENT MATTHEW JACK DWIGHT VOGT

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QUESTION PRESENTED

Whether the Tenth Circuit Court of Appeals correctly held that the Fifth Amendment applies not only to the prosecution's use of compelled statements at a criminal trial, but also to the prosecution's use of such statements in pretrial proceedings, including probable cause hearings.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The National Fraternal Order of Police (FOP) is the world's largest organization of sworn law enforcement officers, with more than 325,000 members in more than 2,100 lodges. The FOP is the voice of those who dedicate their lives to protecting and serving our communities, representing law enforcement personnel at every level of crime prevention and investigation nationwide.

The FOP's perspective on the issue presented in this case is both unique and significant for law enforcement personnel around the country. Specifically, the Court's disposition on whether the Fifth Amendment is violated when compelled statements are used at a probable cause hearing, but not at a criminal trial, necessarily implicates and resolves officers' rights as enumerated in *Garrity v. New Jersey*, 385 U.S. 493 (1967).

In *Garrity*, this Court held that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits *use in subsequent criminal proceedings* of statements obtained under

[1] In accordance with Rule 37.6, the FOP and undersigned counsel make the following disclosure statements. The submission of this Brief was consented to by all parties hereto. The Office of General Counsel to the National Fraternal Order of Police authored this Brief in its entirety. There are no other entities which made monetary contributions to the preparation or submission of this Brief. In addition, Petitioner and Respondent have consented in writing to the filing of this Brief and have notified the Clerk that they consent to the filing of *amicus* briefs in support of either or neither party.

threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." *Id.* at 500 (emphasis added). Courts around the country have interpreted this differently. Some courts limit "criminal proceedings" to criminal trial. *See, e.g.*, *Renda v. King*, 347 F.3d 550, 552 (3d Cir.2003) (noting "there is no claim that the plaintiff's answers were used against her at trial.").

Other courts, by contrast, have interpreted "criminal proceedings" to mean coerced statements protected by *Garrity* cannot be used in trial preparation, interpreting evidence, or even planning trial strategy. *See, e.g.*, *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973) (requiring government to prove that it did not use immunized testimony "in some significant way short of introducing tainted evidence," and that "[s]uch use could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy");

This split in circuit interpretation on the extent of *Garrity* protection mirrors the circuit split on the scope of Fifth Amendment protection against self-incrimination before this Court today. The Court's decision on this issue will generate a common answer for *Garrity* rights, which the FOP deals with every day.

SUMMARY OF ARGUMENT

In essence, the issue certified by this Court is whether the Fifth Amendment privilege against self-incrimination and the related protections afforded by *Garrity v. New Jersey*, 385 U.S. 493 (1967), work to prohibit use of compelled statements in pretrial proceedings or whether the prohibition vests only upon commencement of a criminal trial.

In response to the question presented, the FOP respectfully submits that an officer's *Garrity* rights vest at the time a statement is compelled under threat of adverse employment action, and any such statement cannot be used in *any* subsequent criminal investigations or proceedings *including* probable cause hearings. To stop short of this position "strips the [Fifth Amendment and *Garrity* rights] of an essential part of [their] force and meaning." *Chavez v. Martinez*, 538 U.S. 760, 793 (2003) (Kennedy, J., concurring in part and dissenting in part). Indeed, as this Court recognized fifty years ago, police officers "are not relegated to a watered-down version of constitutional rights." *Garrity*, 385 U.S. at 500.

ARGUMENT

The Fifth Amendment of the United States Constitution provides that: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. Const., amend. V. On its face, the right against self-incrimination seems clear and

straightforward. In application, however, the permissible use of compelled statements or testimony is far less evident. This is particularly true when dealing with public employees such as police officers.

Police officers in the United States serve in a unique employment environment. Officers serve in the line of duty with each other – often developing close relationships and loyalties with their peers. Police officers also serve in a defined hierarchy, answering to a commanding officer in a "quasi-military" chain of command. *See generally Oladeinde v. City of Birmingham*, 230 F.3d 1275, 1293 (11th Cir. 2000). With this unique employment structure comes difficult questions about how to best protect individual liberties such as the right against self-incrimination. Answering to a commanding officer and friend can feel like more than a mere request from an employer and runs the risk of unduly burdening police officers' Fifth Amendment protection against self-incrimination. *Garrity*, 385 U.S. at 496 (noting that "subtle pressures may be as telling as coarse and vulgar ones."); *see also United States v. Vangates*, 287 F.3d 1315, 1321 (11th Cir. 2002).

