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 CRIMINAL PROCEDURE SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici are scholars of criminal procedure, each of whom has published a book or law review article in this area. *Amici* law professors also teach or have taught courses in constitutional law or criminal procedure and have devoted significant attention to studying the Fifth Amendment's Self-Incrimination Clause:

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

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SUMMARY OF ARGUMENT

The Self-Incrimination Clause provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In *Chavez v. Martinez*, this Court held that even if a person is coerced into making incriminating statements, the Clause is not violated if those statements are never used in any part of a "criminal case." 538 U.S. 760, 766 (2003) (plurality opinion). This case raises an important question left unanswered by *Chavez*: when does a "criminal case" commence?

Here, respondent Matthew Vogt was formally charged in Kansas state court with two felony counts, and the government introduced allegedly coerced and incriminating statements as evidence against him at a probable cause hearing. *See* Pet. App. 3a-4a; Resp. Br. 6. As a result, Vogt's rights under the Self-Incrimination Clause were violated because—as the text, structure, and history of the Constitution all make clear—a probable cause hearing after formal charges are brought is plainly part of a "criminal case."

To start, as Founding-era usage reflects, the broad phrase "any criminal case" plainly includes pre-trial probable cause hearings. This definition also comports with other uses of the term "case" in the Constitution. For example, Article III uses the term "Case" to refer to proceedings over which a court has jurisdiction, and the Grand Jury Clause uses the term "case" in the context of describing how legal proceedings may be initiated. Moreover, the use of the term "criminal case"

[2] Institution names are provided for purposes of affiliation only.

contrasts notably with the Sixth Amendment's use of the narrower term "criminal prosecution."

The use of this broad language is consistent with the Self-Incrimination Clause's placement in the Fifth Amendment, which includes other rights related to the initiation of criminal proceedings, rather than in the Sixth Amendment, which focuses on the legal protections that apply once a criminal prosecution has begun. Indeed, the drafting history of the Bill of Rights confirms that the decision to include the Clause in the Fifth Amendment, and to use the broad "in any criminal case" language, was a considered one on the part of the Bill of Rights' Framers.

Finally, narrowly construing the scope of the Clause would not only be at odds with its plain text, it would also be at odds with the historical foundations of the privilege. As this Court has recognized, the privilege was a reaction against "putting the accused upon his oath and compelling him to answer questions," *Doe v. United States*, 487 U.S. 201, 212 (1988), reflecting the Founders' rejection of the notion that "the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused," *Ullmann v. United States*, 350 U.S. 422, 501 (1956) (quoting *Maffie v. United States*, 209 F.2d 225, 227 (1st Cir. 1954)). Using coerced statements at a pre-trial probable cause hearing violates that principle no less than using them at trial.

For all these reasons, a "criminal case" includes a pre-trial probable cause hearing, and this Court should hold that the use of coerced and incriminating testimony at such a proceeding violates the Self-Incrimination Clause.

ARGUMENT

I. THE TEXT, STRUCTURE, AND DRAFTING HISTORY OF THE CONSTITUTION DEMONSTRATE THAT THE SELF-INCRIMINATION CLAUSE IS VIOLATED WHEN COERCED, INCRIMINATING STATEMENTS ARE INTRODUCED AT PRE-TRIAL PROBABLE CAUSE HEARINGS.

1. The Fifth Amendment to the Constitution provides that "[n]o 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, this Amendment is violated when compelled statements are used "in any criminal case." *Mitchell v. United States*, 526 U.S. 314, 327 (1999). The term "criminal case" plainly includes pre-trial probable cause hearings that occur after formal charges are brought.

When the Fifth Amendment was adopted, the term "criminal case" was commonly understood to encompass proceedings that occurred before the beginning of a trial. Noah Webster's 1828 American Dictionary of the English Language, for example, defines "case" to include "[a] cause or suit in court." *Case,* 1 Webster's An American Dictionary of the English Language (1st ed. 1828) [hereinafter "Webster's American Dictionary"].[3] A "suit in court" plainly begins before there is a trial. Webster's dictionary goes on to say

[3] The only other definition of "case" in Webster's 1828 dictionary that pertains to the law is "[a] question; the state of facts involving a question for discussion or decision; as, the lawyer stated the *case*." *Id.* Though this definition is probably not the one the Founders had in mind when they used the word "case" in the Fifth Amendment, it is in any event a similarly broad definition that is not limited to trials alone.

