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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Our position is straightforward. It is based in the constitutional text. And it has remained consistent throughout these proceedings. See Pet. Cert. Reply Br. 4 ("Our argument does not turn on when a 'criminal case' begins."). A person cannot be a "witness against" a criminal defendant until the stage where guilt and punishment are determined—that is, *at trial*. That is why this Court has described the Self-Incrimination Clause and the Confrontation Clause as "trial rights."[1] That is why defendants may not attack indictments by claiming that the grand jury violated either Clause and why the Confrontation Clause does not apply to constitutionally mandated bail hearings. Pet. Br. 19-22. And that is why there is no warrant for holding that the Self-Incrimination Clause is violated—and civil liability triggered—by use of allegedly compelled statements during pretrial hearings that are not constitutionally required and that are expressly designed to substitute for the very grand jury proceedings where the Fifth Amendment would pose no such bar.

Vogt's position, in contrast, is a moving target. According to Vogt, the Self-Incrimination Clause covers uses "at any point in the criminal case." Resp. Br. 10, 32. Except (maybe) not uses before a grand jury. *Id.* at 45. Or (probably) not during post-charge bail hearings. *Id.* at 29, 48 n.12. And (perhaps) not during proceedings held to determine the defendant's competency to stand trial. *Id.* at 29, 38 n.8. And definitely not during

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[1] *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) ("The privilege against self-incrimination * * * is a fundamental trial right of criminal defendants."); *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 52 (1987) (plurality opinion) ("The opinions of this Court show that the right to confrontation is a *trial* right[.]").

suppression hearings designed "to filter out [the] compelled statements themselves," *id.* at 55 n.14, but (maybe) during hearings held to determine the admissibility of other evidence, see *Best* v. *City of Portland*, 554 F.3d 698, 702-703 (7th Cir. 2009) (holding that plaintiff had stated claim based on use of compelled statements during a suppression hearing).

These hedges, caveats, and qualifications are necessary to prevent Vogt's proposed resolution of this case from too flagrantly violating this Court's precedent or practical realities. But they illustrate a deeper problem. To the extent Vogt proposes a clear rule that he attempts to ground in the constitutional text, that rule sweeps far beyond this case and creates consequences he is unwilling to accept. And when Vogt tries to limit the damage, his "rule" becomes increasingly ad hoc, jerry-rigged, and removed from the constitutional text and purpose.

A. Vogt proposes no workable test for determining which pretrial uses violate the Self-Incrimination Clause

1. Vogt's primary argument involves a reading of the constitutional text that cannot be squared with this Court's precedent or his own concessions about which pretrial uses the Fifth Amendment does and does not restrict. As Vogt points out, "[t]he Self-Incrimination Clause prohibits the government from 'compel[ing]' a person 'to be a witness against himself' 'in any criminal case.'" Resp. Br. 1. According to Vogt, a "criminal case" exists once formal proceedings have been initiated, *id.* at 16-18, and the sole function of the words "witness against himself" is to "describe[] the

type of evidence covered by the Clause," *id.* at 9, regardless of "how or when the prosecution later uses that statement," *id.* at 20.

As the Federal Government has already explained (U.S. Br. 18-19), that argument is inconsistent with *Estelle* v. *Smith*, 451 U.S. 454 (1981), which involved the constitutional restrictions on use of a defendant's statements from a court-ordered competency examination. The statements were compelled and testimonial, *id.* at 463-464, 468, and they were obtained and used after a criminal case had been commenced, *id.* at 456-457 (noting that the examination took place after the defendant was indicted). Yet the Court was clear that although use of the defendant's statements in one type of proceeding (a sentencing hearing to determine his future dangerousness) had violated the Self-Incrimination Clause, *id.* at 466, "no Fifth Amendment issue would have arisen" had the statements been used during a hearing held to "ensur[e] that [the defendant] understood the charges against him and was capable of assisting in his defense," *id.* at 465; see *id.* at 468. *Estelle* thus demonstrates that, contrary to Vogt's suggestions, the *exact same statements* may or may not trigger Self-Incrimination Clause concerns depending on "how or when the prosecution later uses" them, Resp. Br. 20. Cf. *Crawford* v. *Washington*, 541 U.S. 36, 60 n.9 (2004) (reaffirming that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted").

