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CLARIFYING THE SCOPE OF THE SELF-INCRIMINATION
CLAUSE: *CITY OF HAYS V. VOGT*

SAMANTHA RUBEN*

INTRODUCTION

The Fifth Amendment protection against self-incrimination is not purely a trial right and can be asserted at a probable cause hearing. The Fifth Amendment's Self-Incrimination Clause states that "[n]o person . . . shall be compelled in any *criminal case* to be a witness against himself."¹ Absent a principled theory from the Supreme Court, lower courts have struggled to clearly and consistently define the scope of the Self-Incrimination Clause.² The Supreme Court had a chance to clarify the meaning of "criminal case" within the Fifth Amendment in *City of Hays v. Vogt*.³ However, the Supreme Court ultimately dismissed the writ of certiorari as improvidently granted.⁴ Because the Supreme Court failed to answer define "criminal case," a circuit split remains.⁵ Should the Supreme Court have another opportunity to resolve this question, the Court should define the scope of the Self-Incrimination Clause and incorporate the privilege as a right beyond trial that can apply at a probable cause hearing.

Any effort to interpret a constitutional provision must begin with the text.⁶ To interpret what the Self-Incrimination Clause means, it is necessary

* J.D. Candidate, Chicago-Kent College of Law, 2019. This note is dedicated to my parents and sister, who encouraged me to attend law school and provide constant guidance and support.

1. U.S. CONST. amend. V (emphasis added).

2. Geoffrey B. Fehling, Note, *Verdugo, Where'd You Go?: Stoot v. City of Everett and Evaluating Fifth Amendment Self-Incrimination Civil Liability Violations*, 18 GEO. MASON L. REV. 481, 484 (2011) ("The aftermath of [*Chavez v. Martinez*] is unclear, leaving courts to attempt to protect the Fifth Amendment's constitutional guarantees without exercising too much discretion in interpreting the scope of constitutional rights."). See also *United States v. Sweets*, 526 F.3d 122, 129 (4th Cir. 2007) (explaining that the judicial protection of the Fifth Amendment right "must not degenerate to a judicially-created code of pretrial police conduct").

3. 138 S. Ct. 1683 (2018) (Justice Gorsuch did not partake in the consideration or decision of the case).

4. *Id.* at 1684.

5. *Vogt v. City of Hays*, 844 F.3d 1235, 1240 (10th Cir. 2017) (joining the Second, Seventh, and Ninth Circuits in "concluding that the right against self-incrimination is more than a trial right" that applies at a probable cause hearing).

6. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 22 (1997) (explaining that "[t]he text is the law, and it is the text that must be observed").

to understand how the Framers would have interpreted “criminal case.” However, because the meaning of “criminal case” is unclear, a circuit split has developed as to when a “criminal case” commences within the meaning of the Fifth Amendment’s Self-Incrimination Clause.⁷ Some circuits require that a criminal case solely means a criminal trial, providing no Fifth Amendment protections to proceedings that occur before trial.⁸ However, other circuit courts have extended the right against self-incrimination to pre-trial proceedings.⁹ These courts have held that this pre-trial right includes, but is not limited to, suppression hearings, bail hearings, probable cause hearings, grand jury proceedings, and initial complaint or arraignment hearings.¹⁰

Chavez v. Martinez is the Supreme Court’s most relevant guidance on the issue.¹¹ *Chavez* stated that a criminal case requires at least the initiation of criminal proceedings, but the Court did not specifically decide or discuss what a criminal case means.¹² Although the Court did not explicitly decide how a criminal case is defined in terms of the Fifth Amendment, *City of Hays v. Vogt* presented the Supreme Court with an opportunity to provide clarity to lower courts.¹³ The Supreme Court should have held that a criminal case encompasses all pre-trial proceedings, including a probable cause hearing. The Tenth Circuit case *Vogt* was granted certiorari, and the Supreme Court dismissed it as improvidently granted (“DIG”).¹⁴ The effect of the one sentence order leaves the Tenth Circuit’s decision intact.¹⁵ It also leaves a circuit split open, as the Court failed to answer the question of

7. Several courts provide a broad definition of “criminal case.” See *Stoot v. City of Everett*, 582 F.3d 910, 925 (9th Cir. 2009) (holding that the Fifth Amendment protects coerced statements that were eventually used in formal charges and a criminal proceeding); *Best v. City of Portland*, 554 F.3d 698, 699 (7th Cir. 2009) (stating that a “criminal case” begins for purposes of the Fifth Amendment at the hearing stages); *Higazy v. Templeton*, 505 F.3d 161, 171 (2d Cir. 2007) (holding that the Fifth Amendment applies at a grand jury and bond hearing). *But see Winslow v. Smith*, 696 F.3d 716, 731 (8th Cir. 2012) (stating that the self-incrimination clause of the Fifth Amendment only applies when the statements are later used in a criminal trial); *Murray v. Earle*, 405 F.3d 278, 293 (5th Cir. 2005) (holding that statements arising from pre-trial interrogation “cannot ‘cause’ a subsequent Fifth Amendment violation”); *Renda v. King*, 347 F.3d 550, 557–59 (3d Cir. 2003) (stating that only statements made at a criminal trial are protected by the Fifth Amendment; statements made in obtaining an indictment are not protected).

8. See *Renda*, 347 F.3d at 557–59; *Winslow*, 696 F.3d at 721; *Murray*, 405 F.3d at 293.

9. See cases cited *supra* note 7.

10. *Id.*

11. 538 U.S. 760 (2003).

12. *Id.* at 766.

13. 138 S. Ct. 55 (2017) (mem.).

14. *City of Hays v. Vogt*, 138 S. Ct. 1683, 1683 (2018).

