No. 23-1020

In the Supreme Court of the United States

STATE OF UTAH,
PETITIONER,

v.

ALFONSO VALDEZ,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

BRIEF IN OPPOSITION

EMILY ADAMS
FREYJA JOHNSON
THE APPELLATE GROUP
P.O. Box 1564
Bountiful, Utah 84054

LISA S. BLATT
Counsel of Record
AARON Z. ROPER
ERIN L. BROWN
NATALIE R. SCHMIDT
WILLIAMS & CONNOLLY LLP
680 Maine Avenue SW
Washington, DC 20024
(202) 434-5000
lblatt@wc.com

QUESTIONS PRESENTED

The Fifth Amendment's Self-Incrimination Clause protects criminal defendants from being compelled to make incriminating, testimonial communications. *Hiibel v. Sixth Jud. Dist. Ct.*, 542 U.S. 177, 189 (2004). A "testimonial" communication is one that "explicitly or implicitly[] relate[s] a factual assertion or disclose[s] information." *Id.* (citation omitted).

The questions presented are:

1. Whether verbally disclosing a cell-phone passcode is testimonial under the Fifth Amendment.

2. If so, whether verbally disclosing a cell-phone passcode becomes non-testimonial when the government already knows who owns the phone.

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BRIEF IN OPPOSITION

INTRODUCTION

The Utah Supreme Court correctly held that verbally disclosing a cell-phone passcode is a testimonial statement protected by the Fifth Amendment right against self-incrimination. The State therefore may not comment at trial on a defendant's refusal to disclose a passcode. That narrow decision does not conflict with the decision of any other court and does not warrant this Court's review.

As Utah (at 18) acknowledges, no disagreement exists among state supreme courts or federal courts of appeals on the first question presented: whether verbally disclosing a passcode is testimonial. The only two of those courts

to weigh in—the Pennsylvania and Utah Supreme Courts—agree that disclosing a passcode is testimonial.

Utah and its amici devote much of their briefs to whether the Self-Incrimination Clause applies when police ask a suspect to *enter* a cell-phone passcode. There is no split on that issue either. Even if there were, all "agree [that] this is a case involving *disclosure* of a passcode." Pet. 26. And Utah (at 26) acknowledges that disclosing and entering a passcode "might implicate divergent Fifth Amendment analyses." If passcode entry is the issue States care about, the obvious course is to await a case actually presenting that issue.

Utah (at 16-17) claims a 2-1 split among state supreme courts on the second question: whether a foregone-conclusion exception would render the verbal disclosure of a phone passcode unprotected whenever the government establishes the suspect's ownership of the phone. Any shallow disagreement on that question between three state courts would not warrant certiorari. But there is also no clean split. The New Jersey case on which the split depends conflates the disclosing-a-passcode and entering-a-passcode scenarios that Utah admits might diverge.

This case's narrow fact pattern is insufficiently important for this Court's review. The Utah Supreme Court held only that verbally disclosing a phone passcode is testimonial, such that the State may not comment on the refusal to disclose a passcode at trial. The decision below does not resolve whether police may ask a suspect to unlock the phone without sharing the passcode—either by typing in the passcode himself or by using his fingerprint or facial identification.

Moreover, vehicle problems abound. To start, the questions presented will have no impact on future cases in

the same posture. Commenting at trial on post-*Miranda* silence independently violates the Due Process Clause. While the Utah Supreme Court decided the self-incrimination question the parties litigated, the court made clear that the Due Process Clause, not the Self-Incrimination Clause, should govern future cases. Pet.App.16a n.7. This case's bare-bones record could also impede intelligent review. Pet.App.19a n.8. And other problems with respondent's prosecution "troubled" the Utah Court of Appeals, Pet.App.74a, leaving it unclear whether the questions presented were outcome determinative.

Finally, the Utah Supreme Court's decision is correct. Stating a cell-phone passcode is an explicit verbal communication of information at the heart of the right against self-incrimination. There is no categorical exception to that right for information that is a "foregone conclusion," as Utah assumes. Even if there were, any such exception would not apply here where police do *not* know the phone's passcode. This Court should deny further review.

STATEMENT

1. In August 2017, respondent Alfonso Valdez was arrested following an altercation with his former girlfriend, Jane. Pet.App.6a-7a. During Valdez's arrest, police seized a cell phone from his pocket, which was locked with a passcode. Pet.App.3a, 7a-8a. Police read Valdez his *Miranda* rights, and he invoked his right to remain silent. Pet.App.7a.