In fact, Vogt himself relies on a context- and purpose-based approach when attempting to avoid the untenable consequences of his own proposed rule. For example, Vogt argues that there is no constitutional

problem with using a compelled statement for purposes of determining the statement's admissibility at trial *because* "the point of a suppression hearing is to determine whether the statement is compelled and eligible for Fifth Amendment protection." Resp. Br. 55 n.14. Vogt makes the same move when discussing bail hearings and competency proceedings. *Id.* at 48 n.12 (referring to the "purpose" served by bail hearings); *id.* at 29 (discussing bail hearings and competency proceedings). We agree with Vogt that the context and purpose for which an allegedly compelled statement is being used matters for Fifth Amendment purposes. But, at that point, even Vogt has abandoned the idea that the "witness against himself" determination can be based *solely* "on the nature of the evidence given and the circumstances surrounding that person's statement at the time it is made." *Id.* at 20.

2. Although the precise formulations vary, Vogt suggests three more reasons why use of his allegedly compelled statements during the probable cause hearing violated the Fifth Amendment. The first rests on a mischaracterization of the nature of that hearing. The second and third have no basis in the constitutional text and are endlessly manipulable.

a. At times, Vogt suggests that the Self-Incrimination Clause was violated because the purpose of the probable cause hearing was to determine his guilt or innocence. See, *e.g.*, Resp. Br. 9 ("to demonstrate his criminal guilt"); *id.* at 28 ("showing his guilt of the charged crime"). That simply isn't so. Under Kansas law, "[a] preliminary hearing *is not* a trial of a defendant's guilt or innocence but rather an inquiry as to *whether* the defendant should be held for trial." *State* v. *Butler*, 897 P.2d 1007, 1020 (Kan. 1995) (emphases added); accord Kan. Stat. Ann. § 22-2902(3) (2016)

(framing issue as whether "there is probable cause to believe that a felony has been committed by the defendant"). The probable cause hearing thus "fulfills the function of a grand jury proceeding," *Butler*, 897 P.2d at 1007, for which it is an express statutory substitute, Kan. Stat. Ann. § 22-2902(1) (2016) (providing "a right to a preliminary examination before a magistrate, unless such charge has been issued as a result of an indictment by a grand jury").

b. Vogt's next argument is framed in the negative. Unlike certain other pretrial proceedings, Vogt suggests, probable cause hearings implicate the Fifth Amendment because they are not "so divorced from the ultimate determination of guilt and punishment as to warrant different treatment" than uses at trial. Resp. Br. 29.

There are several fatal problems with this argument. Vogt never explains how a "so divorced" test can be squared with his proposed interpretation of "criminal case" and "witness against." What is more, Vogt's own explanations only underscore the severe line-drawing problems that would be created by such a standard. For example, Vogt all but concedes that the Fifth Amendment does not apply to use of the defendant's statements at constitutionally mandated bail hearings. Resp. Br. 29, 48 n.12. But why not? The ultimate legal question is the same as at Kansas's probable cause hearing: whether there is "probable cause to believe the suspect has committed a crime." *Gerstein* v. *Pugh*, 420 U.S. 103, 120 (1975) (bail hearings); see Kan. Stat. Ann. § 22-2902(3) (2016) (probable cause hearing). True, the hearings may be governed by somewhat different procedural rules, Resp. Br. 48 n.12, and the consequences of an affirmative answer are somewhat different. But those differences have nothing to

do with the text of the Fifth Amendment nor with the *relationship* between the question to be decided at the hearing and "the ultimate determination of guilt and punishment." *Id.* at 29; cf. *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 527 (1988) (holding that even an order denying a motion to dismiss based on *forum non conveniens* was not "completely separate from the merits" for purposes of the collateral order doctrine).

c. At still other points, Vogt suggests that use of his statements violated the Self-Incrimination Clause because the probable cause hearing was "a necessary step the State had to take to continue prosecuting him," Resp. Br. 29, and thus gave Vogt "a chance to avoid trial in the first place," *id.* at 12.