15. See Rory Little, *Opinion analysis: A DIG in Vogt*, SCOTUSBLOG (May 29, 2018, 4:17 PM), <http://www.scotusblog.com/2018/05/opinion-analysis-a-dig-in-vogt/> [<https://perma.cc/5CH5-E4EY>], for analysis on why the Supreme Court may have chosen to “DIG” the case.

whether the Fifth Amendment right against self-incrimination is violated when incriminating statements are used at a probable cause hearing, as opposed to at a criminal trial.¹⁶

In *Vogt*, the petitioner, the City of Hays, compelled a police officer to make self-incriminating statements in order to keep his job.¹⁷ These statements were used to support a criminal case against Officer Vogt.¹⁸ His compelled statements were eventually used in a probable cause hearing, but the state court dismissed the charges before the case went to trial.¹⁹ Vogt refiled in federal court, under 42 U.S.C. § 1983, alleging a Fifth Amendment violation.²⁰ The City's motion to dismiss was granted, and the Court of Appeals later reversed the district court's holding.²¹ Because Officer Vogt had "alleged that his compelled statements had been used in a probable cause hearing," the Court of Appeals sided with the Second, Seventh, and Ninth Circuits, agreeing that the right against Fifth Amendment self-incrimination is more than just a right at trial.²² One of the issues is whether there is an actual disagreement amongst the circuits as to whether the right concerning self-incrimination is solely a trial right.²³ Petitioners argue that there is disagreement amongst the circuits as to whether it is a trial right.²⁴ Respondents argue that the circuits are in agreement about this question, and the Fifth Amendment's use of the word "case" instead of "trial" is controlling in the question.²⁵

Historical evidence demonstrates that the Framers of the Constitution meant for the Self-Incrimination Clause of the Fifth Amendment to apply beyond the scope of criminal trials.²⁶ The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself."²⁷ One of the Fifth Amendment's goals is to offer protection to

16. *Id.*

17. *Vogt v. City of Hays*, 844 F.3d 1235, 1238 (10th Cir. 2017).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 1246.

23. *Id.* at 1239.

24. *Id.*

25. *Id.*

26. Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Characterization of the Right Against Self-Incrimination as a "Trial Right" in Chavez v. Martinez*, 70 TENN. L. REV. 987, 1017 (2003) (explaining that historical sources have shown "that the right against self-accusation was understood to arise primarily in pretrial or pre-prosecution settings rather than in the context of a person's own criminal trial" because the Framers intended the Fifth Amendment to be broadly applicable to any witness who refused to answer a potentially self-incriminating question).

27. U.S. CONST. amend. V.

individuals who provide self-incriminating testimony before a case is filed, and to protect that same testimony from being submitted as evidence for a potential crime committed.²⁸ In his original draft of the Fifth Amendment, James Madison did not include the words “criminal case.”²⁹ When the Framers drafted the Constitution, they intended that the word “case” be interchangeable with “potential prosecution.”³⁰ To further the Framers’ underlying purpose of the Fifth Amendment, the Supreme Court should interpret a “criminal case” to protect individuals from being compelled to make self-incriminating statements.³¹

The Fifth Amendment’s Self-Incrimination Clause can be asserted at a probable cause hearing because the Fourteenth Amendment explicitly protects citizens’ fundamental rights when their life, liberty, and property are compromised.³² The Fourteenth Amendment protects “those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.”³³ Thus, a self-incriminating statement that is used at a probable cause hearing can effectively deprive the individual of liberty, evidencing the need for the rights provided by the Fifth and Fourteenth Amendments to be protected.³⁴

This note will first examine the history of the Fifth Amendment, the Framers’ intent in creating the Fifth Amendment, and how “criminal case” has been interpreted by various courts. It will discuss appellate court decisions and the main reasoning behind those holdings. It will then examine the holding of *Chavez* and the ripple effect that *Chavez* has had throughout the different appellate courts. The note also explains the view that self-incrimination should be interpreted narrowly to not include probable cause hearings. Then, this note examines the procedural posture of *Vogt* and connects the previous sections and history of the Fifth Amendment to the case. This note concludes by explaining why the Supreme Court should have decided that the Fifth Amendment right against self-incrimination is a broad right not limited solely to criminal trials.

28. *Vogt*, 844 F.3d at 1239.

29. *Id.* at 1244 (citing 1 ANNALS OF CONG. 451–52 (1789) (statement of Rep. Madison)).

30. Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: “Here I Go Down that Wrong Road Again”*, 74 N.C. L. REV. 1559, 1627 (1999).

31. LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 425 (Macmillan Pub. Co. 1968) (1923).

32. *See* *Mallory v. Hogan*, 378 U.S. 1, 8 (1964) (holding that the Fifth Amendment applies to the states through the Fourteenth Amendment). *See also* U.S. CONST. amend. XIV, § 1.

33. *Hurtado v. California*, 110 U.S. 516, 521 (1884).

34. *Zahrey v. Coffey*, 221 F.3d 342, 344 (2d Cir. 2000).

I. HISTORICAL AND JUDICIAL BACKGROUND OF THE SELF-INCRIMINATION CLAUSE OF THE FIFTH AMENDMENT

The Framers' intent, the interpretation of the clause by circuit courts, and Supreme Court precedent suggest that the Self-Incrimination Clause of the Fifth Amendment is not solely a trial right. Fifth Amendment protection can be asserted at a probable cause hearing because an individual's freedom can be curtailed and injurious results could occur if an individual testifies. Further, police officers should not be faced with a Hobson's choice when trying to defend themselves.

A. The Framers Intended the Self-Incrimination Clause to be Interpreted Broadly.

The Supreme Court has recognized that the power to compel testimony is not absolute, and the Fifth Amendment protects this essential right by preventing compulsory self-incrimination.³⁵ The Fifth Amendment privilege

reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty[,] . . . and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.³⁶

The historical context and the Supreme Court's dicta concerning the Fifth Amendment unmistakably indicate a broad interpretation of the Fifth Amendment's Self-Incrimination Clause.

The Framers of the Fifth Amendment meant for the Self-Incrimination Clause to be a right not only at trial, but at other pre-trial proceedings. The purpose of the Fifth Amendment is to offer protection to individuals so they are not forced to act as a witness in an investigation where their self-incriminating testimony might act as evidence that the suspect has committed a crime.³⁷ The Framers intended for the words they wrote in the Constitution to be applied based on their original meaning, but they also understood that the application of the language of the document would have to change over time.³⁸ In *Counselman v. Hitchcock*, the Supreme

35. *Kastigar v. United States*, 406 U.S. 441 (1972).