Police obtained a search warrant for the phone. Pet.App.7a. "[T]he record is unclear" whether the warrant also authorized police to obtain the passcode. Pet.App.7a n.4. "[U]nder circumstances that are not developed in the record," police asked Valdez for the passcode, but he refused. Pet.App.8a. The State never

moved to compel Valdez to provide the passcode and never gained access to the phone. Pet.App.8a. Police were also unable to locate Jane's cell phone. Pet.App.8a.

The State charged Valdez with aggravated robbery, aggravated assault, and aggravated kidnapping. Pet.App.43a. Valdez's first trial ended in a mistrial after the State's first witness testified about Valdez's prison record in violation of a pretrial order. Pet.App.43a.

During Valdez's second trial, Detective Steve Haney testified about his efforts to unlock the seized cell phone. Pet.App.82a. Haney told the jury that, after Valdez had invoked his *Miranda* rights, Haney informed Valdez about the search warrant and requested the passcode. Pet.App.82a, 84a. Haney told Valdez that if he refused, police would attempt another extraction method that would destroy the phone. Pet.App.82a. According to Haney, Valdez "refused to give [him] the pass code and just told [him] to destroy the phone." Pet.App.82a.

Valdez objected to Detective Haney's testimony, arguing that he had "a Fifth Amendment Right … to not provide" the passcode. Pet.App.81a. The trial court overruled the objection, reasoning that "the officer has the right to say this person invoked their Fifth Amendment Right … instead of answering the questions." Pet.App.81a.

After Haney's testimony, Valdez moved for a mistrial based in part on Haney's comments on his refusal to provide the passcode—a "testimonial" statement protected by the Fifth Amendment. Pet.App.85a-86a. The court stated that it was "inclined" to deny the motion, but never issued a definitive ruling. Pet.App.10a, 86a-87a.

During Valdez's case-in-chief, his ex-wife, who was also Jane's coworker, testified that Jane had shown her a

text exchange with Valdez that was "sexual in nature." Pet.App.35a, 47a. The ex-wife's testimony challenged the State's theory, suggesting that Jane and Valdez's meeting was consensual, not a kidnapping. Pet.App.10a. In its closing argument, the State urged the jury to disbelieve Valdez's ex-wife because Valdez had refused to share the passcode that might have revealed the exculpatory messages. Pet.App.10a-11a. According to the State, "[t]he only way [detectives] could get into that phone to see what these text messages said was by getting the code from the defendant. And he chose to decline to do that." Pet.App.11a (emphasis omitted).

The jury convicted Valdez of robbery, aggravated assault, and kidnapping. Pet.App.12a. Valdez appealed. Pet.App.12a.

2. In February 2021, the Utah Court of Appeals reversed, holding that the State's commentary on Valdez's refusal to provide the passcode violated his Fifth Amendment right against self-incrimination. Pet.App.50a-51a.

As the court noted, the Self-Incrimination Clause protects against compelled, incriminating, and testimonial communications. Pet.App.52a (citing *Hiibel v. Sixth Jud. Dist. Ct.*, 542 U.S. 177, 189 (2004)). Here, Utah disputed only testimoniality. Pet.App.52a-53a. As the court observed, this Court has held that testimonial statements are those that would "disclose the contents of [the accused's] own mind." Pet.App.54a (quoting *Doe v. United States* (*Doe II*), 487 U.S. 201, 211 (1988)). "[T]he vast majority of verbal statements … will be testimonial." Pet.App.54a (quoting *Doe II*, 487 U.S. at 213). For example, the court noted, telling police "the combination to a wall safe" is testimonial under *United States v. Hubbell*, 530 U.S. 27, 43 (2000). Pet.App.56a-57a.

The court found that "the best reading of the record" was that Detective Haney asked Valdez "to make an affirmative verbal statement" conveying the passcode. Pet.App.59a-60a. Haney "did not merely ask that Valdez unlock and then hand over his phone." Pet.App.60a. The requested "verbal statement" "convey[ing] information" was testimonial under this Court's precedent, the court held. Pet.App.60a (quoting *Doe II*, 487 U.S. at 213). The court expressed "no opinion" on the proper analysis had Haney asked Valdez "to personally unlock the phone" without stating the passcode. Pet.App.57a, 60a n.5.

The court rejected Utah's argument that the Fifth Amendment does not apply to otherwise testimonial statements that reveal information that is a "foregone conclusion." Pet.App.60a-61a (citing *Fisher v. United States*, 425 U.S. 391, 410-13 (1976)). As the court explained, *Fisher* simply recognized that any implicit message inherent in responding to a document subpoena is not testimonial where "the party's act of producing the documents would reveal nothing to the government that it did not already know." Pet.App.62a. Nothing in *Fisher* suggested a categorical exception for "verbal statements" that are a "foregone conclusion." Pet.App.66a & n.6.