that "*case* is nearly synonymous with cause, whose primary sense is nearly the same." *Id.* "Cause" in turn is defined as "[a] suit or action in court; any legal process which a party institutes to obtain his demand, or by which he seeks his right or his supposed right." *Cause,* 1 Webster's American Dictionary, *supra.* This broad definition of "cause" to include any "action in court . . . which a party institutes" clearly includes all aspects of a legal proceeding, not a trial alone. *See Blyew v. United States*, 80 U.S. (13 Wall.) 581, 595 (1871) ("The words 'case' and 'cause' are constantly used as synonyms in statutes and judicial decisions, each meaning a proceeding in court, a suit, or action," and "no court can have jurisdiction of either a case or a cause until *it is presented in the form of an action*." (emphasis added)). Indeed, were it otherwise, an action which settles before trial would not be a "case" at all—an outcome that would be "contrary to the law and to common sense," *Mitchell*, 526 U.S. at 327 (holding that the Self-Incrimination Clause applies at sentencing).

Importantly, interpreting "case" to include pretrial probable cause hearings comports with other uses of the word "case" in the Constitution. *See* Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 791 (1999) (interpreters should "us[e] the Constitution as a dictionary"); *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places . . . is generally read the same way each time it appears."). Article III, for example, provides that

> [t]he judicial Power shall extend to all *Cases*, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all *Cases* affecting Ambassadors, other public Ministers and Consuls;—

> [and] to all *Cases* of admiralty and maritime Jurisdiction.

U.S. Const. art. III, § 2 (emphases added). "Case" in this context refers to proceedings over which the judicial power extends; in other words, cases over which an Article III court has jurisdiction, and "Article III judges preside over many types of judicial proceedings, including bail hearings, competency hearings, and probable cause hearings," Thea A. Cohen, Note, *Self-Incrimination and Separation of Powers*, 100 Geo. L.J. 895, 897 (2012); *see Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) ("Article III . . . gives the federal courts jurisdiction over only 'cases and controversies,' and the doctrine of standing serves to identify those *disputes* which are appropriately resolved through *the judicial process*." (emphasis added)). And significantly, the only other use of the term in the Bill of Rights explicitly refers to a pre-trial proceeding: the Grand Jury Clause in the Fifth Amendment requires an indictment by a Grand Jury "except in *cases* arising in the land or naval forces." U.S. Const. amend. V (emphasis added).[4]

Finally, it is notable that the drafters of the Bill of Rights used the term "trial" in other Amendments, but nonetheless used the broader word "case" in the Self-Incrimination Clause. The Sixth Amendment demands "a speedy and public *trial*" in all criminal prosecutions, U.S. Const. amend. VI (emphasis added), while the Seventh Amendment ensures that "the right of *trial* by jury shall be preserved," *id.* amend. VII

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[4] The only other reference to "Case" in the Constitution that is possibly legal also uses the word to refer to the initiation of legal proceedings, not a trial. *See* U.S. Const. art. I, § 6 (Senators and Representatives "shall in all *Cases*, except Treason, Felony and Breach of the Peace, be privileged from Arrest.").

(emphasis added). "If the Framers had meant to restrict the [Self-Incrimination Clause] to 'trial,' they could have said so." Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in* Chavez v. Martinez, 70 Tenn. L. Rev. 987, 1014 (2003). Instead, they used the capacious term "criminal case."

2. This interpretation of "case" to include pre-trial probable cause hearings is not only consistent with the Amendment's plain text, it also makes sense in light of the placement of the Self-Incrimination Clause in the Fifth rather than the Sixth Amendment.

The Self-Incrimination Clause appears in the Fifth Amendment alongside other rights that govern when and how criminal proceedings may be brought. For instance, the Amendment lists the right not to be charged with a crime "unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. The Grand Jury Clause sets out a prerequisite to bringing an indictment, and thus is violated at the time of indictment, not at trial. The Fifth Amendment also sets forth the right not to "be subject for the same offense to be twice put in jeopardy of life or limb." *Id.* The Double Jeopardy Clause similarly prohibits the government from *indicting* a defendant a second time for the same crime. "The prohibition is not against being twice punished, but against being twice put in jeopardy." *Price v. Georgia*, 398 U.S. 323, 326 (1970) (quoting *United States v. Ball*, 163 U.S. 662, 669 (1896)); *see Abney v. United States*, 431 U.S. 651, 659 (1977) (allowing interlocutory appeal of *pretrial* motion seeking to dismiss an indictment on double jeopardy grounds).

In short, the privilege against self-incrimination appears with other Fifth Amendment rights that govern when the government can bring criminal

proceedings—rights that necessarily can be violated pre-trial. The Fifth Amendment's Self-Incrimination Clause is no different. *Cf. United States v. Balsys*, 524 U.S. 666, 673 (1998) (holding that the Fifth Amendment's reference to "criminal case" does not include foreign criminal prosecutions because the privilege appears "in the company of guarantees of grand jury proceedings, defense against double jeopardy, due process, and compensation for property taking," and "none of these provisions is implicated except by action of the government that it binds").