36. *Id.* at 444–45 (explaining how important it is to “safeguard the values which underlie the privilege”).

37. *Counselman v. Hitchcock*, 142 U.S. 547, 562–63 (1972).

38. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1193, 1256 (1987) (explaining that the “living Constitution is the product of a tradition in which the present cannot be understood independently of the past”).

Court understood that the Fifth Amendment offers broad protection, and the Court interpreted the clause to allow to a grand jury to be included in the term “criminal case.”³⁹ Further, the privilege during the founders’ era could be exercised by prospective jurors, politicians, and even in a civil trespass case.⁴⁰ In *Marbury v. Madison*, the Attorney General of the United States even invoked his Fifth Amendment privilege to avoid self-incrimination.⁴¹

When drafting the Fifth Amendment, the Framers thought that the word “case” could be interchangeable with a potential prosecution.⁴² The word “case” and “cause” have been interpreted to be synonymous with each other, both by the Supreme Court and the Framers.⁴³ As used in statutes and judicial decisions, the Supreme Court has acknowledged that “case” and “cause” are consistently used as synonyms for each other, whether in a proceeding in action, court, or suit.⁴⁴

The Tenth Circuit in *Vogt* explained that in his original draft of the Fifth Amendment, James Madison omitted the word “criminal case.”⁴⁵ It was only after Representative Laurence recommended to Madison that “criminal case” be added for the purpose of not conflicting with other laws.⁴⁶ Adding the words “criminal case” did not alter the view that the Fifth Amendment’s Self-Incrimination Clause applies to more than just a criminal trial.⁴⁷ Historical sources have noted that “the right against self-accusation was understood to arise primarily in pretrial or pre-prosecution settings rather than in the context of a person’s own criminal trial,” evidencing the Framers’ intent for the Fifth Amendment to have broad application.⁴⁸ Further, “[i]f the Framers had meant to restrict the right to ‘trial,’ they could have said so.”⁴⁹ Thus, the Framers intended the Fifth Amendment to operate outside of a person’s own criminal trial. This strongly suggests that Officer Vogt should have been able to assert his Fifth Amendment privilege at his probable cause hearing to prevent his statements from being used against him.

39. *Counselman*, 142 U.S. at 563. *See also* Dripps, *supra* note 30, at 1627.

40. Dripps, *supra* note 30, at 1625.

41. 5 U.S. 137 (1803).

42. Dripps, *supra* note 30, at 1627.

43. *See* *Blyew v. United States*, 80 U.S. 581, 595 (1871); *id.* at 1627.

44. *See* *Blyew*, 80 U.S. at 595.

45. 844 F.3d 1235, 1244 (2017).

46. LEVY, *supra* note 31, at 424.

47. *Id.* at 424–26.

48. Davies, *supra* note 26, at 1017.

49. *Id.* at 1014.

There are other areas within the Constitution that the Framers used narrower language to implicate a trial. The Sixth and Seventh Amendments specifically express “trial” or “criminal prosecution.”⁵⁰ The Tenth Circuit Court of Appeals in *Vogt v. City of Hays* noted that when the Constitution uses a particular textual formulation in one provision, and a different word or words in another, the distinction is meaningful and must be respected by the courts interpreting the language.⁵¹ The Framers undoubtedly understood the difference in meaning between “trial” and “case.” The Framers further exhibited this belief during their era by allowing the Fifth Amendment to be invoked in civil proceedings and governmental investigations. Historical reports also reveal that the drafters of the Fifth Amendment only included the language “criminal case” to keep the law consistent with the common law of the colonies. The particular use of the word case by the Framers therefore suggests the Self-Incrimination Clause is a broad right not limited purely at trial.

B. The Supreme Court’s Previous Interpretation of “Criminal Case” Implies That the Self-Incrimination Clause is not Just a Right at Trial.

Fifth Amendment protection is afforded beyond a “criminal case” because the Supreme Court has acknowledged the Framers’ intent to protect an individual from being compelled to make self-incriminating statements. In many instances, the Supreme Court has acknowledged the Framers’ intent to protect individuals from being compelled to make self-incriminating statements beyond a “criminal case.”⁵² For instance, in *Mitchell v. United States*, the Supreme Court explained that “[t]o maintain that sentencing proceedings are not part of ‘any criminal case’ is contrary to the law and commonsense.”⁵³ In *Mitchell*, the Court had to determine whether a self-incriminating statement used at a sentencing hearing violated Fifth Amendment privileges.⁵⁴ The Court focused on whether the defendant’s liberty was at stake.⁵⁵ It determined that because the defendant had entered into a guilty plea but the length of imprisonment was undeter-

50. U.S. CONST. amend. VI; U.S. CONST. amend. VII.

51. *Vogt v. City of Hays*, 844 F.3d 1235, 1245 (10th Cir. 2017) (citing LEVY, *supra* note 31, at 427).

52. Aileen Kavanagh, *Original Intention, Enacted Text, and Constitutional Interpretation*, 47 AM. J. JURIS. 255, 256 (2002).

53. 526 U.S. 314, 320–21 (1999).

