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1 P R O C E E D I N G S

2 (11:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 16-1495, the City of Hays
5 versus Vogt.

6 Mr. Heytens.

7 ORAL ARGUMENT OF TOBY J. HEYTENS

8 ON BEHALF OF THE PETITIONER

9 MR. HEYTENS: Mr. Chief Justice, and
10 may it please the Court:

11 The decision below should be reversed
12 for two independent reasons. Reason number 1:
13 Because the only setting in which a person can
14 be made to be a witness against himself for
15 purposes of the Fifth Amendment is during a
16 proceeding where that person's guilt or
17 punishment are to be adjudicated, that is, at
18 trial.

19 And, second, because regardless of
20 whether it is possible that some types of Fifth
21 Amendment violations could ever occur before
22 trial, the Court should reject any such notion
23 with regard to the specific type of Fifth
24 Amendment violation alleged here, which is the
25 use of statements in violation of Garrity

1 versus New Jersey.

2 JUSTICE GINSBURG: Mr. Heytens --

3 JUSTICE KENNEDY: Your -- your first
4 statement, I -- was very well stated. The
5 first reason is because the only thing that
6 double jeopardy -- that the clause applies to
7 is?

8 MR. HEYTENS: That the
9 Self-Incrimination Clause can only be violated
10 during a proceeding where the person whose
11 statements are at issue is being used to
12 adjudicate that person's guilt or punishment
13 for purposes of criminal liability. That's the
14 first reason.

15 JUSTICE GINSBURG: It has to be at
16 trial. So, in making that argument, Mr.
17 Heytens, you are recognizing that you are
18 shrinking to almost a vanishing point the
19 possibility of using the Fifth Amendment to
20 block the use against you of incriminating --
21 the -- you -- you're shrinking the privilege to
22 nothing because there aren't many trials
23 nowadays; upwards of 95 percent of cases are
24 disposed of by plea bargaining. So, by
25 limiting the Fifth Amendment to there must be a

1 trial, there must be a witness at trial, you're
2 saying effectively the Fifth Amendment, which
3 is considered very important, is out of the
4 picture in most criminal cases.

5 MR. HEYTENS: I don't think that's --
6 that's right, Justice Ginsburg, and I think the
7 reason for that is that it's critical to
8 distinguish between two issues.

9 The first issue is when can the
10 privilege against self-incrimination be
11 invoked, and the second is when the
12 Self-Incrimination Clause can actually be --
13 can actually be violated.

14 So let me give you an example. Under
15 this Court's decision in Chavez, if Chavez
16 holds nothing else, I understand Chavez to hold
17 this: Nothing that happens inside a police
18 interrogation room can itself constitute a
19 completed violation of the Fifth Amendment.

20 But that is not to say, of course,
21 that if an officer is interrogating me I cannot
22 say I decline to answer your questions on the
23 grounds that may incriminate me. So I think
24 it's very important to distinguish between the
25 question of when the privilege can be asserted

1 -- I can assert the privilege in a civil case.
2 I can assert the privilege in a police
3 interrogation room. I can assert the privilege
4 at someone else's criminal trial, and nothing
5 that we're asking the Court to do is
6 inconsistent with any of that.

7 JUSTICE GINSBURG: So, Mr. Heytens,
8 then if this -- this defendant, based on what
9 you just said, could refuse to answer the
10 question if it had been put to him at the
11 probable cause hearing, say tell us about that
12 episode when you -- you retained the knife, he
13 could say: I won't because that might
14 incriminate me, he could raise the privilege.

15 MR. HEYTENS: Absolutely.

16 JUSTICE GINSBURG: But he can't object
17 if prior testimony, a -- a prior statement to
18 that effect, is introduced at the probable
19 cause hearing. He -- he said it before, it
20 can't be introduced. If he gives the
21 testimony, if he gives the statement at the
22 probable cause hearing, that's right, he
23 doesn't have to incriminate himself, but he
24 can't object to the introduce -- introduction
25 of a prior compelled statement.

1 MR. HEYTENS: I -- I understand the --
2 the apparent anomaly, Justice Ginsburg. And I
3 think the reason, though, for it is the reason
4 that he can assert the privilege against
5 self-incrimination at the probable cause
6 hearing is the same reason that he could assert
7 it in the police interrogation room. It is the
8 risk that if he gives a statement in that
9 setting, it could later be used against him at
10 a trial on guilt or a trial on the merits, and
11 that's the reason that he could assert the
12 privilege at the probable cause hearing, but it
13 is not because that anything that happens at
14 the probable cause hearing can actually make
15 him a witness against himself.

16 JUSTICE BREYER: What about a grand
17 jury proceeding?

18 MR. HEYTENS: Can it be asserted?
19 Absolutely, Justice Breyer.

20 JUSTICE BREYER: No, can it be
21 prevented?

22 MR. HEYTENS: Our -- Justice Breyer,
23 our understanding -- the -- can what --

24 JUSTICE BREYER: I mean, I -- I've
25 come across Supreme Court cases which refer to

1 a grand jury proceeding as part of a criminal
2 case, and you cannot introduce it in a criminal
3 case.

4 So what I wondered and seemed to be
5 missing is that I haven't found anything that
6 says, you know, you can't attack the grand jury
7 proceeding later, but that's different. So --

8 MR. HEYTENS: So --

9 JUSTICE BREYER: -- so somebody finds
10 a way, gets an order from a judge, he says I
11 don't want these pieces of paper introduced,
12 they were taken from me in violation of my
13 Fifth Amendment right not to be a witness, and
14 I don't want them brought before the grand
15 jury.

16 I'm rather surprised that that's never
17 come up.

18 MR. HEYTENS: Well -- well, Justice
19 Breyer, I think it has come up. And I think
20 that points --

21 JUSTICE BREYER: And -- then where are
22 the cases that say that even though the person
23 objected, you can introduce it to the grand
24 jury? I can't find any. And I have found
25 cases that say a grand jury is a criminal

1 proceeding.

2 MR. HEYTENS: Right. We -- we
3 certainly understand the grand -- this Court's
4 decision in Counselman to say that the grand
5 jury is part of the criminal case for purposes
6 of the Fifth Amendment. And we think that's
7 very significant because, Justice Breyer, I
8 agree that I'm not aware of any case where the
9 defendant tries to stop the information from
10 being presented to the grand jury.

11 What I am aware of is numerous
12 statements by this Court that says that a
13 defendant may not attack an indictment by
14 claiming that the grand jury considered
15 statements obtained in violation of the Fifth
16 Amendment. By my count, the Court has said
17 that at least three times.

18 JUSTICE KAGAN: Mr. Heytens, you also
19 agree now, don't you, that the probable cause
20 hearing is part of the criminal case? That's
21 not at issue here?

22 MR. HEYTENS: We agree with that, yes.

23 JUSTICE KAGAN: Okay. So then, if I
24 just look at the language of the
25 Self-Incrimination Clause, it's "shall be

1 compelled in any criminal case," which we are
2 in now, and -- and there's no issue here about
3 compulsion. Maybe there should be, but there
4 isn't.

5 "Shall be compelled in any criminal
6 case to be a witness against himself." "To be
7 a witness against himself," if I'm just
8 thinking about the natural reading of those
9 terms, it's when my testimony is introduced
10 adverse to my interests in that criminal case.

11 So why isn't that just what we should
12 be asking?

13 MR. HEYTENS: I understand that if you
14 were looking simply at the language, that is a
15 more than plausible interpretation, but I don't
16 think that's the --

17 JUSTICE KAGAN: Kind of the obvious
18 interpretation, right?

19 MR. HEYTENS: Right. But -- but I
20 think it would be inconsistent with a number of
21 things that this Court has already said, and I
22 think it would be inconsistent with some of the
23 concessions that I understand our friend on the
24 other side to have made.

25 Let me give you one very -- very clear

1 example. I think a Gerstein hearing is also
2 pretty clearly part of a criminal case, and I
3 understand the red brief to all but acknowledge
4 that the rule that they're advocating doesn't
5 apply to Gerstein hearing.

6 This Court in Estelle -- I think a
7 competency hearing is clearly part of a
8 criminal case, but this Court said in Estelle
9 that --

10 JUSTICE KAGAN: Well, I don't think
11 Estelle is -- is inconsistent with that because
12 what the Court in Estelle said was that this is
13 actually a neutral determination. And that's
14 understandable when you consider that the
15 victory you win when you're declared
16 incompetent is to continue to be detained as
17 incompetent.

18 So it's -- it's -- it's not like here
19 where it's like: Well, obviously -- obviously,
20 I want to win this so that I can get out of
21 this criminal case.

22 MR. HEYTENS: Sure. Well, I guess two
23 responses to that, Justice Kagan. I think
24 everything you just said also would apply to a
25 grand jury context, and the Court has

1 repeatedly said you can't attack an indictment.