The court therefore held that the State violated Valdez's Fifth Amendment right against self-incrimination by "quite clearly invit[ing] the jury to draw an inference of guilt from Valdez's silence." Pet.App.70a-71a. The court found the error not harmless given weaknesses in the State's case. Pet.App.72a-73a. The court was also "troubled" by other evidentiary "impropriet[ies]" at Valdez's trial, urging the district court to avoid these errors on any retrial. Pet.App.74a-77a.

3. In December 2023, the Utah Supreme Court unanimously affirmed. Pet.App.6a. The court opined that

"complex" Fifth Amendment questions can arise when police ask a suspect to provide an unlocked device without disclosing the passcode. Pet.App.5a. But here, the analysis was "more straightforward." Pet.App.5a. "[T]he best reading of the record" was that Detective Haney asked Valdez to verbally state the passcode. Pet.App.24a. The State thus sought "[o]rdinary testimony"—"a suspect's oral or written communication that explicitly conveys information from the suspect's mind." Pet.App.21a, 24a (citation omitted).

The court rejected Utah's argument that "providing a memorized passcode to a cell phone is more akin to handing over a physical key than providing the combination to a wall safe" and thus potentially non-testimonial under *Hubbell*, 530 U.S. at 43. Pet.App.25a. Sharing a passcode is not an "act" like "handing over a physical key," the court observed, but a "statement" that "explicitly communicates information from the suspect's own mind." Pet.App.26a-27a.

The court also rejected Utah's argument that this case fell within any "foregone conclusion exception." Pet.App.30a. As the court noted, this Court has never discussed that theory outside of cases involving document subpoenas. Pet.App.33a. Any narrow exception for subpoena responses cannot apply to "verbal statements" at the heart of the Fifth Amendment right. Pet.App.33a.

Although the court decided the self-incrimination question the parties had litigated, the court clarified that the Fourteenth Amendment's Due Process Clause, not the Fifth Amendment's Self-Incrimination Clause, usually governs "a claim that the State improperly commented on a defendant's post-arrest, post-*Miranda* silence at trial." Pet.App.16a n.7. Under that framework,

the State's commentary on the defendant's silence is generally impermissible "regardless of whether the statement was … testimonial." Pet.App.16a n.7.

REASONS FOR DENYING THE PETITION

This case does not meet this Court's criteria for certiorari. Utah (at 18) concedes that there is no split on the first question—whether verbally disclosing a passcode is testimonial. Utah (at 16-17) claims a 2-1 split among state supreme courts on the second question—whether any "foregone-conclusion" exception applies to verbally disclosing a passcode. But the New Jersey Supreme Court decision on which that split depends conflates the disclosing-a-passcode and entering-a-passcode scenarios that Utah (at 26) says might "diverge[]."

Utah instead urges this Court to grant review to help decide whether the Self-Incrimination Clause applies to physically entering phone passcodes. Utah identifies no split on that issue. If the Court wants to decide the entering-a-passcode question, the Court should await a case presenting that question. The Utah Supreme Court's narrow holding about the verbal disclosure of phone passcodes belies Utah and its amici's concerns about the broader consequences for law enforcement.

Further, this case is a poor vehicle to resolve the questions presented. Commentary on pretrial, post-*Miranda* silence generally violates the Due Process Clause, as the Utah Supreme Court noted. This case suffers from a threadbare record. And other errors at Valdez's trial could independently require vacating his conviction.

The decision below is also correct. Verbally stating a phone passcode "relate[s] a factual assertion or disclose[s] information" and is therefore testimonial. *See Pennsylvania v. Muniz*, 496 U.S. 582, 589 (1990) (citation

omitted). That classic testimonial statement does not become non-testimonial if police already know who owns the phone.

I. Courts Are Not Divided on the Questions Presented

A. There Is No Split on the First Question

1. Utah (at 18) acknowledges that there is no split on the first question: "[E]very state supreme court … that has considered the question has held that disclosing a passcode … is testimonial." *See* Pet.App.27a; *Commonwealth v. Davis*, 220 A.3d 534, 548 (Pa. 2019), *cert. denied*, 141 S. Ct. 237 (2020) (No. 19-1254). As one scholar has put it, "almost everyone … agrees" that "compel[ling] a suspect to orally state … her passcode" "would violate the Fifth Amendment." Laurent Sacharoff, *What Am I Really Saying When I Open My Smartphone? A Response to Orin S. Kerr*, 97 Tex. L. Rev. Online 63, 64 (2019).