54. *Id.*

55. *Id.* (stating that the core “of this basic constitutional principal is ‘the requirement that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips” (quoting *Estelle v. Smith*, 451 U.S. 454, 462 (1981))).

mined, the defendant was still entitled to Fifth Amendment self-incrimination protection, because of the potential intrusion on their liberty.⁵⁶

Additionally, the Supreme Court followed the Framers' intent and expanded the definition of "criminal case" in two other instances. In *Kastigar v. United States*, the Supreme Court followed the Framers' intent to recognize a broad definition of "criminal case" as including a federal grand jury appearance.⁵⁷ While *Kastigar* ultimately denied Fifth Amendment protection because of an immunity issue, the Supreme Court still recognized that the Fifth Amendment Self-Incrimination Clause applies beyond criminal trials.⁵⁸ After being subpoenaed, witnesses appeared before a federal grand jury.⁵⁹ They asserted their Fifth Amendment right against making self-incriminating statements in response to questions.⁶⁰ The *Kastigar* Court explained that the purpose of the Fifth Amendment, which predates the Constitution, is to prevent compulsory self-incrimination.⁶¹ Second, the Supreme Court expanded the definition of the Fifth Amendment in *Lefkowitz v. Turley*.⁶² In *Lefkowitz*, architects who had public contracts in New York were eliminated after refusing to sign waivers of immunity in a grand jury investigation.⁶³

In *Chavez*, the Court explained in its plurality decision that the plaintiff's Fifth Amendment right was not violated when the alleged incriminating, coerced statements lead to a criminal charge or case pursued by the government.⁶⁴ The police interrogated an injured suspect, and no police charges were brought.⁶⁵ The suspect brought a 42 U.S.C. § 1983 civil damages action against a police sergeant, claiming that the sergeant had violated his constitutional rights by coercively interrogating him in the hospital.⁶⁶ The Court rejected the sergeant's argument that a "criminal case" encompasses an entire criminal investigation, including an officer's interrogation.⁶⁷ The Supreme Court looked to the Framers' intent to protect the

56. *Id.* at 327 (explaining that if the Court were to hold that the defendant had no right to remain silent, this would ignore the Fifth Amendment's privilege at the most important state).

57. 406 U.S. 441 (1972).

58. *Id.* at 443.

59. *Id.* at 442.

60. *Id.*

61. *Id.* at 446 n.14.

62. 414 U.S. 70, 84 (1973).

63. *Id.* at 71–77.

64. 538 U.S. 760, 766 (2003).

65. *Id.* at 764.

66. *Id.* at 764–65.

67. *Id.* at 766.

witnesses from answering “official questions . . . in any proceeding, civil or criminal formal or informal, where the answers might incriminate him in future proceedings.”⁶⁸

However, the Supreme Court has also stated that a criminal case, at the very least, requires the initiation of legal proceedings.⁶⁹ In *Chavez*, the Court did not explicitly define the “precise moment when a ‘criminal case’ commences,” but the case still provides some insight into when it might.⁷⁰ The mere use of compulsive questions is not enough to trigger a Fifth Amendment right violation. Justice Thomas looked to the meaning of “case” and “cause,” and in his plurality opinion, he stated that because the suspect was not charged with a crime and his answers were not used against him in any type of criminal proceeding, there was not a violation of the Fifth Amendment and the suspect was not entitled to relief.⁷¹

He further explained that:

[t]he Fifth Amendment requires that [n]o person . . . shall be compelled in any criminal case to be a witness against himself. We fail to see how, based on the text of the Fifth Amendment, Martinez can allege a violation of this right, since Martinez was never prosecuted for a crime, let alone compelled to be a witness against himself in a criminal case.⁷²

Three other justices found that the police had violated the Fifth Amendment right against self-incrimination, demonstrating that the Fifth Amendment should apply beyond a criminal trial.⁷³

C. Circuit Court Precedent Also Strongly Implies that the Fifth Amendment Self-Incrimination Clause Applies Beyond a Criminal Trial.

While *Chavez* is the most recent Supreme Court case to discuss the question of what a criminal case means, many other courts have looked past *Chavez* to find that a criminal case includes proceedings outside of trial.⁷⁴ The Ninth Circuit, Seventh Circuit, and Second Circuit have followed *Chavez* to extend the Fifth Amendment’s protection past trial.⁷⁵

68. *Id.* at 770 (quoting *Lefkowitz*, 414 U.S. at 84).

69. *Id.* at 766.

70. *Id.* at 766–67.

71. *Id.*

72. *Id.* at 766.

73. *Id.* at 778 (explaining Justice Souter’s view, this specific suspect did not present a strong enough showing for the Court to expand the privilege against compelled self-incrimination).

74. *See generally id.* at 760–78.

75. *Stoot v. City of Everett*, 582 F.3d 910, 925 (9th Cir. 2009) (stating that the Fifth Amendment protects coerced statements that initiate formal charges eventually used in a criminal proceeding); *Best v. City of Portland*, 554 F.3d 698, 702 (7th Cir. 2009) (explaining that hearing stages are when a criminal case begins); *Higazy v. Templeton*, 505 F.3d 161, 170–73 (2d Cir. 2007) (stating that the Fifth

These courts have held that the Fifth Amendment right against Self-Incrimination applies at bail hearings, suppression hearings, arraignments, and probable cause hearings.⁷⁶

For example, the court in *Stoot v. City of Everett* stated that the Fifth Amendment protects against coerced statements that initiate the government to proceed with formal charges and that eventually are used in a criminal proceeding.⁷⁷ In *Stoot*, the court was grappling with whether self-incriminating statements used in a pre-arraignment hearing could implicate the Fifth Amendment.⁷⁸ To determine whether a compelled statements used in a pre-arraignment hearing would violate the Fifth Amendment, the court explained that a coerced statement is used in a criminal case when it has been relied upon to file a formal charge against the suspect.⁷⁹ When, because of the compelled statements, it is judicially determined that the prosecution may proceed and the pretrial custody status is determined, the Court decided that the use of those statements imposes the burden that is precluded by the Fifth Amendment.⁸⁰

Sornberger is also instructive as it is factually and procedurally similar to *Vogt*. In *Sornberger*, the plaintiff alleged in her complaint that the police coerced her, as the City of Hays allegedly coerced Officer Vogt, to make self-incriminating statements that were then used in a probable cause hearing.⁸¹ The plaintiff's statements that were used at the probable cause hearing never led to a criminal trial, however, the Seventh Circuit still found the police violated the Fifth Amendment.⁸² The court explained that "a suspect's criminal prosecution was not only initiated, but was commenced because of her allegedly un-warned confession, the 'criminal case' contemplated by the self-incrimination clause has begun."⁸³ The Seventh Circuit revealed that once a confession is used as evidence to initiate or

Amendment right applies at a grand jury and bond hearing, because they are both critical stages of the prosecution where self-incriminating statements may be used as evidence); *Sornberger v. City of Knoxville*, 434 F.3d 1006, 1026–27 (7th Cir. 2006) (holding that the right to be free from self-incrimination starts at the pre-trial stages of criminal prosecution, as an un-warned confession may commence a criminal prosecution).