2 So --

3 JUSTICE KAGAN: Yes. I mean, you're
4 quite right that there's a -- if you are right
5 that the grand jury is different, and you might
6 be, that there is a kind of anomaly there, but
7 explained, I think, by a kind of historic
8 judgment that grand juries are sacrosanct, that
9 everything has to be secret, that we don't want
10 people poking around in that black box, and
11 none of that is true of just standard probable
12 cause hearings.

13 MR. HEYTENS: We agree with that,
14 Justice Kagan, but I think the anomaly actually
15 goes deeper than that for -- for two reasons.
16 One is that, under Kansas law -- under Kansas
17 law, this probable cause hearing is an express
18 statutory substitute for proceeding by a grand
19 jury.

20 And so we think it would be a little
21 bit strange to say that you have rights at the
22 substitute proceeding that you only have by
23 virtue of state law but --

24 JUSTICE SOTOMAYOR: I'm sorry, how --
25 how is it the same? You -- it's not the same.

1 In a grand jury, there's no adversarial
2 pursuit. There's no judge. There's no
3 defendant's lawyer. There's no anything like
4 the grand jury. So it can't be -- it's an
5 imperfect substitute at best.

6 MR. HEYTENS: Well, I -- I agree that
7 the procedures aren't the same, certainly,
8 Justice Sotomayor. And I understand the
9 procedures are different. I'm not sure what
10 any of that, though, has to do with whether
11 this is a criminal case and whether I'm being
12 made to be a witness against myself for
13 purposes of the Self-Incrimination Clause.

14 But I think there's an even bigger
15 problem, which is the anomaly is actually not a
16 two-part anomaly; it's a three-part anomaly
17 because, as I read this Court's decisions in
18 *Hurtado* and *Gerstein*, the State of Kansas could
19 choose option number 3, option number 3 being
20 no grand jury, no probable cause hearing, the
21 prosecution goes forward based on nothing but
22 the prosecutor's determination that there is
23 probable cause. And there is no suggestion
24 that it would violate the Self-Incrimination
25 Clause for the prosecutor sitting in her office

1 to consider these statements.

2 So we're in a situation here where, as
3 far as the federal Constitution is concerned,
4 Kansas has three choices: a grand jury, a
5 probable cause hearing, or neither. And it
6 appears clear to me that, in option 1 and
7 option 3, the right that our friends on the
8 other side are asserting would not apply. And
9 so it would seem anomalous that you'd have
10 rights in option 2 that you don't have in
11 option 1 or option 3.

12 But -- but even if the grand jury
13 analogy isn't persuasive to all members of the
14 Court, I think there's another analogy that is
15 extremely damaging, which is the Gerstein
16 analogy because, as I read this Court's
17 decision in Gerstein, the legal question that
18 is decided at a Gerstein hearing, whether there
19 is probable cause to believe that the accused
20 has committed the crime, is legally
21 indistinguishable from the question at Kansas's
22 probable cause hearing.

23 So I'm not sure what the basis on that
24 ground would be for saying that this right
25 applies at the probable cause hearing but

1 doesn't apply at the Gerstein hearing. And I
2 don't think it's plausible to say that it
3 applies at the Gerstein hearing for all the
4 reasons that the Kansas amicus brief gives,
5 because it's simply not going to be practically
6 possible to have this right at a Gerstein
7 hearing, which is a non-adversarial proceeding
8 where there is no right to counsel and which
9 has to be held within 48 hours of arrest and
10 detention.

11 JUSTICE BREYER: Well, I don't -- so
12 back to my first question, I don't know what
13 the answer is in a grand jury proceeding. I do
14 know you can't attack that proceeding at trial,
15 but I don't know whether, as in this case,
16 somebody might, if they were used, bring a 1983
17 claim on the ground that its constitutional
18 rights have been violated. That's what
19 happened here.

20 And I don't know what would happen if
21 because of the circumstance the defendant went
22 before a judge and said: Judge, keep that
23 piece of paper out of the grand jury
24 proceeding.

25 MR. HEYTENS: Justice Breyer --

1 JUSTICE BREYER: So I do think perhaps
2 they should be treated alike, but I don't know
3 what alike is.

4 MR. HEYTENS: Well -- well, Justice
5 Breyer, I think all the reasons that the Court
6 has said that you can't collaterally attack an
7 indictment would also argue in saying that you
8 can't file a 1983 action.

9 JUSTICE BREYER: Why?

10 MR. HEYTENS: Well, because --

11 JUSTICE BREYER: I don't know. Maybe
12 you could. I mean, there -- I -- I don't even
13 know where to go to look that up.

14 MR. HEYTENS: Sure.

15 JUSTICE BREYER: And I assume you've
16 looked it up.

17 MR. HEYTENS: I have, Justice Breyer.
18 And -- is -- the reasons this Court gave in its
19 most recent decision on the grand -- the
20 collateral attack on the grand jury, the Court
21 said: Well, if you had a right to challenge
22 the evidence that was introduced before you --
23 before -- against you at a grand jury, you
24 would have a right to discovery. You would
25 have a right to try to find out what was

1 happening before the grand jury.

2 JUSTICE BREYER: Yeah, all right. I
3 see that.

4 CHIEF JUSTICE ROBERTS: Who would --

5 JUSTICE BREYER: So -- so we have an
6 instance where there is a committee
7 investigating Mr. Smith and Mr. Smith takes the
8 Fifth Amendment 90 -- 94 times and then they
9 compel him to give all kinds of statements and
10 then there's a grand jury and he goes to the
11 judge and says: Judge, keep those statements
12 out.

13 MR. HEYTENS: I --

14 JUSTICE BREYER: And Mr. --

15 MR. HEYTENS: -- I understand why
16 Mr. Smith might want to do that.

17 JUSTICE BREYER: Yeah.

18 MR. HEYTENS: But I -- but I guess
19 just --

20 JUSTICE BREYER: And I understand
21 that. He says they were taken in violation of
22 my Fifth Amendment right. And --

23 MR. HEYTENS: So --

24 JUSTICE BREYER: And there we are.
25 Keep them out. Keep them out of the grand

1 jury. Huh. And you're telling me there is --
2 so this is an important case in more ways than
3 one because what we decide here, I guess, would
4 decide the same thing for the grand jury.

5 MR. HEYTENS: Well -- well, Justice
6 Breyer, I -- I'd say two things on that. First
7 and foremost, if he believed that his
8 statements were used in that way, I think it's
9 useful to take a step back and realize nothing
10 that we are saying is to suggest that
11 Mr. Smith, in Justice Breyer's example, would
12 not be file -- entitled to file a motion to
13 suppress each and every one of those statements
14 at his criminal trial.

15 And if that motion prevailed, he would
16 very likely get a dismissal on the charges
17 because, if it was actually true that the
18 government's evidence was almost all derived
19 from his own compelled statements, the granting
20 of the motion to suppress before trial would
21 effectively end the criminal proceeding in his
22 favor.

23 So it's not as if we're -- and the
24 same thing is true here. If Officer Vogt was
25 correct that the -- that the statements that

1 were used were obtained and then used in
2 violation of Garrity -- were obtained in
3 violation of Garrity, and if this case had
4 gotten past the probable cause hearing, I
5 assume and expect that Officer Vogt's lawyer
6 would have filed a motion to suppress all of
7 those statements at trial.

8 And if his Garrity claim was
9 meritorious, I think we need to assume that
10 that motion would have been granted. And if
11 that motion is granted and if all of the
12 evidence was, in fact -- or much of the
13 evidence was derived from those statements, I
14 assume that the criminal proceeding would have
15 ended in his favor. So we're not putting
16 defendants in a position where they don't have
17 an opportunity. Justice --

18 JUSTICE SOTOMAYOR: I'm -- I'm sorry,
19 can we --

20 JUSTICE ALITO: Mr. Heytens --

21 JUSTICE SOTOMAYOR: Can we step back a
22 second? Your brief notes that the Respondent
23 did not file a motion to suppress his
24 statements or object at the probable cause
25 hearing to their admission.

1 Isn't that a waiver?

2 MR. HEYTENS: Justice, I want to be
3 careful, Justice Sotomayor, about what is and
4 is not in the record. I do not read Mr. Vogt's
5 complaint to allege that he ever filed such an
6 objection. That -- that -- that's what I can
7 say based on the face of it.

8 JUSTICE SOTOMAYOR: Well, you've seen
9 the record.

10 MR. HEYTENS: And based on my review
11 of the transcript, I do not -- it's not in --

12 JUSTICE SOTOMAYOR: So --

13 MR. HEYTENS: It's not in the record,
14 but I understand -- my understanding from the
15 hearing is that he did not file such a motion.