Utah reads one Florida intermediate appellate court as holding otherwise. Pet. 10 (citing *State v. Stahl*, 206 So. 3d 124, 135 (Fla. Dist. Ct. App. 2016)). But the Florida Supreme Court has never decided this question, and another Florida intermediate appellate court has held that disclosing a cell-phone passcode can be testimonial. *G.A.Q.L. v. State*, 257 So. 3d 1058, 1065 (Fla. Dist. Ct. App. 2018). Any conflict between Florida intermediate appellate courts obviously does not warrant this Court's review.

Moreover, Utah misreads *Stahl*. There, the Florida Second District Court of Appeal recognized that asking a defendant to "testify to the passcode" could require "the traditional analysis of the self-incrimination privilege" for "verbal communications." 206 So. 3d at 133 n.9. But the parties briefed the case as if it involved a physical act, not a verbal statement, and the court accepted that framing

because it was "not entirely clear from the record" what the State actually asked the suspect to do. *Id.*

2. Utah urges this Court to grant certiorari to help answer a question different from the one decided below. As Utah (at 26) observes, passcode cases typically involve one of two fact patterns: (1) police ask the suspect to disclose the passcode, or (2) police ask the suspect to unlock the device without disclosing the passcode. This case undisputedly involves the first scenario, where courts agree that the disclosure is testimonial. But Utah (at 13-14) claims that resolving this case could help resolve the second scenario on which courts purportedly disagree. Utah's amici similarly claim a "conflict[] regarding the rules for *unlocking* devices" and emphasize the "larger debate over … other methods of granting access." Indiana Br. 13, 19 (capitalization altered and emphasis added).

That is an odd argument for certiorari. This Court ordinarily resolves questions that have divided the lower courts by granting certiorari on *those* questions—not other questions on which courts unanimously agree. As Utah (at 26) admits, disclosing and entering passcodes "might implicate divergent Fifth Amendment analyses." Below, the Utah Supreme Court suggested that the two scenarios raise different "analytical framework[s]." Pet.App.24a. It is thus unclear whether answering the disclosing-a-passcode question here would resolve the entering-a-passcode question Utah and its amici highlight.

In any event, there is no split on the entering-a-passcode question. As Utah (at 13) catalogs, the Eleventh Circuit and the Illinois, Indiana, and Massachusetts high courts hold that entering a passcode is testimonial. Utah claims that the Fourth Circuit has "suggested" otherwise. Pet. 13 (citing *United States v. Oloyede*, 933 F.3d 302, 309 (4th Cir. 2019), *cert. denied sub nom. Popoola v. United*

States, 140 S. Ct. 1212 (2020) (No. 19-7128)). But as Utah's "suggested" hedge signals, the Fourth Circuit did not decide this issue. The court questioned whether the passcode entry at issue was testimonial, but assumed for the sake of argument that it was and ruled against the defendant on other grounds. *Oloyede*, 933 F.3d at 309-10. Utah's first question implicates no split.

B. There Is No Split on the Second Question

1. Utah (at 16-17) asserts a 2-1 split among state supreme courts on whether the Fifth Amendment protects the refusal to disclose a phone passcode where it is a "foregone conclusion" that "the device belongs to the suspect." Courts are not divided on that question either.

Utah's foregone-conclusion theory rests on this Court's decision in *Fisher*, 425 U.S. 391. *Fisher* recognized that responding to a document subpoena can implicitly admit that the requested documents exist and are in the subpoenaed party's control. *Id.* at 410. But, the Court held, that "implicit[] admi[ssion]" does not "rise[] to the level of testimony within the protection of the Fifth Amendment" where "[t]he existence and location of the papers are a foregone conclusion." *Id.* at 411.

This Court has never subsequently applied that foregone-conclusion reasoning. Two subsequent subpoena cases mention it briefly only to reject its application. *United States v. Doe* (*Doe I*), 465 U.S. 605, 614 n.13 (1984); *Hubbell*, 530 U.S. at 44-45. Some lower courts, however, treat *Fisher* as an "exception" to the Fifth Amendment for acts that implicitly convey information the government already knows. *See* Pet.App.13a n.5.

There is no split on how any such exception would apply to verbally disclosing a cell-phone passcode. As Utah (at 17-18) notes, the Pennsylvania and Utah Supreme

Courts agree that any "foregone-conclusion doctrine" has no application when a defendant is asked to state a passcode. Pet.App.30a, 33a; *Davis*, 220 A.3d at 548-49. Utah (at 16-17) claims a split with the New Jersey Supreme Court's decision in *State v. Andrews*, which compelled the disclosure of phone passcodes on the theory that the defendant's knowledge of the passcodes was a "foregone conclusion." 234 A.3d 1254, 1275 (N.J. 2020), *cert. denied*, 141 S. Ct. 2623 (2021) (No. 20-937). But *Andrews* does not clearly distinguish between verbally stating and entering passcodes—a factual difference that Utah (at 26) recognizes might change the analysis.