To protect against these concerns, this Court recognized that the Fifth Amendment ensures employees are not left to choose between their livelihood and self-incrimination. *Garrity*, 385 U.S. at 497.

I. POLICE OFFICERS DEAL WITH *GARRITY* ISSUES EVERY DAY AND MUST BE AFFORDED ADEQUATE FIFTH AMENDMENT PROTECTION.

Imagine this scenario: a police officer sits down with an Internal Affairs investigator who asks questions about his involvement in detaining a suspect who alleges officers used excessive force to subdue him. The investigator tells the officer that any statements he makes are purely for an administrative investigation and will not be used against him in any future criminal proceedings. The investigator also makes it clear that refusal to answer questions will lead to termination. During the course of this interview, the officer makes incriminating statements about the circumstances surrounding the suspect's arrest. The investigator then refers the statement to a prosecutor who previously had no knowledge of any potentially unlawful conduct prior to receiving the officer's statement. The prosecutor then initiates a criminal investigation and charges the officer with a crime based solely on the officer's own compelled statement.

Once charged, the officer is detained pending a criminal trial. The officer is also suspended from his post and the local media reports that the officer may have violated the suspect's constitutional rights. After months of investigating leading up to trial, however, the prosecutor is unable to substantiate any criminal case and the charges are dismissed.

The Petitioner argues that the above situation would not constitute a violation of the Fifth Amendment or *Garrity*. *See* Pet'r's Br. at 5-6. This is so even though the officer's statement was compelled under threat of termination and procured through misrepresentations that the statement wouldn't be used in any subsequent criminal proceedings. According to Petitioner's logic, the fact that the criminal investigation and criminal proceedings were launched solely on the basis of the officer's own compelled statements would not constitute a violation of the Fifth Amendment. The fact that the officer would be bound over – suffering lost freedom – while awaiting criminal trial would not constitute a violation of the Fifth Amendment. Even worse, the officer would also face many collateral consequences beyond criminal punishment including reputational harm and lost employment despite no ultimate finding of guilt.

Now reimagine these same foundational facts. The officer is questioned by an investigator who says the inquiry is purely for an administrative investigation and any subsequent statement will not be used against him in any future criminal proceedings. The investigator also makes it clear that refusal to answer questions and provide a statement will lead to termination. This time, however, the officer expressly invokes his Fifth Amendment right against self-incrimination and remains silent. Without a compelled statement from the officer, which the above hypothetical had, no criminal proceedings are initiated and no charges are ever filed. Stated differently, because there was no statement

upon which to base an investigation as was the case in the earlier hypothetical, no criminal proceeding could be initiated.[2]

The Constitution and this Court's prior rulings simply do not mandate these divergent results, and that is what is at stake if Petitioner's view point is adopted.

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[2] Depending on the circumstances surrounding the officer's refusal to provide a statement, the department may not even be able to terminate the officer. *See Uniformed Sanitation Men Ass'n v. Commr. of Sanitation*, 392 U.S. 280, 283–84 (1968) (prohibiting states from firing employees who refused to waive constitutional privilege and answer questions. The Court noted that "[p]etitioners were not discharged merely for refusal to account for their conduct as employees of the city. They were dismissed for invoking and refusing to waive their constitutional right against self-incrimination. . . . They were entitled to remain silent because it was clear that New York was seeking, not merely an accounting of their use or abuse of their public trust, but testimony from their own lips which, despite the constitutional prohibition, could be used to prosecute them criminally."); *Gardner v. Broderick*, 392 U.S. 273, 278 (1968) ("[T]he mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment"). This inquiry is beyond the scope of the issues before the Court today. The key point is that the officer is in a substantially different position when remaining silent than he is when giving a compelled statement.

A. THE PRESENT CASE IS ILLUSTRATIVE OF THE DAILY CHALLENGES FACED BY POLICE OFFICERS IN ASSERTING THEIR CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION.

The case before this Court today provides a representative and real-world example of both the problem outlined above and the challenges officers throughout the country face every day. As *Garrity* commentators have noted, "[v]irtually every incident where a public employee uses any force or has physical contact with anyone gives rise to a prospective criminal charge of assault and battery, a civil rights charge of excessive force, and an internal or administrative charge of misconduct under [an] agency's internal rules." J. Michael McGuinness, *Fifth Amendment Protection for Public Employees:* Garrity *and Limited Constitutional Protections from Use of Employer Coerced Statements in Internal Investigations and Practical Considerations*, 24 Touro L. Rev. 695, 730 (2013).

