No. 11-591

In the Supreme Court of the United States

PAUL A. SLOUGH, EVAN S. LIBERTY,
DUSTIN L. HEARD, DONALD W. BALL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The D.C. Circuit ruled that prosecutors are free to read government-compelled statements from individuals suspected of crime and rely on those statements in deciding to charge the individuals, without violating the Fifth Amendment or *Kastigar v. United States*, 406 U.S. 441 (1972). The court acknowledged joining one side of a widely acknowledged circuit split that has divided federal and state courts for more than a quarter-century.

The government nonetheless urges this Court to deny review, contending that (a) the judgment is interlocutory; (b) despite the circuit split, those cases do not narrowly focus specifically on prosecutors' decision to indict; (c) the Fifth Amendment is concerned only with evidence, and not with non-evidentiary use of compelled statements to advance a prosecution; (d) although the use immunity principles at issue here are binding in all fifty states, some states are unaffected because they have broader transactional immunity statutes; and (e) a factual dispute purportedly remains regarding the prosecutors' charging decision.

None of these contentions is reason for this Court to refuse review of the squarely presented issue that has long divided federal and state appellate courts.

ARGUMENT

I. THIS CASE'S INTERLOCUTORY POSTURE DOES NOT PREVENT THIS COURT FROM RESOLVING THE ISSUE OF NATIONAL IMPORTANCE

The government first urges this Court to deny review because the D.C. Circuit remanded for further

proceedings on other issues. BIO 14. But denying review in interlocutory cases is a general practice, not a hard and fast rule. *Virginia Military Inst. v. United States*, 508 U.S. 946 (Scalia, J., opinion respecting denial of certiorari); Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 280-81 (9th ed. 2007) ("Gressman"). Where

> there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status—particularly where the lower court's decision is patently incorrect and the interlocutory decision … will have immediate consequences for the petitioner.

Gressman, *supra*, at 281 (citations omitted).

Here, the prosecutors' use of Petitioners Heard's and Ball's statements to decide to charge them is dispositive for Heard and Ball. If such use of their compelled statements violates the Fifth Amendment and *Kastigar*, as the district court held, their prosecution under this indictment is at an end. *See* Pet. App. 119a-124a; Pet. 33.

The government contends judicial economy would be served by trying the petitioners first and deciding the issue only if they are convicted, arguing this interest is "especially compelling here, because the question presented affects only two of the petitioners." BIO 15. For these two petitioners, just the opposite is true. It would be inefficient and unjust to put these men through trial before determining whether the indictment is even viable. It would be even more inefficient and unjust, if the indictment

ultimately may not stand (as the district court held), to indict and try them a second time after what would have amounted to a dress-rehearsal trial. *Cf. Bullington v. Missouri*, 451 U.S. 430, 445 (1981) (noting "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense") (citation omitted).

Apart from hastening the resolution of the case for these petitioners, *see* Gressman, *supra*, at 282, granting review would allow this Court to settle a question of national importance (*see* Pet. 28-31; *infra* Part IV) that has divided federal and state courts for a quarter century (Pet. 16-24; *infra* Part II). Though the government speculates about a variety of scenarios under which the question might evade review on remand, BIO 14, this Court should take this opportunity to resolve the entrenched division among circuits and state high courts, and to provide guidance regarding constitutional principles that must have nationwide uniformity. *See* Pet. 28-31; *infra* Part IV.

II. THIS CASE PRESENTS AN ENTRENCHED AND WIDELY ACKNOWLEDGED SPLIT BETWEEN CIRCUITS AND BETWEEN STATE COURTS OF LAST RESORT

Since the 1980s, one set of federal and state courts, led by the Eleventh Circuit, has held that the Fifth Amendment protects only against *evidentiary* use of a defendant's compelled statements,[1] while a second set of courts, led by the Third and Eighth Cir-

[1] *See* Pet. 16-17, 22-23 (discussing *United States v. Byrd*, 765 F.2d 1524 (11th Cir. 1985), and progeny).

cuits, has held that the Fifth Amendment prohibits *any* use of a defendant's compelled statements, including *nonevidentiary* use, to advance the infliction of criminal penalties.[2] For more than twenty years, federal and state courts have confronted this fundamental judicial divide.[3]

Notwithstanding this clear, entrenched division, the government contends the split is not squarely presented here, because courts are not divided on the narrow question of a prosecutor's discretionary decision to indict. BIO 22. The government is wrong.

