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

Reply Brief for Petitioner

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ARGUMENT

I. This case presents important federal questions that should be settled by this Court.

A. This case presents critically important issues.

1. Access to evidence contained on cellphones raises critical issues directly affecting public safety. And these issues are only growing in importance and frequency. Cellphones are a "pervasive" part of modern life, and they routinely "provide valuable incriminating information about dangerous criminals." *Riley v. California*, 573 U.S. 373, 385, 401 (2014). Yet this Court has never addressed how, or whether, disclosing a cellphone passcode is testimonial under the Fifth Amendment. As explained in Utah's petition and the other States' amicus brief, these issues merit this Court's review.

2. Valdez tries to downplay this manifest importance by suggesting that law enforcement already possesses "tools" to unlock encrypted phones. Opp.15. Valdez's own sources, however, confirm that new encryption technologies continue to outpace decryption.

Valdez's first source (Opp.15) asserts it is "rare" for encryption to prevent police from accessing a cellphone. Logan Koepke et al., *Mass Extraction: The Widespread Power of U.S. Law Enforcement to Search Mobile Phones*, Upturn 8, 26 (Oct. 2020), https://tinyurl.com/2mufzt94. But a closer look reveals inflated numbers—the report relies on cases involving extraction from devices that were unlocked, unencrypted, or where consent was given, and it counts partial access to subsets of data as if it were total access. *Id.* at 26-31. These skewed data are also at least five years old—an eternity in tech-years. *Id.* And the source

itself recognizes that "phone manufacturers continuously patch known security vulnerabilities and develop even more advanced security features" making decryption ever more difficult and time consuming, if it can even be done at all. *Id.* at 26, 30; *see also* Indiana.Br.6-12.

Second, Valdez cites sales materials from Cellebrite—a company that sells cellphone-cracking software—claiming Cellebrite can access some undefined data from iPhones. Opp.15. This reliance is ironic, given that Cellebrite's technology failed to access Valdez's cellphone *in this very case*. R.1165-70. And in any event, even Cellebrite confirms Utah and the amici states' concerns. "Every year," cellphone manufacturers release "new" technologies "with improved security measures," rendering older methods "no longer viable for new devices." Kiem Ton, *Cellebrite Leads the Way: Unlocking the Latest iOS Versions and iPhone Devices*, Cellebrite (Mar. 26, 2023), https://tinyurl.com/yrjuj7dy.

3. Valdez also insists the issues presented here are narrower than they appear because the Utah Supreme Court "held only that *verbally* stating a phone passcode is testimonial," Opp.14 (emphasis added). This "verbal communication," Valdez insists, places the case "at the heart of the right against self-incrimination" and distinguishes it from other scenarios, such as cases where suspects entered passcodes "without revealing them to police." Opp.3, 14.

But this argument assumes there is a sharp legal distinction between verbal statements and nonverbal acts. That assumption is simply mistaken. True, the "vast majority of verbal statements" are testimonial because they "convey information or assert facts." *Doe*

v. United States ("*Doe II*"), 487 U.S. 201, 213 (1988). But this Court has expressly "reject[ed]" the notion that the Fifth Amendment establishes a broader rule applicable to "oral or written statements" and "a more narrow" rule "applicable to acts alone." *Id.* at 209; *see also id.* n.8 (Doe "articulated no cogent argument as to why the 'testimonial' requirement should have one meaning in the context of acts, and another meaning in the context of verbal statements").

Now perhaps different rules *should* apply to verbal statements. Some commentators take that view. *See* App.27a-29a, ¶¶52-56. And that is why State's Petition acknowledged that different factual scenarios "might implicate divergent Fifth Amendment analyses." Pet.26. But the Court's *current* precedents do not draw such distinctions. And the fact that Valdez presumes that they do only highlights the lack of clarity in current law.

