No. 16-1495

In the Supreme Court of the United States

CITY OF HAYS, KANSAS,
Petitioner,

v.

MATTHEW JACK DWIGHT VOGT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE STATE OF KANSAS AND 12 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

This case involves whether the Fifth Amendment forbids the use of previously compelled statements at a pretrial probable-cause hearing. States hold several different types of hearings to assess whether there is probable cause to believe a defendant committed an offense. These proceedings include the 48-hour probable-cause hearing required by *Gerstein v. Pugh*, 420 U.S. 103 (1975), grand jury proceedings, and preliminary hearings.

Under longstanding practice, the determination whether a statement is compelled is rarely made prior to these hearings. Instead, those determinations are made by judges during a *Jackson v. Denno* voluntariness hearing or a suppression hearing that takes place after the probable-cause proceeding concludes. The states have a strong interest in maintaining their current processes, which have deep historical roots, prevent undue delays, and are consistent with the limited purpose of these preliminary proceedings.

SUMMARY OF THE ARGUMENT

The government does not violate the Fifth Amendment merely by compelling a statement. Instead, the question is what "use" of such a statement implicates the constitutional protection? Practical considerations, including not undermining the three different types of pretrial probable-cause hearings states commonly hold, support the result that admission of compelled statements in such preliminary, limited purpose proceedings does not violate the Fifth Amendment.

A. One common type of probable-cause hearing is the hearing this Court requires under the Fourth Amendment, typically within 48 hours of arrest. The purpose of the Fourth Amendment hearing is to ensure the arrest was lawful. Requiring police, prosecutors, and judges to make a non-adversarial determination of whether a statement was compelled prior to its use in that hearing would be exceedingly difficult. It would also largely be an exercise in futility because any decision by a magistrate would be preliminary, and not binding on either a grand jury or a judge at a later preliminary hearing or suppression hearing. That result would exact a high cost on the criminal justice system for, at best, minimal benefits.

B. Another common probable-cause process many states use, but which is not constitutionally mandated, is the grand jury proceeding. These proceedings also are not adversarial, and guilt or innocence is not adjudicated. In fact, the defendant is rarely present unless called as a witness, and no judge is present. The proceedings typically lack the evidentiary and procedural restrictions applied in criminal trials and, in the vast majority of jurisdictions, the sole evidentiary rule is that witnesses may assert their own testimonial privileges. Requiring a determination of whether a statement is compelled prior to or during the grand jury proceedings is therefore contradictory to the entire grand jury process. It would afford a possible defendant a far greater role than historically and currently provided.

Further, "[s]uppression hearings would halt the orderly progress of an investigation, and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective." *United States v. Calandra*, 414 U.S. 338, 349 (1974). In fact, this Court has already held that grand jury indictments cannot be attacked on the ground that they were based on inadmissible evidence or compelled statements. *Id.* at 344-45. The Fifth Amendment does not demand a pre-hearing determination of whether a statement is compelled in the grand jury context.

C. An even more frequently used, but also not constitutionally mandated, probable-cause hearing is the preliminary hearing. These hearings benefit defendants by allowing them to preview the evidence against them and preventing unwise prosecutions from proceeding. Other than requiring counsel at these adversarial proceedings, this Court has not held that the Constitution mandates any additional procedures. Most states—consistent with Federal Rule of Criminal Procedure 5.1—preclude challenges to whether evidence was lawfully obtained during the preliminary hearing. Instead, after a defendant is bound over for trial following the preliminary hearing, states use *Jackson v. Denno* or suppression hearings to determine whether a statement was compelled and thus to ensure compelled statements are not used at *trial*.

Requiring a ruling on Fifth Amendment claims prior to or during preliminary hearings would suffer from many of the same problems noted with respect to the 48-hour probable-cause hearings. In addition, a holding that the use of compelled statement violates the Fifth Amendment at preliminary hearings, but not

at grand jury proceedings, would coerce prosecutors to use grand juries instead of preliminary hearings. That result would contradict this Court's traditional deference to the states with respect to pretrial procedures. In the end, post-probable cause *Jackson v. Denno* and suppression hearings afford defendants all the protection required under the Fifth Amendment.

ARGUMENT

Determining when the Fifth Amendment right against self-incrimination is implicated requires two distinct inquiries. The first is when, outside a criminal proceeding, a statement can be deemed compelled for Fifth Amendment purposes. This Court has held that statements individuals make on pain of penalty in civil hearings, legislative proceedings, and in connection with government employment can be deemed compelled. See *Garrity v. New Jersey*, 385 U.S. 493, 497 (1967) (public employment); *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (citing *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924)).

