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 AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes and Court Rules

Other Authorities

STATEMENT OF INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year, in this Court and others, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. In particular, in furtherance of NACDL's mission to safeguard funda-

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[1] Both parties consented to the filing of this amici curiae brief in support of Respondent. No counsel to a party in this case authored this brief in whole or in part. No party or party's counsel made any monetary contribution that was intended to or did fund the preparation or submission of this brief. No person or entity other than the amici and their counsel, made any monetary contribution that was intended to or did fund the preparation or submission of this brief.

mental constitutional rights, NACDL frequently appears as amicus curiae in cases involving the Fifth Amendment and its state analogues, speaking to the importance of ensuring that no person is compelled in any criminal case to be a witness against himself. NACDL brings a vital perspective to the scope of the Fifth Amendment and has an interest in protecting a criminal defendant against the government's use of compelled, self-incriminating statements in pretrial criminal proceedings.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization of approximately 1.6 million members dedicated to the principles of liberty and equality embedded in the United States Constitution. Founded nearly a century ago, the ACLU has appeared in myriad cases before this Court, both as merits counsel and as an amicus curiae, to defend the Bill of Rights. Many of the ACLU's efforts have focused on enforcing those portions of the Bill of Rights having to do with administration of the criminal justice system. The ACLU participated as amicus curiae in *Miranda v. Arizona*, 384 U.S. 436 (1966), because effectuation of a person's right to be free from compelled self-incrimination is essential to the preservation of our accusatorial system of criminal justice. More than fifty years later, protection of the constitutional right against self-incrimination remains critical to the fair administration of criminal justice.

STATEMENT

1. Most States do not rely on grand juries to launch every felony criminal prosecution. *See* Wayne R. LaFave et al., *Criminal Procedure* § 15.1(g) (4th ed. 2017). In states that do not use grand juries exclusively, a criminal case may be initiated through the prosecutor's filing of a criminal complaint. The details of criminal procedure vary, but all non-grand jury States utilize some form of preliminary hearing in felony cases after the criminal complaint has been filed. This hearing can be known by various names, including preliminary examination, probable cause hearing, commitment hearing, examining trial, and bindover hearing. But by any name, the hearing serves a common purpose: after a criminal complaint has been filed, the prosecutor must demonstrate, to a judicial officer's satisfaction, that sufficient evidence supports the charge(s) for the case to proceed to trial. *See id.*, § 14.1(a). At preliminary hearings, a judicial officer presides and all parties have the right to be represented by counsel. *Id.* In States that utilize a preliminary hearing, absent the defendant making an informed waiver of the hearing, *see, e.g.*, Kan. Stat. Ann. § 22-2902(4) (2016), there can be no criminal conviction without the judicial officer finding probable cause for the prosecution to proceed to trial. *See* LaFave et al., *supra* § 14.3(c). Respondent had a preliminary hearing pursuant to Kansas law. *See* Pet'r Br. 3-4; Resp't Br. 6.

In the federal system, when prosecutors commence a federal criminal charge by complaint

prior to indictment by grand jury, a preliminary examination is necessary to determine whether probable cause exists and whether the defendant will be required to appear at future court appearances. Fed. R. Crim. P. 5.1(e). At a preliminary examination, a federal magistrate judge presides and all parties have the right to be represented by counsel. *Id.* The purpose of the preliminary examination—like the state-court preliminary hearing—is for a judicial officer to determine whether there is probable cause to sustain the criminal proceedings. When federal prosecutors choose to proceed in a way that necessitates a preliminary examination—by criminal complaint prior to indictment—the charge cannot proceed without the magistrate judge finding probable cause. Fed. R. Crim. P. 5.1(e)-(f).

2. In contemporary American criminal practice, a preliminary hearing or preliminary examination may provide a criminal defendant's only "day in court." As this Court has recognized, ours "is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper,* 566 U.S. 156, 170 (2012). The numbers amplify this observation. Five years ago, this Court observed the "simple reality" that "ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Missouri v. Frye*, 566 U.S. 134, 143 (2012); *see also Padilla v. Kentucky*, 559 U.S. 356, 372 (2010) ("Pleas account for nearly 95% of all criminal convictions.").