Beyond that, officers nationwide deal with *Garrity*-related questions in a variety of their daily job functions. Any time an officer is involved in an altercation where a firearm is discharged, a weapon used, a suspect complains of unlawful treatment, an inter-departmental complaint is filed, or an officer is required to supply a report by order of a commanding officer, the contours of *Garrity* are implicated.

B. THE TENTH CIRCUIT CORRECTLY HELD THAT THE FIFTH AMENDMENT IS VIOLATED WHEN INCRIMINATING STATEMENTS ARE COMPELLED AND USED IN A PROBABLE CAUSE HEARING.

The Fifth Amendment of the United States Constitution provides in pertinent part: "No person . . . shall be compelled *in any criminal case* to be a witness against himself. . . ." U.S. Const., amend. V (emphasis added).[3]

The Tenth Circuit's decision correctly interpreted this constitutional guarantee, acknowledging that "[t]he Fifth Amendment is violated when criminal defendants are compelled to incriminate themselves and the incriminating statement is used in a probable cause hearing." *See Vogt v. City of Hays*, 844 F.3d 1235, 1237 (10th Cir. 2017). In so holding, the court below correctly determined that Fifth Amendment protection vests well before a formal criminal trial. *Id*. at 1241–42.

By extension, the Tenth Circuit's rationale also applies to *Garrity* statements. *Garrity* is designed to extend the Fifth Amendment privilege against self-incrimination to police officers – and all employees – in the employment context. *Garrity*, 385 U.S. at 500. If the Fifth Amendment is violated by virtue of a compelled

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[3] The Fifth Amendment's Self-Incrimination Clause is applicable to the States through the Fourteenth Amendment. *See Malloy v. Hogan*, 378 U.S. 1, 6 (1964); U.S. Const., amend XIV.

statement, the fact that the compelled statement is a *Garrity* statement does not change the permissible use of the testimony. Indeed, a *Garrity* statement is, by definition, compelled testimony. *Id*. at 496.

II. THE PROPER SCOPE OF *GARRITY* AND FIFTH AMENDMENT PROTECTION EXTENDS TO PRETRIAL PROCEEDINGS, NOT JUST A CRIMINAL TRIAL.

The FOP respectfully submits that *Garrity* rights vest at the time a statement is compelled under threat of adverse employment action. Once such a statement is elicited, it shall not be used in *any* subsequent criminal investigation or proceeding *including* probable cause hearings. This position is consistent with the text and scope of the Fifth Amendment privilege against self-incrimination.

A. THERE IS SUBSTANTIAL PRECEDENT SUPPORTING PRETRIAL PROTECTION UNDER *GARRITY*.

The seminal case on the scope of Fifth Amendment protection when testimony is compelled and used in subsequent proceedings is *Kastigar v. United States*, 406 U.S. 441 (1972). In *Kastigar*, the petitioners were subpoenaed to appear before a United States grand jury. *Id*. at 442. The government, anticipating that the petitioners would assert their Fifth Amendment privilege, obtained an order from a California Federal District Court directing the petitioners to provide

testimony and evidence before a grand jury under grant of immunity. *Id*. The petitioners appeared before the grand jury but refused to answer questions or produce evidence, asserting their privilege against self-incrimination. *Id*. The district court found the petitioners in contempt and confined them until they answered the grand jury's questions or the term of the grand jury expired. *Id*.

The issue ultimately ended up before this Court, which was tasked with deciding "whether testimony may be compelled by granting immunity from the use of compelled testimony and evidence derived therefrom ('use and derivative use' immunity), or whether it is necessary to grant immunity from prosecution for offenses to which compelled testimony relates ('transactional' immunity)." *Id*. at 443.

This Court held that compelled testimony – and any fruits derived from such testimony – may not be used against an individual in a criminal case. *Id.* at 453. In so doing, the Court acknowledged that Fifth Amendment protection is akin to use and derivative use immunity. *Id*. (noting "[i]mmunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords [sufficient Fifth Amendment] protection."). The practical implication of this is that a person in question can be prosecuted for the offense under investigation, but the prosecution may not rely on the compelled testimony or any evidence derived from that compelled testimony to achieve an adjudication of guilt. Instead, the prosecution has an "affirmative duty to prove that the

evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Id*. at 460.