16 JUSTICE SOTOMAYOR: And wouldn't a
17 ruling by us against you just mean that
18 defendants -- whether it's within 48 hours at a
19 hearing that's being held or a probable cause
20 hearing, et cetera, wouldn't we be putting the
21 onus on defendants to raise a valid objection
22 if they have one then?

23 MR. HEYTENS: Justice Sotomayor, I --
24 I would certainly say if the Court were to rule
25 against us, I would urge that you make clear

1 that any such right requires a timely objection
2 on --

3 JUSTICE SOTOMAYOR: Well, that's a
4 matter of -- of -- of law. If you don't object
5 to the admission of a statement, you've waived
6 that objection.

7 MR. HEYTENS: That's certainly
8 generally true, Justice Sotomayor, yes. The
9 objection --

10 JUSTICE ALITO: Are you familiar with
11 any cases -- I don't know what the states say
12 about this -- but in federal law that allow a
13 person who thinks that he or she may be under
14 investigation by a grand jury to go to a
15 federal judge and file a motion in limine
16 regarding the evidence that may be presented to
17 the grand jury?

18 MR. HEYTENS: I am not, Justice Alito.

19 JUSTICE ALITO: This would be
20 revolutionary, wouldn't it?

21 MR. HEYTENS: I -- I would agree with
22 that, Justice Alito.

23 If there are no further questions, I'd
24 like to reserve.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Ms. Prelogar.

3 ORAL ARGUMENT OF ELIZABETH B. PRELOGAR

4 ON BEHALF OF THE UNITED STATES, AS

5 AMICUS CURIAE, IN SUPPORT OF THE

6 PETITIONER

7 MS. PRELOGAR: Mr. Chief Justice, and
8 may it please the Court:

9 The Self-Incrimination Clause
10 prohibits using a defendant's compelled
11 statement to adjudicate his criminal
12 responsibility. That kind of prohibited
13 incriminatory use does not occur in a pretrial
14 probable cause hearing where the defendant's
15 guilt and punishment are not on the line and
16 the only question is whether he'll be bound
17 over to the next stage of the criminal case.

18 I'd like to begin --

19 JUSTICE KAGAN: Ms. -- Ms. Prelogar, I
20 -- I guess that would mean as a conceptual
21 matter, even if not as a practical matter, but
22 as a conceptual matter, that the government
23 could force somebody to testify against himself
24 in such a proceeding?

25 MS. PRELOGAR: Well, to be clear,

1 Justice Kagan, we think that a defendant in
2 that situation would still -- would still have
3 a valid privilege against self-incrimination
4 because he could reasonably fear that anything
5 he says in that probable cause hearing could
6 then be used against him at the ensuing trial
7 to prove his guilt.

8 So a defendant could invoke his
9 privilege to prevent that testimony. And at
10 that point, the only way the government could
11 compel the defendant to speak would be to
12 formally grant him immunity.

13 JUSTICE KAGAN: Yeah. So this is why
14 I said maybe not as a practical matter, but as
15 a conceptual matter, you would be saying that
16 the government could, if it chose and if it
17 accepted certain consequences, could force him
18 to testify against himself?

19 MS. PRELOGAR: Only by granting that
20 immunity and --

21 JUSTICE KAGAN: Right.

22 MS. PRELOGAR: -- as this Court has
23 recognized in the immunity cases, by then
24 conveying on the defendant and conferring on
25 him that --

1 JUSTICE KAGAN: How about this? How
2 about if he didn't testify? Could -- could the
3 government draw an inference against him for
4 failing to testify, as the government could,
5 for example, in a civil case?

6 MS. PRELOGAR: I think that the
7 government could draw the adverse inference,
8 but I think the inference would only matter if
9 the government had already come forward with
10 sufficient evidence to show that you would
11 expect the defendant to respond to that and to
12 speak at that hearing. And at that point, I
13 think the government has already proven
14 probable cause. So I can't imagine any case
15 where it would make a difference to draw an
16 adverse inference against a defendant in that
17 situation.

18 JUSTICE KAGAN: Yeah, I guess my
19 questions are just that it seems odd for
20 something that is understood to be a part of
21 the criminal case, I don't -- I -- I -- I take
22 it that you have no continuing objection to
23 that view either --

24 MS. PRELOGAR: That's right. We think
25 this is part of the criminal case.

1 JUSTICE KAGAN: So, you know, it just
2 seems odd for something that is -- is clearly
3 part of a criminal case to say: Yes, the
4 government can draw an adverse inference, but
5 don't worry, we won't, it will never come up;
6 and, yes, the government could force him to
7 testify against himself, but don't worry, we
8 would have to give him immunity and we -- and
9 we wouldn't want to do that.

10 It just seems conceptually a difficult
11 position.

12 MS. PRELOGAR: Well, I think that the
13 reason we think that that is so and that those
14 things are permissible is because the
15 consequence of that probable cause hearing is
16 simply an interim step in the criminal
17 procedure that will -- that will then go on to
18 the criminal trial.

19 And I think that in the context of
20 that proceeding, where the defendant's not
21 exposed to the risk that those statements are
22 going to be used for the really consequential
23 things, for guilt and punishment, he hasn't
24 functioned as a witness against himself --

25 JUSTICE SOTOMAYOR: I'm sorry, if you

1 -- if you don't win at the probable cause
2 hearing, that ends the case. So it has a
3 consequence with respect to his innocence or --
4 or not his innocence, but his being proven
5 guilty or not.

6 MS. PRELOGAR: That's --

7 JUSTICE SOTOMAYOR: Because it ends
8 the case.

9 MS. PRELOGAR: That's true --

10 JUSTICE SOTOMAYOR: It can end it.

11 MS. PRELOGAR: -- Justice Sotomayor,
12 but I think what the Self-Incrimination Clause
13 focuses on are -- is what the defendant's
14 exposure is. And there's no chance that at the
15 end of that hearing that a magistrate could
16 enter a judgment of conviction and criminal
17 punishment could ensue.

18 JUSTICE SOTOMAYOR: But it increases
19 the possibility of his being found guilty and
20 punishment imposed?

21 MS. PRELOGAR: I think that that can't
22 be the test because it would be inconsistent
23 with this Court's decision in Estelle versus
24 Smith. The Court there recognized that there
25 would be no self-incrimination problem with

1 using a defendant's compelled statement to
2 adjudicate his competence to stand trial --

3 JUSTICE BREYER: What -- what about
4 other things? I mean, how does it work? I've
5 -- I've not conducted grand juries, some of my
6 colleagues have, but, I mean, I can imagine all
7 kinds of unconstitutionally seized evidence.
8 It could violate the Fourth Amendment. It
9 could violate the Fifth Amendment's coerced
10 confession. It could violate any one of 15 --
11 not 15, but, you know, five or six different
12 constitutional prohibitions.

13 And if the prosecutor says I'm going
14 to go and introduce all this stuff before the
15 grand jury, does then a defendant have no
16 remedy whatsoever?

17 MS. PRELOGAR: Well, that's what this
18 Court has held in cases like *Lawn* and *Calandra*,
19 that a defendant --

20 JUSTICE BREYER: Then does that happen
21 all the time, that in grand juries they
22 introduce coerced confessions, they introduce
23 -- this comes as a surprise to me.

24 MS. PRELOGAR: Well, I think --

25 JUSTICE BREYER: I mean, you have the

1 experience.

2 MS. PRELOGAR: I -- I --

3 JUSTICE BREYER: They introduce
4 illegally seized evidence, they introduce all
5 this constitutionally impermissible evidence.

6 MS. PRELOGAR: Well, the issue,
7 Justice Breyer, is I think that oftentimes it
8 won't be apparent from the outset that the
9 evidence was obtained in -- in violation of the
10 Constitution.

11 JUSTICE BREYER: I just want to know
12 what happens. I guess this is not relevant to
13 what happens, but I -- I -- I can be educated.

14 MS. PRELOGAR: I can tell you --

15 JUSTICE BREYER: And it seems like an
16 important point.

17 MS. PRELOGAR: I can tell you that at
18 pretrial probable cause hearings, both under
19 the federal rule, this is Rule 5.1, and in the
20 majority of state jurisdictions, defendants are
21 prohibited by rule from challenging the
22 admission of evidence on grounds that it was
23 unlawfully acquired.

24 Now that doesn't mean that they lack a
25 remedy. They can file a motion to suppress,

1 they can get that issue resolved before they
2 have to face the consequence of either taking a
3 plea or going to trial.

4 But I think what those rules recognize
5 -- and there are other distinctions between the
6 body of evidence that's available at the
7 probable cause hearing as well. Hearsay is
8 routinely admitted.

9 So I think what those rules recognize
10 is that a probable cause hearing is
11 fundamentally distinct from the issues that are
12 going to be resolved at the guilt stage.

13 It's a lesser consequence for the
14 defendant. He doesn't face the exposure to
15 possibly having his conviction and punishment
16 adjudicated.