These numbers do not appear to have changed. The most recent compiled statistics for federal

convictions show a slight uptick in the incidence of guilty pleas, to 97.64% (from 97.26%). *See* Dep't of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics Online, Table 5.22.2010*, http://www.albany.edu/sourcebook/pdf/t5222010.pdf (last visited Dec. 19, 2017).[2]

For those States—twenty-odd, plus the District of Columbia—that report their criminal justice statistics to the National Center for State Courts, recent years show a continued trend dominated by guilty pleas. In 2014, those States had jury or bench trials in less than 2.5% of felony dispositions (33,781 trials from a total of 1,352,192 cases); in 2015, the incidence of jury or bench trials increased slightly but remained under 2.8% (36,141 trials from a total of 1,302,696 cases).[3] This stark fact underscores the

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[2] Federal funding for the Sourcebook of Criminal Justice Statistics was withdrawn, and the 2010 edition is the latest compilation of that volume. *See* James R. Jacobs, *Sourcebook of Criminal Justice Statistics: another defunded publication*, Free Gov't Info. (June 29, 2012) https://freegovinfo.info/node/3731 (last visited Dec. 19, 2017).

[3] These numbers derive from reports by the Court Statistics Project, hosted on the National Center for State Courts website, http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_ Criminal (last visited Dec. 19, 2017), by choosing the tables "Felony Jury Trials and Rates" and "Felony Bench Trials and Rates" for each of the years 2014, 2015, and 2016, and then aggregating the number of cases resolved through each trial format in each state for a given year. For both 2014 and 2015, Iowa was excluded from the calculations above because it reported statistics for bench trials but not for jury trials. (continued)

importance of pretrial proceedings, of which the preliminary hearing is typically the most extensive and is the only hearing directed to the elements of the alleged crime.

3. Preliminary hearings are intended to screen out baseless prosecutions by ensuring that "there are substantial grounds upon which prosecution may be based." LaFave et al., *supra*, § 14.1(a). At the conclusion of a preliminary hearing, the presiding judicial officer provides an independent analysis of the charging decision. If the prosecution fails to show—to the presiding judicial officer's satisfaction—probable cause for a felony charge to proceed to trial, that charge will not move forward in that particular case. The prosecution may direct law enforcement to continue investigating and collecting evidence, but, at least for the moment, the charge is dismissed. *Id.* § 14.3.

Preliminary hearings serve several additional purposes. These include:

For 2016, North Carolina reported numbers (after not doing so the previous two years) that paint the state as an outlier. North Carolina reported nearly 75,000 trials out of a total of 112,595 felony dispositions for the year. That rate of 66.3% suggests that North Carolina tries criminal cases at more than eight times the incidence of Nebraska, which had the next highest trial rate for 2016. Setting North Carolina's data to one side, the numbers remain on trend, with total trial incidence decreasing to 2.3% (28,901 trials from a total of 1,225,931 cases), based on numbers reported from twenty-three states and D.C.

- Laying the groundwork for future impeachment. Preliminary hearings provide an opportunity for the defense to elicit damaging admissions or testimony inconsistent with a witness's initial statements to the police. LaFave et al., *supra*, § 14.1; *see also Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (at preliminary hearing "skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial").
- Preserving evidence. Preliminary hearings provide an opportunity to preserve witness testimony, which may be used if the witness should die, disappear, or otherwise become unavailable to testify. LaFave et al., *supra*, § 14.1; *see also Coleman*, 399 U.S. at 9 (at preliminary hearing "interrogation of witnesses by an experienced lawyer can … preserve testimony favorable to the accused of a witness who does not appear at the trial").
- Illuminating prior bail determinations or conditions of pretrial release. The evidence adduced at a preliminary hearing may cause the court to reassess bail or other terms imposed as a condition of pretrial release. LaFave et al., *supra*, § 14.1; *see also Coleman*, 399 U.S. at 9 (at preliminary hearing "counsel can also be influential … in making effective arguments for the accused on such matters as

the necessity for an early psychiatric examination or bail").