4. Valdez also suggests that review is unnecessary because investigators can use "[b]iometric tools" to access phones without using passcodes. Opp.14. But biometrics frequently offer no solution. As explained by Apple, biometrics "don't replace the user's passcode or password; instead, they provide easy access to the device within thoughtful boundaries and time constraints." *Apple Platform Security*, https://support.apple.com/guide/security/face-id-touch-id-passcodes-and-passwords-sec9479035f1/web (published May 7, 2024). "This is important because a strong passcode or password forms the foundation for how a user's iPhone… cryptographically protects that user's data." *Id.* There are also "security-sensitive operations" "where biometrics aren't permitted." *Id.* And "[f]or additional protection," Apple's biometrics allow "only five unsuccessful match attempts before a passcode or password

is required to obtain access to the user's device or account." *Id.*

Passcodes are therefore not going away any time soon. And even if they do, the problems they present will still remain. The Ninth Circuit, for instance, has already suggested that the testimoniality of unlocking a phone with fingerprints may turn on similar distinctions, such as whether the officer "required [the suspect] to independently select the finger that he placed on the phone." *United States v. Payne*, 99 F.4th 495, 513 (9th Cir. 2024).

Ultimately, moreover, the thinness of the distinction between passcodes and biometrics only highlights the concerns about "the continuing viability" of present doctrine. *State v. Stahl*, 206 So.3d 124, 135 (Fla. Dist. Ct. App. 2016). It is unclear why "the Fifth Amendment should provide greater protection to individuals who passcode protect their iPhones with letter and number combinations than to individuals who use their fingerprint as the passcode." *Id.* Both, after all, serve the same function. They are merely tools to open the phone.

B. The lack of a "split" over the Court's much-criticized combination/key analogy is irrelevant because the very existence of the analogy has prevented a split from forming.

1. As explained in the State's Petition, the lower courts' reasoning about passcodes has largely been controlled by the key/combination analogy first suggested in *Doe II*. Under this analogy, whether an act is "testimonial" depends on whether the actor uses "his mind to assist the Government in developing its case." *Doe II*, 487 U.S. at 220 (Stevens, J., dissenting).

Forcing a suspect to "reveal the combination to [a] wall safe" would thus be testimonial because it would require the suspect "to use his mind to assist the prosecution," while forcing a suspect "to surrender a key to a strongbox" would not. *Id.* at 219 (Stevens, J., dissenting).

But the Court adopted this analogy without any historical or textual analysis. *See United States v. Hubbell*, 530 U.S. 27, 43 (2000). And since then, lower courts have repeatedly "question[ed]" whether surrendering a key "is, in fact, distinct from telling an officer the combination," *Stahl*, 206 So.3d at 135; *see People v. Sneed*, 187 N.E.3d 801, 812 (Ill. App. Ct. 2021), *aff'd on other grounds*, 230 N.E.3d 97 (Ill. 2023); *State v. Andrews*, 234 A.3d 1254, 1274 (N.J. 2020). The analogy also pre-dates modern encryption technologies and therefore fails to confront the difficulties those technologies present. It never would have occurred to the *Hubbell* court, for instance, to consider what would happen if someone were to invent an unbreakable combination safe capable of automatically destroying its contents.[1]

Finally, the analogy is simply troublesome on its own terms. The Court offered the analogy to illustrate the purported distinction between testimonial acts that require suspects to make use of the contents of their own minds and non-testimonial acts that do not. But retrieving a key from a known location originates from the contents of the actor's mind just as much as

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[1] Valdez's concerns about *stare decisis* (Opp.16) are also misplaced for the same reasons. The combination/key analogy was not intended—and cannot possibly have been intended—to address the modern encryption technologies at issue here.

disclosing a combination. Indeed, so does nearly every volitional act.

The analogy thus fails the very test it was intended to demonstrate.[2] And yet—because it arises from this Court's caselaw—the lower courts have no power to reconsider it. The analogy has thus stood as a roadblock to any doctrinal development about what "testimonial" means in the context of passcodes. And because the lower courts cannot reconsider the meaning of "testimonial," they have been forced to seek circuitous workarounds under the hazily defined "foregone conclusion doctrine" instead.

2. Valdez does little to meaningfully engage with this criticism. Instead, he insists there is no need to revisit the analogy because lower-court cases have not been "split" in their ultimate outcomes. Opp.9-11. But lower courts are strictly bound to follow this Court's precedents.[3] *Bosse v. Oklahoma*, 580 U.S. 1, 3 (2016). As a result, the very existence of the analogy has prevented a "split" from forming in the first place. The most lower courts can do is criticize the analogy in

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[2] One might respond that the scenarios are also distinguishable because disclosing a combination requires verbal communication. But as discussed, the Court has rejected that distinction. *See Doe II*, 487 U.S. at 209-10 & n.8.