76. See also *Vogt v. City of Hays*, 844 F.3d 1235, 1240 (10th Cir. 2017) (explaining that the "Second, Seventh, and Ninth Circuits have held that certain pretrial uses of compelled statements violate the Fifth Amendment"), *cert. granted*, 138 S. Ct. 55 (2017), *cert. dismissed as improvidently granted*, 138 S. Ct. 1683 (2018).

77. 582 F.3d at 925.

78. *Id.* at 912.

79. *Id.* at 925.

80. *Id.* (explaining that this scenario makes the suspect a witness against himself in the criminal proceeding, violating the Fifth Amendment).

81. *Sornberger v. City of Knoxville*, 434 F.3d 1006, 1027 (7th Cir. 2006).

82. *Id.* at 1026.

83. *Id.* at 1026–27.

commence a criminal prosecution, the Fifth Amendment is invoked because the purpose of the Fifth Amendment is to protect an individual from being a witness against himself.⁸⁴

Further, the Second Circuit in *Weaver v. Brenner* concluded that the use of self-incriminating statements at trial is not a requirement for a Fifth Amendment violation.⁸⁵ In *Weaver*, the prosecutors used a defendant's coerced confession during a grand jury trial.⁸⁶ The court in *Best v. City of Portland* also held that use of a compelled statement in a pre-trial suppression hearing violates the Fifth Amendment Self-Incrimination Clause.⁸⁷ The court explained that it had never adopted the narrow view that use in a criminal case means at trial.⁸⁸ Instead, the court looked to precedent, which showed that the use of a suspects' statements at an arraignment, probable cause hearing, and bail hearing also had implicated the Self-Incrimination Clause.⁸⁹

D. The Fifth Amendment Protection can be Asserted at a Probable Cause Hearing Because the Fourteenth Amendment Provides Citizens Have Fundamental Rights When Their Life, Liberty, and Property are at Stake.

Like the Fifth Amendment, the Fourteenth Amendment guarantees protection from state infringement.⁹⁰ The Court in *Mallory* held that the Fifth Amendment applies to the states through the Fourteenth Amendment.⁹¹ The Fourteenth Amendment protects individuals fundamental right against state violation of life, liberty, and property.⁹² These fundamental principles set out by the Fourteenth Amendment "lie at the base of all our civil and political institutions."⁹³ The Supreme Court explained in *Hallinger v. Davis* that the Fourteenth Amendment "derives its authority from the limits of those fundamental principles of liberty and justice . . . and the greatest security for which resides in the right of the people to make their

84. *Id.*

85. 40 F.3d 527, 535 (2d Cir. 1994).

86. *Id.* at 536 ("The use of a coerced confession before a grand jury plainly makes [the person who gave the statement] a witness against himself in a criminal case, one leading to the infliction of criminal penalties against him. Such use, if the confession is found as a fact to have been coerced, violates [the individual's] constitutional rights.")

87. 554 F.3d 698, 703 (7th Cir. 2009).

88. *Id.* at 702.

89. *Id.*

90. *Mallory v. Hogan*, 378 U.S. 1, 8 (1964).

91. *Id.* See also U.S. CONST. amend. XIV, § 1.

92. *Hurtado v. California*, 110 U.S. 516, 521 (1884).

93. *Id.*

own law and alter them at their pleasure.”⁹⁴ Accordingly, the Fifth Amendment protection can be asserted at a probable cause hearing because the individual’s self-incriminating statement can be used in the future to deprive that individual of life, liberty, and property.

Like the Fourteenth Amendment, the Fifth Amendment right against self-incrimination is a fundamental right that the Constitution must protect.⁹⁵ Refusing to allow a witness to assert Fifth Amendment protection is a violation of life, liberty and property.⁹⁶ The Second Circuit held that when a government official acts in his investigatory capacity and obtains information or evidence that he or she could foresee himself or herself using in the future, future use of that information could cause a deprivation of liberty.⁹⁷ This triggers the Fourteenth Amendment protection, and Fifth Amendment protection can be asserted.⁹⁸

II. THE ARGUMENT FOR A NARROW INTERPRETATION OF THE SELF-INCRIMINATION CLAUSE

In contrast to the other circuit courts, the Third Circuit, Fifth Circuit, and Eighth Circuit have adopted a strict construction of the Fifth Amendment’s Self-Incrimination Clause.⁹⁹ These courts take the narrow view that the Fifth Amendment is a fundamental trial right that can only be violated at trial.¹⁰⁰ The concern is that extending the Self-Incrimination Clause to pre-trial hearings would negatively and fundamentally change the nature and purpose of the proceedings. Evaluating whether a defendant’s statements were voluntarily given requires a court to assess the totality of the circumstances.¹⁰¹ Before resolving preliminary issues in a case, courts would have to adjudicate fact-intensive suppression questions. For instance, to establish that a statement was compelled under *Garrity v. New Jersey*, factual questions such as whether the defendant believed his em-

94. 146 U.S. 314, 323 (1892).

95. *Kastigar v. United States*, 406 U.S. 441, 442 (1972) (analyzing whether the Fifth Amendment protects witnesses in front of a federal grand jury and holding that the Fifth Amendment extends beyond criminal trials).

96. *Zahrey v. Coffey*, 221 F.3d 342, 344 (2d Cir. 2000).

97. *Id.*

98. *Id.*

99. *Winslow v. Smith*, 696 F.3d 716, 731 (8th Cir. 2012) (stating that the self-incrimination clause of the Fifth Amendment only applies when the statements are later used in a criminal trial); *Murray v. Earle*, 405 F.3d 278, 293 (5th Cir. 2005) (holding that statements arising from pre-trial interrogation “cannot ‘cause’ a subsequent Fifth Amendment violation”); *Renda v. King*, 347 F.3d 550, 557–59 (3d Cir. 2003) (stating that only statements made at a criminal trial are protected by the Fifth Amendment; statements made in obtaining an indictment are not protected).