Following this Court's lead in *Kastigar*, many other courts around the country similarly extended protection to pretrial proceedings when individuals assert their Fifth Amendment right against self-incrimination. For example, in *United States v. Vangates*, the Eleventh Circuit was tasked with deciding "whether certain statements made by a correctional officer are protected under the Fifth Amendment to the Constitution and *Garrity*. . . ." 287 F.3d 1315, 1316 (11th Cir. 2002).

In *Vangates*, a correctional officer was convicted of obstruction of justice and a federal criminal civil rights violation. *Id*. at 1316–17. Vangates argued that her convictions should be reversed because the trial court erroneously concluded her testimony from a previous civil trial was admissible in the criminal case. *Id*. at 1319. During the civil case, the victim in the underlying dispute had filed an action under 42 U.S.C. § 1983 seeking damages for an assault she allegedly sustained when police arrested her. *Id*. During the civil trial, the plaintiff introduced evidence from the Internal Affairs investigative file, which included transcripts and tape recordings of interviews with police officers that were expressly protected by *Garrity* via a grant of use and derivative use immunity. *Id*. at 1318. The police officers did not object to the evidence when it was introduced during the civil trial. *Id*. at 1320.

While the civil suit was pending, plaintiff's counsel filed a civil rights complaint with the Federal Bureau of Investigation (FBI), which opened up an investigation on the arresting officers. *Vangates*, 287 F.3d at 1318. These actions culminated in an indictment from a grand jury charging the officers with two felonies. *Id*. A criminal action commenced and prior to the start of the criminal trial, the officers submitted motions in limine to exclude the Internal Affairs file containing their *Garrity* statements. *Id*. at 1319. The district court judge excluded the Internal Affairs investigatory file and all references in the testimony made to that file. *Id.* However, the judge permitted all other portions of the civil trial transcript not referencing the Internal Affairs investigation to be used in the criminal trial. *Id*. This included some incriminating testimony given by Vangates. *Id*. Vangates was subsequently convicted. *Vangates*, 287 F.3d at 1319. She appealed, contending that the district court erred in concluding that her civil trial testimony was not protected under *Garrity*. *Id*.

The Eleventh Circuit ultimately agreed with the district court's decision to exclude the Internal Affairs investigatory file but permit all portions of the civil trial transcript not referencing that file. *Id*. at 1321. In so deciding, the Eleventh Circuit explained that Fifth Amendment and *Garrity* protection extends "*to any 'proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings*.'" *Id*., citing *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984) (emphasis added). Further, the Court

noted that while Vangates's testimony related to the Internal Affairs investigation was covered by *Garrity* under an express grant of immunity, that immunity did not apply to her civil trial testimony that did not mention the Internal Affairs investigation. *Id*. at 1321. The Eleventh Circuit clarified, however, that "*[e]ven absent an explicit grant of immunity. . . . Vangates's civil trial testimony still would be protected if she had been compelled to give it.*" *Id*. (emphasis added).

Similarly, the D.C. Circuit considered the scope of Fifth Amendment privilege in *U.S. v. North (North I)*, 910 F.2d 843 (D.C. Cir. 1990), *opinion withdrawn and superseded in part on reh'g*, *U.S. v. North (North II)*, 920 F.2d 940 (D.C. Cir. 1990). North was a former member of the National Security Council and was called to testify before a congressional committee about illicit activity taking place during the Iran-Contra affair. *Id*. at 851. North asserted his Fifth Amendment right not to testify, but the government compelled his testimony with a grant of immunity under 18 U.S.C. § 6002. *Id*. North's six-day testimony was aired on national television and radio. *Id*. North was eventually convicted of three counts relating to the Iran-Contra scandal by a specially appointed Independent Counsel. *Id.* He appealed, arguing that his Fifth Amendment right was violated by the lower court's failure to require the Independent Counsel to establish independent sources for the testimony of witnesses before the grand jury and at trial and to demonstrate that the witnesses did not use his immunized testimony in any way. *Id.* at 853. North also

argued that his Fifth Amendment right was violated by the lower court's failure to determine whether the Independent Counsel made non-evidentiary use of his immunized testimony. *Id*.

