No. 16-1495

IN THE

Supreme Court of the United States

CITY OF HAYS, KANSAS,

Petitioner,

v.

MATTHEW JACK DWIGHT VOGT,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Fifth Amendment provides that "[n]o person … shall be compelled in any criminal case to be a witness against himself."

The question presented is:

Whether the 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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INTRODUCTION

Respondent Matthew Vogt was a police officer employed by Petitioner City of Hays, Kansas ("the City" or "Hays"). The City compelled Officer Vogt to make incriminating statements as a condition of keeping his job, and then used those statements to initiate and support a criminal case against him. The prosecution used Officer Vogt's compelled statements against him at a probable cause hearing, but a state court dismissed the criminal charges before it ever got to trial.

In Officer Vogt's action under 42 U.S.C. § 1983 alleging a violation of the Fifth Amendment, the district court granted the City's motion to dismiss, ruling that there can be no violation of the right against self-incrimination unless the prosecution introduces the statement in a criminal trial. The Court of Appeals reversed and remanded for further proceedings, holding that the protection against self-incrimination is not limited to the use of compelled statements at trial, but also extends to the use of such statements in pretrial criminal proceedings like the probable cause hearing in this case.

The Petition urges that this holding implicates a circuit conflict, but the split it portrays does not exist. The Tenth Circuit followed the consensus view—articulated in decisions of the Second, Seventh, and Ninth Circuits—that the Constitution's protection against self-incrimination applies not only with respect to criminal trials but also to other parts of a criminal case, like bail hearings, arraignments, and probable cause hearings. The City asserts that other

circuits have come to the opposite conclusion, but it mischaracterizes those courts' decisions, and there is no contrary line of circuit authority.

The Tenth Circuit's decision is also correct. The Fifth Amendment's text applies explicitly to "any criminal case," U.S. Const. amend. V, not just to a trial. As the Court of Appeals explained, the provision's history also shows that it is not limited to criminal "trials." And the separate opinions in *Chavez v. Martinez*, 538 U.S. 760 (2003), also indicate that the right against self-incrimination is not just a trial right, but may be implicated when compelled statements form the basis for criminal charges and when the prosecution uses such statements in a judicial proceeding.

This case is also an unsuitable vehicle for this Court's review. The Court of Appeals' decision is interlocutory in nature; it merely reversed the district court's threshold grant of the City's motion to dismiss, and remanded the matter for further proceedings in district court. Moreover, the City's position in this litigation is that it is entitled to prevail on Officer Vogt's Fifth Amendment claim for multiple reasons wholly independent of the question it seeks to present for this Court's review. And, Judge Hartz's concurrence in the decision below, "emphasiz[ing] the limits" of the panel's ruling (Pet. App. 33a), further underscores that certiorari is unwarranted.

This Court should deny the Petition.

STATEMENT OF THE CASE

Officer Vogt Is Compelled To Make Statements, Which Are Then Used To Initiate And Support A Criminal Case Against Him.

Respondent Matthew Vogt was a police officer working for Petitioner City of Hays. In late 2013, he applied for a job with the police department of the City of Haysville, Kansas, a separate municipality. During the hiring process, he disclosed that he had kept a knife that he obtained while working as a Hays police officer. The City of Haysville offered Officer Vogt a job, conditioned upon his reporting and returning the knife to the City of Hays. Pet. App. 2a-3a, 48a.

Officer Vogt reported and returned the knife to the Hays police department. The Hays police chief ordered him to submit a written report concerning his possession of the knife, and Officer Vogt complied with the order. Pet. App. 3a. Officer Vogt then gave the City of Hays a two-week notice, intending to accept the new job with the City of Haysville. *Id.*

Meanwhile, the Hays police chief opened an internal investigation into Officer Vogt's possession of the knife. A Hays police officer directed Officer Vogt to provide a more detailed account regarding the knife in order to keep his job with the City of Hays. Officer Vogt again complied, and the Hays police used the additional statement to locate additional evidence. Pet. App. 3a, 49a-50a.

Based on Officer Vogt's statements and the additional evidence, the Hays police chief asked the Kansas Bureau of Investigation to start a criminal investigation. In conjunction with this request, the Hays police department provided the Kansas Bureau of Investigation with Officer Vogt's statements and the additional evidence. The Kansas Bureau of Investigation undertook a criminal investigation, and the investigation led the Haysville police department to withdraw its job offer. Pet. App. 3a, 50a.