- Providing notice. Preliminary hearings provide an opportunity for the defense to obtain notice of the scope and depth of the prosecution's evidence by cross-examining witnesses presented by the prosecutor and by subpoenaing other potential trial witnesses to testify at the hearing. LaFave et al., *supra* § 14.1(a)-(d); *see also Coleman*, 399 U.S. at 9 (1970) ("trained counsel" at preliminary hearing can "discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial").[4]
- Facilitating plea bargains. The preliminary hearing may help the defendant—and sometimes the prosecutor—appreciate the relative strength of the evidence and thereby guide the parties toward a plea bargain. LaFave et al., *supra*, § 14.1(a)-(d).
- Providing a forum for threshold constitutional challenges to evidence. In some—but not all—jurisdictions, the preliminary hearing offers

[4] Some States' criminal procedures assert that preliminary hearings are not for discovery. *See, e.g.*, D.C. Crim. P. R. 5.1.(d). This underscores that defendants are entitled to discovery at a later juncture, but it does not alter the practical reality—as recognized by this Court in *Coleman*—that preliminary hearings provide an opportunity for the defense to glean insight into the prosecution's case.

> the initial opportunity for the defense to challenge the constitutional validity of evidence. The preliminary hearing sometimes offers sufficient advantages over a pretrial motion to suppress that defense counsel will insist upon a preliminary examination for this purpose alone. *Id.*

SUMMARY OF ARGUMENT

This Self-Incrimination Clause of the Fifth Amendment applies to preliminary hearings (and analogous proceedings, whatever name they may be assigned under various State law provisions) when such proceedings are held after the initiation of criminal charges. This conclusion follows from the constitutional text, this Court's precedents, and consideration of how such proceedings function in the context of criminal prosecutions.

A. The words of the Self-Incrimination Clause, as construed by this Court, lead to this conclusion. The Fifth Amendment guarantees that "no person … shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This Court has consistently recognized and affirmed the vital function this guarantee plays in maintaining the fair administration of justice.

1. The preliminary hearing is part of a "criminal case" and therefore under the umbrella of the Self-Incrimination Clause. The preliminary hearing occurs after the filing of a criminal complaint. It

takes place in open court, with all parties having the opportunity to be represented by counsel. And a judicial officer presides. It is manifestly distinct from the criminal investigatory process. Though this Court has not pinpointed exactly when a "criminal case" begins, it must be at or before the preliminary hearing.

2. Prosecutorial use of a defendant's involuntary, self-incriminating statement at the preliminary hearing violates the Self-Incrimination Clause because it compels the defendant to be a "witness against himself." Not every criminal case has a preliminary hearing, but cases that do cannot proceed to trial or conviction unless the presiding judicial officer finds probable cause. It follows that prosecutorial use of a defendant's involuntary, self-incriminating statement to substantiate probable cause is part and parcel of the criminal prosecution. If the rule were otherwise, nothing would stop the prosecutors from calling defendants to the stand in every preliminary hearing to ask them whether they committed the crime. Under the government's theory, so long as the answer was not used at trial, a defendant could be compelled to testify against himself at a preliminary hearing.

B. Limiting the Self-Incrimination Clause to a trial right would deny criminal defendants a critical constitutional protection where it is often most important. A criminal defendant's compelled statement alone will often satisfy the probable cause standard at a preliminary hearing, even though that statement could not be used against the defendant at

trial. Such use undermines the purposes of preliminary hearings. It also pressures defendants to plead guilty before trying to vindicate their constitutional rights. Nearly all cases in our criminal justice system end in pleas. It is unjust to require defendants to swim against that systemic current solely for an initial opportunity to test their constitutional rights.

C. The United States's policy arguments in support of Petitioner do not withstand scrutiny. Courts are equipped to adjudicate challenges to the use of compelled, self-incriminatory statements at the preliminary hearing stage. Arguments about judicial efficiency and streamlined procedures do not take precedence over constitutional commands. None of the government's arguments compels a different outcome here.

ARGUMENT

THE FIFTH AMENDMENT'S GUARANTEE AGAINST SELF-INCRIMINATION APPLIES AT PRELIMINARY HEARINGS.

A. This principle is consistent with the Constitution's text and with precedent.

The Fifth Amendment guarantees that "no person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Self-Incrimination Clause is a critical bulwark designed to deter coercion and ensure the impartial administration of criminal justice. *Malloy v. Hogan*, 378 U.S. 1, 2-3 (1964). "This Court's decisions have

referred to the right as 'the mainstay of our adversary system of criminal justice.'" *Michigan v. Tucker*, 417 U.S. 433, 439 (1974) (quoting *Johnson v. New Jersey*, 384 U.S. 719, 729 (1966)). Through this provision, governments, both state and federal, are required to establish guilt by evidence independently and freely secured, and may not use compulsion to prove a charge against an accused with his own words. *Malloy*, 378 U.S. at 6. The privilege against self-incrimination is an absolute right: even a compelling governmental interest cannot justify its infringement. And its protection is so critical that this Court established a prophylactic rule—in *Miranda v. Arizona*, 384 U.S. 436 (1966)—requiring law enforcement to inform individuals in any custodial interrogation of the right to remain silent.