That claim likewise cannot withstand scrutiny. For one thing, it depends on a very specific use of the word "necessary." Unlike the constitutionally mandated bail hearings at which Vogt seems to acknowledge that the Self-Incrimination Clause would have posed no bar to the use of his statements, the Federal Constitution did not require Kansas to conduct a preliminary hearing at all. Pet. Br. 20-21. Even under Kansas law, moreover, there is no right to a probable cause hearing where the defendant has been indicted by a grand jury. Kan. Stat. Ann. § 22-2902(1) (2016). In other words, neither the Federal Constitution nor Kansas law made the hearing "necessary" in the sense of being "essential."

A chance-to-avoid-trial test also proves far too much and is endlessly manipulable. A defendant who challenges his competency to stand trial has "a chance to avoid trial in the first place," Resp. Br. 12, but this Court has said that use of compelled statements during competency hearings does not violate the Self-In-

crimination Clause, *Estelle*, 451 U.S. at 465, 468. Defendants file suppression motions because they hope "to avoid trial in the first place," Resp. Br. 12, but Vogt disclaims any suggestion that the Clause is violated by use of allegedly compelled statements at suppression hearings, Resp. Br. 55 n.14. This Court has been careful to police against facile use of chance-to-avoid-trial reasoning in other contexts. See *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994) (observing that "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial'") (citation omitted). Similar vigilance is warranted here.

A chance-to-avoid-trial theory is particularly dubious here for two additional reasons, one involving Vogt's own inaction and the other involving Kansas law. As we and the Federal Government have pointed out, it appears that Vogt made no effort to prevent consideration of his allegedly compelled statements during the probable cause hearing, whether by filing a prehearing motion or objecting at the hearing itself. Pet. Br. 28; U.S. Br. 4 n.2. If the Fifth Amendment problem was compromising his chance to avoid a trial, it was at least partly of Vogt's own making.

The final problem with a chance-to-avoid-trial argument can be illustrated by imagining a counterfactual where the state trial court found probable cause and allowed the criminal case to proceed. Vogt could not have taken an immediate appeal, because in Kansas, like the federal system, criminal defendants are not permitted interlocutory appeals. *State* v. *Zimmerman*, 660 P.2d 960, 963 (Kan. 1983). So even if Vogt had objected to the use of his statements during the probable cause hearing or filed a motion to suppress

his statements after it—and even if such a claim had merit—Vogt still could have been faced with the choice "between trial and a plea" had the judge wrongly overruled Vogt's objection, "even though the prosecution should never have been entitled to go to trial in the first place." Resp. Br. 58.[2]

B. The grand jury analogy underscores the fundamental problems with the Tenth Circuit's ruling

Everyone agrees that "this case does not involve grand jury proceedings." Resp. Br. 45. And it is understandable why the Federal Government—which, unlike the States, is constitutionally required to prosecute via grand jury—would resist the comparison to minimize the risk of adverse impact on federal prosecutions. U.S. Br. 9 n.3. But the grand jury analogy is a telling one, and Vogt's inability to refute it underscores the weaknesses of his position.

1. To briefly restate the point: A criminal defendant may not attack an indictment by claiming that the grand jury considered his own previously compelled statements. The Federal Constitution permits States to use—or not use—grand juries as they see fit, and Kansas law specifically provides that the hearing that

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[2] Vogt could have challenged the conduct of his probable cause hearing via an appeal from a judgment of conviction. Even there, however, Kansas law provides that "where an accused has gone to trial and been found guilty beyond a reasonable doubt, any error at the preliminary hearing stage"—including consideration of inadmissible evidence—"is harmless unless it appears that the error caused prejudice at trial." *Butler*, 897 P.2d at 1021. Vogt thus seeks to impose Section 1983 liability against the City based on something that would not have supported relief even had he gone to trial.

occurred in this case is a substitute for and an alternative to proceeding via grand jury. The Federal Constitution also would permit Kansas to eliminate probable cause hearings entirely and leave criminal defendants with no opportunity to challenge the decision to prosecute. Pet. Br. 19-21.