Officer Vogt was ultimately charged in Kansas state court with two felony counts related to his possession of the knife. The state trial court conducted a probable cause hearing in which the prosecution introduced Officer Vogt's compelled statements and additional evidence that law enforcement developed based on those statements. The state court determined that the prosecution lacked probable cause to support the charges. The court accordingly dismissed the case. Pet. App. 3a, 50a-51a.

Officer Vogt Sues Alleging A Fifth Amendment Violation, And The District Court Dismisses The Case.

After the state court dismissed the criminal charges against him, Officer Vogt filed this action under 42 U.S.C. § 1983 against the City of Hays, the City of Haysville, and specified Hays and Haysville officials in their individual and official capacities. The complaint alleged that the use of his compelled statements to initiate and support a criminal case against him, including use of the statements at the probable cause hearing, violated his Fifth Amendment right

against self-incrimination. Pet. App. 1a, 3a-4a, 46a-54a. The defendants, including the City of Hays, filed motions to dismiss under Fed. R. Civ. P. 12(b)(6).

The district court granted the dismissal motions, holding that Officer Vogt failed to state a claim under the Fifth Amendment because his compelled statements were never admitted against him at a criminal trial. Pet. App. 35a-44a. The district court recognized that "this case turns on whether the compelled statements were used in a criminal proceeding." Pet. App. 39a. The court then reasoned that, because "the compelled statements were never introduced against Vogt at trial," he "fail[ed] to state a violation of his Fifth Amendment rights." Pet. App. 43a-44a.

The Tenth Circuit Reinstates Officer Vogt's Fifth Amendment Claim.

The Court of Appeals affirmed in part and reversed in part, and remanded for further proceedings. Pet. App. 2a, 33a.

The Court of Appeals reversed the district court's holding that there cannot be a Fifth Amendment violation unless the compelled statements are admitted at a criminal trial. The court first looked to the text of the Fifth Amendment, which provides that "No person shall be 'compelled in any criminal case to be a witness against himself.'" Pet. App. 10a (quoting U.S. Const. amend. V). The court noted that the text employs the broad term "criminal case," and does not limit its scope to a criminal "trial" or "prosecution." *Id.* The Court of Appeals also examined the evidence of the Framers' understanding of the right against self-

incrimination, and concluded that consistent with the applicable constitutional text the "Founders apparently viewed the right more broadly" than just a trial right, "envisioning it to apply beyond the trial itself." Pet. App. 19a; *see id.* at 11a-19a. The Court of Appeals observed as well that other Circuits have addressed the question and that the Second, Seventh, and Ninth Circuits have all concluded that the prosecution's use of compelled statements in the context of pretrial proceedings such as bail hearings, suppression hearings, arraignments, and probable cause hearings violates the Fifth Amendment. Pet. App. 6a-7a. For all of these reasons, and because Officer Vogt "alleged that his compelled statements had been used in a probable cause hearing," the court held that Officer Vogt had "adequately pleaded a Fifth Amendment violation consisting of the use of his statements in a criminal case." Pet. App. 20a.

The Court of Appeals accordingly remanded Officer Vogt's claims against the City of Hays for further proceedings in the district court. Pet. App. 33a. In remanding the matter to the district court, the Court of Appeals noted that the City takes the position that it is entitled to prevail on Officer Vogt's Fifth Amendment claim regardless of whether the protection against self-incrimination extends to the use of compelled statements in pretrial criminal proceedings. In particular, the City has asserted that it cannot be held liable for any Fifth Amendment violation even if one occurred, because a separate entity, the State of Kansas, actually filed and conducted the criminal case against Officer Vogt, and because the Hays officials who undertook any conduct attributable to Hays, including its police chief, had no ultimate policymaking

authority. On these points, the Court of Appeals held that the allegations in the complaint were sufficient to survive a motion to dismiss, and that these issues could be explored further in the proceedings on remand in district court. Pet. App. 26a-32a.

Although it reversed and remanded with respect to the City of Hays, the Court of Appeals affirmed the district court's dismissal of Officer Vogt's remaining claims on grounds not relevant here. Pet. App. 20a-26a.