1. The guarantee applies "in any criminal case." U.S. Const. amend. V. Petitioner is incorrect to equate the Fifth Amendment's reference to a "criminal case" with the narrower concept of a "criminal trial." Had the Framers meant to restrict this protection only to trial proceedings, they could have done so. Instead, the Self-Incrimination Clause provides broader protection against the use of compelled statements in "any criminal case." The court below extensively examined the term "criminal case" and properly concluded that it encompasses preliminary hearings like the one at issue in this case. Pet'r App. 10a-19a.

Precedent confirms that a preliminary hearing is part of a "criminal case" and therefore under the umbrella of the Self-Incrimination Clause. This

Court has previously held that "criminal case" is a general term for "an action, cause, suit, or controversy at law" or "a question contested before a court of justice." *Chavez v. Martinez*, 538 U.S. 760, 766 (2003) (plurality) (citing *Blyew v. United States*, 13 Wall. 581, 595 (1872)). Although the *Chavez* Court did not pinpoint "the precise moment when a 'criminal case' commences" for Fifth Amendment purposes, it clearly did not limit the guarantee against use of compelled statements to trial, stating that "'[a] criminal case' at the very least requires the initiation of criminal proceedings." *Id.* at 766.

It follows that an adversarial, evidentiary proceeding held *after* a criminal complaint has been filed by a prosecutor, designed for a judicial officer to determine whether there is sufficient evidence proceed to trial, is part of the criminal case at which compelled self-incriminating statements may not be used. *See* Resp't Br. 15-16. Indeed, courts applying *Chavez* have consistently held that the Self-Incrimination Clause is violated where compelled statements are used by prosecutors before trial to aid in the establishment of facts showing the defendant committed a crime. *See e.g.*, *Sornerberger v. City of Knoxville*, 434 F.3d 1006, 1024-27 (7th Cir. 2006) (use of a suspect's unwarned statements at an arraignment hearing, probable cause hearing, and bail hearing constituted use of the statements in a "criminal case"); *Stoot v. City of Everett,* 582 F.3d 910, 924 (9th Cir. 2009) (use of coerced confession in a probable cause affidavit filed in support of indictment and at pretrial arraignment and bail

hearing constituted use in a "criminal case" in violation of Fifth Amendment); *see also, e.g.*, *Higazy v. Templeton*, 505 F.3d 161, 179 (2d Cir. 2007) (use of compelled statements at bail hearing sufficient to state claim for Fifth Amendment violation); *Best v. City of Portland*, 554 F.3d 698, 702 (7th Cir. 2009) (use of compelled statements at pre-trial suppression hearing sufficient to state claim for Fifth Amendment violation). As these cases illustrate—and as detailed on pages 15-18 of Respondent's brief—the term "criminal case" within the meaning of the Fifth Amendment must include the preliminary hearing.

The conclusion that the Self-Incrimination Clause's protection against use of compelled statements applies to preliminary hearings finds additional support in this Court's Sixth Amendment jurisprudence. Established law provides that the term "criminal case" in the Fifth Amendment has at least as broad a scope as the term "criminal prosecution" does in the Sixth Amendment. *Counselman v. Hitchcock*, 142 U.S. 547, 562-63 (1892), *overruled on other grounds by Kastigar v. United States*, 406 U.S. 441 (1972). And in interpreting the Sixth Amendment, this Court has held that a "criminal prosecution" commences upon "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, *preliminary hearing*, indictment, information, or arraignment." *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 198 (2008) (emphasis added). If, as *Rothgery* holds, a "criminal prosecution" includes a prelim-

inary hearing, such a hearing must also fall within the term "criminal case" used in the Fifth Amendment. *See Counselman,* 142 U.S. at 562-63.