Andrews affirmed a trial-court order requiring the defendant to "disclose the passcodes" to his phones. *Id.* at 1259. While some language in the opinion implies that Andrews would be compelled to tell police his passcodes, the New Jersey Supreme Court elsewhere framed the question as whether "[c]ommunicating *or entering* a passcode" was a "testimonial act of production." *Id.* at 1273 (emphasis added). That ambiguous framing reflected the interlocutory posture of the case. Because Andrews had refused to cooperate, it remained to be seen whether police would ask him to state the passcodes or enter them himself. But, as New Jersey clarified in successfully opposing this Court's review, the State actually wanted Andrews "to enter his passcode without sharing it with anyone." Br. in Opp. 17, *Andrews*, 141 S. Ct. 2623. Thus, as New Jersey told this Court, the case did "*not* present the disagreement as to whether he can be required to verbally disclose that password," *id.*—the issue on which Utah claims a split.

Even if the New Jersey, Pennsylvania, and Utah Supreme Courts disagreed, a 2-1 split among state supreme courts would not warrant this Court's review. This Fifth

Amendment question can arise in any U.S. court with criminal jurisdiction. Yet Utah identifies no decision from the 47 other state high courts, the 12 regional federal courts of appeals, the D.C. Court of Appeals, the 4 territorial high courts over which this Court has certiorari jurisdiction, or the Court of Appeals for the Armed Forces. There is no reason for this Court to dive into an evolving technological issue that 65 of 68 lower courts have yet to consider.

2. As above, Utah (at 19-20) tries to bootstrap this case onto another asserted split: "whether the foregone-conclusion doctrine applies to *entry* of a passcode." Again, this Court does not ordinarily grant certiorari to opine about other fact patterns. *Supra* p. 10.

Regardless, lower courts have not "reached varying conclusions" on this issue. *Contra* Pet. 20. As Utah (at 20) notes, the Illinois, Massachusetts, and Oklahoma high courts hold that a foregone-conclusion exception can apply to entering a passcode. Utah asserts that the Indiana Supreme Court has "suggested" otherwise. Pet. 20 (citing *Seo v. State*, 148 N.E.3d 952, 958 (Ind. 2020)). But a "suggest[ion]" is not a holding. The Indiana court merely declined to apply any foregone-conclusion exception to the facts at hand and identified "several reasons why the narrow exception may be generally unsuitable to the compelled production of any unlocked smartphone." *Seo*, 148 N.E.3d at 958. The court refrained from making any "general pronouncement" on the doctrine's applicability. *Id.* at 962.

II. This Case Does Not Warrant This Court's Review

In the last five years, this Court has denied at least four petitions raising questions about the Fifth Amendment's application to passcodes.[1] That same course is appropriate here.

1. Utah and its amici's wide-ranging concerns about "law enforcement's ability to investigate and solve crimes" ignore the narrowness of the decision below. Pet. 18-19, 21-24; Indiana Br. 3-13. The Utah Supreme Court held only that verbally stating a phone passcode is testimonial. Pet.App.30a. The court below did not resolve the legality of law enforcement's many other options to access locked devices. *See generally* Orin S. Kerr & Bruce Schneier, *Encryption Workarounds*, 106 Geo. L.J. 989, 996-1011 (2018).

To start, the court below did not decide what happens if police ask suspects to *enter* passcodes without revealing them to police. Instead, the court stated that requests to disclose and requests to enter passcodes "present distinct issues under the Fifth Amendment." Pet.App.21a. Utah itself (at 26) acknowledges that the analyses might "diverge[]."

Biometric tools like facial recognition and fingerprint scanners may offer police another way to access locked devices. Some 81% of phones have those features, with more every day.[2] As scholars emphasize, the "[c]ompelled

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[1] *Sneed v. Illinois*, 144 S. Ct. 1012 (2024) (No. 23-5827); *Andrews*, 141 S. Ct. 2623; *Davis*, 141 S. Ct. 237; *Popoola*, 140 S. Ct. 1212.

[2] Alessandro Mascellino, *Cisco Report: 81 Percent of All Smartphones Have Biometrics Enabled*, BiometricUpdate.com (Nov. 4, 2022), https://tinyurl.com/yzea5b9r; Luana Pascu, *Biometric Facial Recognition Hardware Present in 90% of Smartphones by 2024*, BiometricUpdate.com (Jan. 7, 2020), https://tinyurl.com/mvrc76rj.

use of biometrics" raises "different Fifth Amendment issues" than disclosing or entering passcodes. Orin S. Kerr, *Compelled Decryption and the Privilege Against Self-Incrimination*, 97 Tex. L. Rev. 767, 768 n.5 (2019). Biometrics can also "raise significant Fourth Amendment issues" not presented here. Kerr & Schneier, *supra*, at 1003.