17 And for that reason, courts have
18 recognized, and this Court in cases like
19 Gerstein and Brinegar and Barber, have
20 recognized that a defendant doesn't have the
21 same right to have that determination made on
22 the body of evidence that would be admissible
23 at trial.

24 JUSTICE KAGAN: Ms. Prelogar, suppose
25 we rule against you on this issue. Do you

1 think that had -- that that would have
2 necessary consequences for any other kinds of
3 proceedings?

4 MS. PRELOGAR: I think it would depend
5 on the basis on which this Court ruled against
6 us.

7 Now I understand that Respondent has
8 suggested some ways to narrow what I understand
9 to be the Tenth Circuit's rule in this case
10 where, as I read the Tenth Circuit's opinion,
11 once you're in the criminal case, all
12 proceedings are covered.

13 And Respondent identifies some
14 limiting constructions that I think would limit
15 the number of procedures to which the rule
16 would apply, looking at things like what is the
17 legal issue being resolved in the case and what
18 is the potential consequence.

19 So, in that sense, I think that the
20 Court could write an opinion that narrows down
21 on the probable cause hearing that was at issue
22 here. But, ultimately, if the Court were --

23 JUSTICE KAGAN: And how about -- Mr.
24 Heytens spent some time talking about Gerstein
25 hearings.

1 Do you think that this is the same --
2 identical to Gerstein hearings so that whatever
3 we did here we would have to do there, or do
4 you think a distinction can be drawn between
5 the two?

6 In other words, if you -- if we rule
7 against you, will the government come back the
8 next time and say, Ah, we lose now, or will you
9 have a good argument to make?

10 MS. PRELOGAR: I'm -- I'm sure we
11 would not lose, or hopefully not. I think the
12 argument we would make would then look at the
13 purpose of the Gerstein hearing and would say
14 the purpose there is to determine whether
15 pretrial detention should continue.

16 And that would be a different purpose
17 than the probable cause determination, which is
18 a bind-over determination. But I think
19 actually that focus on purpose shows why we
20 should prevail in this case, because the -- the
21 purpose of this proceeding is fundamentally
22 different and fundamentally distinct from the
23 kinds of issues that a defendant will face at
24 trial, and from --

25 JUSTICE GINSBURG: Here, it is to --

1 it is to determine whether there's enough
2 evidence to go to trial. And on the one hand,
3 you're conceding that the evidence couldn't
4 come in at trial, but it can be used to
5 determine whether there's enough evidence to go
6 to trial. That seems strange.

7 MS. PRELOGAR: Well, I think, again,
8 Justice Ginsburg, this goes back to the lesser
9 consequences of a probable cause hearing. It's
10 not meant to be a full dress rehearsal for
11 trial, and it's not meant to necessarily
12 resolve exactly what evidence is going to be
13 admissible at trial.

14 JUSTICE GINSBURG: But how can you
15 use, to determine whether there's enough
16 evidence to go to trial, evidence that can't
17 come in at trial?

18 MS. PRELOGAR: And again, I think that
19 that's not anomalous when you look at how these
20 proceedings generally operate with the
21 admission of hearsay, for example, with the
22 admission of evidence that might later be
23 determined to have violated the Fourth
24 Amendment.

25 CHIEF JUSTICE ROBERTS: I suppose you

1 don't know at the probable cause hearing
2 whether it's going to be admissible or not
3 because you may not have the defendant's
4 argument, the defendant's side of the case.

5 I mean, that's the whole point about
6 the grand jury proceedings.

7 MS. PRELOGAR: Exactly. And I think
8 that that would also be a problem with trying
9 to apply this rule to the Gerstein hearing and
10 to other proceedings where there aren't those
11 same adversarial safeguards or adversarial
12 presentations.

13 I think if this Court were to adopt a
14 rule like the one the Tenth Circuit adopted
15 here, then it really would gum up the works
16 essentially by forcing adjudication of those
17 suppression questions at the outset of a case
18 before any issue could be resolved, before the
19 Gerstein determination could be made or bail
20 set.

21 JUSTICE SOTOMAYOR: Only if it's
22 raised. Only if it's raised.

23 MS. PRELOGAR: Well, Justice
24 Sotomayor, I think that that shows that there
25 are complicated questions about what a

1 defendant would then have to do to preserve an
2 argument.

3 And -- and this Court has earlier --
4 in earlier cases observed that a lot of times
5 at the outset of a case the suppression
6 question might be complicated and
7 fact-intensive. A defendant might not realize
8 that he has a valid claim.

9 And so to put the onus on him to --

10 JUSTICE SOTOMAYOR: There's a lot of
11 jurisdictions who already give defendants those
12 rights to do it right at the beginning of the
13 case. Some exercise it. Some don't. A lot
14 don't, because there's a lot of reasons why a
15 defendant doesn't want to do it early on.

16 MS. PRELOGAR: Well, there's certainly
17 a lot of variants in how state jurisdictions
18 handle this issue, but I think the -- the
19 problem --

20 JUSTICE SOTOMAYOR: Very few of them
21 seem gummed up in the way that you're
22 anticipating this will create a problem.

23 MS. PRELOGAR: Well, that's, I think,
24 because, as -- as we read the criminal cases,
25 that this issue hasn't largely arisen, and

1 there hasn't been a requirement that courts
2 adjudicate suppression questions in the
3 sequencing of preliminary proceedings before
4 they resolve other issues in the case.

5 If this Court were to instead adopt a
6 broader rule and find that any use in any
7 proceeding in a criminal case could violate the
8 Fifth Amendment, then I expect that it would
9 require substantial changes to the criminal
10 process.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Ms. Corkran.

14 ORAL ARGUMENT OF KELSI B. CORKRAN

15 ON BEHALF OF THE RESPONDENT

16 MS. CORKRAN: Mr. Chief Justice, and
17 may it please the Court:

18 Our test for a violation of the
19 Self-Incrimination Clause is the one this Court
20 has always applied: A compelled testimonial
21 incriminating statement cannot be used in a
22 criminal case.

23 That test has four requirements. Each
24 of them comes directly from the Fifth
25 Amendment's text, and Petitioner concedes three

1 of them here: That the statement was
2 compelled, that it was used in a criminal case,
3 and that it was by a witness, which means it
4 was testimonial.

5 That leaves only the requirement that
6 the statement be against himself. This Court
7 has long recognized that a statement is against
8 someone when it can be used to criminally
9 prosecute them, when it is incriminating.

10 Petitioner does not contest that
11 Officer Vogt's statement was incriminating.
12 Instead, it urges the Court to redefine the
13 word "against" so that the clause no longer
14 applies in any criminal case but only in the
15 portion of the criminal case where guilt is
16 ultimately adjudicated.

17 There are numerous fatal flaws with
18 this theory. I'll start with the Fifth
19 Amendment's text.

20 Petitioner has no explanation for why
21 the framers would have chosen this circuitous
22 way to limit the clause's application. If the
23 framers had intended the clause to apply only
24 in criminal trials, they wouldn't have hidden
25 that limitation in the word "against." They

1 would have just said "in any criminal trial"
2 instead of "any criminal case."

3 And it's particularly implausible that
4 --

5 JUSTICE KENNEDY: Well, you seem to
6 assume that in a probable cause hearing the
7 state has gathered all of its evidence, that
8 it's -- that it's done all of its
9 investigation, that it has all of its witnesses
10 in order, but that's just not the way probable
11 cause hearings work.

12 MS. CORKRAN: No, certainly not.
13 Probable cause is a very low bar. I think in
14 Kaley the Court described it as a reasonable
15 belief that the defendant committed the crime.

16 And so, once we get to that probable
17 cause hearing, if the government has enough
18 evidence to meet that bar outside of the -- the
19 defendant's compelled statement, then there's
20 no reason to get into this issue here. They
21 will be able to show probable cause.

22 JUSTICE KENNEDY: No, but -- but the
23 point is the government might not have readily
24 available the evidence that it ultimately will
25 use.

1 MS. CORKRAN: Yes, but once we're at
2 the point where we have this adversarial
3 courtroom proceeding, which is the last step
4 before moving to trial, if all the government
5 has at that point to prove probable cause is
6 the defendant's compelled statement, then it
7 makes enormous sense to figure out at that
8 stage whether that statement is admissible or
9 not for the reason Justice Ginsburg pointed out
10 earlier, which is 95 percent of the time this
11 hearing is the whole ball game.

12 Once the prosecution gets its probable
13 cause determination, the vast majority of
14 defendants will choose to plead instead of --

15 JUSTICE ALITO: Well, that's very --

16 CHIEF JUSTICE ROBERTS: Well, right.
17 But the plea will -- the content of the plea
18 agreement will be affected by whether or not
19 the statements are going to be admissible at
20 trial. It's not as if they don't -- the
21 prosecutor doesn't have to worry about that in
22 deciding what plea to offer.