Similarly, in *Missouri v. Frye*, the Court recognized that plea bargaining is an essential component of the criminal justice system that can determine "who goes to jail and for how long." 566 U.S. at 144 (citing Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1912 (1992)). As such, the court deemed plea bargaining a critical stage of the criminal prosecution, during which the defendant is afforded a constitutional right to effective assistance of counsel. By the same logic, a preliminary hearing is a critical stage of a criminal case. *See Coleman*, 399 U.S. at 7-10. Such a hearing—which often functions as the defendant's only day in court—plays a critical part in determining whether the defendant "goes to jail and for how long." *Frye,* 556 U.S. at 144. As such, there can be no doubt that preliminary hearings are within the ambit of the Self-Incrimination Clause.

2. While the chronology and substance of preliminary hearings establish that they fall squarely within "a criminal case," those are not the only reasons the Self-Incrimination Clause applies. Using a defendant's compelled testimony to establish probable cause forces him to be "a witness against himself" in a hearing that is a necessary stepping stone toward criminal conviction. Just as it would violate the Fifth Amendment for the prosecutor to call the defendant to the stand in a preliminary hearing and compel him to answer whether he

committed the crime, so it violates the Fifth Amendment to use statements he was compelled to give elsewhere against him in that hearing.

When a preliminary hearing or preliminary examination is held, the judicial officer's finding of probable cause is a necessary precondition for the prosecution to proceed to criminal conviction. That means that the preliminary hearing—assuming the prosecution prevails at that hearing—moves the defendant one step closer to conviction; and if the prosecution does not prevail, the criminal case is over. This fact renders untenable Petitioner's argument that using an involuntary, self-incriminating statement against the defendant at a preliminary hearing does not "compel[]" the defendant "to be a witness against himself." U.S. Const. amend. V.

A person qualifies as a "witness" when their own "communication … that relates either express or implied assertions of fact or belief" is used in court. *United States v. Hubbell*, 530 U.S. 27, 35 (2000). Because a preliminary hearing is an adversarial proceeding before a judicial officer, when a criminal defendant's self-incriminating statement is presented at such a hearing, the defendant has been made a witness. And because the purpose of the preliminary hearing is to advance the government's prosecution of the defendant, such use makes the defendant "'a witness against himself' under any plausible definition of the term." Resp't Br. 2 (quoting U.S. Const. amend. V).

In Petitioner's view, a defendant cannot be "a witness against himself" until and unless he is compelled to testify—live or through introduction of a compelled, self-incriminating statement—at his criminal trial. *See* Pet'r Br. 6. This position defies logic. Not every criminal prosecution requires a preliminary hearing. But in every criminal prosecution that has a preliminary hearing, the prosecutor must prevail at that proceeding in order to obtain a conviction. If the prosecutor fails to demonstrate probable cause at the preliminary hearing, the prosecution ends. The preliminary hearing thus arises in the context of, and is a necessary step in, the government's effort to obtain a conviction. It follows that to use a defendant's compelled statement against him in such a hearing is part and parcel of the defendant's path to conviction.

Petitioner dodges this axiomatic conclusion by analogizing to grand jury proceedings. Pet'r Br. 19-21. But the analogy fails precisely because the grand jury is not an adversarial proceeding before a judicial officer after criminal charges have been initiated. To be sure, the Constitution does not require States to provide preliminary hearings instead of grand jury proceedings, but once a State chooses to initiate criminal charges by complaint such that the prosecutor must prove probable cause at a preliminary hearing, the Self-Incrimination Clause applies.

B. Limiting the Self-Incrimination Clause's application to the criminal trial itself would severely prejudice defendants.

Preliminary hearings do not require proof beyond a reasonable doubt, but only probable cause. Comparatively, the burden of proof to require a trial after such a hearing is low. LaFave et al., *supra*, § 14.3(a). This fact exacerbates the danger of permitting a defendant's compelled statements to be used against him in a preliminary hearing. A prosecutor will often be able to prove probable cause solely on the basis of a compelled statement made by the defendant. *See, e.g.*, *Rayyis v. Super. Ct.*, 35 Cal. Rptr. 3d 12, 23 (Cal. Ct. App. 2005); *People v. Melotik*, 561 N.W.2d 453, 455 (Mich. Ct. App. 1997); *State v. Moats*, 457 N.W.2d 299, 302 (Wis. 1990). Were this Court to conclude that the Self-Incrimination Clause does not bar use of a compelled statement at a preliminary hearing, criminal defendants would suffer severe prejudice.