The government concedes that the D.C. Circuit's decision here is squarely on point with the former side of this split. It notes that the Eleventh Circuit's *Byrd* decision expressly ruled on prosecutorial charging decisions, and contends the Ninth Circuit has also joined this side of the divide. BIO 22-23.[4]

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[2] *See* Pet. 17-19, 21-22 (discussing *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973); *United States v. Semkiw*, 712 F.2d 891 (3d Cir. 1983), and progeny).

[3] *See* Pet. 24 (collecting federal and state appellate decisions surveying the divide).

[4] In *United States v. Montoya*, 45 F.3d 1286 (9th Cir. 1995), the Ninth Circuit did not categorically hold charging decisions immune from *Kastigar* review, as the Eleventh and D.C. Circuits have. Instead, while assuming that a charging decision could constitute prohibited nonevidentiary use, *Montoya* ruled that the particular use in that case—justifying prosecution in a memorandum to superiors—was too attenuated to constitute use in the criminal case. 45 F.3d at 1295-97. To the extent the government points out the factual similarities between this case and *Montoya*, however, that only further supports the extent of the circuit split on facts like these.

The government goes to great lengths in its brief, however, to detail what is conceded in the petition: that the cases on the other side do not narrowly address prosecutorial decisions to charge. *Compare* BIO 23-27 *with* Pet. 18-19, 23 & n.7. Significantly, however, the Eighth Circuit's decision in *McDaniel did* address, though not exclusively, the prosecutor's indictment of McDaniel after having read his entire immunized grand jury testimony. *See McDaniel*, 482 F.2d at 307-08, 311.

Indeed, the facts of *McDaniel* closely parallel the facts of this case. In each case, the prosecutor thoroughly immersed himself in the defendant(s)' compelled testimony, in the stated belief that he did not know it was compelled, and later obtained the defendant(s)' indictment. *Compare McDaniel*, 482 F.2d at 311, *with* Pet. App. 22a-24a, 40a-48a, 124a-128a.[5] On these closely related fact patterns, the Eighth Circuit and D.C. Circuit reached opposite conclusions: the Eighth Circuit found a *Kastigar* violation; the D.C. Circuit refused to inquire. Thus, irrespective of any other asserted nonevidentiary uses in *McDaniel* or this case, on the issue presented here

[5] The only significant difference in the facts is that the *McDaniel* prosecutor read the defendant's immunized testimony in unquestioned good faith, 482 F.2d at 311, whereas here the district court found that the prosecutor intentionally sought out the defendants' compelled statements (against the admonitions of DOJ taint attorneys), and recklessly used them to obtain the indictment in disregard of explicit warnings about *Kastigar* and *Garrity*. Pet. App. 23a-24a, 127a-133a. The district court found the prosecutor's explanation for his exposure to and use of the statements was completely lacking in credibility. Pet. App. 24a, 129a.

(the decision to indict), the D.C. Circuit's decision, like the Eleventh Circuit's in *Byrd*, squarely conflicts with the Eighth Circuit's in *McDaniel*. *See* Gressman, *supra*, § 4.3, at 242.

Further, the government fails to acknowledge that under the categorical rule adopted by the Third and Eighth Circuits (and the state high courts that follow them), the question presented here would necessarily be decided the opposite way from its resolution in the Eleventh and D.C. Circuits. In the Third or Eighth Circuits, the government would have been required to prove at the *Kastigar* hearing, as the district court required here, that the prosecutors did not make significant nonevidentiary use of defendants' compelled statements in *any* way to advance the prosecution. In the D.C. or Eleventh Circuits, however, the court would refuse to inquire, holding prosecutors' charging decisions immune from *Kastigar* inquiry. Pet. 19. This irreconcilable conflict of principle is sufficient to grant certiorari. *See* Gressman, *supra*, § 4.3, at 242.