But just because a person is compelled to make a statement against self-interest does not mean his or her privilege has been violated. The Court has recognized time and again that the government may compel incriminating statements so long as the speaker obtains (expressly or implicitly) some measure of immunity respecting those statements' later use against the speaker. See *Garrity*, 385 U.S. at 497 (effectively granting implicit immunity when public employment is threatened); *Kastigar v. United States*, 406 U.S. 441, 442 (1972) (testimony may be compelled if immunity is expressly granted). That leads to the second question, which is the one presented here: When

does the *use* of a compelled statement violate the Self-Incrimination Clause? Clearly its use at trial violates the privilege. But the privilege is not violated by the compelled statement's use at a pretrial probable-cause proceeding.

As the Petitioner explains, this Court has frequently described the privilege against self-incrimination as a trial right. The privilege may not be invoked if there is no threat of criminal liability, which can only be imposed following a criminal trial. Still other constitutional provisions that refer to "witnesses" protect a *trial* right. See Pet. Br. 9-15, 21-22. A closer examination of the most common state pretrial proceedings—the constitutionally required 48-hour probable-cause hearing, grand jury proceedings, and preliminary hearings—confirms that the privilege does not apply to statements used in those proceedings. Prohibiting the use of compelled statements in those settings would fundamentally reshape those proceedings and would be inconsistent with their limited purposes.

A. The Fifth Amendment does not bar use of compelled statements at 48-hour probable-cause hearings.

This Court has long recognized that police officers with probable cause to believe a suspect has committed a crime may arrest the suspect before securing an arrest warrant. See *Ker v. California*, 374 U.S. 23 (1963). "To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy," however, the suspect is entitled to a prompt "judicial determination of probable cause as a prerequisite to extended restraint of liberty following

arrest." *Gerstein v. Pugh*, 420 U.S. 103, 112, 114 (1975). In *City of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991), the Court held that this judicial probable-cause hearing must generally take place "within 48 hours of arrest."

The nature of these hearings is incompatible with a rule barring use of compelled statements. The 48-hour hearing substitutes for the pre-arrest judicial determination of probable cause, which "traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony." *Gerstein*, 420 U.S. at 120. For that reason, "adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment." *Id*. Defendants are not entitled to counsel at these hearings, to confront their accusers, to testify on their own behalves, and so on.

And time is of the essence. Given the "serious consequences of prolonged detention," the probable-cause "determination must be made . . . promptly after arrest"—usually within 48 hours. *Id*. at 114, 125; *McLaughlin*, 500 U.S. at 55.

Police and prosecutors could not possibly make informed decisions regarding the circumstances surrounding and thus the permissible use of suspects' statements at these hearings. In some cases, prosecutors would have to watch multiple recordings of police interviews of a defendant for each of their criminal cases within less than 48 hours of an arrest to determine whether statements were compelled. Or, if no recordings exist, prosecutors would have to investigate the circumstances of the police interviews of defendants. Such onerous, labor intensive

investigations are not feasible in densely populated jurisdictions, and exceedingly difficult in virtually every jurisdiction. And because probable-cause hearings are nonadversarial, prosecutors would have to conduct all of this analysis and assessment in a vacuum, without even knowing whether an arrestee would claim the privilege as to any particular statements.

More generally, determining whether a statement was voluntarily made is a complex inquiry that cannot practically be undertaken so soon after arrest. "Expanded concepts of fairness in obtaining confessions have been accompanied by a correspondingly greater complexity in determining whether an accused's will has been overborne—facts are frequently disputed, questions of credibility are often crucial, and inferences to be drawn from established facts are often determinative." *Jackson v. Denno*, 378 U.S. 368, 390 (1964). Indeed, the determination whether a confession is voluntary may even involve expert testimony by the defense. E.g., *Hickman v. State*, 787 S.E.2d 700, 704 (Ga. 2016).

There is simply no way prosecutors and courts can assess and resolve voluntariness at hearings held within 48 hours of arrest. *Gerstein* thus sensibly "established a 'practical compromise' between the rights of individuals and the realities of law enforcement." *McLaughlin*, 500 U.S. at 53 (quoting *Gerstein*, 420 U.S. at 114). Barring the use of compelled statements at *Gerstein* hearings would undermine that compromise and make it difficult, if not impossible, to hold such hearings promptly after arrest.