The *North I* court concluded that any witness testimony based on North's immunized testimony was improper even if North's testimony was used merely "to refresh their memories, or otherwise to focus their thoughts, organize their testimony, or alter their prior or contemporaneous statements." *Id*. at 856. Upon rehearing, en banc, the *North II* court elaborated more poignantly:

> It simply does not follow that insulating prosecutors from exposure automatically proves that immunized testimony was not used against the defendant. *Kastigar* is instead violated whenever the prosecution puts on a witness whose testimony is shaped, directly or indirectly, by compelled testimony, regardless of how or by whom he was exposed to that compelled testimony.

United States v. North (North II), 920 F.2d 940, 942 (1990) (en banc).

Many other courts and resources have followed *Kastigar*, *Vangates*, *North I*, and *North II*'s reasoning that compelled statements must not be used even in pretrial proceedings:

- *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973) (holding that the government impermissibly used the

defendant's compelled testimony and noting impermissible investigatory uses of compelled testimony include: (1) focusing the investigation; (2) deciding whether to initiate prosecution; (3) refusing to plea bargain; and (4) planning trial strategy. The Eighth Circuit reasoned that "although [the prosecutor] asserts that he did not use [the immunized] testimony in any form, we cannot escape the conclusion that the testimony could not be wholly obliterated from the prosecutor's mind in his preparation and trial of this case." *Id*. at 312. The *McDaniel* court further noted that " . . . *if the immunity protection is to be coextensive with the Fifth Amendment privilege, as it must to be constitutionally sufficient, then it must forbid all prosecutorial use of the testimony, not merely that which results in the presentation of evidence before the jury*." *Id*. at 311 (emphasis added));

- *U.S. v. Pantone*, 634 F.2d 716, 722 (3d Cir. 1980) (suggesting that use of immunized testimony, even as a morale booster to federal prosecutors, may be impermissible: "[i]t may be posited that mere access to the self-incriminating grand jury testimony could provide the United States Attorney a degree of psychological confidence he might otherwise lack, and therefore might imperceptibly affect the later trial");

- *Wiley v. Mayor & City Council of Baltimore*, 48 F.3d 773, 778 (4th Cir. 1995) (holding that since the protected statements weren't used, no *Garrity* violation occurred. The Court clarified, however, that *Garrity* rights are "self-executing" and that "*[o]f course, if the state had attempted to make direct or derivative use of the officers' statements against them, Garrity's self-executing immunity would have immediately attached*.") (emphasis added);

- *State of Ohio v. Jackson*, 927 N.E.2d 574, 578–82 (Ohio 2010) (holding that the State made two constitutionally impermissible uses of the defendant's *Garrity* statement. First, an investigator impermissibly testified before a grand jury, as that investigator was present when the defendant made a *Garrity* statement. This was an impermissible use even though the investigator never mentioned contents of the *Garrity* statement before the grand jury. Second, a prosecutor impermissibly reviewed the defendant's protected statement during trial preparation.);

- *Vogt v. City of Hays*, 844 F.3d 1235, 1239-46 (10th Cir. 2017) (holding that the phrase "criminal case" as stated in the Fifth Amendment includes probable cause hearings. The Tenth Circuit supported its decision by analyzing the historical antecedents of the Fifth

Amendment and other cases around the country holding the Fifth Amendment is not exclusively a trial right.);

- The United States Attorneys' Manual, Section 9-23.400 (recognizing that the government's ability to use compelled testimony is tied to *Kastigar*'s sweeping proscription on using fruits of the testimony against witnesses. Given *Kastigar*'s restrictions, the manual instructs government attorneys that the Attorney General must personally authorize prosecution of a person who has testified under immunity for an offense stemming from or closely related to his compelled testimony.).

The above cases clearly recognize a pretrial protection for compelled testimony by virtue of the Fifth Amendment and *Garrity*. In each case, the conduct giving rise to a constitutional violation occurred prior to the commencement of a criminal trial. These cases therefore support the broader proposition that pretrial conduct involving protected *Garrity* statements frequently infringes constitutional rights. In order to effectively provide protection against self-incrimination, the *Garrity* doctrine must be recognized from the outset of a criminal investigation or proceeding.

B. THE PRINCIPLES EXPOUNDED IN *KASTIGAR* SERVE AS A FOUNDATION TO HOLD THAT THE RIGHT AGAINST SELF INCRIMINATION, AS ENUMERATED IN THE FIFTH AMENDMENT AND *GARRITY*, ATTACHES TO PRETRIAL PROCEEDINGS.