2. Vogt disputes none of that. Instead, he suggests that the difference is that there is no "'criminal prosecution' at the time the grand jury does its work," that "the grand jury's unique role and history" explain why "the Fifth Amendment's constraints" are "ease[d]" in that context, and that there is no anomaly in saying that the Constitution imposes fewer restrictions on proceedings that are often constitutionally required (grand juries) than on proceedings that are never constitutionally required (probable cause hearings). Resp. Br. 45-47. None of these arguments withstands scrutiny.

a. The presence or absence of an ongoing "criminal prosecution" provides no basis for treating grand juries and probable cause hearings differently for Self-Incrimination Clause purposes. The reason is simple. The words "criminal prosecution" appear only in the Sixth Amendment, whereas both the Grand Jury Clause and the Self-Incrimination Clause are housed in the Fifth Amendment.

The Self-Incrimination Clause applies to "criminal case[s]." Vogt's whole argument, of course, is premised on the idea that probable cause hearings are part of a criminal case. But, as Vogt acknowledges, this Court has said that grand jury proceedings *also* "are part of a 'criminal case' under the Fifth Amendment." Resp. Br. 25 (citing *Counselman* v. *Hitchcock*, 142 U.S. 547, 563 (1892)). Although *Counselman* was overruled on

other grounds by *Kastigar* v. *United States*, 406 U.S. 441 (1972), its conclusion about the scope of "criminal case" has never been disavowed. Indeed, it is reinforced by the Fifth Amendment's clarification that there is no right to a grand jury "in *cases* arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." U.S. Const. amend. V (emphasis added). By underscoring that grand jury proceedings are *part* of the "criminal case," the constitutional text thus refutes any effort to distinguish between grand juries and probable cause hearings on that basis.

b. Vogt's assertion that "the grand jury's unique role and history" explain why this Court has "ease[d] the Fifth Amendment's constraints in grand jury proceedings," Resp. Br. 46, suffers from two problems. First, it assumes the answer to the question being asked by presupposing what the Self-Incrimination Clause would have required had it not been "ease[d]." Second, it amounts to nothing less than a suggestion that grand juries have a non-textual entitlement to violate the Self-Incrimination Clause. In contrast, any anomaly disappears once it is recognized that "[t]he privilege against self-incrimination * * * is a fundamental trial right" that can be violated "only at trial." *Verdugo-Urquidez*, 494 U.S. at 264.

c. Vogt is right that the Federal Constitution sometimes imposes restrictions on procedures that States are not required to create in the first place. Resp. Br. 46-47. But when the Constitution does so, it is for some reason. Other than simply repeating his assertions about what the Fifth Amendment requires of its own force, Vogt identifies no such reason here.

In fact, Vogt's own example undermines his argument. As Vogt notes, Resp. Br. 46-47, "[t]he Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions." *Halbert* v. *Michigan*, 545 U.S. 605, 610 (2005). But if States provide for such review, the Constitution requires them to "appoint counsel for an indigent defendant's first-tier appeal as of right." *Id.* at 611. The Court's decisions also explain why this is so: because of "both equal protection and due process concerns." *Id.* at 610 (internal citation omitted).

Here, in contrast, equality and fairness concerns cut against Vogt. In the appointment-of-counsel context, the salient distinction was between rich and poor defendants, and the Court's decisions acted to address an *existing* disparity. See *Douglas* v. *California*, 372 U.S. 353, 355 (1963) ("[T]here can be no equal justice where the kind of an appeal a man enjoys depends on the amount of money he has.") (internal quotation marks and citation omitted). But Vogt is asking this Court to hold that the Constitution requires *creating* a distinction between different categories of defendants (those who can take issue with use of allegedly compelled statements during pretrial proceedings and those who cannot) and to do so based on a distinction over which States have unfettered choice and the defendants themselves often have no control (whether a particular prosecution involves a grand jury or a probable cause hearing).[3]