100. *See also United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990).

101. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 226–27 (1973).

ployer had threatened him or her with the loss of employment, whether that belief was reasonable, and whether the Fifth Amendment privilege had been waived would arise.¹⁰² It might also slow down the pretrial process, including probable cause assessments and bail determinations. State and local governments have also expressed concerns with a broad view on the Self-Incrimination Clause.¹⁰³ They argue that the Tenth Circuits decision will burden government employers to be less vigilant in discovering and rectifying employee misconduct.¹⁰⁴ The government has an interest in correcting such misbehavior in the workplace.

On one hand, the government has a vital and compelling concern in preventing crimes and charging those that deceive the public trust. Holding that the Self-Incrimination Clause is only a trial right allows the government to use statements against potentially dangerous defendants. It can be difficult for the government and police officials to determine whether a person was “in custody” or interrogated in terms of *Miranda* purposes.¹⁰⁵ Sometimes, the only way to tell whether a criminal defendant’s statements will be used at trial is if the defendant does not challenge them or if the trial court explicitly states that the statements are admissible at trial. Courts often hold suppression hearings to determine whether statements can be used at trial.¹⁰⁶

In other contexts, the Self-Incrimination Clause can be strategically used to avoid investigation. Attorneys often invoke the Fifth Amendment for their clients to shut down a potential investigation. Also, people assert their Fifth Amendment rights at congressional hearings. Further, the Securities and Exchange Commission and Internal Revenue Service need to be able to investigate individuals, and broadening the Fifth Amendment could prevent them from properly executing their core function of investigating potential criminals.

102. 385 U.S. 493 (1967). *See, e.g.*, *United States v. Friedrick*, 842 F.2d 382, 396–402 (D.C. Cir. 1988).

103. *See* Brief of State and Local Government Employers as *Amici Curiae* in Support of Petitioner at *5–12, *City of Hays v. Vogt*, 2017 WL 5591729 (Nov. 20, 2017) (No. 16-1495).

104. *Id.*

105. *Oregon v. Elstad*, 470 U.S. 298, 316 (1985). *But see* *Miranda v. Arizona*, 384 U.S. 436, 496–503 (1966) (explaining that statements made under particular circumstances are evidence as to whether the Fifth Amendment has been violated or not). The *Miranda* Court followed the “totality of the circumstances” rule to determine whether the Fifth Amendment self-incrimination clause applies. *Id.* at 503. Further, Justice Clark’s dissent explained that the Due Process Clause of the Fifth and Fourteenth Amendments is the controlling law that protects persons from self-incrimination. *Id.* at 499–504 (Clark, J., dissenting).

106. *See* WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* § 10.1(a) (4th ed. 2016) (explaining that “the great majority of jurisdictions have abandoned the contemporaneous objection rule in favor of a requirement that objections be raised before trial by way of a pretrial motion to suppress”).

While legal history rarely speaks with one clear voice, the historical argument in favor of having a narrow self-incrimination right is that the purpose of the privilege was to prevent against torture to extract confessions. Today, there are many procedures in place to prevent law enforcement from abusing Fifth Amendment rights. However, the full scope of the issue in *Vogt* is not whether a statement is used in a subsequent criminal proceeding. The main issue is whether the Fifth Amendment protection is warranted in a probable cause hearing or in a pre-trial proceeding. Because the Supreme Court's precedent already suggests that the Fifth Amendment applies beyond "criminal trials,"¹⁰⁷ it is irrelevant whether the self-incriminating statements were used in a trial.

III. THE SUPREME COURT SHOULD INTERPRET THE SELF-INCRIMINATION CLAUSE BROADLY TO ENCOMPASS PRETRIAL HEARINGS.

Despite the specific language of the Fifth Amendment stating "criminal case," the Framers' intent, Supreme Court precedent, and the Second, Seventh, Ninth Circuits demonstrate that the Fifth Amendment Self-Incrimination Clause should extend to pre-trial proceedings and include probable cause hearings.¹⁰⁸ There is no evidence to suggest that the Framers *only* intended for the Fifth Amendment to apply at trial. At the time the Framers created the Fifth Amendment, the strict and extensive criminal procedure that permeates our criminal system had not been established.¹⁰⁹ This strongly suggests that the Framers could not have foreseen all of the proceedings that would take place before a criminal investigation turns into a trial.

The Supreme Court should have held for Respondent and stated that the Self-Incrimination Clause is a broad right that applies not just to criminal trials, but to probable cause hearings. While working for the City of Hays, Respondent police officer Matthew Vogt applied for another job with the police department of a nearby town, City of Haysville.¹¹⁰ While he was applying for the job with Haysville, Vogt disclosed that he had kept a knife

107. See *Chavez v. Martinez*, 538 U.S. 760, 766 (2003); *Mitchell v. United States*, 526 U.S. 314, 320–21 (1999); *Lefkowitz v. Turley*, 414 U.S. 70, 84 (1973); *Kastigar v. United States*, 406 U.S. 441, 453 (1972).

108. See *Stoot v. City of Everett*, 582 F.3d 910, 912 (9th Cir. 2009); *Best v. City of Portland*, 554 F.3d 698, 703 (7th Cir. 2009); *Higazy v. Templeton*, 505 F.3d 161, 172–73 (2d Cir. 2007).

109. FED. R. CRIM. P. introductory historical note (looking to the history of criminal procedure, the very first Rules of Criminal Procedure originated in 1944).