If the Self-Incrimination Clause could be violated only when compelled statements are used at trial, it would have made far more sense to include it in the Sixth Amendment. That Amendment "[o]n its face . . . is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution." *United States v. Marion*, 404 U.S. 307, 313 (1971). Notably, the Sixth Amendment differs from the Fifth Amendment in two important respects. First, the Fifth Amendment applies broadly to "person[s]," U.S. Const. amend. V, rather than simply "the accused," *id.* amend. VI, suggesting that it—unlike the Sixth Amendment—is not limited to the period after formal charges are brought. Second, the Fifth Amendment applies to "any criminal case," *id.* amend. V, rather than to "all criminal prosecutions," *id.* amend. VI.

As this Court has explained, "[a] criminal prosecution under article 6 of the amendments is much narrower than a 'criminal case,' under article 5 of the amendments." *Counselman v. Hitchcock*, 142 U.S. 547, 563 (1892), *overruled in part on other grounds, Kastigar v. United States*, 406 U.S. 441 (1972); *see Balsys*, 524 U.S. at 672 (noting "the textual contrast between the Sixth Amendment . . . and the Compelled

Self-Incrimination Clause, with its facially broader reference to 'any criminal case'"); *Rothgery v. Gillespie Cty.,* 554 U.S. 191, 222 (2008) (Thomas, J., dissenting) (finding it "significant that the Framers used the words 'criminal prosecutions' in the Sixth Amendment rather than some other formulation such as . . . 'criminal cases'" and noting that "the difference in phraseology was not accidental"). A criminal "prosecution" commences once "adversary judicial proceedings ha[ve] been initiated." *United States v. Gouveia*, 467 U.S. 180, 192 (1984); *see generally Counselman*, 142 U.S. at 563 (Sixth Amendment applies in "a criminal prosecution against a person who is accused and who is to be tried by a petit jury.").

Given these textual differences, it makes sense that the Sixth Amendment's focus is on "procedural rights of the criminally accused after indictment." Tracey Maclin, *The Prophylactic Fifth Amendment*, 97 B.U. L. Rev. 1047, 1062 (2017). First, the Amendment guarantees "a speedy and public trial," U.S. Const. amend. VI, a right which this Court has held applies only after "some charge or arrest" in a criminal prosecution, *Marion*, 404 U.S. at 319 (quoting Note, *The Right to a Speedy Trial*, 57 Colum. L. Rev. 846, 848 (1957)); *see United States v. MacDonald*, 456 U.S. 1, 6-7 (1982) ("[N]o Sixth Amendment right to a speedy trial arises until charges are pending."). Similarly, the Amendment guarantees the right to "an impartial jury," U.S. Const. amend. VI, which by definition applies during jury selection and trial.

The Sixth Amendment also guarantees the right "to be confronted with the witnesses against [the accused]" and the right to "have compulsory process for obtaining witnesses in his favor," *id.*—protections that courts have recognized most clearly apply after the initiation of a criminal prosecution. *See United States v.*

Williams, 504 U.S. 36, 52 (1992) (rejecting argument that target of a grand jury investigation may "tender his own defense"); *see also Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) (probable cause hearing need not be "accompanied by the full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses," that must be present at trial); *Peterson v. California*, 604 F.3d 1166, 1169-70 (9th Cir. 2010) (finding no right to confront witnesses at a preliminary hearing and collecting cases).

To be sure, as the United States notes, "[s]ome Sixth Amendment rights attach and apply before trial." U.S. Br. 25. The Sixth Amendment right to counsel, for example, extends to every "critical stage" in a criminal prosecution, *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961); *see, e.g.*, *Coleman v. Alabama*, 399 U.S. 1, 10 (1970) (Sixth Amendment right to counsel applies at preliminary hearing to determine whether there was sufficient evidence against the accused and to fix bail); *Powell v. Alabama*, 287 U.S. 45, 57 (1932) (Sixth Amendment right to counsel exists "from the time of their arraignment until the beginning of their trial"). But, significantly, there is no right to counsel before a criminal prosecution begins—for instance, before a grand jury or during an initial probable cause hearing. *See United States v. Mandujano*, 425 U.S. 564, 581 (1976) (plurality opinion) ("Under settled principles the witness may not insist upon the presence of his attorney in the grand jury room."); *Gerstein*, 420 U.S. at 122 (finding no right to counsel at probable cause determination to justify pretrial custody). The Fifth Amendment, by contrast, applies more broadly to "any criminal case."