[3] This fact also dispenses with Valdez's argument that the State forfeited its arguments by failing to challenge the analogy below. Opp.16. Preservation rules do not require the State to make futile arguments. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007); *In re Micron Tech., Inc.*, 875 F.3d 1091, 1097-98 (Fed. Cir. 2017) (collecting cases). And regardless, the State's briefing below made amply clear that the analogy is "inapt" and "disregards how digital keys work." Pet.Utah.S.Ct.Br.12, 20.

dicta. And that's exactly what they have repeatedly done.

C. Valdez acknowledges that the Court's lack of guidance about the foregone-conclusion doctrine has caused the lower courts to take "various approaches" on a question of federal constitutional law.

Finally, certiorari is appropriate because lower courts are divided over how the foregone-conclusion doctrine applies to passcodes. Pet.14-21.

And Valdez has not shown otherwise. Indeed, many of his arguments actually prove the State's point. Valdez acknowledges that this Court has discussed the foregone-conclusion doctrine in only three cases—two of which "mention[ed] it briefly only to reject its application." Opp.11. And Valdez also acknowledges that—lacking sufficient guidance—lower courts "have taken various approaches" to the foregone-conclusion doctrine "in the context of entering phone passcodes." Opp.18.

Valdez nevertheless insists there is still "no split" on the subject because lower courts do not disagree about how the doctrine applies "to *verbally* disclosing a cell-phone passcode." Opp.11 (emphasis added). But as discussed, this Court has "reject[ed]" the notion that "a more narrow" rule applies "to acts alone" than applies to "oral or written statements." *Doe II*, 487 U.S. at 209. The line that Valdez believes separates this case from other cases in which courts are split is a mirage.

II. This case is an excellent vehicle for addressing the questions presented.

1. This case presents an excellent vehicle to address the questions presented. Unlike other recent petitions involving passcodes, this case arises from a final judgment and not an interlocutory order. There are therefore no lingering jurisdictional hurdles or speculative facts contingent on unknown future events. The Fifth Amendment issues are also presented without complicating factors—such as harmless error—that might prevent a decision on the merits. And while Valdez claims the case has "vehicle problems," Opp.17, those arguments are distractions.

2. Valdez first asserts that any decision "will have no effect on future cases in the same posture" because "even if this Court reversed, the State still could not comment on a suspect's post-*Miranda* refusal to verbally disclose a passcode" under the Fourteenth Amendment's Due Process Clause. Opp.17-18.

But Valdez's did not raise a Fourteenth Amendment claim below, and the Utah Supreme Court declined to address the issue. App.14a-17a, ¶¶29 n.6, 34 n.7. And the time for Valdez to raise such a claim has now long since passed. Valdez cannot evade review of the Fifth Amendment claim he actually raised—and on which he succeeded below—with a conclusory assertion that a separate, unraised claim surely would have been meritorious too.

Indeed, Valdez's drive-by Fourteenth Amendment argument is highly questionable. Valdez observes that it is "'a deprivation of due process' to tell a defendant that he has the right to remain silent" under *Miranda v. Arizona*, 384 U.S. 436 (1966), and then "'use that silence against him.'" Opp.17-18 (quoting *Doyle v.*

Ohio, 426 U.S. 610, 618 (1976)). Valdez then reasons that this must mean prosecutors are forbidden ever to comment on a defendant's post-*Miranda* silence—*even where the defendant had no Fifth Amendment right to remain silent in the first place.* Opp.7-8.

But *Miranda* itself only exists "to protect the Fifth Amendment right against compelled self-incrimination." *Vega v. Tekoh*, 597 U.S. 134, 149 (2022). And the reason that cases like *Doyle* were decided under the Fourteenth Amendment and not the Fifth is simply because the *Miranda* rules are "prophylactic" in nature, and "a violation of *Miranda* is not itself a violation of the Fifth Amendment." *Id.* at 146-47, 152.