110. *Vogt v. City of Hays*, 844 F.3d 1235, 1240 (10th Cir. 2017) (Haysville is a separate municipality in Kansas), *cert. granted*, 138 S. Ct. 55 (2017), *cert. dismissed as improvidently granted*, 138 S. Ct. 1683 (2018).

he had found while working as a police officer at his job in Hays.¹¹¹ After he disclosed this information, the Haysville police department offered Vogt a job that was conditional on him disclosing and returning the knife back to the City of Hays.¹¹²

Vogt subsequently followed Haysville's directions and reported and gave up the knife.¹¹³ The chief police officer directed him to submit a written report about the knife and Vogt complied.¹¹⁴ Intending to accept the job with the City of Haysville, Vogt then put in his two-week's notice with the City of Hays.¹¹⁵ However, after hearing about his possession of the knife, the Hays chief police officer opened an internal investigation against Vogt.¹¹⁶ The officer asked Vogt for more detail about his possession of the knife.¹¹⁷ Vogt's additional statements to the officer were then used by the Hays police to locate additional evidence.¹¹⁸

After acquiring these additional statements and evidence, the Hays police asked the Kansas Bureau of Investigation to open a criminal investigation against Vogt.¹¹⁹ After the Kansas Bureau of Investigation engaged in its criminal investigation, the Haysville police department withdrew its offer from Vogt.¹²⁰ Officer Vogt was then charged with two felony counts in Kansas state court because of his possession of the knife.¹²¹ After Vogt was charged, his case went to state trial court, where his compelled statements and additional evidence law enforcement developed were introduced.¹²² This information was used against him at a probable cause hearing. Eventually, the state court decided that the prosecution did not have probable cause to support their charges, and the court dismissed the case.¹²³

Officer Vogt subsequently filed an action in federal court under 42 U.S.C. § 1983 against the City of Hays, the City of Haysville, and their officials in both their individual and official capacities.¹²⁴ Vogt's complaint

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 1237.

alleged that the use of the compelled statements in initiating and supporting a criminal case against him and in the probable cause hearing violated his self-incrimination Fifth Amendment right.¹²⁵ The defendants moved to dismiss the complaint, and the district court granted the motions. The district court stated that because Vogt's statements were never used at a criminal trial, he had no Fifth Amendment right and he failed to state a claim.¹²⁶

However, on appeal, the district court's decision was reversed.¹²⁷ The Tenth Circuit started with the text of the Fifth Amendment, which states that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself."¹²⁸ The court noted that the broad, plain meaning of a "criminal case."¹²⁹ It stated the Framers' overall intent in writing the Fifth Amendment and explained how they "envisioned it to apply beyond the trial itself."¹³⁰ The court also looked to the Second, Seventh, and Ninth Circuits and their conclusion that the right applies to more than just a criminal trial.¹³¹ For these reasons, the Court of Appeals held that protection against self-incrimination extends to the use of compelled statements in pre-trial criminal proceedings.

The Tenth Circuit in *Vogt v. City of Hays* looked at the plain meaning of the text of the Fifth Amendment in deciding whether "criminal case" extends to more than just a "criminal trial."¹³² The Fifth Amendment does not specify case to mean "trial" or "prosecution" but solely "criminal case."¹³³ Black's Law Dictionary defines criminal case as "[a]n action, suit, or cause instituted to punish an infraction of the criminal laws."¹³⁴ Therefore, criminal case broadly refers to the suit in general, and does not on its face appear to be limited to a trial.

On the other hand, the petitioner in *Vogt* argued that the Fifth Amendment's Self-Incrimination Clause does not turn on what "criminal case" means, but what acts make someone "a witness against himself."¹³⁵ The petitioner stated that until a criminal defendant takes the witness stand

125. *Id.*

126. *Id.*

127. *Id.* at 1237–38.

128. *Id.* at 1242.

129. *Id.*

130. *Id.*

131. *Id.* at 1241–42.

132. *Id.* at 1244.

133. U.S. CONST. amend. V.

134. *Criminal Case*, BLACK'S LAW DICTIONARY (2d ed. 1910).

135. Petition for a Writ of Certiorari at *5, *City of Hays v. Vogt*, 2017 WL 2610082 (June 13, 2017) (No. 16-1495).

or the compelled statements are used at an actual trial, they have not been a “witness against himself.”¹³⁶

If the question were to come before the Supreme Court again, the Court should apply the Second Circuit’s analysis as set forth in *Zahrey*.¹³⁷ Lieutenant Wright, an employee of the defendant, was acting in his capacity as a government officer when he ordered Officer Vogt to answer questions concerning his possession of the knife.¹³⁸ Lieutenant Wright, while acting in his investigatory capacity, assured Officer Vogt that the defendant was only conducting an internal investigation.¹³⁹ However, the statements from Officer Vogt were not just used in an internal investigation.¹⁴⁰ Officer Vogt’s statements were turned over to the Kansas Bureau of Investigation after the defendant listened to hundreds of Officer Vogt’s phone calls.¹⁴¹ Lieutenant Wright could have foreseen that Officer Vogt’s statements could be incriminating, because immediately after his questioning, the alleged compelled statements became the fruit of a criminal investigation.¹⁴² As a result of the of the criminal investigation, Officer Vogt was charged with two felony counts and he subsequently lost his job.¹⁴³ Further, his reputation was damaged and he was humiliated.¹⁴⁴

Officer Vogt’s disclosures to Lieutenant Wright imposed on his liberty interests because the felony charges had the potential to result in incarceration. Officer Vogt also was deprived of his former life, as the criminal investigation led to emotional distress, loss of life enjoyment, damage to his reputation, humiliation, and inconvenience. Officer Vogt was also deprived of his property, because he lost his job which as a result led to a loss of income.¹⁴⁵

Further, the Fifth Amendment protection can be asserted at a probable cause hearing because the individual’s self-incriminating statement can be later used as evidence to prosecute the individual. The Supreme Court in *Hoffman v. United States* stated that the Fifth Amendment provides a privilege to two incriminating answers.¹⁴⁶ First, incriminating responses that

136. *Id.* at *6.

137. 221 F.3d 342 (2d Cir. 2000).