III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S SELF-INCRIMINATION AND IMMUNITY JURISPRUDENCE

The government principally contends that the decision below is correct on the merits, because the Fifth Amendment protects only against *evidentiary* use of compelled statements. This contention ignores the entrenched divide among courts on the question, and merely chooses one side of the split. *See* Part II, *supra*; Pet. 16-24. Further, the contention is wrong. The D.C. Circuit's decision conflicts with this Court's jurisprudence of compulsion and immunity from *Counselman* through *Kastigar*. *See* Pet. 24-28.

It is unquestioned that the Fifth Amendment and *Kastigar* require the government to prove that all of its evidence was obtained independently, untainted by direct or derivative use of the compelled testimony. BIO 19; *see Kastigar*, 406 U.S. at 460. From many judicial iterations of that principle, and from the text of the Fifth Amendment itself, the government fashions the contention that the admission of direct or derivatively obtained evidence against the defendant is the Self-Incrimination Clause's sole concern. BIO 15-20.[6]

The government ignores two additional bedrock principles. The first is that the central concern of the Self-Incrimination Clause is to protect against being forced to give testimony that leads to the infliction of criminal penalties. Pet. 24-25 (quoting *Kastigar*, 406 U.S. at 453, and citing *Counselman v. Hitchcock*, 142 U.S. 547 (1892)). The derivative use immunity re-

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[6] The government's overreaching generalization is best exemplified by its heavy reliance on *Chavez v. Martinez*, 538 U.S. 760 (2003), which was not even a criminal case. *See* BIO 16, 20-21. *Chavez* rejected a criminal suspect's attempt to assert civil liability against police officers for an allegedly coercive hospital-bed interrogation. The plurality emphasized the absence of any criminal case at all, *id.* at 766, while a narrow concurrence rejected the idea that civil liability was either a necessary or workable protection against self-incrimination violations, *see id.* at 778-79 (Souter, J., concurring in the judgment). The descriptions in *Chavez* of the Self-Incrimination Clause's focus on admission of evidence or on "courtroom use" of compelled statements (BIO 16, 20-21, quoting *Chavez* plurality and J. Souter opinions) are pure dicta, and, indeed, ignore use of compelled statements in the grand jury to obtain an indictment, a clearly prohibited use. *See Counselman*, 142 U.S. at 562 (holding grand jury is part of "criminal case").

quired by the Constitution and spelled out in *Kastigar* thus "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." *Kastigar*, 406 U.S. at 453; *accord id.* at 461. It is a "total prohibition on use" (*id.* at 460): "the compelled testimony and its fruits cannot be used *in any manner* by federal officials *in connection with a criminal prosecution against him*." *Id.* at 457 (quoting *Murphy*, 378 U.S. at 79).

The government claims that this Court held in *United States v. Apfelbaum*, 445 U.S. 115 (1980) that these statements "cannot 'be taken literally.'" BIO 20. But *Apfelbaum* merely recognized a narrow exception for use of compelled statements *in a perjury or false statements prosecution*, because the Fifth Amendment does not give a license to lie. *Id.* at 127, 131. *Kastigar*'s sweeping "total prohibition on use" remains in effect, as required by the Fifth Amendment, in all but false statement or perjury prosecutions. *See id.* at 128, 130.

The second principle ignored by the government is that for derivative use immunity to supplant the privilege, it must be as broad as the privilege, putting the speaker in the same position as if he had invoked the privilege and remained silent. Pet. 25-26 (quoting *Kastigar* and *Murphy*). A prosecutor's use of an individual's compelled statement to decide to indict that person hardly leaves the person in the same position as if he had relied on his privilege.

The right against self-incrimination is the right to remain silent. *Kastigar*, 406 U.S. at 461. "[A]s far as the individual's Fifth Amendment right is concerned

he should be indifferent between the protection afforded by silence and that afforded by immunity." *Pillsbury Co. v. Conboy*, 45 U.S. 248, 257 (1983). Because immunity that is less than coextensive with the privilege would be insufficient to supplant the privilege, use immunity must afford the defendant the same protection as if he had invoked the privilege. *See* Pet. 25-26 (citing *Kastigar*, *Murphy*, *Counselman*, and *United States v. Balsys*, 524 U.S. 666 (1998)).