In short, "the right against compelled self-accusation is in the wrong amendment to be a 'trial right.'"

Davies, *Farther and Farther, supra*, at 1009; *see* Michael J. Zydney Mannheimer, *Ripeness of Self-Incrimination Clause Disputes*, 95 J. Crim. L. & Criminology 1261, 1322 (2005) ("It appears that the placement of the Self-Incrimination Clause in the Fifth Amendment rather than the Sixth signifies that a 'criminal case' can exist before a 'criminal prosecution[]' commences."); Leonard W. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* 427 (Ivan R. Dee 1999) (1968) ("[T]he location of the self-incrimination clause in the Fifth Amendment rather than the Sixth proves that the [Framers] did not intend to restrict that clause to the criminal defendant only nor only to his trial.").

3. In addition to the text and structure of the Constitution, the history of the Fifth Amendment's drafting suggests that the Founders intended for the term "criminal case" to apply broadly, including at proceedings like the pre-trial probable cause hearing at issue here.

The inclusion of the Self-Incrimination Clause in the Fifth Amendment rather than in the Sixth Amendment—and its application in "any criminal case" rather than in a "criminal prosecution"—appears to have been no accident. The Bill of Rights was largely modeled on state constitutional provisions, particularly Section 8 of the Virginia Declaration of Rights. *See id.* at 409 ("Section 8 . . . became a model for other states and for the United States Bill of Rights."). Section 8 of Virginia's constitution included a privilege against self-incrimination. The Section read in full:

> That in all capital or criminal prosecutions a man has a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an

> impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty; *nor can he be compelled to give evidence against himself*; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.

Va. Declaration of Rights of 1776, § 8 (emphasis added). The Virginia privilege against self-incrimination therefore appeared amidst the prosecution-focused rights that later made their way into the Sixth Amendment. In addition, the Virginia Declaration of Rights articulated a narrower privilege than the Fifth Amendment's Self-Incrimination Clause, limiting its reach to "capital or criminal prosecutions."

This more limited right in Virginia's Declaration of Rights contrasted with similar rights in other state constitutions at the time. For instance, Delaware—which also modeled its bill of rights on Virginia's—"introduced a subtle but crucial change by making [the privilege] an independent section instead of inserting it among the enumerated rights of the criminally accused." Levy, *supra*, at 409. Moreover, Delaware altered the language to read: "That no Man in the Courts of common Law ought to be compelled to give Evidence against himself." Del. Declaration of Rights of 1776, art. 15. Unlike Virginia, Delaware's privilege extended to "Courts of common Law," not merely criminal prosecutions. Maryland similarly adopted a broader provision, declaring that "no man ought to be compelled to give evidence against himself, *in a common court of law, or in any other court*." Md. Const. of 1776, Declaration of Rights, art. XX (emphasis added).

As the First Congress considered a federal Bill of Rights, New York, North Carolina, and Rhode Island all sent proposals for a Bill of Rights that included a privilege against self-incrimination that mirrored

Virginia's formulation of the right—listed with other prosecution-focused rights and limited to a criminal prosecution. *See* Levy, *supra*, at 420-21. Rather than adopt that model, however, James Madison placed the self-incrimination clause as "part of a miscellaneous article" separate from what became the Sixth Amendment. *Id.* at 422; *see* Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 Mich. L. Rev. 1086, 1122 (1994) ("Madison proposed an article containing a series of guarantees surrounding jury trial as well as a more general article concerning judicial process."). That miscellaneous article—which later became the Fifth Amendment, read:

> No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence; *nor shall be compelled to be a witness against himself*; nor be deprived of life, liberty, or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

1 Annals of Cong. 448, 451–52 (Madison) (1789) (Joseph Gales ed., 1790).[5] In addition to separating the

[5] It is also noteworthy that in an early speech to the House of Representatives, Madison suggested inserting most of the provisions that later became separate Amendments into the limitations on the power of Congress in Article I, Section 9 of the Constitution. *See* James Madison, Speech to the House of Representatives (June 8, 1789), *in* 1 Annals of Cong. 448-59. In that proposal, Madison grouped the Self-Incrimination Clause in a paragraph with other now-Fifth Amendment rights rather than a different paragraph that compiled the "criminal prosecution[]" rights that later became the Sixth Amendment. *Id.* Later, the select committee that reviewed this proposal moved the paragraph of now-Sixth Amendment rights to a proposed revision to Article III, Section 2, but left the Self-Incrimination Clause

privilege from other trial-focused rights, Madison also used language that was notably more similar to Delaware's and Maryland's broader formulation of the right. By its plain terms, this version of the Clause "applied to civil as well as criminal proceedings and in principle to any stage of a legal inquiry, from the moment of arrest in a criminal case, to the swearing of a deposition in a civil one." Levy, *supra*, at 423.