So it is far from clear whether—absent an underlying Fifth Amendment right—the Fourteenth Amendment would independently forbid the government from commenting on a suspect's refusal to unlock a phone. And such a rule would also present significant practical problems. As discussed, investigators often cannot unlock a phone without a suspect's cooperation. And thus, if the suspect refuses to cooperate, the government's only remedy may be to ask the jury to draw adverse inferences from that refusal.

But again, there is no need to delve into these issues now. Fourteenth Amendment issues may present themselves in some future cases. But they will not present themselves in every case. And they should not stop the Court from providing much-needed guidance on the important Fifth Amendment issues squarely presented now.

3. Valdez also suggests that "complications" might arise from the purportedly "bare-bones" factual record. Opp.18. But Valdez has had the entire scope of

this litigation to identify problems with the record. And his opposition only identifies one.

Valdez observes that courts "have taken various approaches" to the foregone-conclusion doctrine, with some requiring proof that the government "knew exactly which limited set of documents" would be on the phone and others merely requiring proof that the government "knew that the suspect knows the password." Opp.18 (quotation marks and ellipses omitted). Thus, Valdez concludes, even if this Court were to apply the doctrine, the facts of this case "would not necessarily" qualify. Opp.18.

As discussed, these arguments give much of the game away. They acknowledge, however begrudgingly, that there is indeed a split on a question presented. But more to the point, they simply do not establish a vehicle problem. If the Court believes that the foregone-conclusion doctrine requires certain showings, it can say so. And if the Court believes the State did not make those showings, then it can hold the State failed to make its case. But that is a merits issue, not a vehicle problem. The prospect that the State might not *satisfy* a constitutional rule would not prevent the Court applying or explaining such a rule.

4. Valdez further observes that he challenged his convictions on other grounds which the Utah courts "declined to definitively resolve." Opp.19. Valdez thus worries that even if the Court were to reverse, the Utah courts might still vacate his convictions for other reasons. Opp.19.

Valdez couches this argument in terms of "uncertain[ty]" over "whether the questions presented were outcome determinative." Opp.19. But Valdez cannot really mean that. The Utah Court of Appeals

expressly grounded its decision "solely on the basis of the Fifth Amendment violation." App.74a, ¶54. And the Utah Supreme Court did the same. App.37a, ¶74. There is no question that the Fifth Amendment was outcome-determinative here.

Valdez's real concern appears to be that, if the State succeeds before this Court, it might still lose on remand. But the mere possibility that state courts might reach the same result on other grounds is not a basis for refusing to review a squarely presented constitutional issue. *See Kansas v. Carr*, 577 U.S. 108, 118 (2016). "Turning a blind eye in such cases would change the uniform law of the land into a crazy quilt." *Id.* (internal quotation marks omitted). In short, this case presents an excellent opportunity for addressing the issues presented.

III. The decision below is incorrect.

Finally, the decision below is incorrect. The reasons why have already been discussed at length. But it is still worth explaining, if only briefly, how Valdez misunderstands the problem presented. According to Valdez, a passcode is not merely "a meaningless set of numbers" without "substantive significance." Opp.20 (quotation marks omitted). If it were, then "the police would not want to know it." Opp.20. Rather, "[j]ust like a wall-safe combination, the passcode itself is factual information, telling police how to open the device." Opp.20-21.

But turning over a physical key also discloses factual information: the key's shape, the material it was made from, and so on.[4] And yet this sort of information

[4] Note, moreover, that the key/combination analogy again fails to clearly resolve the question.

is not testimonial because it is purely instrumental. No one cares whether the blade of the key has four cuts or three, or whether it was struck from pure brass or a nickel-brass alloy. All that matters is what the key does. And passcodes work the same way. It makes no difference to a jury whether a passcode is "password123" or "kwyjibo116." All that matters is that the code unlocks the evidence on the phone. Indeed, in many cases (such as the pattern swipe code here), the passcode lacks any semantic content at all.

The most that could possibly be said is that, even if the passcode lacks semantic content, the act of turning it over sometimes carries *circumstantial* content. It suggests, for instance, that the passcode exists on the phone and that the actor has access to it. But again, the same is true with a physical key. And where the government already knows these facts, this circumstantial baggage "adds little or nothing" to the prosecution's case, and the "question is not of testimony but of surrender." *Fisher v. United States*, 425 U.S. 391, 411 (1976) (quotation marks omitted).

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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