Again, *Apfelbaum*'s caution against taking this requirement literally in perjury prosecutions does not obviate the more general principle. It is true that immunity statutes are within our constitutional tradition notwithstanding that they do not literally restore the witness to the position of silence. 445 U.S. at 124-27. Neither immunity statutes nor the Fifth Amendment protect from having compelled speech used in *noncriminal* settings, where they may cause public embarrassment, civil liability, or job loss. *Id.* at 127. However, *with respect to criminal proceedings* (other than perjury or false statement prosecutions), the Fifth Amendment requires that one who is compelled to speak retain the same protections as if he had invoked his privilege. *See Kastigar*, 406 U.S. at 458-59 (quoting *Murphy*); *id.* at 461, 462. This Court has repeatedly confirmed the principle after *Apfelbaum*. *See Pillsbury*, 459 U.S. at 255. One who finds himself indicted based on his compelled statement has hardly been afforded the same protection as if he had refused to speak.

If the government were correct that the Fifth Amendment and *Kastigar* are satisfied as long as the government uses only independently obtained evi-

dence at trial, nothing would stop prosecutors from compelling any investigative target to submit to an interview and preview his defense, so long as the evidence to be used in court was assembled independently by investigators isolated from the prosecutor's knowledge of the statements. The Court should grant review to resolve this issue and make clear that is not the law.

IV. THIS COURT SHOULD CLARIFY THE CONSTITUTIONALLY REQUIRED USE IMMUNITY PRINCIPLES THAT APPLY IN ALL FIFTY STATES

The government acknowledges that the Fifth Amendment and *Kastigar* "provide[] the constitutional minimum of protection for the right against self-incrimination" in all fifty states. BIO 28; *see also* Pet. 28-31. Notwithstanding this Court's admonitions that this nationwide protection requires a uniform construction (*see* Pet. 30-31; *see also Kastigar*, 406 U.S. at 458 & n.47), the government contends this Court need not provide such guidance, because some states provide the greater protection of transactional immunity. BIO 28-29. The contention is a non sequitur.

Petitioners do not contend this Court should provide guidance on transactional immunity under state law, as the government supposes. BIO 29. Petitioners instead urge this Court to provide uniform nationwide guidance on the derivative use immunity that is required as a constitutional minimum in the federal courts and in all fifty states.

V. THE LOWER COURTS HAVE CONCLUSIVELY DETERMINED THE QUESTION ON WHICH THE GOVERNMENT TRIES TO CLAIM A CONTINUING FACTUAL DISPUTE

Finally, the government claims that a factual dispute remains concerning whether its decision to charge Petitioners Heard and Ball was based on their compelled statements, as the district court found. BIO 29-32. The district court's detailed findings were reviewable only for clear error, and were not disturbed by the court of appeals. *See* Pet. App. 16-17.[7] Thus, on the record presented to this Court, those facts are established.

Moreover, they are incontrovertible. With respect to Heard, the prosecutors wrote in their prosecution memorandum that they viewed Heard's compelled statements as compelling evidence of guilt that warranted seeking his indictment. Pet. App. 120a-121a. They repeated that view to Heard's counsel in urging that Heard plead guilty and cooperate. *Id.* 121a. These representations by the prosecutors—which they have never disavowed—show plainly that the prosecutors' review of Heard's compelled statements was a central motivation for the decision to charge him.

The government's contention that the initial prosecution memorandum was replaced with one sanitized of this *Kastigar* violation (BIO 30-31) does

[7] The government did not petition for limited panel rehearing to correct the oversight it asserts here. Fed. R. App. P. 40(a)(2).

not change the analysis. Whether or not the prosecutors' assessment of Heard's compelled statements reached their supervisors, the initial prosecution memo shows that these statements motivated *the line prosecutors'* decision to charge. That decision is the prohibited use of Heard's statement, whether or not the prosecutor's DOJ supervisors became aware of the statements.

Moreover, the district court's findings as to both Heard and Ball were supported by the chronological evidence, the testimony of another prosecutor, and most significantly by the district judge's determination, after hearing the lead prosecutor testify and observing his demeanor, that the prosecutor's only offered justifications for his charging decisions simply were not credible. Pet. App. 121a-124a. That credibility determination is virtually unreviewable under the clear error standard. *See, e.g., Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985). The government's protests notwithstanding, there is no genuine dispute regarding the prosecutors' use of Heard's and Ball's compelled statements in deciding to charge them. The strength and clarity of the evidence and findings on the point make this case an ideal vehicle to decide the issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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