As the Bill of Rights was being debated in the House of Representatives, however, Representative John Laurence of New York worried that "a general declaration" was "in some degree contrary to laws passed," and "he thought it ought to be confined to criminal cases." 1 Annals of Cong. 782. While it is not entirely clear what "laws passed" Representative Laurence may have been referencing, *compare* Levy, *supra*, at 425-26, *with* Davies, *Farther and Farther, supra*, at 1017 & n.141, what is clear is that his proposal to add "in any criminal case" was designed to limit the privilege against self-incrimination to criminal, not civil, cases, *see Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 294 (1989) (O'Connor, J., concurring in part and dissenting in part) (The Framers "decid[ed] to confine the benefits of the Self-Incrimination Clause of the Fifth Amendment to *criminal proceedings*." (emphasis added)). There is no evidence that the phrase "in any criminal case" was added to restrict the right to criminal *trials*. In short, the drafting history confirms that the placement of the Self-Incrimination Clause in the Fifth Amendment and its application to "any criminal case" rather than to a "criminal prosecution" was a considered choice on the part of the Founders.

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among other now-Fifth Amendment rights to be inserted into Article I. *See* Edward Dumbauld, *The Bill of Rights and What It Means Today* 210-12 (1957).

4. Ignoring the Self-Incrimination Clause's plain reference to "any criminal case," petitioner argues that the word "witness" in the Clause means that the Clause protects only against the use of compelled testimony at trial, even though a plurality of this Court has already suggested that the key to deciding the scope of the Clause is determining the meaning of the term "criminal case," not the term "witness." *See Chavez*, 538 U.S. at 767 (plurality opinion) (stating that the Self-Incrimination Clause is violated when compelled statements are "use[d] in a criminal case," but declining to decide "the precise moment when a 'criminal case' commences"). And, as previously discussed, the broad term "criminal case" clearly includes pre-trial probable cause hearings. In any event, petitioner offers no evidence to support its cramped reading of the term "witness," and the text, historical evidence, and this Court's precedents all refute it.

To start, the word "witness" plainly includes individuals who give testimony at pre-trial proceedings. Webster's 1828 Dictionary defines "witness" simply as "[o]ne who gives testimony." *Witness,* 2 Webster's American Dictionary, *supra.* "Testimony" in turn means "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact" and typically occurs "in judicial proceedings." *Testimony*, 2 Webster's American Dictionary, *supra.* An even earlier dictionary linked the definition of "witness" to the definition of "cause": a "witness" is "one that gives Evidence in a Cause." G. Jacob, *A New Law-Dictionary* 83 (6th ed., The Savoy, Henry Lintot 1750). Nowhere does either dictionary limit the terms "witness" or "testimony" to those who give testimony or evidence *at trial*.

The term "witness" was also routinely used at the Founding to describe an individual who gave

testimony during pre-trial proceedings. As this Court has explained, prior to the Founding, the English "Marian bail and committal statutes required justices of the peace to examine suspects *and witnesses* in felony cases" at pre-trial examinations, and to later "certify the results to the court." *Crawford v. Washington*, 541 U.S. 36, 44 (2004) (emphasis added). In many ways, Marian pre-trial committal and bail proceedings were the legal antecedents to the modern probable-cause hearing. *See* Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine*, 100 J. Crim. L. & Criminology 933, 943 n.6 (2010).

It is notable, then, that legal treatises and manuals from before and at the time of the Founding consistently referred to individuals who testified before a justice of the peace pre-trial as "witnesses." In Sir Matthew Hale's famous treatise *History of the Pleas of the Crown*, first published in 1736, he explained that justices of the peace in pre-trial committal proceedings "ought to take the examinations of felons (without oath,) and the informations of accusers *or witness* (upon oath,) and return them to the justices of gaol-delivery." 2 Matthew Hale, *History of the Pleas of the Crown* 51-52 (Sollom Emlyn rev. ed., London, E. Rider 1800) (1736) (emphasis added).[6] Another leading treatise of the time, Sergeant William Hawkins's *Pleas of the Crown*, explained that before a witness's statement from a pre-trial proceeding could be introduced at trial, prosecutors must "make Oath that [they] have used all their Endeavours to find the Witness, but cannot find him." 2 William Hawkins, *A Treatise of the*

[6] "Gaol" means "[a] prison; a place for the confinement of debtors and criminals." 1 Webster's American Dictionary, *supra.*

Pleas of the Crown 430 (4th ed., London, E. Richardson and C. Lintot 1762) (1716); *see* Geoffrey Gilbert, *Law of Evidence* 140 (3rd ed., London, His Majesty's Printers 1769) (1754) (stating that the examination of "a Witness examined before the Coroner" could be admitted at a later trial if the witness had died).