23 MS. CORKRAN: Yes. Well, the -- but
24 the defendant will be in a position where they
25 won't know about that admissibility

1 determination until they've already rolled the
2 dice and gone to trial. And the vast majority
3 of defendants are going to take the more
4 conservative route and take that guilty plea
5 even though the -- the government it turns out
6 didn't have even enough evidence to show
7 probable cause.

8 CHIEF JUSTICE ROBERTS: Well, I don't
9 know that that's true. They have -- if they're
10 represented by counsel, counsel can look at it
11 and say: Look, they're never going to be able
12 to use this, so don't plea to that. Maybe
13 they'll offer something else. But the fact
14 that it's going to be resolved in a plea
15 bargain context rather than an actual trial, I
16 just don't see the pertinence of that.

17 MS. CORKRAN: Yeah. I mean, the
18 admissibility of a statement, sometimes it's
19 going to be clear here, when you're talking
20 about a compelled Garrity statement, it's
21 obviously not admissible. But a lot of the
22 time there are going to be different questions
23 and it sure -- defense counsel is going to
24 advise the -- the defendant on -- on the
25 likelihood of success at trial.

1 JUSTICE BREYER: For -- for reasons
2 that are my own problem, I suddenly see now for
3 the first time that if you win here, if you
4 win, this is a major change because it's pretty
5 hard to see how you can say you can attack the
6 preliminary hearing and you cannot attack the
7 grand jury, and you cannot attack the Estelle
8 hearing or all these different hearings --

9 MS. CORKRAN: Yeah.

10 JUSTICE BREYER: -- that they've been
11 talking about, so suddenly, whereas you
12 previously haven't done it for whatever set of
13 historical reasons, this will suddenly be
14 subject to a lot of attacks.

15 So that makes me pretty careful.

16 MS. CORKRAN: Yeah.

17 JUSTICE BREYER: And for that reason,
18 I looked up whether you objected, because I do
19 not see how the magistrate running the -- the
20 preliminary hearing can know what to do unless
21 somebody tells him that these statements were
22 taken in violation of the Fifth Amendment.

23 One, I don't see where you ever did
24 tell the magistrate that.

25 Two, looking at the transcript of the

1 preliminary hearing, I couldn't find any
2 instance where any of the compelled statements
3 were introduced into the preliminary hearing.

4 So what I would like you to do is to
5 tell me what pages to look at in the
6 preliminary transcript, which I have here,
7 which will show that you did object or at least
8 that some of the compelled statements were
9 used.

10 MS. CORKRAN: So none of this is in
11 the record, and the reason it's not --

12 JUSTICE BREYER: It may not be in the
13 record.

14 MS. CORKRAN: Yeah. But I -- it's --

15 JUSTICE BREYER: But if it's not in
16 the --

17 CHIEF JUSTICE ROBERTS: But that's an
18 important point, isn't it?

19 MS. CORKRAN: Yes.

20 JUSTICE BREYER: Of course, it's an
21 important point.

22 MS. CORKRAN: But --

23 (Laughter.)

24 MS. CORKRAN: But the --

25 CHIEF JUSTICE ROBERTS: Well, before

1 we start having an -- an extended exchange
2 about material and something that's not in the
3 record, I -- well, I guess I would just like to
4 point out that it's not in the record. There's
5 a reason we can find things to what's in the
6 record, including how do we know what this is
7 if it's not in the record.

8 MS. CORKRAN: But the --

9 CHIEF JUSTICE ROBERTS: How do we know
10 that it's been adequately -- had a chance for
11 people to object to it and all that? It's --
12 it's not just a passing comment that it's not
13 in the record.

14 JUSTICE BREYER: Nor -- nor is
15 actually mine a passing comment because Article
16 III of the Constitution says we are to take
17 real cases and controversies.

18 MS. CORKRAN: Yeah.

19 JUSTICE BREYER: And to decide a major
20 matter where, in fact, going from what is in
21 the record to an earlier stage of this and
22 discovering if it's true, that there was no
23 instance about which you are complaining, in my
24 mind raises the question as to whether this is,
25 in fact, an appropriate case or controversy for

1 the Court to take.

2 CHIEF JUSTICE ROBERTS: And we're
3 supposed to decide whether the cases are
4 controversies according to law. And as far as
5 I'm concerned, coming in and saying I want to
6 know about this thing that's not in the record
7 is no different from somebody else coming off
8 the street and saying: Hey, wait a minute, I
9 know what happened in this case. So --

10 MS. CORKRAN: So --

11 CHIEF JUSTICE ROBERTS: -- go ahead
12 and answer it.

13 MS. CORKRAN: Yeah.

14 CHIEF JUSTICE ROBERTS: It's a
15 question that you've been presented with. Go
16 ahead and answer it. But I want you to --

17 JUSTICE BREYER: You don't have to
18 answer it. I -- I -- I --

19 MS. CORKRAN: I --

20 CHIEF JUSTICE ROBERTS: No, no, feel
21 free. I'm just saying I will discount the
22 answers because it's not something that's in
23 the record.

24 MS. CORKRAN: Yeah. So it's really
25 important to explain that the reason it's not

1 in the record is because Petitioner chose to
2 seek this Court's interlocutory review at the
3 pleading stage.

4 And so that is why Petitioner has not
5 raised any of those questions before this
6 Court. It is conceded at this point that the
7 complaint adequately alleges that the statement
8 was used in the probable cause hearing.
9 Petitioner is not contesting that.

10 And so none of these questions are
11 ripe for resolution at this point because of
12 Petitioner's cert strategy. And so --

13 JUSTICE ALITO: Well, this is a very
14 -- this is a very odd case. And it wasn't a
15 case of involving -- it's not a case where you
16 had a right to take an appeal. It's a case
17 where we decided to -- we decided to take it,
18 where the city had a right to take the -- to
19 take an appeal.

20 But let me ask you this: What -- did
21 the -- did the city violate the Fifth Amendment
22 at the time when the officer was questioned?

23 MS. CORKRAN: No. The violation was
24 not complete until the statement was used in
25 the criminal case.

1 JUSTICE ALITO: Then why are you suing
2 the city?

3 MS. CORKRAN: So Section 1983
4 establishes liability for causing the
5 deprivation of a constitutional right. And I
6 want to point out Petitioner has not challenged
7 in this Court whether we have adequately
8 alleged proximate causation. In answering --

9 JUSTICE ALITO: I understand that.

10 MS. CORKRAN: Yeah.

11 JUSTICE ALITO: I'm just trying to
12 understand this seems like a very odd case and
13 I'm just trying to understand what's really
14 involved. That's one thing that -- that --

15 MS. CORKRAN: Yeah.

16 JUSTICE ALITO: -- I don't understand.

17 MS. CORKRAN: So -- so I'll say --

18 JUSTICE ALITO: How did they cause the
19 -- the -- what will your theory be as to how
20 they caused this prosecution?

21 MS. CORKRAN: Yeah. So the Tenth
22 Circuit applied settled law with regard to
23 proximate causation. All of the court of
24 appeals have held that cause in Section 1983
25 incorporates common law principles of -- of

1 proximate causation.

2 So what the Tenth Circuit said is that
3 when the police chief went to the Kansas Bureau
4 of Investigation and said: Here are Officer
5 Vogt's compelled statements, you should
6 initiate a criminal investigation, it was
7 reasonably foreseeable that that -- those
8 statements would ultimately be introduced in
9 the criminal case. And I'll say that the Ninth
10 Circuit and the Seventh Circuit, or I guess the
11 Sixth Circuit, have addressed very similar
12 circumstances and come to the same conclusion.

13 So I'm not aware of any circuit split
14 on this issue, but it's certainly not before
15 this Court. That's a Section 1983 question.

16 Petitioner has chosen to present to
17 this Court the Fifth Amendment question. It's
18 a constitutional question. Everything that's
19 going on below will be decided on remand. So
20 --

21 JUSTICE SOTOMAYOR: Counsel, just so
22 we're clear, the -- I think the concurring
23 opinion in this case did a very good job of
24 pointing out that all of the questions that are
25 being asked, both by Justice Alito and by

1 Justice Breyer, there is a substantial question
2 about whether any of these statements were
3 compelled.

4 MS. CORKRAN: Yeah.

5 JUSTICE SOTOMAYOR: There is a
6 substantial question about whether there was an
7 objection or not. There are lots of questions
8 that the concurrent said still had to be
9 decided, correct?

10 MS. CORKRAN: Yeah. And so, if this
11 Court wanted to dig the case as improvidently
12 granted, we would certainly not object. I
13 think we said in our brief in opposition that
14 we thought it was premature to take this
15 question at this time, but -- but I can
16 continue to talk about the record -- okay.

17 (Laughter.)