1. Preliminary hearings use a probable cause standard, which is a low burden of proof. This standard generally requires a judicial officer to determine that "there is probable cause to believe an offense has been committed and the defendant committed it." *State v. Carlson*, 845 N.W.2d 827, 832 (Minn. Ct. App. 2014) (quoting Minn. R. Crim. P. 3.02); *Sheriff v. Witzenberg*, 145 P.3d 1002, 1009 (Nev. 2006); *State v. Clark*, 825 A.2d 803, 804 (Vt. 2003). Exactly what "probable cause" means has often been left to judicial interpretation. Some courts define probable cause in this context as

"substantially less proof than beyond a reasonable doubt." LaFave et al., *supra*, § 14.3(a); *accord, e.g.*, *State v. Haukos*, 847 N.W.2d 270, 279 (Minn. Ct. App. 2014); *State v. Lownes*, 499 N.W.2d 896, 898-99 (S.D. 1993). Others define it as "only some evidence from which a reasonable person could infer the presence of that element." LaFave et al., *supra*, § 14.3(a); *accord, e.g.*, *State v. McLellan*, 294 P.3d 203, 204-05 (Idaho 2013); *Witzenberg*, 145 P.3d at 1004 n.6; *People v. McBride*, 516 N.W.2d 148, 150 (Mich. Ct. App. 1994). Still others borrow the probable cause standard for arrest, requiring "evidence that is sufficient to induce a person of ordinary prudence and caution to entertain a reasonable belief that the defendant committed the crime charged." LaFave et al., *supra*, § 14.3(a); *accord, e.g.*, *People v. Dist. Court, 17th Judicial Dist.*, 926 P.2d 567, 570 (Colo. 1996); *State v. Bockert*, 893 P.2d 832, 835 (Kan. 1995); *In re Keijam T.*, 602 A.2d 967, 970-971 (Conn. 1992). In most cases, a self-incriminating statement can, on its own, satisfy any of the three defined standards and allow the felony charge to proceed.

Allowing the prosecutor to proceed to trial based on a defendant's self-incriminating statement—without adjudication arguments that the Constitution prevents the statement from being considered as evidence against the defendant—undermines the screening purpose of preliminary hearings. It could result in trials for cases that lack sufficient admissible evidence. Allowing such cases to proceed beyond the preliminary hearing is both

inefficient and unjust. But it is particularly frightening when considered in concert with the fact that nearly all cases end with pleas. Because for many defendants the preliminary hearing is the apex of their case—an adversarial hearing before a judicial officer responsible for safeguarding their rights and upholding the law—it is particularly important that constitutional rights, including the Self-Incrimination Clause, apply at that hearing. Any time a prosecutor relies on a defendant's involuntary statement to show probable cause at a preliminary hearing, the defendant's constitutional rights have been violated. Even worse is where a defendant pleads guilty before having an opportunity to challenge the admissibility of the statement.

Postponing consideration of challenges under the Self-Incrimination Clause until trial therefore harms defendants and distorts the criminal justice system by undermining the screening function that is the *raison d'être* of the preliminary hearing. Allowing a felony charge to proceed to trial based on use of a defendant's statement—without full and fair consideration of the constitutionality of such use under the circumstances specific to that statement—could lead to a guilty plea even if the prosecutor lacks sufficient admissible evidence by which to prove guilt beyond a reasonable doubt. It is no answer to say that a challenge to the voluntariness of the defendant's statement can be raised later in the criminal process through a motion to suppress, because for many defendants, that will be too late. While many factors contribute to a guilty plea, a

judicial officer's initial finding of probable cause sufficient to hold a defendant for trial cannot be dismissed. Indeed, some States prohibit any plea until after the conclusion of the preliminary hearing. *See e.g.*, Wis. Stat. § 970.03(3) (2015-16). The judicial imprimatur provided by a probable cause determination at the preliminary hearing, while based on a lower standard of proof than needed for conviction, may suggest to a defendant that the prosecution is on its way to prevailing at trial.