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[3] The Court's decision in *Coleman* v. *Alabama*, 399 U.S. 1 (1970), Resp. Br. 47, reflects a different principle. The Sixth Amendment has long been construed to require counsel at all "critical stages" of the State's criminal process, including stages that are not constitutionally required. *Coleman*, 399 U.S. at 7-9 (plurality opinion) (giving examples). The Court's holding was

C. Holding that the Self-Incrimination Clause can be violated by use during pretrial proceedings would cause severe problems

The court below acknowledged that "[i]f the Fifth Amendment applies to pretrial proceedings," evidence that would be inadmissible at trial "would be considered inadmissible in pretrial proceedings as well." Pet. App. 19a. Such a holding would create severe problems.

1. For one thing, the City is not the gatekeeper of evidence on Fifth Amendment grounds. It is the court, not the parties or the witnesses, that determines whether evidence was obtained in a constitutional manner and the uses to which it may be put in further proceedings. Cf. *Jackson* v. *Denno*, 378 U.S. 368 (1968); note 5, *infra* (discussing *Kastigar* hearings). What is more, Vogt seeks to hold the City liable based on at least two decisions the City did not make: the state prosecutors, not the City, decided to proceed via probable cause hearing rather than via grand jury and to use Vogt's allegedly compelled statements at the probable cause hearing. Pet. Br. 27-29; State & Local Gov't Employers Amicus Br. 9, 12-14.

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thus based on a conclusion that the preliminary hearing at issue there was a "critical stage" for Sixth Amendment purposes. This case involves a different question: what uses of allegedly compelled statements make someone a "witness against himself" for purposes of the Self-Incrimination Clause.

Press-Enterprise Co. v. *Superior Court of California*, 478 U.S. 1 (1986), and *Waller* v. *Georgia*, 467 U.S. 39 (1984), Resp. Br. 39 n.9, are even further afield, because those cases implicated important public interests involving access to judicial proceedings. *Waller*, 467 U.S. at 46-47 (noting that the public-trial guarantee "ensure[s] that judge and prosecutor carry out their duties responsibly").

2. Vogt acknowledges that his position would require courts to resolve admissibility issues *before* conducting at least some types of pretrial proceedings. Resp. Br. 53-55. As the State amici explain, requiring that such decisions be made before bail hearings or during grand jury proceedings would be incompatible with the nature of those proceedings. Kansas Amicus Br. 5-11.

Even if the Court could identify some basis for limiting expansion of the Self-Incrimination Clause's restrictions to probable cause hearings alone, but see Section A, *supra*, such a holding would still cause significant problems. The Federal Government and many States currently *forbid* courts from adjudicating suppression issues during probable cause hearings, U.S. Br. 29; Kansas Amicus Br. 13 & n.5, so all of those rules would have to be flipped to *require* courts to do so. But the current rules are well-justified, because "requir[ing] courts to make complex determinations about the admissibility of a defendant's statements before resolving other preliminary issues" "would change the nature and purpose of pretrial proceedings," U.S. Br. 26, "either cause delays or would give the parties insufficient time to investigate and prepare" for those hearings, Kansas Amicus Br. 14 (quotation marks and citation omitted), and "raise difficult questions about what a defendant must do to preserve an argument that his statements were compelled," U.S. Br. 30.

3. Vogt's reassurances that there is no cause for alarm are unpersuasive.

a. Much of Vogt's argument rests on a bit of rhetorical sleight-of-hand, specifically blurring the distinction between what this Court must assume be-

cause of the procedural posture of this case and the actual situation confronting the City. The reason "[t]here is no dispute before this Court that Officer Vogt's statements were compelled by [the City] and implicated him in criminal conduct," Resp. Br. 1, is because the Court is reviewing a decision dismissing Vogt's complaint for failure to state a claim. The City, of course, did not have Vogt's complaint when it acted, nor was it required to view the facts in the light most favorable to him. Yet much of Vogt's argument is premised on the idea that the City *knew all along* that Vogt would later argue that his interactions with his former superiors gave rise to obligations under *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), and that the City should have avoided the whole problem by keeping the information about Vogt's possible criminal wrongdoing from the KBI. Resp. Br. 48-52. But, as we and our amici have explained, matters will rarely be so clear in the real world, which is why courts hold suppression hearings in the first place. Pet. Br. 26-27; U.S. Br. 27-28; Kansas Amicus Br. 67.[4]

b. Vogt asserts that "application of the Fifth Amendment at pretrial hearings is the law of the land in at least four circuits * * *, and there has been no sign that those proceedings have become unworkable for prosecutors in those parts of the country." Resp. Br.