18 MS. CORKRAN: So -- so going back to
19 the --

20 CHIEF JUSTICE ROBERTS: Yeah. Just --

21 MS. CORKRAN: Yeah. So going back to
22 the -- the question that the question
23 Petitioner presented to this Court --

24 JUSTICE SOTOMAYOR: Could I just go
25 back?

1 MS. CORKRAN: Yeah.

2 JUSTICE SOTOMAYOR: There is a circuit
3 split on this. There's three circuits on one
4 side, three circuits on the other -- four now
5 on the other side.

6 Among those four are now the Tenth,
7 the Ninth, the Seventh, and the Second who
8 support your position.

9 MS. CORKRAN: Yeah.

10 JUSTICE SOTOMAYOR: Do you know
11 whether the works have been gummed up in those
12 circuits?

13 MS. CORKRAN: There is no evidence
14 they've been gummed up. And I also want to say
15 about the -- the asserted circuit split, the
16 cases that are supposedly in support of the
17 Petitioner's position, none of them actually
18 addressed a circumstance where you had a
19 post-charge pretrial use of the compelled
20 statement. They were all cases similar to
21 Chavez, where the defendant, or the -- I guess
22 the plaintiff, was attempting to rely on
23 pre-charge compulsion to make a Fifth Amendment
24 claim.

25 Now, in doing so -- well, I should

1 clarify that in at least one of those cases the
2 compelled statement was also used to initiate
3 the charges.

4 JUSTICE ALITO: Well, unless you can
5 distinguish this from the grand jury --

6 MS. CORKRAN: Yeah.

7 JUSTICE ALITO: -- it's -- the issue
8 has enormous implications for the reasons that
9 were brought out by Justice Breyer's questions.

10 So how could you distinguish this from
11 the grand jury?

12 MS. CORKRAN: Yeah. So I'm going to
13 attempt to answer that concisely with the
14 caveat that it would take an entire second set
15 of briefs to adequately address the nuances of
16 the Court's grand jury jurisprudence, which is
17 why neither we nor the government attempted
18 that. This is just a very different and more
19 complicated question, but my -- my best simple
20 answer is that Hubbell and Counselman hold that
21 the clause applies to grand injuries.

22 With this added limitation from Lawn,
23 Calandra, and Williams, the courts don't have
24 authority to crack open indictments because of
25 the grand jury's status as an independent

1 constitutional fixture. It's not textually
2 assigned to the judicial branch.

3 That said, courts do crack open
4 indictments all the time. That's the whole
5 point of a Kastigar hearing. And when a court
6 finds that jury -- a grand jury has made use or
7 derivative use of a compelled immunized
8 statement, the remedy is to dismiss the
9 indictment itself unlawful. That is
10 irreconcilable with Petitioner's theory that
11 it's perfectly fine for the government to use
12 compelled statements all the way up to the
13 point of trial.

14 So, as a practical matter --

15 JUSTICE KAGAN: Ms. Corkran, suppose
16 that I just did not want to go into the grand
17 jury business, mostly because I think that
18 there is this very long tradition of not
19 cracking them open unless we have to.

20 MS. CORKRAN: Yes.

21 JUSTICE KAGAN: And, you know, it
22 might be that there is the same right in the
23 grand jury context, but we've just decided in a
24 wide variety of ways that that right does not
25 get remedied in the same way, as easily, as

1 quickly, as anything, as in other contexts.

2 Would it be -- wouldn't that be
3 correct?

4 MS. CORKRAN: Yes, that's fine and --
5 and that's as far as we went in our -- our
6 briefing because, again, this is such a
7 complicated question. But, yes, the -- the
8 Lawn-Calandra-Williams limitation on cracking
9 open indictments would not apply to probable
10 cause hearings, both because the -- the unique
11 historical posture isn't there but also because
12 the nature of the proceeding is so different.
13 A probable cause hearing is an adversarial
14 courtroom proceeding before a judge, so there
15 isn't anything to crack open.

16 So that leads to Petitioner's policy
17 point about whether it makes sense to apply the
18 clause to probable cause hearings in a way
19 that's different than how the clause applies to
20 grand juries. And this Court answered that
21 question in *Coleman v. Alabama* when it said
22 that the Sixth Amendment right to counsel
23 applies to probable cause hearings, the exact
24 sort of probable cause hearing we have at issue
25 here, even though that right does not apply to

1 grand juries.

2 And Justice White's concurrence made
3 the same ominous predictions about the death of
4 probable cause hearings that Petitioner has
5 made here, and it didn't happen. It's 48 years
6 later, and the vast majority of states are
7 still using probable cause hearings as the
8 primary mechanism for pursuing felony
9 prosecutions, even though the right to counsel
10 is surely more burdensome on the state than the
11 self-incrimination privilege.

12 So I'd like to go back to the Court's
13 precedent because I think this is important.
14 Not once in the history of this country has
15 this Court relied on the term "witness against
16 itself" -- "himself" to limit when the use of a
17 compelled incriminating testimonial statement
18 violates the clause.

19 JUSTICE ALITO: Well, what is your
20 test for determining whether a proceeding is
21 part of the criminal case for these purposes?

22 MS. CORKRAN: So I would look to the
23 -- the Court's definition of criminal
24 prosecution in Rothgery because we know that a
25 criminal case is at least as broad as a

1 criminal prosecution. And Rothgery says it's
2 the defendant's first appearance before a
3 judicial officer where he is formally told of
4 the charges against him and deprivations are
5 imposed on his liberty. And there's no
6 question that that covers the probable cause
7 hearing here.

8 JUSTICE SOTOMAYOR: How do you
9 distinguish Estelle?

10 JUSTICE ALITO: Does it --

11 MS. CORKRAN: So -- so Estelle was a
12 case about competency. What the Court held in
13 Estelle was that the defendant's rights had
14 been violated by the use of his psychiatric
15 exam at his sentencing proceeding. So that
16 holding in itself forecloses the notion that
17 the clause is only a trial right.

18 What Petitioner and the government are
19 latching onto are two sentences of dicta where
20 the Court said: Well, if the psychiatric exam
21 had been limited to its function of determining
22 whether the defendant understood the charges
23 against him and was capable of assisting in his
24 own defense, then a Fifth Amendment problem
25 wouldn't have arose.

1 That is consistent with our position,
2 and I'll explain why. A competency hearing is
3 part of a criminal case, I imagine, most of the
4 time, but the other three requirements of the
5 clause are going to substantially limit its
6 application to those hearings.

7 So Estelle explains that a routine
8 competency exam is focused exclusively on
9 whether the defendant understands the charges
10 against him and is capable of assisting in his
11 own defense. That determination does not
12 require extracting testimonial incriminating
13 statements from the defendant.

14 And to the extent that the defendant
15 has volunteered to put competency at issue, it
16 might not even be compelled. So --

17 JUSTICE ALITO: But your answer is,
18 though, but in general, then, the -- the clause
19 does not apply or does apply in a competency
20 hearing?

21 MS. CORKRAN: So the clause --

22 JUSTICE ALITO: The evidence --
23 evidence obtained in violation of the -- the
24 privilege would be admissible in a competency
25 hearing or not?

1 MS. CORKRAN: Yeah. So, in the narrow
2 circumstance where a defendant has been forced
3 to undergo a psychiatric exam and, in answering
4 those questions, he makes a compelled
5 incriminating testimonial statement, no, that
6 can't be admitted in the competency hearing
7 because it's part of the criminal case.

8 But that limitation shouldn't affect
9 the utility of competency hearings. I think
10 it's important to point out Estelle didn't even
11 involve a competency hearing. There, the
12 psychiatrist had sent a letter to the judge
13 that simply said: I find that the defendant
14 understands the difference between right and
15 wrong and understands the charges against him
16 and is capable of assisting his defense.

17 JUSTICE ALITO: So what about a
18 Gerstein hearing and a bail hearing?

19 MS. CORKRAN: Yeah. So a Gerstein
20 hearing is not part of the criminal case
21 because it's a Fourth Amendment requirement.
22 It's a substitute for an arrest warrant. So
23 this Court fleshed that point out well last
24 term in Manuel v. City of Joliet. And so
25 Gerstein itself explains that because it's a

1 Fourth Amendment requirement, the whole panoply
2 of rights in the Sixth Amendment do not apply
3 to Gerstein hearings.

4 JUSTICE ALITO: But I thought you said
5 that the -- that the criminal case begins when
6 the -- when the defendant is -- appears in
7 court and is called upon to answer the charges.

8 MS. CORKRAN: Yes. So I don't know
9 that a Gerstein hearing --

10 JUSTICE ALITO: That's not -- a
11 Gerstein doesn't satisfy that?

12 MS. CORKRAN: No, the point of a --
13 well, it depends on whether -- when you would
14 have the Gerstein hearing, but the Gerstein
15 hearing that's contemplated by Gerstein is this
16 hearing within 48 hours of arrest --

17 JUSTICE ALITO: Yeah.

18 MS. CORKRAN: -- where the purpose is
19 to get the arrest warrant after the fact.
20 There's no reason that the Fifth Amendment
21 requirements would apply to that hearing when
22 the Sixth Amendment requirements don't.