Kastigar clarifies two vital points when considering the scope of Fifth Amendment and *Garrity* protection. First, the *Kastigar* Court decided that use and derivative use immunity provided protection commensurate with the right against self-incrimination guaranteed by the Fifth Amendment. *Kastigar*, 406 U.S. at 453. This decision, the Court noted, left parties in the same position they would have been in had they simply asserted the Fifth Amendment privilege without grant of immunity. *Id*. at 458–59, 462. Accordingly, *Kastigar* made clear that express immunity is not required to invoke Fifth Amendment protection. *Id*. But whether the individual has immunity or remains silent, they must be left in the same position constitutionally. *Id*.

Second, *Kastigar* stands for the broader proposition that there is no moratorium on the constitutional right against self-incrimination until some later action. 406 U.S. at 453-54. Many courts following this line of reasoning found impermissible uses of compelled testimony that occurred prior to the commencement of a criminal trial. *See, e.g.*, Section (II)(A), *supra*, at 10–18. Surely then, if a constitutional violation occurs as a result of pretrial conduct, no reason exists to consider that same conduct any less a violation if used only in

pretrial proceedings. Justice Kennedy puts it best: "A constitutional right is traduced the moment torture or its close equivalents are brought to bear. *Constitutional protection for a tortured suspect is not held in abeyance until some later criminal proceeding takes place*." *Chavez*, 538 U.S. 789–90 (Kennedy, J., concurring in part and dissenting in part) (emphasis added).

This position makes sense because the individual against whom a compelled statement is used has presumably suffered actual punishment and harm between the time pretrial criminal proceedings commence and the criminal trial itself. For example, that individual would potentially be bound over for trial, consequently losing the freedom they had prior to their compelled testimony being used against them to commence a criminal prosecution. This individual is also now subjected to the possibility of a criminal conviction, which carries additional criminal punishments. They would also suffer ancillary social consequences. For example, they would likely lose their job or be suspended without pay. They would suffer the social stigma of being labeled a criminal, particularly if the incident is publicized. *See, e.g.*, J. Michael McGuinness, *Fifth Amendment Protection for Public Employees:* Garrity *and Limited Constitutional Protections from Use of Employer Coerced Statements in Internal Investigations and Practical Considerations*, 24 Touro L. Rev. 695, 730 (2013). (noting that "when a public employee becomes the subject of a criminal investigation the whole community will often know of the allegations quickly, courtesy of the media") (internal

citations omitted). Their family members would be forced to consider whether their parent, child, sibling, or significant other is a criminal.

Given these potential harms, why then would an individual have no constitutional protection until some vestige of the compelled statement is used at trial? This question is particularly difficult to answer when noting that many courts hold even knowledge of an incriminating compelled statement is a constitutional violation once a criminal trial commences. *See, e.g.*, *McDaniel*, 482 F.2d 305, 312 (reasoning that "although [the prosecutor] asserts that he did not use [the immunized] testimony in any form, we cannot escape the conclusion that the testimony could not be wholly obliterated from the prosecutor's mind in his preparation and trial of this case"). Petitioner's contrary argument that a criminal trial must commence for constitutional rights to be infringed injects a rigid distinction of when Fifth Amendment protection truly protects that simply cannot be reconciled with the Fifth Amendment's text and the *Garrity* Court's opinion. As Justice Kennedy has stated, to hold "*that the Self-Incrimination Clause is not violated until the government seeks to use a statement in some later criminal proceeding [would] strip[ ] the Clause of an essential part of its force and meaning.*" *Chavez*, 538 U.S. at 793 (Kennedy, J., concurring in part and dissenting in part) (emphasis added).

These are the precise concerns the FOP seeks to guard against. An officer's *Garrity* statement, compelled under threat of adverse employment action, must be protected from *any* subsequent criminal

investigations or proceedings. That is because the constitutional right was violated the moment his statements were compelled under threat of adverse employment action and provided to criminal investigators, not when a criminal trial commences.

Notably, the FOP does not seek broader protection than that already provided under *Kastigar*. *Kastigar* gives prosecutors permission to use a compelled statement in exchange for use and derivative use immunity. *Kastigar*, 406 U.S. at 458–59, 462. *Kastigar* simultaneously imposes an affirmative "heavy burden" on prosecutors to show – during any subsequent criminal proceedings – that they had independent evidence to convict, which is sufficient to protect an officer's Fifth Amendment rights as enumerated in *Garrity*. *Id*. at 460.