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[4] Simply giving the information to the KBI could not itself have been a Fifth Amendment violation because, at that point, there was no "criminal case." See *Chavez* v. *Martinez*, 538 U.S. 760 (2003); Pet. Br. 18-19. This matter was nearly certain to be referred to the KBI in any event, because Vogt does not contend that the City compelled him to make his initial disclosures about the knife. And Vogt cites no authority for the proposition that the City was required to forgo even telling state officials that one of its police officers had been implicated in serious wrongdoing.

53-54. It would be more accurate to say that courts and litigants have yet to perceive the problem. The decisions comprising the Vogt-favoring side of the split were all civil cases decided within roughly the last decade, see Pet. 7-8, and we have been unable to locate any cases where a criminal defendant relied on one of those decisions to support a claim that the Federal Constitution barred use of allegedly compelled statements during pretrial proceedings or required overturning a conviction because such statements were improperly used during such proceedings. That will doubtlessly change if Vogt prevails before this Court.[5]

4. Vogt contends (Resp. Br. 29-30) that our position would permit the prosecution to require criminal defendants to take the witness stand at probable cause hearings and then use the resulting statements to support binding the defendant over for trial. Vogt identifies no case where prosecutors attempted such a maneuver.[6] (And, of course, Vogt's own approach would

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[5] Vogt is incorrect that "courts have already determined that the Fifth Amendment requires pretrial proceedings in cases where testimony has been immunized." Resp. Br. 56. Under current law, "a trial court may hold a *Kastigar* hearing pre-trial, post-trial, mid-trial (as evidence is offered), or it may employ some combination of these methods." *United States* v. *North*, 910 F.2d 843, 854 (D.C. Cir. 1990). Under Vogt's approach, these "time-consuming procedure[s]," Resp. Br. 56, often will need to occur far earlier and before other proceedings designed to take place immediately or soon after charges are filed.

[6] The decisions cited by NACDL (at 18), are not to the contrary. *Rayyis* v. *Superior Court*, 35 Cal. Rptr. 3d 12, 13-14 (Cal. Ct. App. 2005), involved "the 'corpus delicti' rule," under which "the fact that a crime has been committed * * * cannot be proved based solely on extrajudicial statements of the defendant." *People* v. *Melotik*, 561 N.W.2d 453, 455, 457 (Mich. Ct. App. 1997), and

permit such conduct before a grand jury, yet he provides no reason for believing there have been problems in that context either.)

The reason should be equally obvious: the strategy would be self-defeating. The defendant would be able to invoke the privilege against self-incrimination at the probable cause hearing and refuse to speak unless granted immunity. See Pet. Br. 12-15 (discussing the distinction between when the privilege against self-incrimination may be invoked and when the Fifth Amendment is actually violated). And any victory won at the probable cause hearing by granting the defendant immunity would almost certainly be a pyrrhic one, because the resulting statements would be inadmissible at trial and it seems unlikely that the prosecutors would be able to carry their burden of showing that none of their trial evidence was derived from the defendant's immunized statements. See *id.* at 16-18 (discussing immunity doctrines).[7]

D. Vogt's remaining arguments do not warrant a different result

1. Contrary to his repeated suggestions (Resp. Br. 20-24), the issue is not whether Vogt's statements

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State v. *Moats*, 457 N.W.2d 299, 302 (Wis. 1990), involved out-of-court statements obtained by police officers.