Judge Hartz issued a short concurrence, agreeing with the panel's judgment and reasoning, and noting several issues regarding the Fifth Amendment and *Garrity v. New Jersey*, 385 U.S. 493 (1967), that the panel had not addressed or resolved. Pet. App. 33a-34a.

REASONS TO DENY CERTIORARI

This Court should deny the Petition because the circuit conflict that the Petition portrays does not exist, the Tenth Circuit's decision is correct, and this case in any event is not a suitable vehicle for this Court's review. Certiorari is unwarranted.

I. The Circuit Conflict Portrayed In The Petition Does Not Exist, And The Tenth Circuit Followed The Consensus View That The Right Against Self-Incrimination Is Not Just A Trial Right.

The Petition's depiction of a circuit split is inaccurate. The Tenth Circuit here agreed with holdings of

the Second, Seventh, and Ninth Circuits, and there is no line of circuit authority on the other side.

A. In holding that the Fifth Amendment's protection against self-incrimination extends beyond the prosecution's use of compelled statements at trial, the Tenth Circuit expressly followed decisions to that effect by the Second, Seventh, and Ninth Circuits. Pet. App. 7a.

The Seventh Circuit first analyzed this issue in 2006, when it considered the Fifth Amendment claims of a couple mistakenly arrested and charged with bank robbery. *Sornberger v. City of Knoxville*, 434 F.3d 1006, 1009-12 (7th Cir. 2006). During the investigation, the wife falsely stated that she assisted her husband with the robbery, and police used her statements "to develop probable cause sufficient to charge her and initiate a criminal prosecution." *Id.* at 1025. The police subsequently identified the actual culprit, and the prosecution dropped the charges. *Id.* at 1012. In the ensuing § 1983 action, the complaint alleged that the police coerced the wife's confession. The Seventh Circuit held that the compelled statements "were used against her in a 'criminal case' and in a manner that implicates the Self-Incrimination Clause." *Id.* at 1026. Specifically, before dropping the charges, the prosecution introduced the confession at a preliminary hearing "to determine whether probable cause existed to allow the case against her to go to trial." *Id.* The court concluded that where "a suspect's criminal prosecution was not only initiated, but was commenced *because* of her [compelled] confession, the 'criminal case' contemplated by the Self-Incrimination Clause has begun." *Id.* at 1026-27 (emphasis in

original). The court specifically "refuse[d] to hold that the right against self-incrimination cannot be violated unless a [compelled statement] is introduced in the prosecution's case-in-chief at trial." *Id.* at 1027 n.15. *See also Best v. City of Portland*, 554 F.3d 698, 702-03 (7th Cir. 2009) (reaffirming *Sornberger* and holding that a suppression hearing is part of a "criminal case" under the Fifth Amendment).

A year later, the Second Circuit joined the Seventh Circuit in rejecting the notion that a Fifth Amendment violation occurs only if the prosecution uses a compelled statement at trial. *Higazy v. Templeton*, 505 F.3d 161 (2d Cir. 2007). There, the defendant claimed that use of a compelled statement at his bail hearing violated his Fifth Amendment right against self-incrimination. *Id.* at 170, 172-73. The Second Circuit agreed, holding that the defendant's initial appearance at his bail hearing "was part of [his] criminal case," such that the prosecutor's use of his compelled confession at the hearing constituted a Fifth Amendment violation. *Id.* at 173. The Second Circuit reaffirmed its earlier ruling that "use or derivative use of a compelled statement at any criminal proceeding" violates the defendant's rights against self-incrimination under the Fifth Amendment, and "use of the statement at trial is not required." *Id.* (quoting *Weaver v. Brenner*, 40 F.3d 527 (2d Cir. 1994)).

Most recently, the Ninth Circuit "join[ed] the Second and Seventh Circuits in holding that use of … statements at trial is not necessary for [a defendant] to assert a claim for violation of his rights under the Fifth Amendment." *Stoot v. City of Everett*, 582 F.3d

910, 925 (9th Cir. 2009), *cert. denied*, 559 U.S. 1057 (2010). There, police questioned a minor about allegations of sexual abuse of a younger child and obtained the minor's confession. Prosecutors used the confession to file criminal charges and also introduced it at a pretrial arraignment and bail hearing. *Id.* at 912, 923. The Ninth Circuit concluded that a "coerced statement has been 'used' in a criminal case when it has been relied upon to file formal charges against the declarant, to determine judicially that the prosecution may proceed, and to determine pretrial custody status." *Id.* at 925.