C. APPLYING THE FOP'S POSITION TO THE PRESENT CASE.

Officer Vogt worked with Hays police department. While working there he sought employment with Haysville police department in late 2013. *See* Pl.'s Compl., at ¶ 11. During the Haysville hiring process, Officer Vogt disclosed that he had kept a knife for his personal use after coming into possession of it in the course of his employment as a Hays police officer. *Id*. at ¶ 12. Notwithstanding this disclosure, Haysville offered Officer Vogt employment on the condition he report the knife to Hays police department. *Id*. at ¶ 13. Officer Vogt complied with Haysville's condition to

report the knife to his superiors at Hays police department. *Id*. at ¶ 15.

Upon making the disclosure, Officer Vogt was ordered by Chief Scheibler, as a condition of his employment as a Hays police officer, to file a written report about his possession of the knife. *Id*. at ¶ 16. Lieutenant Wright, who is responsible for internal investigations conducted by Hays police department, further compelled Officer Vogt to give a statement about the knife as a condition of his employment with Hays. *Id*. at ¶ 19. Lieutenant Wright also assured Officer Vogt that he was seeking only policy violations in an administrative review and was not conducting a criminal investigation. *See* Pl.'s Compl., at ¶¶ 19–20.

Using these compelled statements, the compelled report, and fruits from these sources, Chief Scheibler requested the Kansas Bureau of Investigation initiate a criminal investigation into Officer Vogt's conduct. *Id*. at ¶ 22. These actions culminated in a probable cause hearing to determine if Officer Vogt could be formally charged with two felonies and bound over for trial. *Id*. at ¶ 27.

Applying the FOP's position to facts of this case, Officer Vogt's *Garrity* rights vested and were implicated at the time Chief Scheibler and Lieutenant Wright ordered him – as a condition of his employment – to provide statements regarding the knife Officer

Vogt came into possession of during his employment with Hays.[4]

This case is a particularly salient illustration of why broad *Garrity* rights are needed. Here, Officer Vogt's commanding officer and the Internal Affairs investigator compelled Officer Vogt to incriminate himself under the guise of an administrative review. Pl.'s Compl., at ¶¶ 16, 19–20. Officer Vogt then provided evidence which provided the sole basis for the Kansas Bureau of Investigation to initiate pretrial criminal proceedings.

Fortunately for Officer Vogt, the district court found there was not sufficient probable cause to

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[4] This Court need not decide whether Officer Vogt's statements were actually compelled to determine if a *Garrity* violation occurred. When deciding a motion to dismiss, the District Court was required to view all well-plead facts, and reasonable inferences therefrom, as true. *See Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1105 (10th Cir.2017) (stating "[i]n ruling on a motion to dismiss for failure to state a claim, '[a]ll well-pleaded facts . . . must be taken as true,' and the court must liberally construe the pleadings and make all reasonable inferences in favor of the non-moving party"); *see also Vogt v. City of Hays*, 844 F.3d 1235, 1246 n.7 (10th Cir. 2017) (noting that "Mr. Vogt's complaint states that the 'compelled statements and fruits thereof were used against him in a criminal case. . . .' At this stage, we can reasonably infer that these statements were used to support probable cause"); Pet'r's Br., at 26 ("[g]iven the procedural posture of this case – a motion to dismiss for failure to state a claim – we must assume that Vogt's statements were 'compelled' within the meaning of the Fifth Amendment"). Accordingly, Officer Vogt's allegations in the Complaint that his statement was compelled under threat of adverse employment action, Pl.'s Compl., at ¶¶ 16, 19–22, must be taken as true and are sufficient to demonstrate a *Garrity* violation at the motion to dismiss stage.

formally charge him and bind him over for trial. What if, however, the district court had found probable cause based on Officer Vogt's compelled statement? If that had occurred, Officer Vogt would have been detained while awaiting a criminal prosecution. He would have also suffered collateral consequences such as lost employment and negative social stigma from the pending criminal charges. These additional harms, while ancillary, are very real consequences that should not be overlooked.

If this Court holds that Fifth Amendment rights do not vest until a compelled statement is used during criminal trial, then Officer Vogt – and every police officer facing similar circumstances – will have absolutely no recourse while waiting to defend their name. Significantly, this result would hold true even if no outside evidence materialized to convict him and charges were subsequently dropped before a criminal trial commenced.