23 It's -- it's -- to the extent that
24 it's happening at the same time of the -- as
25 the criminal case, it's -- it's happening in

1 parallel.

2 JUSTICE ALITO: Wouldn't it -- in a
3 criminal -- in a federal case, if there's a
4 complaint, wouldn't it begin at the time of the
5 filing of the complaint? Wouldn't that be the
6 beginning of the criminal case?

7 MS. CORKRAN: Yeah. So a Gerstein
8 hearing -- the Gerstein determination could be
9 folded into something that's happening within
10 the criminal case. So I understand that to
11 happen sometimes. The -- the state will
12 quickly file charges and then fold the Gerstein
13 hearing into the arraignment. But there's
14 nothing requiring states to do that.

15 So, in an emergency situation where a
16 state -- you know, they need to take physical
17 custody of someone who has confessed to
18 murdering their whole family, this -- the
19 clause would not prohibit the government from
20 then getting that Gerstein determination based
21 on the confession and then later pulling
22 together the evidence necessary to make the
23 probable cause showing in court.

24 JUSTICE ALITO: I'm just not -- I'm
25 not following your answer.

1 MS. CORKRAN: Yeah.

2 JUSTICE ALITO: In a federal case,
3 when a complaint is filed, is that not the
4 beginning of the criminal case, in your view,
5 so that everything that happens after that is
6 part of the criminal case?

7 MS. CORKRAN: Yes, that's right.

8 JUSTICE ALITO: First appearance --
9 the initial appearance in court, that's part of
10 the -- the criminal case. The bail hearing is
11 part of the criminal case. The -- the
12 competent -- if there's a competency hearing,
13 that's part of the criminal case. It's all
14 part of the criminal case.

15 MS. CORKRAN: Yes. And bail
16 determinations are made at different sorts of
17 proceedings, so -- but a Gerstein hearing, what
18 Gerstein is contemplating is this substitute
19 for a warrant. So instead of the -- it's when
20 the police want to take custody of someone
21 before they've gotten the arrest warrant, they
22 can do so and then go to a neutral adjudicator
23 and say: Do I have sufficient evidence to
24 justify the arrest? That is a Fourth Amendment
25 requirement.

1 JUSTICE KAGAN: Right. If I
2 understand what you're saying -- and maybe I
3 don't -- but it's -- it's a substitute for
4 exactly the proceeding that would take place if
5 the police decided that they needed an arrest
6 warrant, is that right?

7 MS. CORKRAN: Yes, exactly.

8 JUSTICE KAGAN: And in that
9 proceeding, you would say that the privilege
10 does not apply --

11 MS. CORKRAN: Yes. The privilege --

12 JUSTICE KAGAN: -- because the
13 criminal case had not yet commenced --

14 MS. CORKRAN: Yeah, it's not --

15 JUSTICE KAGAN: -- before the arrest
16 has been made, is that correct?

17 MS. CORKRAN: Right. And that's --
18 that's the reasoning of Gerstein when Gerstein
19 says why the Sixth Amendment rights would not
20 apply to that hearing, you know, the -- Justice
21 Alito's, I think, hypothetical, the Gerstein
22 hearing would be happening within the criminal
23 prosecution. But Gerstein says those rights
24 don't apply in that context.

25 JUSTICE BREYER: Is -- is it possible

1 to ask, does -- is this a -- this is a 1983
2 case?

3 MS. CORKRAN: Yes.

4 JUSTICE BREYER: Could we say, in your
5 opinion, before a plaintiff in a 1983 case can
6 bring a claim, that the preliminary hearing
7 consider -- considered matters that were taken
8 in violation of the Fifth Amendment, they must
9 allege in their complaint that they objected
10 before the hearing, for otherwise the
11 magistrate would have no idea what he is
12 supposed to do?

13 MS. CORKRAN: So Petitioner has not
14 asked this Court to interpret Section 1983.

15 JUSTICE BREYER: I know they haven't.
16 I'm asking.

17 MS. CORKRAN: Yeah. So I think that's
18 a question of statutory interpretation and
19 congressional intent. If Congress wanted to
20 limit Section 1983 that way, it could.

21 But there's no indication in the plain
22 language of Section 1983 that it is limited in
23 that way.

24 JUSTICE BREYER: Well, then what is
25 the answer to this? There are many, many ways

1 in which a -- a statement by an individual
2 could violate the -- incrimination. In this
3 case, he is asked questions by his superiors in
4 the police department under threat of
5 leaving --

6 MS. CORKRAN: Yeah.

7 JUSTICE BREYER: -- and they don't
8 know that he considers that to be a violation
9 of the Fifth Amendment.

10 MS. CORKRAN: Well, but the --

11 JUSTICE BREYER: Then those statements
12 go to court in a preliminary hearing, and the
13 magistrate doesn't know that the person
14 considers them to be a violation of the Fifth
15 Amendment.

16 What are the magistrates and the
17 police department supposed to do? They're not
18 necessarily conversant with all the facts of
19 the case, if no one objects.

20 MS. CORKRAN: Yeah. So I want to
21 start by saying that this Court held in
22 *Minnesota v. Murphy* that a Garrity privilege is
23 self-executing, that when an employee is in a
24 situation where their boss says to them you
25 will lose your job if you don't make these

1 statements, it self-executes. So you don't
2 have to raise the privilege at -- at that
3 moment.

4 But -- and with response to or in
5 response to what the -- the state is supposed
6 to do, what happened here is highly unusual.
7 Since the 1970s, the Department of Justice and
8 police departments across the country have
9 developed best practices to ensure that
10 compelled statements are not used in criminal
11 investigations.

12 So, once a statement is compelled via
13 an administrative investigation or a grant of
14 immunity, that statement is then formally
15 siloed from any criminal investigation.

16 So what happened here, the police
17 chief's decision to take this compelled
18 statement and hand it to the Kansas Bureau of
19 Investigation and say you should investigate
20 this was highly unusual and, frankly, very hard
21 to understand, given the ubiquity of Garrity
22 protocols in this country.

23 So I -- to go back to your point
24 earlier about whether this is a dramatic
25 revolution, it's not. What we're proposing

1 here is what the law has always been.

2 All -- all police departments across
3 the country and the Department of Justice would
4 say, even before this case coming before the
5 Court, that what the police chief did here was
6 -- was illegal.

7 CHIEF JUSTICE ROBERTS: I don't
8 understand. You -- you talk about it being --
9 being siloed and not being -- so the idea is
10 you're supposed to pretend that the person
11 didn't say what he said in conducting the
12 investigation?

13 MS. CORKRAN: Yes. So the best
14 practices is that whoever was involved in -- in
15 taking that compelled statement is then siloed
16 themselves from the criminal investigation so
17 that the -- the government can prove that the
18 -- the criminal investigation and the ultimate
19 prosecution happened entirely independent of --

20 CHIEF JUSTICE ROBERTS: Well, so if
21 the person says -- you know, they say you've
22 got to tell me what happened or you'll be
23 fired, and the person says, you know, I buried
24 the body here, he's not supposed to tell
25 anybody?

1 MS. CORKRAN: Well, if he was asking
2 that question as part of an administrative
3 investigation --

4 CHIEF JUSTICE ROBERTS: Yeah.

5 MS. CORKRAN: -- then -- then, yes,
6 you can't use that statement.

7 Now there could be an independent
8 criminal investigation --

9 CHIEF JUSTICE ROBERTS: I just want to
10 make sure I understand. So he's investigating
11 it and said do you have anything to do with
12 this, the disappearance, and the person says, I
13 buried the body next to this barn, the person
14 at that point is supposed to say, okay, I'm
15 going to turn this over to Fred and I'm not
16 going to tell him anything?

17 MS. CORKRAN: So you're talking about
18 a government employer making that inquiry of an
19 employee as part of an administrative
20 investigation --

21 CHIEF JUSTICE ROBERTS: Yes.

22 MS. CORKRAN: -- or is the government
23 -- so, under those circumstances, once the
24 government gives the grant of immunity, no,
25 that cannot be used. That's -- that's been the

1 law since Kastigar and Garrity.

2 CHIEF JUSTICE ROBERTS: There's no
3 grant of immunity. There's a -- you've got to
4 tell us or I'm going to fire you. In other
5 words, the same thing here, that it's a
6 compelled statement.