138. *Vogt v. City of Hays*, 844 F.3d 1235, 1238 (10th Cir. 2017), *cert. granted*, 138 S. Ct. 55 (2017), *cert. dismissed as improvidently granted*, 138 S. Ct. 1683 (2018).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. 341 U.S. 479, 486 (1951).

will support a conviction.¹⁴⁷ And second, incriminating statements that will “furnish a link in the chain of evidence needed to prosecute.”¹⁴⁸

In Officer Vogt’s case, his incriminating responses did not support a conviction, but his statements to Lieutenant Wright certainly “furnished a link in the chain of evidence needed to prosecute.”¹⁴⁹ Officer Vogt’s statements led to an investigation of thousands of phone calls he made while acting in his capacity as a police officer.¹⁵⁰ These calls caused the defendant to report Officer Vogt’s statements to the Kansas Bureau of Investigation and request a criminal investigation.¹⁵¹ Officer Vogt’s self-incriminating statements were therefore causal evidence used to eventually charge him with two felonies.¹⁵² Absent his compelled statements, Officer Vogt would not have had a criminal investigation against him and would not have been deprived of his life, liberty, and property.

The Fifth Amendment protection can also be asserted at a probable cause hearing because police officers should not be faced with a Hobson’s choice when trying to defend themselves. The definition of a Hobson’s choice is “an election by compulsion or without freedom of choice; a choice without an alternative.”¹⁵³ In *Garrity*, the police officers were faced with a Hobson’s issue.¹⁵⁴ The police officers were worried they would be discharged if they did not respond to questions or answer the police because they feared self-incrimination.¹⁵⁵ Simply put, the police officers had “a choice between the rock and the whirlpool.”¹⁵⁶ The Court in *Garrity* held that the police officers were improperly faced with a Hobson’s choice.¹⁵⁷ Threatening an individual’s job in order to gain incriminating evidence raises the Fifth Amendment protection because the Self-Incrimination Clause protects an innocent person from making statements out of fear.¹⁵⁸ Individuals should not have to decide between the lesser of two evils such as in a Hobson’s choice.¹⁵⁹ In the specific context of police

147. *Id.*

148. *Id.*

149. *Id.*

150. *Vogt*, 844 F.3d at 1238.

151. *Id.*

152. *Id.*

153. *Pictorial Review Co. v. Helvering*, 68 F.2d 766, 769 (D.C. Cir. 1934).

154. *Garrity v. New Jersey*, 385 U.S. 493, 496 (1967).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. Peter Westen, *Answer Self-Incriminating Questions or Be Fired*, 37 AM. J. CRIM. L. 97, 112 n.97 (2010) (stating that the cruelest trilemma is the Hobson’s choice).

officers, an officer should never have to decide between keeping themselves safe and doing their job, or putting themselves and others around them at risk.

Officer Vogt was also faced with a similar Hobson's choice. He had the choice between making self-incriminating statements regarding his carrying of the knife or losing his livelihood as an employed police officer. Officer Vogt chose the latter and handed the defendant's the "smoking gun" to further investigate his activities which commenced into a criminal prosecution. He kept the knife in the interest of public safety of all citizens that he is under a duty to protect. Officer Vogt should not be punished for this decision. The Supreme Court should acknowledge that police officers are often placed in unimaginable circumstances where they must make quick, life-changing decisions that could affect their livelihood and the public's livelihood. Accordingly, police officers should not be compelled to choose between their livelihood and tarnishing their reputation as police officers by self-incriminating themselves. The Court should extend the Fifth Amendment protection to probable cause hearings so individuals are not faced with the choice between their livelihood and reputation.

In deciding *Vogt*, there were a few ways in which the Supreme Court could have held. The Supreme Court could have crafted a narrow holding for Officer Vogt and held that probable cause hearings are included within "criminal case" for purposes of the Fifth Amendment. Or, the Court could have limited its holdings to preliminary hearings. The Court could also have ruled broadly and stated that there are many pre-trial proceedings that are protected by the Fifth Amendment. On the other hand, if the Supreme Court were to hold for the City, this would shrink the Fifth Amendment to a vanishing point because today, there are hardly any trials.¹⁶⁰ Accordingly, if the question were to come before the Court again, the Supreme Court should hold that the prosecutorial use of a defendant's involuntary, self-incriminating statement at a preliminary hearing invokes Fifth Amendment protection.

160. Rory Little, *Argument analysis: Vogt argument suggests a narrow ruling or even a "DIG"*, SCOTUSBLOG (Feb. 21, 2018, 11:43 AM), <http://www.scotusblog.com/2018/02/argument-analysis-vogt-argument-suggests-narrow-ruling-even-dig/> [https://perma.cc/3ZDS-PMZV]. However, Justice Alito suggested that ruling for Officer Vogt would be "revolutionary." *Id.* Justice Neil Gorsuch has recused himself from the case since it came from the Tenth Circuit, his former court. *Id.* The justices appear to be divided on the merits of the case, and it is possible it comes out to a 4-4 tie at the end. *Id.*

CONCLUSION

By dismissing the case as improvidently granted, the Supreme Court correctly affirmed the Tenth Circuit's decision, which found that the Fifth Amendment's Self-Incrimination Clause applies to probable cause hearings. Previously, the Supreme Court has stated that "there can be no doubt that the Fifth Amendment privilege is available outside of the criminal court proceedings and serves to protect persons in all settings in which their freedom is curtailed in any significant way from being compelled to incriminate themselves."¹⁶¹ There is undoubtedly tension and ambiguity between the circuit courts. This is further evidence that the Supreme Court should state that the Fifth Amendment's protection against self-incrimination extends beyond a trial to a probable cause hearing.

The Framers intended the Fifth Amendment Self-Incrimination Clause to be a broad, fundamental right. The Fifth Amendment's protection can be asserted at a probable cause hearing because the Fourteenth Amendment protects citizens when their fundamental rights of life, liberty, and property are at stake. Further, probable cause hearings should be included as within the scope of the Self-Incrimination Clause because police officers should not be faced with a Hobson' choice when trying to defend themselves. It is vital that the Supreme Court set clear and consistent precedent regarding the fundamental right against self-incrimination, and establish that the Fifth Amendment protects individuals at pre-trial hearings.

161. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).