B. The Petition asserts that these decisions are in conflict with decisions from the Third, Fourth, Fifth, and Eighth Circuits. Pet. 6-8. That assertion is incorrect. The City manufactures this purported split by mischaracterizing the holdings of those cases. While the Petition highlights some stray language that seems supportive of the City's position, the split it portrays does not exist.

In *Burrell v. Virginia*, 395 F.3d 508 (4th Cir. 2005), the plaintiff was involved in a car accident, and when he refused to produce documentation of his car insurance the police officer on the scene issued summonses for him to appear in court. The plaintiff then sued, alleging that compelling the production of proof of insurance violated his Fifth Amendment rights. *Id.* at 510-11. The Fourth Circuit rejected the Fifth Amendment claim because the plaintiff alleged no improper "courtroom" or "trial" conduct. *See id.* at 513-14. The court did not limit the right against self-incrimination to the use of compelled statements at a criminal trial; to the contrary, the court emphasized

that "Burrell *only* claim[ed] that his constitutional rights were violated at the time the summonses were issued." *Id.* at 513 n.4 (emphasis in original). The Fourth Circuit in *Burrell* thus did not consider whether prosecutors' use of compelled statements in a pretrial judicial proceeding, such as a bail hearing or a probable cause hearing, violated the Fifth Amendment; instead, it considered only the very different question whether an officer violates the Fifth Amendment by issuing a summons for failure to provide proof of insurance.

In *Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005), the Fifth Circuit likewise did not analyze whether the right against self-incrimination protects against the use of compelled statements in pretrial proceedings because the prosecution had used the plaintiff's compelled statements at her criminal trial. There, officers questioned an 11-year-old girl and elicited a confession that was admitted at trial and resulted in her conviction. *Id.* at 284. A state appellate court later reversed the conviction, and the girl brought a civil rights action. The City fixates on the Fifth Circuit's passing statement that the "privilege against self-incrimination is a fundamental trial right which can be violated only *at* trial." *Id.* at 285 & n.11. But that language was dicta, because, as noted, the statements there *were* admitted and used at trial. Moreover, the Fifth Circuit ultimately concluded that, "as [the plaintiff] cannot demonstrate that the acts of the defendants in obtaining her confession proximately caused the violation of her Fifth Amendment rights, we hold that she may not maintain against the defendants … a claim under § 1983." *Id.* at 296; *see id.* at 292-93. Thus, the disposition of the case turned on a causation

point in any event, and not on any decision regarding the scope of the Fifth Amendment.

And in *Winslow v. Smith*, 696 F.3d 716 (8th Cir. 2012), the Eighth Circuit similarly did not analyze whether the right against self-incrimination is just a trial right, because the plaintiffs there did not allege any use of their compelled statements in *any* criminal proceeding—whether pretrial or trial. In *Winslow*, the four plaintiffs, previously criminal defendants, had entered pleas of guilty, nolo contendere, or no contest to rape and murder charges, but they later received full pardons. *Id.* at 727-30. They then sued state officials alleging violations of multiple constitutional rights. *Id.* The Eighth Circuit referenced plaintiffs' self-incrimination claims in a footnote, stating that those claims failed because "Plaintiffs did not proceed to a criminal trial." *Id.* at 731 n.4. But the court at no point addressed whether the use of compelled statements in pretrial proceedings—had any such use occurred—could have triggered the privilege against self-incrimination. So, like *Burrell* and *Murray*, *Winslow* presents no holding on the issue that the Tenth Circuit confronted and addressed in this case.

The only circuit that even arguably holds that the Fifth Amendment right against self-incrimination is just a trial right is the Third Circuit, in *Renda v. King*, 347 F.3d 550 (3d Cir. 2003), and that case is distinguishable. In *Renda*, officers interviewed a suspect without providing *Miranda* warnings, and they used her statement to charge her with giving false reports to law enforcement. *Id.* at 552-53. The state trial court, however, later suppressed her statement, *id.* at 553, and the prosecution dropped the charges. In her

§ 1983 suit against state officials, the Third Circuit recognized that the prosecution used plaintiff's statement against her in "one sense," *id.* at 559, *i.e.*, as the basis for bringing criminal charges, but it concluded that its "prior decision in *Giuffre*" *v. Bissell,* 31 F.3d 1241 (3d Cir. 1994), "compels the conclusion that it is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution." *Renda*, 347 F.3d at 559. *Giuffre* was a qualified immunity case that addressed whether it was "clearly established" at the time of the events in that case that obtaining statements in violation of *Miranda* could transgress the Fifth Amendment, "even though those statements were never used against the plaintiff in a court of law," *Giuffre*, 31 F.3d at 1256. Unlike *Renda* and *Giuffre*, this is not a *Miranda* case and Officer Vogt's compelled statements were affirmatively used against him in a judicial probable cause hearing, and not just in filing charges.