Finally, States have a growing array of tools to unlock phones without suspects' help. Contrary to Utah's claim (at 11) that "modern cellphones cannot be opened by alternative means," it is now the "rare" case "in which law enforcement *cannot* access the contents of a phone." Logan Koepke et al., *Mass Extraction: The Widespread Power of U.S. Law Enforcement to Search Mobile Phones*, Upturn 8 (Oct. 2020), https://tinyurl.com/2mufzt94. From 2015 to 2019, police used sophisticated decryption tools to access "hundreds of thousands of cellphone[s]." *Id.* at 41. Last year, government contractor Cellebrite announced that it could "access and extract data from the latest versions and updates to" the then-most recent iPhone, "including evidence stored in encrypted applications." Kiem Ton, *Cellebrite Leads the Way: Unlocking the Latest iOS Versions and iPhone Devices*, Cellebrite (Mar. 26, 2023), https://tinyurl.com/yrjuj7dy.

Amici claim that these tools are expensive and time-consuming. Indiana Br. 6-12. But even smaller law-enforcement agencies use these tools, and multiple federal grant programs aid their acquisition. Koepke et al., *supra*, at 36-39. "Weaknesses in encryption systems are common," allowing law enforcement to access devices without time-consuming brute-force guessing. Kerr & Schneier, *supra*, at 995. Even as encryption improves,

new decryption tools may render this issue of diminishing importance.

2. Utah (at 7-13) urges this Court "to address the continued validity of" this Court's precedent distinguishing between revealing "the combination to a wall safe" (which is testimonial) and "surrender[ing] the key to a strongbox" (which can be non-testimonial). *See Hubbell*, 530 U.S. at 43. As Utah (at 9-10) notes, some state courts have invoked that analogy in holding that providing a passcode is testimonial given the obvious parallel between passcodes and safe combinations.

As an initial matter, Utah's attack on the combination/key analogy is forfeited if not waived. Below, Utah embraced the analogy, urging that "providing a memorized passcode to a cell phone is more akin to handing over a physical key than providing the combination to a wall safe." Pet.App.25a; *see* Pet'r's Utah S. Ct. Br. 20-22. Having lost on its preferred turf, Utah now attacks the analogy root-and-branch. A petition for certiorari is too late for Utah to press an argument antithetical to its framing below. *See United States v. Ortiz*, 422 U.S. 891, 898 (1975).

Regardless, Utah never explains how the combination/key analogy strengthens the case for review. Ordinarily, on-point Supreme Court precedent that has produced consistent results in the lower courts would be a compelling reason to *deny* certiorari. Utah (at 7-8, 11) belittles the combination/key analogy as deriving from a 1988 dissenting opinion by Justice Stevens. *See Doe II*, 487 U.S. at 219 (Stevens, J., dissenting). But eight Justices signed onto that analogy in *Hubbell*, 530 U.S. at 43. Despite acknowledging (at 12-13) that *Hubbell* binds lower courts, Utah never briefs the stare decisis factors.

Utah (at 10) flags lower courts' "doubts about the continued usefulness" of the combination/key analogy. But the sum of those "doubts" is two state intermediate-appellate-court decisions questioning how the analogy applies to cell phones. Pet. 10-11 (citing *Stahl*, 206 So. 3d at 135, and *People v. Sneed*, 187 N.E.3d 801, 813 (Ill. App. Ct. 2021)). Utah also invokes the New Jersey Supreme Court's "concerns" about the difference between passcodes and "biometric device locks." Pet. 10-11 (quoting *Andrews*, 234 A.3d at 1274). Those concerns about other technologies have nothing to do with the combination/key analogy.

Utah's attack on the combination/key analogy is also puzzling given the limited role that analogy played in the decision below. The Utah Supreme Court primarily considered the analogy in rejecting *Utah's* argument that disclosing a phone passcode is more like handing over a key than sharing a safe combination. Pet.App.25a-27a. Utah's gratuitous attack on precedent should be one more strike against review.

3. Even if the questions presented warranted review, this case has numerous vehicle problems, as the Utah Supreme Court's footnotes document. *E.g.*, Pet.App.7a n.4, 14a n.6, 16a n.7, 19a n.8.