Even if courts were required to make such determinations early in the proceedings, any resolution would necessarily be preliminary, and conclusive only for the *Gerstein* hearing. A magistrate's conclusion that a statement was compelled would not bind a grand jury or judge at a preliminary hearing or later suppression hearing. 4 W. LAFAVE ET AL., CRIMINAL PROCEDURE § 14.4(b), p. 390 (4th ed. 2015) (preliminary evidentiary hearing rulings not binding on trial judge). Conversely, a magistrate's decision to allow the use of a defendant's statements to the police would have little to no effect. Once the defendant obtains counsel, such counsel would almost certainly make new arguments that the defendant's statements were not voluntary. A decision holding that the Fifth Amendment bars the use of compelled statements at *Gerstein* hearings would therefore serve little to no practical purpose—but such a rule would with certainty exact a high cost on the criminal justice system.

B. The Fifth Amendment does not bar use of compelled statements in grand jury proceedings.

Although the Constitution does not require states to use grand juries, 18 states require prosecution by grand jury indictment (unless waived) for all felonies, upon a finding of probable cause or prima facie guilt. *Id*. at § 14.2(c), p. 337, § 15.2(f), p. 530.[1] An additional

[1] These states are Alabama, Alaska, Delaware, Georgia, Kentucky, Maine, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, South Carolina, Tennessee, Texas, Virginia, and West Virginia. *Id*. at § 15.1(d), p. 468-69, nn.190-97.

four states require indictments in some, but not all, felonies. *Id*. at § 15.1(e), p. 478.[2] The remaining 28 states also permit indictment by grand jury; but the overwhelming majority of those states also permit charging by information followed by a preliminary hearing in place of the grand jury. *Id*. at § 14.2(d), p. 341, § 15.1(g), p. 491-92. In most of those states, use of a grand jury is not standard practice. *Id*. at § 15.1(g), p. 493.

Barring use of compelled statements is incompatible with the nature of grand jury proceedings. As this Court has explained, "[a] grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated. Rather, it is an ex parte investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person." *United States v. Calandra*, 414 U.S. 338, 343-44 (1974). Grand jury proceedings are therefore typically "unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial." *Id*. at 349. A judge is never present and the defendant is only present during his own testimony, in those rare cases where he testifies. See *United States v. Williams*, 504 U.S. 36, 48 (1992) ("in its day-today functioning, the grand jury generally operates without the interference of a presiding judge"); 4 W. LAFAVE ET AL., *supra*, § 15.2(b), p. 500, § 15.2(c), p. 512. In the vast majority of jurisdictions, the only evidentiary rule applicable in grand jury

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[2] These states are Louisiana, Rhode Island, Florida, and Minnesota. *Id*. at § 15.1(e), p. 468-69, nn.629, 671.

proceedings is that witnesses may assert their own testimonial privileges. *Id*. at § 15.2(d), p. 516.[3]

Requiring grand juries, or the courts that supervise them, to determine whether statements being presented to the grand jury were compelled is antithetical to that process. Requiring such an inquiry would necessarily accord possible defendants a far greater role in grand jury proceedings than they historically have been provided and a far greater role than virtually all jurisdictions presently provide. Further, "[s]uppression hearings would halt the orderly progress of an investigation, and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective." *Calandra*, 414 U.S. at 349.

For these reasons, this Court has held that grand jury indictments are not subject to challenge because they are allegedly based on inadmissible evidence or hearsay, *Costello v. United States*, 350 U.S. 359, 363 (1956), or because they are based on allegedly compelled statements, *Calandra*, 414 U.S. at 344-45. As the Court explained, "[i]f indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the

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[3] States therefore cannot (absent a grant of immunity) compel witnesses to incriminate themselves before grand juries. As noted at the outset, however, the question of when statements are deemed compelled for Fifth Amendment purposes is distinct from the question of when *use* of a compelled statement violates the Amendment.

merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury." *Costello*, 350 U.S. at 363. Permitting those challenges "would run counter to the history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change." *Id.* Nor does the Fifth Amendment.

C. The Fifth Amendment does not bar use of compelled statements at preliminary hearings.

The Constitution does not mandate that states use grand juries, see *Hurtado v. California*, 110 U.S. 516 (1884); it also does not compel the states to interpose any preliminary proceeding between a prosecutor's charge by information and the criminal trial itself. See *Gerstein*, 420 U.S. at 119, 123; *Beck v. Washington*, 369 U.S. 541, 545 (1962). The vast majority of the 28 states that permit felony prosecutions to be initiated by prosecutors filing an information nonetheless provide for preliminary hearings in which the state "must establish that there is sufficient evidence supporting its charge to 'bind the case over' to the next stage of the process." 4 W. LAFAVE ET AL., *supra*, § 14.1(a), p. 308, § 15.1(g), p. 491.[4] In addition, all of the states that use

[4] At least five of those states have constitutional provisions requiring preliminary hearings when a case is charged by information. Ariz. Const. art. 3, § 30; Haw. Const. art. 1, § 10; Ill. Const. art. I, § 7; N.M. Const. art. II, § 14; Okla. Const. art. II, § 317.

grand juries require or permit preliminary hearings. *Id*. at 14.2(c), p. 337.