In sum, of the four circuits that the City claims have held that the Fifth Amendment privilege against self-incrimination is just a trial right, only one even purports to hold as much, and, as shown above, that case is distinguishable in any event. The other cases that the Petition cites contain at most drive-by dicta that the Petition cobbles together to give the impression of an established circuit split where there is none. The Tenth Circuit here properly followed the Second, Seventh, and Ninth Circuits in holding that the Fifth Amendment's protection against self-incrimination is not limited to the use of compelled statements at a criminal trial but instead may also extend to the use of such statements in pretrial proceedings. Any cir-

cuit conflict on that issue is at best shallow and undeveloped, and at least at this time is not worthy of this Court's review.[1]

II. The Tenth Circuit Correctly Interpreted The Fifth Amendment's Language And History And This Court's Precedent In Concluding That The Right Against Self-Incrimination Is Not Just A Trial Right.

The decision of the Tenth Circuit is correct. It draws strong support from the Fifth Amendment's text and history, and from the multiple opinions in *Chavez v. Martinez*, 538 U.S. 760 (2003).

A. As the Court of Appeals noted, the text of the Fifth Amendment provides that "No person shall … be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Thus, the constitutional language refers broadly to "any criminal case," and is not limited to "criminal trials" or "criminal prosecutions." The Court of Appeals properly concluded that the broad wording of the Self-Incrimination Clause militates against a restrictive

[1] The Petition also cites *Smith v. Patterson*, 430 F. App'x 438 (6th Cir. 2011), but that decision is unpublished and thus is not binding or precedential in the Sixth Circuit. And the Minnesota Supreme Court case that the Petition cites is also inapposite. In *State v. Mems*, 708 N.W.2d 526, 534 (Minn. 2006), the defendant alleged that his privilege against self-incrimination was violated because he received an inadequate *Miranda* warning. *Id.* at 534. He did not claim that any statement he made was wrongfully used in any courtroom proceeding, whether at trial or otherwise. *See also Tinker v. Beasley*, 429 F.3d 1324, 1328 n.7 (11th Cir. 2005) ("Tinker never made any incriminating statement.") (cited at Pet. 7).

reading that would limit its protections to the use of compelled statements at a criminal trial and that would not extend to the use of such statements in pretrial proceedings. "If the Framers had meant to restrict the right to 'trial,' they could have said so." Pet. App. 13a-14a (quoting 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)).

The fact that the Constitution in other places employs narrower language further bolsters this conclusion. In particular, as the Court of Appeals noted, the omission of the terms "trial" or "criminal prosecution" from the Fifth Amendment's text stands in contrast to the Sixth and Seventh Amendments, where the constitutional text expressly employs those terms. Pet. App. 10a-11a; U.S. Const. amends. VI, VII. As the Court of Appeals explained, where the Constitution employs a particular verbal formulation in one provision, and a different verbal formulation in another provision, the courts must respect the distinction. Pet. App. 10a-11a; *see also* Pet. App. 17a-18a (citing Leonard W. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* 427 (1968)).

The Court of Appeals also examined the evidence of the intent underlying the language of the Fifth Amendment. The court concluded that "[t]he Founders' understanding of the term 'case' suggests that the Fifth Amendment encompasses more than the trial itself." Pet. App. 13a. And for good reason: Pretrial proceedings no less than trials on the merits may impinge upon a defendant's liberty. *See, e.g.*, *United*

States v. Abuhamra, 389 F.3d 309, 324 (2d Cir. 2004) ("[B]ail hearings determine whether a defendant will be allowed to retain, or forced to surrender, his liberty during the pendency of his criminal case."). By applying the privilege to all aspects of a "criminal case," the Tenth Circuit's decision preserves the Fifth Amendment's historical role as a bulwark protecting the individual against the power of the state.