To start, the decision below will have no effect on future cases in the same posture. The Utah Supreme Court answered the self-incrimination question the parties had litigated. Pet.App.16a n.7. But, "to avoid confusion in future cases," the court clarified that the Fourteenth Amendment's Due Process Clause, not the Fifth Amendment's Self-Incrimination Clause, usually governs trial commentary on post-*Miranda* silence. Pet.App.16a n.7. It is "fundamentally unfair and a deprivation of due process" to tell a defendant that he has the right to remain

silent and then turn around and use that silence against him. *Doyle v. Ohio*, 426 U.S. 610, 618 (1976). Thus, even if this Court reversed, the State still could not comment on a suspect's post-*Miranda* refusal to verbally disclose a passcode. Utah (at 25) presents this case's Fifth-Amendment-only framing as a plus. But an issue's irrelevance going forward is a bug, not a feature.

Moreover, this case's bare-bones record risks impeding intelligent review. The district court made "no factual findings or legal conclusions" on the Fifth Amendment question. Pet.App.19a n.8. Even the search warrant was missing from the record. Pet.App.7a n.4. The only evidence about Utah's efforts to obtain the passcode comes from Detective Haney's trial testimony and takes up a single page of the petition appendix. *See* Pet.App.82a.

While the Utah Supreme Court was able to resolve this case in Valdez's favor with the limited facts at hand, Pet.App.19a n.8, ruling for Utah would present significant complications. Utah (at i, 19-21, 23-24, 26, 32) assumes that any foregone-conclusion exception would apply when police have "evidence the phone belongs to the suspect." But in the context of entering phone passcodes, courts have taken various approaches. Some courts require the government to show "that it already knew … exactly which limited set of documents … were to be found on the phone," while others require the government to demonstrate "that it already knew that the suspect knows the password." Pet.App.66a-67a n.6; *accord* Indiana Br. 15-16. Thus, even were this Court to endorse a foregone-conclusion exception, "it would not necessarily follow that the facts of this case fit within the exception's ambit," as the Utah Court of Appeals noted. Pet.App.66a n.6. Yet Utah developed next to no record on what those facts are.

Finally, it is uncertain whether the questions presented were outcome determinative. Valdez challenged his convictions on multiple grounds, including that his attorney was ineffective in failing to object to a police detective's vouching for Jane's veracity and Utah's use of hearsay. Pet.App.50a. The Utah Court of Appeals declined to definitively resolve those issues but expressed serious concerns over the detective's claim that he was "a sort of human lie detector" and the State's "lengthy" use of hearsay. Pet.App.75a-77a. Thus, even were the decision below reversed, there is a significant possibility that Utah courts would vacate Valdez's conviction on other grounds. This Court should not grant certiorari to decide an issue that has few consequences for future cases or this one.

III. The Decision Below Is Correct

The Utah Supreme Court correctly determined that disclosing a cell-phone passcode is a testimonial statement protected by the Fifth Amendment.

1. The Self-Incrimination Clause provides that "[n]o person … shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. As multiple Justices have observed, Founding-Era sources offer "substantial support for the view that the term 'witness' meant a person who gives or furnishes evidence." *Hubbell*, 530 U.S. at 50 (Thomas, J., concurring); *accord Carpenter v. United States*, 585 U.S. 296, 404 (2018) (Gorsuch, J., dissenting); Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. Pitt. L. Rev. 27, 78-79 (1986). On that understanding, the Fifth Amendment "protects against the compelled production not just of incriminating testimony, but of any incriminating evidence." *Hubbell*, 530 U.S. at 49 (Thomas, J.,

concurring). That test would plainly protect the passcode here, which Utah (at 25) concedes is incriminating.

This Court's modern precedents, however, have limited the Self-Incrimination Clause to "testimonial" communications. *Id.* at 34 (majority op.). A communication is testimonial if it "relate[s] a factual assertion or disclose[s] information," *i.e.*, if it "disclose[s] the contents of [the suspect's] own mind." *Muniz*, 496 U.S. at 594 (citations omitted). Such statements go to the "core" of the right against self-incrimination because they put defendants to "the 'trilemma' of truth, falsity, or silence." *Id.* at 596-97. Under that test, "[t]he vast majority of verbal statements" are testimonial because "[t]here are very few instances in which a verbal statement, either oral or written, will not convey information or assert facts." *Doe II*, 487 U.S. at 213-14. A paradigmatic example of a testimonial statement, this Court has said, is "telling an inquisitor the combination to a wall safe." *Hubbell*, 530 U.S. at 43.