As Justice Kennedy noted, "[t]his is no small matter." *Chavez*, 538 U.S. at 793 (Kennedy, J., concurring in part and dissenting in part). Law enforcement personnel around the country face situations every day that implicate officers' *Garrity* rights. What should law enforcement personnel do when confronted with reporting obligations if there is no guarantee that statements they provide will be protected during any subsequent criminal proceeding short of a criminal trial? This puts officers in an impossible situation where they must speculate about the extent of their constitutional rights when deciding to answer any

question or fill out any report put to them by an administrative superior or commanding officer. This could turn even the most basic officer-reporting functions into complex questions of constitutional law.

Some clarity is necessary here. The FOP does not contend that Hays and the government would be precluded from disciplining or prosecuting Officer Vogt if they believe he has acted unlawfully. Hays may reprimand Officer Vogt in an administrative manner.[5] The prosecutor may prosecute Officer Vogt provided he can produce evidence to support a criminal action that is wholly separate from the information Officer Vogt reported under compulsion. The prosecutor could, for example, investigate leads based upon Officer Vogt's initial, voluntary statement and pursue criminal charges. But here, the criminal investigation and proceedings were initiated solely using Officer Vogt's compelled statement and fruits derived from that statement. Once the investigation is launched using Officer Vogt's compelled statement, a constitutional violation has occurred. That is because the compelled statement has now poisoned the mind of the

[5] In this unique factual pattern, nothing would preclude Hays police department from calling the prosecutor and relaying Officer Vogt's initial, *voluntary*, statement about coming into possession of a knife during the course of his employment as a police officer. Officer Vogt's initial statement is not constitutionally protected because he initiated contact with his superiors and made disclosures voluntarily. Hays could not, however, relay to the prosecutor any information that was provided solely in Officer Vogt's compelled statement protected under *Garrity* without implicating Fifth Amendment rights.

prosecutor and may imperceptibly impact the course of any subsequent criminal investigation or proceeding. *See, e.g.*, *Pantone*, 634 F.2d at 722 (suggesting that use of immunized testimony, even as a morale booster to federal prosecutors, may be impermissible: "[i]t may be posited that mere access to the self-incriminating grand jury testimony could provide the United States Attorney a degree of psychological confidence he might otherwise lack, and therefore might imperceptibly affect the later trial"); *McDaniel*, 482 F.2d at 311 (holding that the government impermissibly used the defendant's compelled testimony and noting impermissible investigatory uses of compelled testimony include: (1) focusing the investigation; (2) deciding whether to initiate prosecution; (3) refusing to plea bargain; and (4) planning trial strategy).

For the Fifth Amendment and *Garrity* to provide true protection, officers must be given assurances that their *Garrity* statements cannot and will not be used to incriminate them in *any* manner. Indeed, as this Court already noted in *Kastigar*, a primary goal of Fifth Amendment application is to put an individual under compulsion at parity, rights-wise, with an individual in the same situation who simply remains silent. *Kastigar*, 406 U.S. at 458–59, 462. *Kastigar* does this by immunizing the compelled testimony – and all fruits derived therefrom – and by imposing on the government "the heavy burden of proving that all of the evidence it proposes to use w*as derived from legitimate independent sources*." *Id*. at 461–62 (emphasis added). That goal is not achieved if protection against

self-incrimination for compelled statements turns on whether the compelled statement is ultimately introduced in some manner at trial.

CONCLUSION

The FOP represents a broad segment of this Nation's police personnel. These individuals serve our communities and put their lives on the line every day to ensure our protection. With this great responsibility comes a heavy burden. Our officers are often put in challenging situations, not all of which have perfect outcomes. In those instances where further explanation or reporting is required by law enforcement personnel, there must be sufficient assurances that officers' constitutional rights under the Fifth Amendment and *Garrity* are carefully preserved.

Accordingly, and for the foregoing reasons, the FOP respectfully requests this Court hold that a statement compelled in contravention of the Fifth Amendment and *Garrity* shall not be used in *any* subsequent criminal investigation or proceeding, *including* probable cause hearings. Such a holding would be consistent with the principle this Court has already articulated:

that police officers "are not relegated to a watered-down version of constitutional rights." *Garrity*, at 500.

Respectfully submitted,

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