B. This Court in *Chavez v. Martinez*, 538 U.S. 760 (2003), touched upon but did not resolve the question presented in this case. *Chavez* involved a police interrogation of an injured suspect. The state filed no criminal charges against the individual, and the question in the § 1983 context was whether the officer violated the Fifth Amendment by eliciting incriminating statements, even though the statements never made their way into any criminal proceeding. The Court's answer was no.

Chavez yielded no majority opinion. Justice Thomas' plurality opinion (for four Justices) stated that the existence of a "criminal case" within the meaning of the Fifth Amendment "at the very least requires the initiation of legal proceedings." *Id.* at 766. Justice Souter's concurring opinion (for two Justices) observed similarly that "the text of the Fifth Amendment … focuses on courtroom use of a criminal defendant's compelled, self-incriminating testimony." *Id.* at 777. Justice Stevens' concurring and dissenting opinion added that the Fifth Amendment's privilege against self-incrimination "is the most specific provision in the Bill of Rights that protects all citizens from the kind of custodial interrogation that was once employed by the Star Chamber [and] by the Germans of

the 1930's and early 1940's." *Id.* at 788 (internal quotation marks omitted). And Justice Kennedy's concurring and dissenting opinion (for three Justices) took the view that "the Self-Incrimination Clause is applicable at the time and place police use compulsion to extract a statement from a suspect. The Clause forbids that conduct." *Id.* at 795.

Although *Chavez* did not decide the "precise moment when a 'criminal case' commences," *Id.* at 766-67, the various opinions suggest that the protection against self-incrimination is more than just a trial right. "[E]xtract[ion]" (*id.* at 795 (Kennedy, J.)) of a compelled statement may occur long before any criminal trial. Likewise, "the initiation of legal proceedings" (*id.* at 766 (Thomas, J.)) will typically take place prior to a trial. And "courtroom use of a criminal defendant's compelled, self-incriminating testimony" (*id.* at 777 (Souter, J.)) can arise in any number of pretrial settings, including, for example, bail hearings, suppression hearings, arraignments, and probable cause hearings. Taken together, the separate opinions in *Chavez* indicate that the protection against self-incrimination applies not only to the prosecution's use of compelled statements at a criminal trial, but may also extend to the prosecution's use of such statements in pretrial criminal proceedings. *See* Pet. App. 5a-6a; *Stoot*, 582 F.3d at 922-25; *Higazy*, 505 F.3d at 171-73; *Sornberger*, 434 F.3d at 1023-27.

C. The Petition invokes the proposition that criminal defendants generally may not challenge an indictment on the ground that the evidence before the grand jury included the defendant's compelled statements. *See* Pet. 11. But the Petition draws the wrong

conclusion from that premise. The principle that the City seeks to invoke does not reflect the fact that the Fifth Amendment cannot apply before trial; it reflects the fact that the grand jury is a distinct institution governed by a special body of rules.

As this Court has explained, the grand jury "is a constitutional fixture in its own right"; "it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people"; it "deliberates in total secrecy"; and it may operate on an *ex parte* basis and "hear only the prosecutor's side." *United States v. Williams*, 504 U.S. 36, 47-51 (1992). In light of the distinct nature of the grand jury, "certain constitutional protections afforded defendants in criminal proceedings have no application before that body," including the Double Jeopardy Clause and the Fourth Amendment's exclusionary rule. *Id*. at 49. That is why this Court's "cases suggest that an indictment obtained through the use of evidence previously obtained in violation of the privilege against self-incrimination 'is nevertheless valid.'" *Id*. (quoting *United States v. Calandra*, 414 U.S. 338, 346 (1974)). These precepts by their terms turn on the grand jury's special role and function; they do not stand for any larger point that the Fifth Amendment's protections against self-incrimination apply only at trial and do not extend to pretrial courtroom proceedings like probable cause hearings.

Indeed, even on its own terms, the Petition is simply mistaken in suggesting that the Fifth Amendment categorically does not apply in the grand jury context. *See* Pet. 11, 12. It is settled that witnesses

called upon to testify before the grand jury may invoke their Fifth Amendment rights against self-incrimination, and may obtain use immunity encompassing their testimony. *See Williams*, 504 U.S. at 49; *Kastigar v. United States*, 406 U.S. 441 (1972). A defendant who has received such immunity may request a hearing in court to ensure that his prosecution does not improperly rely upon immunized testimony. *Kastigar*, 406 U.S. at 460-61.