7 MS. CORKRAN: Yes. So then it's a
8 compelled statement, and the privilege is
9 self-executing at least --

10 CHIEF JUSTICE ROBERTS: For the
11 purposes of an ongoing investigation?

12 MS. CORKRAN: Yeah. Yeah. And if
13 that were not the -- the -- if that were not
14 the rule, so if Petitioner's theory would
15 correct -- was correct, then the disincentives
16 for employee cooperation in those sorts of
17 administrative investigations would skyrocket
18 because, if the grant of immunity only applies
19 at trial, you could compel those statements
20 from the employee at pain of losing their job
21 and then turn around and use those statements
22 to criminally prosecute them, keep them in
23 custody all the way up to the point of the
24 criminal trial, at which --

25 JUSTICE KENNEDY: So, if the employer

1 requires a statement to be made and the
2 employee says that a crime was committed, the
3 employer cannot tell the Police Department?

4 MS. CORKRAN: Yes, that's been the
5 rule since Garrity and -- and Kastigar. Now I
6 do want to distinguish between unwarned
7 statements and compelled statements. So an
8 unwarned statement, where the Miranda rights
9 are not read, is not necessarily a
10 constitutional violation. That is a
11 prophylactic exclusionary rule that the court
12 may or may not extend to preliminary hearings.

13 But when it comes to a compelled
14 statement, whether immunized or not, the
15 Constitution is very clear. It cannot be used
16 in a criminal case. And -- and that was what
17 the framers intended as well. We know that the
18 framers based the clause on a common law
19 privilege that specifically applied to
20 preliminary proceedings.

21 JUSTICE SOTOMAYOR: This is such an
22 odd case because I'm not quite sure that there
23 was a compelled statement at all, if the facts
24 as I've read them -- and I know they're not in
25 the record and I know what the Chief says --

1 but, first of all, no employer -- his employer
2 didn't compel these statements. He went to his
3 employer because he wanted a different job.

4 MS. CORKRAN: That was true for the
5 first statement, yeah.

6 JUSTICE SOTOMAYOR: All right. On the
7 second statement, he went to his chief and
8 said: I'm resigning.

9 MS. CORKRAN: No, sorry. So that's
10 not -- that's not actually correct. So he
11 voluntarily made the first statement to the
12 police chief. The police chief then told him
13 he had -- needed to document what had happened
14 on pain of losing his job. That is the
15 compelled statement.

16 Then, after he made that statement, he
17 tendered his resignation, and then there was a
18 third statement in which he gave more details
19 about what had happened. So it's -- the
20 question of the impact of the -- the
21 resignation on that third statement is up for
22 grabs.

23 JUSTICE SOTOMAYOR: Well, I had a --
24 but that's what's going to be litigated below.

25 MS. CORKRAN: Yes.

1 JUSTICE SOTOMAYOR: I thought he had
2 announced his resignation before there was a
3 request for additional --

4 MS. CORKRAN: Yeah. So -- so in the
5 complaint, that -- that resignation happened
6 between the second and the third statement.

7 JUSTICE SOTOMAYOR: That -- I'll take
8 it.

9 MS. CORKRAN: Okay.

10 JUSTICE SOTOMAYOR: But it's still an
11 odd case.

12 MS. CORKRAN: It is. And, again, it's
13 an odd case because Petitioner chose to seek
14 this Court's review at the pleading stage and
15 Petitioner chose to present only the Fifth
16 Amendment question to this Court.

17 JUSTICE ALITO: If this case -- if
18 this case goes to trial, you will prove that
19 the officer suffered damage as a result of the
20 probable cause hearing or as a result of having
21 been -- as a result of the admission that he
22 made under alleged -- allegedly under
23 compulsion by the city?

24 MS. CORKRAN: So it would be the use
25 of the statement in the probable cause hearing.

1 The complaint alleges emotional damages,
2 reputational damage, loss of income. Seeks
3 punitive damages. Petitioner has not contested
4 the adequacy of those allegations.

5 JUSTICE ALITO: Yeah, but you -- you
6 will prove that the reason why he didn't get
7 the job with the other police department was
8 the probable cause hearing and not the
9 statement that he made?

10 MS. CORKRAN: No, that would be
11 inconsistent with the complaint. The complaint
12 says that the City of Haysville withdrew the
13 job offer at the point of the criminal
14 investigation by the -- the Kansas Bureau.

15 JUSTICE SOTOMAYOR: That has nothing
16 to do with the probable cause hearing. He
17 wanted the probable cause hearing, so how could
18 the statement have hurt him? How can he put --
19 prove damage?

20 MS. CORKRAN: Yeah, I would just say,
21 on this record, Petitioner has not challenged
22 the adequacy of those allegations. At a
23 minimum, he would be entitled to nominal
24 damages.

25 So I want to just emphasize that what

1 we're talking about here is an incriminating
2 testimonial statement that the government has
3 extracted from the defendant against his will.
4 There is nothing radical about saying that the
5 government should not be able to use that
6 statement for any purpose in a criminal case.

7 That is -- that was the framers'
8 position. They found it offensive to a
9 civilized system of justice to allow
10 prosecutors to -- to enlist defendants as
11 instruments in their own condemnation. They
12 thought it was crucial to our democracy that
13 prosecutions proceed based on the independent
14 labor of the government's officers.

15 Petitioner's theory to the contrary
16 should be rejected. I'm happy to answer any
17 other questions.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Four minutes, Mr. Heytens.

21 REBUTTAL ARGUMENT OF TOBY J. HEYTENS
22 ON BEHALF OF THE PETITIONER

23 MR. HEYTENS: I'd just like to make
24 three quick points in rebuttal: One in
25 response to Justice Kagan's point about the

1 apparent oddity with regard to this particular
2 proceeding, one about suppression hearings, and
3 one about Garrity.

4 So, in response to Justice Kagan's
5 questions about the oddity of this particular
6 type of hearing, I think beyond the fact that
7 the Supreme Court of Kansas has held that the
8 purpose of this hearing is not to adjudicate
9 guilt or punishment, I think an even more
10 important indication of that is that, under
11 Kansas law, nothing that happened at this
12 hearing could conclusively resolve Officer
13 Vogt's guilt or innocence one way or the other.
14 And the way -- the reason that we know that is
15 because the Supreme Court has specifically held
16 that the dismissal of charges after a probable
17 cause hearing is not preclusive of, and without
18 prejudice to, the state's ability to reinstate
19 the exact same criminal prosecution.

20 Which is the same rule for grand
21 injures, right? The Court has said that just
22 because a grand jury refuses to return an
23 indictment does not mean that the prosecution
24 cannot ask another grand jury to return an
25 indictment.

1 And, in fact, the Supreme Court of
2 Kansas has reversed trial courts who have
3 dismissed the probable cause hearing on the
4 theory that the government will not be able to
5 carry its proof beyond a reasonable doubt
6 burden at trial because, they've said, that's
7 not the purpose of this hearing. This hearing
8 does not adjudicate guilt or innocence.

9 The point on suppression hearings, I
10 think it's just worth emphasizing again in
11 response to Justice Ginsburg's point, we are
12 not talking about the possibility that someone
13 will have to decide to plead guilty without
14 being able to challenge evidence for one very
15 simple reason: They can file a pretrial motion
16 to suppress.

17 Many -- it is true that a large
18 majority of prosecutions are resolved via
19 guilty plea. But it is also true that before
20 pleading guilty, defendants often file pretrial
21 motions to suppress and only plead guilty after
22 the denial of their motion to suppress.

23 In the federal system, they are even
24 sometimes permitted to file a conditional
25 guilty plea to preserve their ability to

1 challenge the admissibility of the evidence on
2 appeal. So we're not talking about taking
3 people -- away people's ability to challenge.

4 And then last but not least, we didn't
5 discuss it in the initial argument, but this
6 Court -- the second argument that we have
7 raised, the second independent argument,
8 relates that this Court could say, whatever the
9 rule might be with regard to other types of
10 Fifth Amendment claims, there can be no Garrity
11 violation until trial.

12 It would actually be very similar to
13 what I understand a super-majority of this
14 Court said in Chavez with regard to Miranda
15 claims. I understand that, in Chavez, the
16 Court was deeply divided about whether there
17 were circumstances in which an involuntariness
18 claim could occur before trial. But, as I
19 understood, even some of the dissenting
20 justices in Chavez said a Miranda claim is
21 something that can only accrue until trial.

22 And I think that would make sense when
23 it comes to Garrity claims. Garrity does not
24 forbid the taking of the statements. There can
25 be no Garrity violation when the statement is

1 taken. The violation under Garrity is the
2 later use of the statement. And so we would
3 suggest that if the Court doesn't want to reach
4 the broader issue, they could simply say that
5 this type of Fifth Amendment violation cannot
6 occur until the statements are used at trial.

7 We ask the Court -- we ask that the
8 judgment below be reversed.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel. The case is submitted.

11 (Whereupon, at 12:04 p.m., the case in
12 the above-entitled matter was submitted.)

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