A guilty plea elicited after a probable cause determination that was itself based on evidence inadmissible at trial because it violates the defendant's constitutional rights is contrary to the purposes of the Fifth Amendment. This Court has based several applications of the Self-Incrimination Clause on the precept that "an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage." *Tucker*, 417 U.S. at 440-41. So, too, here. Were the Court to hold that self-incrimination challenges must be deferred until after the preliminary hearing, it would be forcing defendants to make a Hobson's choice: wait until they are able to challenge the constitutionality of their self-incriminating statement (without any guarantee of success),[5] or accept a plea deal now,

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[5] "[T]he vast majority of motions to suppress are denied. Many of those denials, however, are likely not a direct reflection of the merits of the defendants' claims." Michael D. Pepson & John N. Sharifi, Lego v. Twomey: *The Improbable Relationship Between an Obscure Supreme Court Decision and Wrongful* (continued)

while it is extended. Such a dilemma lays bare the fundamental unfairness of allowing a defendant's self-incriminating statement to be used at a preliminary hearing without also allowing a constitutional challenge to that use, and it undermines the sound policy rationale that has led some States to require the prosecution to make a showing of probable cause before accepting a guilty plea.

Deferring self-incrimination challenges until trial would also undermine the additional purposes that preliminary hearings serve in practice. Allowing prosecutors to rely on a defendant's involuntary statement limits the quantum of other evidence that the prosecutor must present to obtain a probable cause determination. It therefore shortchanges the defendant's ability to use the preliminary hearing to assess the strength of the prosecution's case. *See Coleman,* 399 U.S. 9. Because reliance on the defendant's statement allows the prosecutor to hold back more of the evidence and witnesses that might be used at trial, the preliminary hearing is not useful as a means to lay groundwork for impeachment, to preserve evidence, or even to facilitate informed plea negotiations. *See id.* at 9. And, because the use of a defendant's statement at the preliminary hearing

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Convictions, 47 Am. Crim. L. Rev. 1185, 1192 & n.37 (Summer 2010) ; *cf. United States v. Bennett*, 514 A.2d 414, 417 (D.C. 1986) (Mack, J., dissenting) ("Without reference to statistics, I believe I can say with some degree of confidence, that the vast majority of motions to suppress evidence are denied by the trial courts.").

allows the prosecutor to shield other evidence not only from the defendant but also from the court, this practice limits the preliminary hearing's possibility of providing further data points that would allow the court—*sua sponte* or at the defendant's urging—to revisit prior determinations regarding bail or conditions imposed upon pretrial release. *See id.* at 9.

2. Allowing a charge to proceed on the basis of a defendant's compelled statement also creates systemic harms. Because double jeopardy does not attach until a jury is impaneled, LaFave et al., *supra*, § 25.1(d), a prosecutor has little incentive not to rely upon a defendant's compelled statement for as much of the pretrial criminal process as the courts will allow. As earlier noted, doing so might influence the defendant to accept a guilty plea. And, even if the defendant refuses to plead guilty and the statement is subsequently suppressed, the prosecutor can have another bite at the apple. If necessary, the prosecutor can dismiss the case, request additional investigation, and refile the charges based on any new evidence uncovered. To maintain the integrity of the criminal justice system, the Court must recognize a defendant's constitutional right against a prosecutor using a compelled statement at a preliminary hearing. Refusing to allow preliminary hearings to proceed on statements that violate the Self-Incrimination Clause would discourage prosecutors from bringing felony charges that they might not be able to prove at trial.

C. The government's policy concerns do not withstand scrutiny.

The United States, participating as amicus, offers a number of doomsday predictions about harms that will allegedly follow from prohibiting the use of compelled, self-incriminating statements at preliminary hearings. As an initial matter, the government's dire predictions for the criminal justice system ignore reality. The Self-Incrimination Clause already applies at preliminary hearings as a matter of settled law in the Second, Seventh, and Ninth Circuits. *See Stoot,* 582 F.3d at 924; *Best*, 554 F.3d at 1257; *Higazy*, 505 F.3d at 179. The government cites no evidence that any of the policy concerns it raises have disrupted criminal justice in these Circuits—or in the Tenth Circuit since it issued the decision below. Nor can the government's concerns, considered on their own merits, withstand scrutiny.

First, the United States argues that determining the admissibility of a compelled statement will burden the courts when preliminary hearings are intended to be informal, expeditious, and focused on preliminary issues such as bail and probable cause "unrelated to guilt or punishment." U.S. Br. 26. Not so. The primary purpose of a preliminary hearing is to determine whether the prosecution has sufficient evidence for the criminal case to proceed to trial. This screening function means that the preliminary hearing is inextricably related to the process of determining whether the defendant is guilty; it is the defendant's first opportunity to establish that the prosecution cannot meet its burden and therefore

have the case dismissed. Moreover, as discussed above, the preliminary hearing serves other functions as well, which are also disrupted when probable cause is found on the basis of a defendant's involuntary statement.