III. This Case Is Not A Suitable Vehicle For The Court's Review.

Even if the question presented were otherwise suited for this Court's review, the interlocutory posture of this case makes it a poor vehicle for the Court to resolve it.

A. The Court of Appeals did not resolve one way or another whether the City is liable on Officer Vogt's Fifth Amendment claim. It merely reversed the district court's dismissal of that claim under Fed. R. Civ. P. 12(b)(6), and remanded the matter to the district court for further proceedings. Pet. App. 33a. Thus, under the terms of the Court of Appeals' ruling, this litigation will proceed in district court, and its ultimate disposition is as yet unknown. Against this backdrop, there is at this juncture no need or reason for this Court's intervention.

B. Moreover, the City has taken the position that it is legally entitled to prevail on Officer Vogt's Fifth Amendment claim on at least two separate grounds wholly independent of the question that it seeks to present for this Court's review. The City's insistence

that it is entitled to prevail on the Fifth Amendment claim regardless of the resolution of the question presented in its Petition further militates against this Court's review.

The City takes the position in this litigation that "it did not cause a violation of the Fifth Amendment," even if a Fifth Amendment violation otherwise occurred. Pet. App. 27a. "Rather, Hays submits that it merely gave Mr. Vogt's compelled statements to the Kansas Bureau of Investigation, pointing out that Hays did not make the decision to pursue criminal charges or to use the statements in pretrial proceedings." *Id.*

The Court of Appeals rejected this argument for purposes of the City's threshold motion to dismiss. It explained that "Section 1983 imposes liability on a state actor who 'causes to be subjected … any citizen … to the deprivation of any rights'" (quoting 42 U.S.C. § 1983); that "causation exists if Hays initiated actions that it knew or reasonably should have known would cause others to deprive Mr. Vogt of his right against self-incrimination"; and that, "[a]ccordingly, Hays could incur liability even if it had been someone else who used the compelled statements in a criminal case." Pet. App. 27a-28a. The Court of Appeals continued that, "[t]aking the[] [complaint's] allegations as true, we conclude that Mr. Vogt adequately pleaded that Hays had started a chain of events that resulted in violation of the Fifth Amendment." Pet. App. 28a.

Separately and independently, the City likewise maintains that, to the extent that its police chief's conduct is attributable to the City, it nonetheless

"cannot incur liability for actions by the Hays police chief because he was not a final policymaker for the city." Pet. App. 29a. The Court of Appeals rejected this proposition too for purposes of the City's motion to dismiss, explaining that "Mr. Vogt pleaded facts indicating that the Hays police chief was a final policymaker on the requirements for police employees." Pet. App. 29a. The Court of Appeals explained that "[t]he complaint alleges that the Hays police chief had final policymaking authority for the police department," and "[t]here is nothing in the complaint to suggest that his decisions were subject to further review up the chain-of-command." Pet. App. 30a. "The absence of such provisions is fatal at this stage," the Court of Appeals observed, "where we must view all of the allegations and draw all reasonable inferences in favor of Mr. Vogt." Pet. App. 32a. "As a result, we conclude that Mr. Vogt has adequately pleaded final policymaking authority on the part of the Hays police chief." *Id.*

In short, the City's stance has been and presumably will remain that for at least two different reasons it is entitled to prevail on Officer Vogt's Fifth Amendment claim wholly apart from the question presented in its Petition: whether the protection against self-incrimination applies only with respect to the prosecution's use of compelled statements at criminal trials or whether, instead, it extends more broadly to the prosecution's use of such statements in pretrial proceedings like the probable cause hearing in this case. That the question presented is thus in the City's view not outcome-determinative of Officer Vogt's Fifth Amendment claim weighs against this Court's granting review.

C. Judge Hartz's concurrence provides additional reasons why the Petition should be denied. As noted, the concurrence identifies several questions pertaining to the Fifth Amendment and *Garrity v. New Jersey*, 385 U.S. 493 (1967), that the Court of Appeals did "not answer[]." Pet. App. 33a. The concurrence's listing of issues that the parties as appropriate are thus free to pursue on remand in the district court further underscores that this Court's needless and premature involvement in this case would be unwarranted.

CONCLUSION

The Court should deny the Petition.

Respectfully submitted,

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