A verbal statement disclosing a passcode is testimonial under that precedent. The suspect discloses information—the passcode. And that information comes directly from his mind. The suspect thus faces the "'trilemma' of truth, falsity, or silence." *Muniz*, 496 U.S. at 597. He can disclose the passcode, thereby self-incriminating. He can lie and provide a fake passcode. Or he can remain silent and risk the State commenting on that silence. While Utah (at 7-13, 18) attacks this Court's "combination to a wall safe" analogy as an outdated "legacy," Utah makes no effort to distinguish that analogy's obvious application to passcodes.

Utah (at 28) insists that a passcode is "a meaningless set of numbers" that "doesn't communicate" anything of "substantive significance." But if the passcode were meaningless, the police would not want to know it. Just

like a wall-safe combination, the passcode itself is factual information, telling police how to open the device. Utah's claim (at 28) that disclosure will not result in "self-accusation" just fights Utah's concession (at 25) that the passcode is incriminating.

Utah (at 28) claims that passcodes are not testimonial because they are "irrelevant to any fact the government will need to prove at trial." This Court has never adopted that crabbed view of what counts as testimonial. The date of a suspect's sixth birthday, for example, can be testimonial, even where that fact had nothing to do with a drunk-driving charge. *Muniz*, 496 U.S. at 598-99.

Utah (at 29) urges that the Fifth Amendment does not provide "blanket protection for any information drawn from a person's mind." Utah argued the opposite below: "'Testimonial' means forcing a person 'to disclose the contents of his own mind.'" Pet'r's Utah Ct. App. Br. 36 (quoting *Doe II*, 487 U.S. at 210-11). And rightly so. This Court has repeatedly identified whether a statement is testimonial based on the source of the information. For example, a handwriting sample based on a phrase of the State's choosing is not testimonial because the suspect is not "communicat[ing] any personal beliefs or knowledge of facts." *Muniz*, 496 U.S. at 597. But if a suspect were "asked to provide a writing sample *of his own composition*, the content of the writing would [reflect] his assertion of facts or beliefs and hence [be] testimonial." *Id.* at 598 (emphasis added). Utah (at 29-30) calls that distinction "bizarre" and "nonsensical," apparently overlooking that this Court has already adopted it.

2. The Utah Supreme Court also correctly rejected Utah's contention (at 32-34) that the Fifth Amendment should not apply where a phone's ownership is a "foregone conclusion."

Utah (at 14-15) assumes the existence of a freestanding "foregone-conclusion doctrine" that would exclude from the Fifth Amendment's protection any "testimony" that "adds little or nothing to the sum total of the Government's information" (citation omitted). This Court has never adopted any such categorical exception to the Fifth Amendment, which would contradict the Amendment's unqualified text and its history.

Instead, this Court has applied the foregone-conclusion concept precisely once, nearly 50 years ago, to help classify the "implicit[] admi[ssion]" in responding to a document subpoena. *Fisher*, 425 U.S. at 411. *Fisher* recognized that responding to a subpoena "has communicative aspects"—namely, that the documents exist and are in the party's possession or control. *Id.* at 410. That implicit message does not "rise[] to the level of testimony within the protection of the Fifth Amendment," this Court held, where "[t]he existence and location of the papers are a foregone conclusion." *Id.* at 411. This Court has since invoked that reasoning only twice, both times in subpoena cases and both times to conclude it did not apply. *Doe I*, 465 U.S. at 614 n.13; *Hubbell*, 530 U.S. at 44-45.

Whatever that framework's utility in subpoena cases, this Court has never suggested that direct verbal testimony becomes non-testimonial just because police already know the answer to a question. In *Muniz*, for example, this Court held that asking a drunk-driving suspect the date of his sixth birthday elicited a testimonial statement—even though police already knew the suspect's date of birth. 496 U.S. at 598-600. Were it otherwise, police could ask paradigmatic testimonial questions like "Where were you on the night of the murder?" and claim that the response was non-testimonial because police already knew the answer.

Even on its own terms, any foregone-conclusion exception would not apply here because police do *not* know the passcode. Utah (at 33) changes the focus by asking whether the "ownership of [the] phone" is in dispute. But police did not ask Valdez who owned the phone; they asked him for the passcode. That passcode adds to "the sum total of the Government's information," *Fisher*, 425 U.S. at 411, because police do not already know it. Commanding a criminal defendant to reveal undisputedly incriminating information goes to the core of the Fifth Amendment right against self-incrimination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

EMILY ADAMS
FREYJA JOHNSON
THE APPELLATE GROUP
P.O. Box 1564
Bountiful, Utah 84054

LISA S. BLATT
Counsel of Record
AARON Z. ROPER
ERIN L. BROWN
NATALIE R. SCHMIDT
WILLIAMS & CONNOLLY LLP
680 Maine Avenue SW
Washington, DC 20024
(202) 434-5000
lblatt@wc.com

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