Second, the United States improperly privileges judicial efficiency over a defendant's constitutional rights. U.S. Br. 26-27. This Court has held that the goal of streamlining prosecutions cannot trump individual rights. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 325 (2009) ("The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience."). That constitutional rights take precedence over judicial efficiency is a bedrock principle of our justice system. "The imperative to safeguard individuals from compelled self-incrimination 'transcends any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime.' *United States v. White*, 322 U.S. 694, 698 (1944)." Resp't Br. 49.

The same principle disposes of the observation that federal magistrate judges lack authority to suppress evidence in a pre-indictment preliminary examination. U.S. Br. 29. This fact does not illuminate the constitutional issue at stake. To the extent that the Fifth Amendment determination disrupts existing criminal procedures (as the

government fears), fidelity to the constitutional guarantee necessitates a procedural change.

Third, the United States argues that questions over the admissibility of a defendant's statement are too difficult to decide at a preliminary hearing. U.S. Br. 27-28. Specifically, the government worries that legal determinations regarding whether a defendant's statement was compelled are complex. U.S. Br. 27. But there is no reason to fear that a court could not effectively resolve suppression issues in the context of a preliminary hearing. Indeed, courts already adjudicate Fifth Amendment issues at preliminary stages. For example, so-called *Kastigar* hearings may be held before trial to review the sources of evidence used to prosecute a previously immunized witness. *See e.g.*, *United States v. Frumento*, 552 F.2d 534, 542 n.14 (3d Cir. 1977). In weighing probable cause at such a hearing, the court cannot consider compelled statements. Moreover, *Kastigar* hearings show that courts can and do delve into issues raised by compelled statements early in criminal proceedings. Similarly, as noted above, several Circuits have adopted a rule allowing self-incrimination challenges at preliminary hearings, without ill effect. Affirming the ruling below will not impose a unique or undue burden.

Fourth, the United States's argument that probable cause hearings happen too soon after a criminal case has been filed for the guarantee against self-incrimination to apply also fails. U.S. Br. 30. It cannot be too soon for the prosecutor, who decides when to file felony charges and is expected

not to do so until ascertaining that the government has sufficient admissible evidence to prove guilt beyond a reasonable doubt at trial. Nor can it be too soon for the criminal defendant whose rights the Self-Incrimination Clause safeguards. No one has suggested—and the government surely does not mean to argue—that a defendant who lacks sufficient information at a preliminary hearing to challenge a compelled self-incriminating statement is thus foreclosed from seeking to suppress the statement prior to its anticipated use at trial. Such a theory would undermine "[t]he essence" of the Self-Incrimination Clause's "requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Mitchell v. United States*, 526 U.S. 314, 326 (1999) (emphasis and internal quotation marks omitted).

Fifth, the United States engages in tautology when it argues that applying the Self-Incrimination Clause to pretrial proceedings has no logical end point. U.S. Br. 30. The government seems to suggest that a defendant's introduction of a statement for the narrow purpose of challenging the constitutionality of the prosecution using the statement as evidence would in and of itself compel the defendant to be a witness against himself. *Chavez*'s determination that violation of the right against self-incrimination, at a minimum, requires "the initiation of legal proceedings" as well as the "use" of statements in those proceedings defeats this argument. *Chavez*,

538 U.S. at 766-77. So does logic. Of course a defendant does not concede the admissibility of an involuntary statement by placing it before court solely to raise a constitutional challenge to its admissibility against him. Courts have experience fencing off admissibility determinations from weighing the merits of the case. The United States makes no showing that this circumstance would be any different.

Additionally, as noted above and by Respondent, the government's position carries a chilling implication. By the United States's logic, the Fifth Amendment would not prevent a prosecutor from compelling a defendant to take the witness stand and forcing him to testify against himself at a preliminary hearing, as long as the testimony would not be used at trial. Such a scenario is inimical to the absolute protections this Court has long understood the Self-Incrimination Clause to confer. *See, e.g.*, *Malloy*, 378 U.S. at 7-8; *Mitchell*, 526 U.S. at 326. A ruling that countenances such a practice would be a substantial and deleterious change in constitutional doctrine.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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