[7] Vogt's suggestion that this Court should act to prevent prosecutors from bringing cases where they *know* the "defendant's compelled statement would not be admissible at trial" solely in the "hope" of "extract[ing] a plea," Resp. Br. 58, ignores "[t]he presumption of regularity" and good faith accorded to those charged with enforcing the law. *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (citation omitted); see *U.S. Attorneys' Manual: Principles of Federal Prosecution* § 9–27.220 (instructing prosecutors to commence a case only if they "believe[] * * * that the admissible evidence will be sufficient to obtain and sustain a conviction").

were sufficiently testimonial to make him a "witness." True, the Court has used that word to describe people who participate in "any investigation," *id.* at 21 (citation omitted), including those questioned by police officers, Crim. Proc. Scholars Amicus Br. 18-19. But the Court has been equally clear that the Fifth Amendment cannot be violated absent some sort of courtroom use during a criminal proceeding. Pet. Br. 18-19. Accordingly, the key question is whether use of Vogt's statements at the probable cause hearing was, by itself, enough to render him "a witness *against himself*."

2. Vogt claims "that a defendant becomes a 'witness against himself' when he makes 'incriminating communications . . . that are 'testimonial' in character.'" Resp. Br. 19 (quoting *United States* v. *Hubbell*, 530 U.S. 27, 34 (2000)). That is not what *Hubbell* says. The sentence from which Vogt quotes only in part makes clear that the Court was speaking (a) about the meaning of "witness" rather than "witness against himself," and (b) in terms of minimum requirements rather than comprehensive definitions. *Hubbell*, 530 U.S. at 34 ("The word 'witness' in the constitutional text limits the relevant category of compelled incriminating communications to those that are 'testimonial' in character."). And Vogt's claim that the *sole* function of the words "against himself" is to "require[] that the testimonial statements be incriminating" in some general sense is warranted by neither decision offered to support it. Resp. Br. 19-20 (citing *Hubbell*, 530 U.S. at 34, and *Hiibbel* v. *Sixth Judicial Dist. Ct.*, 542 U.S. 177, 189 (2004)).[8]

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[8] Although he claims that our discussion of *Hubbell* "makes no sense," Resp. Br. 42, Vogt cannot explain why the Court emphasized the government's inability to show "that the evidence it

This Court's decisions construing the similarly worded Confrontation Clause reinforce that one cannot "be a witness against [one]self" until the stage where guilt and punishment are determined. In *Crawford* v. *Washington*, 541 U.S. 36 (2004), for example, the Court noted that "[o]ne 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," *id.* at 42-43 (citation omitted), but gave no hint that one could be a "witness against" the defendant absent *any* use at trial. In *Cruz* v. *New York*, 481 U.S. 186 (1987), the Court stated that "[o]rdinarily, a witness is considered to be a witness 'against' a defendant for purposes of the Confrontation Clause *only* if his testimony is part of *the body of evidence that the jury may consider in assessing his guilt*," *id.* at 190 (emphases added)—that is, the evidence at trial. Accord *Michigan* v. *Bryant*, 562 U.S. 344, 358 (2011) (describing "the basic objective of the Confrontation Clause" as "prevent[ing] the accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial"); *Whorton* v. *Bockting*, 549 U.S. 406, 413 (2007) (reiterating that the Confrontation Clause applies to "[t]estimonial statements of witnesses absent from trial") (citation omitted).

3. Vogt's argument from history also fails. We agree that "the Framers could not possibly have intended the phrase ['witness against himself'] to cover

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* * * proposed to use at trial was derived from legitimate [independent] sources." Pet. Br. 18 n.11 (quoting *Hubbell*, 530 U.S. at 45). On Vogt's view, that observation was irrelevant at best, and actively misleading at worst.

statements made by the defendant only at the trial itself." Resp. Br. 22. Like the Confrontation Clause, the Self-Incrimination Clause also covers at-trial use of a defendant's compelled pretrial statements. Pet. Br. 1, 9, 12-14. Where we disagree is whether a defendant has been made to be a "witness against himself" when he has *neither* been forced to take the witness stand at his own trial *nor* had his own previously compelled statements introduced against him at trial.