Richard Burn's justice of the peace manual similarly and repeatedly used the term "witness" to refer to individuals questioned in pre-trial examinations. *See* 1 Richard Burn, *The Justice of the Peace and Parish Officer* 760-63 (21st ed., London, A. Strahan 1810) (1755). In the "Examination" chapter—having to do with a pre-trial Marian examination—the manual states that testimony "of other witnesses, whom the justice may bring before him by his warrant" may be later "given in evidence against the party confessing." *Id.* at 760. He goes on to say that "if a quaker be witness, his affirmation must not be taken in this case" because Quakers would not take an oath. *Id.* Finally, the manual provides a template for recording the "[i]nformation of a witness" and for obtaining a "[w]arrant for a witness" to appear at a Marian pre-trial proceeding. *Id.* at 762-63.

By the same token, justice of the peace manuals used in American colonies around the time of the Founding used the term "witness" to refer to individuals giving testimony at Marian pre-trial examinations. *See, e.g.*, *The South-Carolina Justice of Peace* 165 (3rd ed., New York, T. & J. Swords 1810) ("[W]here [an accused] person is not bailed, but committed to ward, the justice or justices who commit him, shall, before such commitment, take the like examination and information, . . . and shall in like manner bind over the witnesses, and certify the whole as above."); James Parker, *Conductor Generalis: or the Office, Duty and Authority of Justices of the Peace* 174 (New Jersey, James

Parker 1764) (referring, in the chapter related to pre-trial examinations, to "other witnesses; whom the justice may bring before him by his warrant for th[e] purpose" of giving evidence); George Webb, *The Office and Authority of a Justice of Peace* 109 (photo. reprt. 1969) (Williamsburg, William Parks 1736) ("When any Person shall be taken for any Criminal Offence, and brought before a Justice of Peace, he is to examine the Prisoner, and Witnesses.").

Confirming this expansive understanding of the term "witness," this Court explained in *Crawford v. Washington* that "witness" for purposes of the Confrontation Clause broadly refers to "[a]n accuser who makes a formal statement to government officers." *Crawford*, 541 U.S. at 51.[7] Again and again since *Crawford*, this Court has referred to individuals who provide testimony pre-trial—and sometimes even before judicial proceedings begin at all—as "witnesses" providing "testimony." *See, e.g.*, *Ohio v. Clark*, 135 S. Ct. 2173, 2179 (2015) (referring to "statements by a witness during police questioning at the station house"); *Michigan v. Bryant*, 562 U.S. 344, 355 (2011) (noting that some but "not all those questioned by the police are witnesses"); *Melendez-Diaz v.*

[7] This Court's opinion in *Crawford* repeatedly uses the word "witness" to refer to individuals who gave testimony at pre-trial proceedings. *See, e.g.*, *Crawford*, 541 U.S. at 43 ("Justices of the peace or other officials examined suspects *and witnesses before trial*." (emphasis added)); *id.* at 44 (noting that "treason statutes required *witnesses* to confront the accused 'face to face' at his arraignment" (emphasis added)); *id.* at 52 (referring to "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" (quoting Br. for Nat'l Ass'n of Crim. Def. Lawyers, et al. as *Amici Curiae* 3)); *id.* ("Under the Marian statutes, witnesses were typically put on oath, but suspects were not.").

Massachusetts, 557 U.S. 305, 309 (2009) ("A witness's testimony against a defendant is . . . inadmissible unless the witness appears at trial."); *Davis v. Washington*, 547 U.S. 813, 826-27 (2006) ("The product of [an] interrogation [by a law enforcement officer], whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial.").

Petitioner is correct of course that the Sixth Amendment's Confrontation and Compulsory Process Clauses—both of which use the word "witness"—protect rights within the context of a criminal prosecution and may not apply at certain pre-trial proceedings. *See* Pet'r Br. 22. But they are wrong that this limitation exists because the Sixth Amendment uses the word "witness." After all, the term "witness" includes even "[s]tatements taken by police officers in the course of interrogations," which are "testimonial under even a narrow standard." *Crawford*, 541 U.S. at 52. Rather, the Sixth Amendment's scope is limited by its use of the terms "criminal prosecution" and "the accused." *See supra* at 8-9; Resp. Br. 24-25. To equate the scope of the Self-Incrimination Clause and the Confrontation Clause simply because both use the term "witness" would be like equating diamonds and coal simply because both contain carbon.