These hearings benefit defendants, allowing them to preview the state's case. The purpose of preliminary hearings is to

> prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of public trial, to save the defendant from the humiliation and anxiety involved in public prosecution, and to . . . [ensure that] there are substantial grounds upon which a prosecution may be based.

Id. at § 14.1(a), p. 309 (internal quotation marks and citations omitted). For those reasons, "the preliminary hearing is held at an early stage of the prosecution." *Adams v. Illinois*, 405 U.S. 278, 282 (1972). In fact, many states require by statute that the hearing be held within a few days or weeks following the defendant's first appearance before a judge. 4 W. LAFAVE ET AL., *supra*, § 14.2(f), p. 350.

The Constitution places few constraints on how states conduct these preliminary hearings. The Court has held that the defendant has the right to the assistance of counsel at the preliminary hearing, *Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (plurality opinion), but has not mandated additional procedures, see *Peterson v. California*, 604 F.3d 1166 (9th Cir. 2010) (holding that the Confrontation Clause does not apply to preliminary hearings).

Accordingly, although states have chosen to make their preliminary hearings adversarial and overseen by a judge, "they vary considerably in their treatment of the applicability of the rules of evidence," with only a few "requir[ing] full application of the rules." 4 W. LAFAVE ET AL., *supra*, § 14.4(b), p. 382. All jurisdictions require magistrates, like grand juries, "to recognize testimonial privileges," *id*., meaning that witnesses (including the defendant) cannot be compelled to testify at preliminary hearings. But most states—consistent with Federal Rule of Criminal Procedure 5.1—preclude challenges to whether evidence was lawfully obtained at the preliminary hearing. *Id*.[5] Instead, states typically leave suppression motions to the presiding trial judge if and when the defendant is bound over for trial.

Most relevant here, trial courts in those states hold *Jackson v. Denno* or suppression hearings to determine whether a statement is voluntary before it is submitted to the jury. See *Jackson v. Denno*, 378 U.S. 368, 395 (1964); *Sims v. Georgia*, 385 U.S. 538, 543-44 (1967). These widely used procedures ensure that coerced statements are not used at the defendant's criminal *trial*. Respondent's reading of the Fifth Amendment—which would, as a practical matter, require that states determine the admissibility of a defendant's statements prior to or during the preliminary hearing—would force states to dramatically restructure their existing procedures, all for little or no gain and at significant cost to the states and their criminal justice systems.

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[5] See, *e.g.*, Ariz. R. Crim. P. 5.3; Conn. Gen. Stat. § 5-46a; Del. Super. Ct. Crim. R. 5.2; Haw. R. Penal. P. 5(c); Ky. R. Crim. P. 3.14; S.D. Codified Laws § 23A-4-6; W. Va. R. Crim. P. 5.1.

As Professor LaFave explains, allowing the defense to seek suppression at the preliminary hearing is "unnecessary to achieving effective screening." 4 W. LAFAVE ET AL., *supra*, § 14.4(b), p. 392. Because any decision would not be final, both a magistrate and the trial judge would necessarily be required to hold hearings on the issue, leading to wasteful judicial duplication. *Id*. Further, "in jurisdictions where the hearing is held with exceptional promptness," requiring suppression hearings would either cause delays or would give the parties insufficient time "to investigate and prepare." *Id*.

Finally, if this Court were to conclude that use of a compelled statement before a grand jury does not violate the Fifth Amendment, but its use at a preliminary hearing does, the inevitable consequence would be to coerce prosecutors to use grand juries instead of preliminary hearings. That result would contravene this Court's admonition that the Constitution does not impose a "single preferred pretrial procedure" and that "flexibility and experimentation by the States" in this regard is "desirable." *Gerstein*, 420 U.S. at 123. Instead, *Jackson v. Denno* or suppression hearings conducted by judges after defendants are bound over for trial provide defendants all the procedural protections necessary to secure their Fifth Amendment rights.

CONCLUSION

For the foregoing reasons, the judgment of the Tenth Circuit should be reversed.

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