As the Federal Government explains, the purpose of the pretrial examinations Vogt discusses was to generate evidence that could later be used to prove the defendant's guilt at trial. U.S. Br. 19-24.[9] Vogt provides no evidence that the Fifth Amendment "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." U.S. Br. 23.

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[9] Vogt's sources agree. Albert W. Alschuler, *A Peculiar Privilege In Historical Perspective: The Right to Remain Silent*, 94 Mich. L. Rev. 2625, 2654 (1996) ("Until the mid-eighteenth century, the record of the defendant's pretrial examination was routinely read at her trial."); John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination At Common Law*, 92 Mich. L. Rev. 1047, 1061 (1994) ("Having impaled himself at pretrial, the criminal defendant would find that any supposed privilege against self-incrimination available at trial was worth little. If he declined to testify at trial, or attempted to recant upon his pretrial statement, the pretrial statement would be invoked against him at trial."); Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Privilege Against Self-Incrimination*, 92 Mich. L. Rev. 1086, 1098 (1994) ("All sources agreed" that the defendant's pretrial "confession, if any, was to be admissible against him at trial.").

Vogt's contrary claims miss the mark because they neglect the critical distinction between when the privilege against self-incrimination may be invoked and when the Fifth Amendment is actually violated. See Pet. Br. 12-15 (discussing this distinction). It is true that, at common law, a criminal defendant was barred from testifying at his own trial. Resp. Br. 22, 31. But that does not mean there was no way a defendant could be "a witness against himself" at such trials. Cf. *Bryant*, 562 U.S. at 357-358 (explaining that "[t]he basic purpose of the Confrontation Clause was to targe[t] the sort of abuses exemplified at the notorious treason trial of Sir Walter Raleigh," where an accuser's out-of-court statements were admitted against Raleigh at trial) (internal quotation marks & citation omitted). And that risk, in turn, explains why "defendants had throughout the criminal process a right to refuse to provide self-incriminating testimony under oath." Resp. Br. 31. Not because compulsion, standing alone, would render the defendant "a witness against himself." But rather because it was clear, then as now, "that an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage." *Michigan* v. *Tucker*, 417 U.S. 433, 440-441 (1974).

E. At minimum, the Court should hold that no *Garrity* violation can occur before trial

This case is a far cry from *Chavez* v. *Martinez*, 538 U.S. 760 (2003). There, the plaintiff was subject to intense police questioning while "screaming in pain" after being "shot in the face," and "[t]he officer made no effort to dispel the perception that medical treatment was being withheld until [the plaintiff] answered the questions put to him." *Id.* at 798 (Kennedy, J., concurring in part and dissenting in part).

Vogt cannot claim that he experienced "severe compulsion," *Chavez*, 538 U.S. at 799 (Ginsburg, J., concurring in part and dissenting in part), much less "torture or its close equivalents," *id.* at 789 (Kennedy, J., concurring in part and dissenting in part). Even crediting all allegations of the complaint, this case involves a police officer who notified his employer about his own misconduct and was then required, as a condition of his job (from which he had already decided to quit) to provide additional information about those same matters. Pet. App. 49a.

As we explained in our opening brief, "[e]ven if some types of Fifth Amendment violations could occur before trial, the Court should reject any such notion for * * * claims" like Vogt's. Pet. Br. 25 (citing *Garrity* v. *New Jersey*, 385 U.S. 493 (1967)). Such claims bear no resemblance to the types of abuses that motivated the Self-Incrimination Clause. What is more, the Constitution specifically *permits* a public employer to inform an employee that he will be fired unless he cooperates with an official investigation so long as it follows certain rules, and the appropriate time for determining whether those rules have been followed is at trial. Pet. Br. 25. Thus, as with *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Court should, at minimum, hold that no *Garrity* violation can occur short of trial. Cf. *Chavez*, 538 U.S. at 790 (Kennedy, J., concurring in part and dissenting in part) (stating that "[t]he identification of a *Miranda* violation and its consequences * * * ought to be determined at trial").

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The judgment of the court of appeals should be reversed.

Respectfully submitted.

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