The United States, for its part, argues that the phrase "a witness against himself" means that the Self-Incrimination Clause is only violated when a compelled statement is introduced to "establish a defendant's criminal responsibility—his guilt and his punishment"—and that this can take place only at trial. U.S. Br. 10-11. But nothing about the phrase "a witness against himself" requires this reading. As detailed above, "the word 'witness' in the constitutional text limits the relevant category of compelled

incriminating communications to those that are 'testimonial' in character," *United States v. Hubbell*, 530 U.S. 27, 34 (2000), not to testimonial statements at trial. And to be a witness "against oneself" simply means that a person's testimony must be incriminating. *See Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189 (2004) (noting that the Clause prohibits the use of statements that are "testimonial, incriminating, and compelled"). A statement is incriminating when the "danger to be apprehended" is "real and appreciable, with reference to the ordinary operation of law in the ordinary course of things." *Brown v. Walker*, 161 U.S. 591, 599 (1896). Indeed, at the time of the Founding, "incriminate" meant "[t]o accuse; to charge with a crime or fault," *Incriminate,* 1 Webster's American Dictionary, *supra,* not to find one guilty at trial. *See United States v. Burr*, 25 F. Cas. 38, 40 (C.C.D. Va. 1807) (No. 14,692E) (C.J. Marshall, presiding) ("[E]very witness is privileged not *to accuse* himself." (emphasis added)). Thus, a statement is incriminating if it presents an appreciable danger of apprehension—a standard easily met when a statement is used at a pre-trial probable cause hearing. The United States fails to explain why a statement could be incriminating only at trial, and that view is refuted by this Court's precedents.

In any event, even if the United States were correct that the use of a coerced statement must somehow "expose a defendant to the risk of conviction or punishment," U.S. Br. 11, the probable cause hearing at issue here certainly clears that hurdle. As this Court has noted, a preliminary hearing is simply a "less searching exploration into the merits of a case than a trial" to determine "whether probable cause exists to hold the accused for trial." *Barber v. Page*, 390 U.S. 719, 725 (1968); Resp. Br. 17 n.4. Such an inquiry, then,

surely "expose[s] a defendant to the risk of conviction or punishment" insofar as a finding of probable cause is a necessary, even if not sufficient, step on the path to conviction and punishment. In short, the language of the Self-Incrimination Clause giving every person the right not to be a "witness against himself" readily encompasses the use of coerced and incriminating statements at a pre-trial probable cause hearing.

* * *

In sum, the plain text of the Self-Incrimination Clause, in conjunction with the structure of the Bill of Rights and the history of its drafting, make clear that a "criminal case" includes pre-trial probable cause hearings such as the one at issue here. As the next Section discusses, construing the Clause more narrowly would not only be at odds with the Constitution's text and structure, but also with historical practice at the time of the Founding.

II. THE HISTORICAL PRACTICE AT THE TIME OF THE FOUNDING CONFIRMS THAT THE SELF-INCRIMINATION CLAUSE IS VIOLATED WHEN COERCED, INCRIMINATING STATEMENTS ARE INTRODUCED AT PRE-TRIAL PROBABLE CAUSE HEARINGS.

The privilege against self-incrimination "registers an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized.'" *Ullmann*, 350 U.S. at 426 (quoting Erwin N. Griswold, *The Fifth Amendment Today* 7 (1955)).

As this Court has explained, the Self-Incrimination Clause was "developed by painful opposition to a course of ecclesiastical inquisitions and Star Chamber

proceedings occurring several centuries ago." *Michigan v. Tucker*, 417 U.S. 433, 440 (1974). Indeed, as late as the Founding, pre-trial practice was still in many ways "designed to induce the accused to bear witness against himself promptly." John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 Mich. L. Rev. 1047, 1061 (1994). Most prominently, the colonies continued to hold procedures like those first described in the English Marian Bail and Committal Statutes of 1554 and 1555. Under those laws, a justice of the peace was required to "take the examination" of an accused individual promptly after the defendant was apprehended. *See* An Acte to take the Examination of Prysoners suspected of Manslaughter or Felonye, 2 & 3 Phil. & M., ch. 10, § 1 (1555) (Eng.) (committal statute). The statute required a justice of the peace to "put in writing" anything the accused person said that was "material to prove the Felony," *id.*, and to "transmit this document to the trial court, where it could be used in evidence against the accused," Langbein, *Privilege Against Self-Incrimination, supra*, at 1060; *see Crawford*, 541 U.S. at 44; *see also* An Act appointing an Order to Justices of Peace for the Bailement of Prisoners, 1 & 2 Phil. & M., ch. 13, § 1 (1554) (Eng.) (authorizing justices of the peace to obtain incriminating statements from suspects at pre-trial interrogations).

The Self-Incrimination Clause was a reaction against "putting the accused upon his oath and compelling him to answer questions" in these pre-trial interrogations, *Doe*, 487 U.S. at 212, reflecting the Founders' rejection of the notion that "the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused," *Ullmann*, 350 U.S. at 501 (quoting *Maffie*, 209 F.2d at 227). By the time of the Founding,

justices of the peace were prohibited from questioning an arrestee *under oath* at these committal or bail proceedings. *See, e.g.*, 2 Hale, *supra*, at 120 (Justice of the peace is "to take the examination of the person accused, but this is to be without oath and put into writing"); Burn, *supra*, at 760 ("The examination of the person accused ought not to be upon oath."); Parker, *supra*, at 174 ("[T]he examination of the person accused, ought not to be upon oath.").[8]

Yet petitioner's theory would permit that very practice, allowing the government to place a defendant under oath at a probable cause hearing—or even a Marian committal or bail proceeding if those still existed—and force him to testify against himself, thereby subjecting him "to the cruel trilemma of self-accusation, perjury or contempt," *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964). After all, so long as the government promised not to use those statements *at trial*, the forced incriminatory testimony—made on pain of perjury on the one hand, or contempt on the other—would not, in petitioner's view, violate the Clause. This defies common sense and turns its back on the historical understandings of the Clause at the time of the Founding. *See* Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law:*

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[8] Significantly, a committal or bail hearing was the *only* time a defendant could be questioned by the government. After all, "England did not have a professional police force until the 19th century," *Crawford*, 541 U.S. at 53, and so police officers were not performing interrogations as they do today. Moreover, at trial, "criminal defendants were deemed incompetent as witnesses," *Ferguson v. Georgia*, 365 U.S. 570, 574 (1961), and therefore did not testify under oath. John H. Langbein, *The Origins of Adversary Criminal Trial* 280 (2003) (noting that "the privilege had so little capacity to affect the treatment of the criminal defendant at trial, since he was not allowed to be sworn until 1898 in England (a few decades earlier in many American jurisdictions)").

"Here I Go Down That Wrong Road Again," 74 N.C. L. Rev. 1559, 1626 (1996) (noting that at the Founding, even "[p]rospective jurors and witnesses in civil cases . . . could avail themselves of the privilege" and "[c]ourts did not compel them to answer on condition that their testimony not later be used against them").[9]

The United States acknowledges this history, but then argues that that the reason the "coerced confessions obtained in those pretrial interrogations" were problematic was because they were "then used to convict the defendant *at trial*." U.S. Br. 24. Of course, the United States is correct that forced statements made under oath could not be introduced against criminal defendants at trial. But there is no reason to think that the Founders were concerned *only* with the use of those statements at trial. After all, testimony obtained at these pretrial examinations was used not only at trial, but also in crafting the indictment. *See* Langbein, *Adversary Criminal Trial, supra,* at 44 n.169 (noting that "indictments . . . were usually drafted by an assistant to the clerk of the peace, sometimes working from Marian pretrial examinations when the offense in question had been serious enough to provoke a [justice of the peace's] investigation"); *id.* at 45 ("Most bills of indictment were generated in the Marian pretrial procedure."). As Hawkins's Treatise explained with regard to an informer's testimony, "the

[9] This position also "ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). As Respondent explains, "[g]iven the ubiquity of plea bargaining, the probable cause hearing is for many defendants their only real chance to challenge the basis for the charges against [them]." Resp. Br. 57-58. It would be perverse to allow the government to introduce compelled, incriminating testimony at a probable cause hearing to induce a defendant to plead guilty, when that testimony could never be used against the defendant at trial.

Examination of an Informer taken upon oath . . . before Justices of Peace in pursuance of [the Marian committal and bail statutes] . . . may be given in evidence at the Trial of such inquisition, *or of an Indictment for the same felony*." 2 Hawkins, *supra*, at 429 (emphasis added). Petitioner and the United States offer no reason why the Founders would not have been equally concerned with the use at the indictment stage of preliminary examination statements made under oath.

In short, the Founders were concerned not just with the use of coerced statements at trial, but also with allowing the prosecution "to build up a criminal case" with "enforced disclosures by the accused," *Ullmann*, 350 U.S. at 427. To prevent this, they broadly prohibited a person from being "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. When the government introduces coerced, incriminating statements as evidence against a person at a probable cause hearing, the government violates that prohibition.

CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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