No. 23-5827

In the Supreme Court of the United States

KEIRON K. SNEED,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the Illinois Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fifth Amendment's foregone conclusion doctrine permits the State to compel petitioner to unlock his phone by entering the passcode, when the State has a valid warrant to search the phone.

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BRIEF IN OPPOSITION

Petitioner was arrested on charges of forging two paychecks and depositing them in his bank account using a cell phone. The police obtained a warrant to seize petitioner's cell phone, but were unable to execute it because the phone was password-protected and petitioner refused to unlock it. The State moved unsuccessfully to compel petitioner to enter the passcode, then filed an interlocutory appeal from the trial court's order denying the motion to compel. On appeal, the Illinois Supreme Court held that petitioner could, consistent with the Fifth Amendment, be compelled to produce the phone's passcode by entering it into the phone. Petitioner now seeks certiorari.

The Court should deny the petition for essentially the same reasons as it did in *Andrews v. New Jersey*, 141 S. Ct. 2323 (2021) (No. 20-937). The Court lacks jurisdiction because the decision below is an interlocutory opinion from a state court. And even if the Court had jurisdiction, its review would not be warranted because there is no division of authority as to whether the foregone conclusion doctrine is applicable to the compelled entry of passcodes, any disagreement as to what facts must be foregone conclusions in that context is nascent and undeveloped, and, in any event, the Illinois Supreme Court correctly applied the Court's Fifth Amendment precedents in this case.

STATEMENT

1. In February 2021, petitioner was arrested on charges of forging two Dairy Queen paychecks. C5.[1] When police arrested petitioner, they seized a cell phone from him, which petitioner subsequently identified as his own by, among other things, listing the associated phone number as his on a police bond sheet. See R8-10.

The next month, the trial court issued a warrant to search petitioner's cell phone, which police still possessed, for any evidence of the creation and deposit of the forged paychecks (such as photographs of the paychecks, messages sent or received about them, and the like). Pet. App. 100a. The trial court found probable cause to believe that such evidence was on petitioner's phone based on a sworn complaint, which alleged that the Dairy Queen bookkeeper reported discovering that a paycheck had been made out to petitioner, who did not work at Dairy Queen but whose wife did. *Id.* at 98a. The paychecks had been cashed using mobile deposit, which allows checks to be deposited using a cell phone. *Ibid.* When the bookkeeper sent a text message to petitioner's wife about the matter, she responded that petitioner "didn't think it would actually work cuz [sic] it wasn't real" and that he "never got the money." *Ibid.* A few weeks later, the bookkeeper discovered a second forged paycheck made payable to petitioner and cashed via mobile deposit. *Id.* at 99a.

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[1] References to "C" are to the common-law record and references to "R" are to the report of proceedings, both of which are lodged with the Illinois Supreme Court.

2. When attempts to execute the warrant to search petitioner's phone were unsuccessful because the phone was passcode-protected, R7-8; Pet. App. 101a-102a, the State moved to compel petitioner to "provide the passcode or enter the passcode," Pet. App. 108a. The State alleged that petitioner could be so compelled because the testimony implicit in the act of producing or entering the passcode was already a foregone conclusion, and thus not privileged under the Fifth Amendment. *Id.* at 102a-108a.

At the hearing on the motion, the trial court heard testimony that petitioner had refused to unlock his phone, and that police were therefore unable to access the phone. R7-8. The investigating officer further testified that the police were unable to unlock the phone themselves and were unaware of any outside agency that would assist in doing so. *Ibid.* Simply entering possible passcodes into the phone in hopes of guessing the correct passcode, the officer explained, risked permanently locking the device after too many unsuccessful attempts. R8.

The court also heard testimony regarding the likelihood that incriminating evidence would be found on petitioner's phone. The investigating officer testified to the facts provided in the previously filed complaint for the warrant, see R4-6, and testified that the forged paychecks made out to petitioner and deposited using a mobile device had been endorsed using petitioner's name, R6-7. The officer agreed on cross-examination that he did not know for certain that the evidence the court had

found probable cause to believe was on petitioner's phone—evidence of the forgery and the deposit of forged paychecks—in fact was on petitioner's phone. R11.

The trial court denied the State's motion to compel. Pet. App. 97a. The court held that petitioner could not be compelled to unlock his phone consistent with the Fifth Amendment's foregone conclusion doctrine. *Id.* at 96a-97a. The court reasoned that the facts to which petitioner would implicitly testify by unlocking the phone—"that the phone belonged to [him] and that he was capable of accessing it"—were foregone conclusions, in that they would not add to the State's knowledge, given that "the phone was found on" petitioner and he "listed the phone number associated with the phone as his own phone number on the bond sheet." *Id.* at 91a. But, the court explained, it was bound by a decision of the Illinois Appellate Court holding that a person may not be compelled to produce a phone's passcode under the foregone conclusion doctrine unless the *contents* of the locked phone are a foregone conclusion. *Id.* at 92a-93a. Therefore, the court held, petitioner could not be compelled to unlock his phone because the State had not shown that it was a foregone conclusion the phone contained the specific evidence for which they had obtained the warrant to search it. *Id.* at 96a-97a.

3. The State pursued an interlocutory appeal from the trial court's order denying the motion to compel, C33, and the Illinois Appellate Court reversed the trial court's order, Pet. App. 85a. Petitioner filed a petition for leave to appeal, which the Illinois Supreme Court granted.

The Illinois Supreme Court affirmed the appellate court's judgment, holding that, under the foregone conclusion doctrine, petitioner could be compelled to produce the phone's passcode by entering it into the phone. *Id.* at 29a. The court held that the act of producing a phone's passcode by entering it into the phone—that is, the act of unlocking a phone with its passcode—is testimonial because, by performing it, a person implicitly makes a factual assertion. *Id.* at 20a, 22a, 29a. Specifically, when a person unlocks a phone with its password, he implicitly asserts that he has the ability to unlock the phone. *Ibid.* The court explained that this implicit factual assertion is comprised of three component assertions: (1) the passcode exists, (2) the person possesses it, and (3) the passcode that the person entered is authentic. *Id.* at 20a, 22a. Applying the foregone conclusion doctrine articulated in *Fisher v. United States*, 425 U.S. 391 (1976), and *United States v. Hubbell*, 530 U.S. 27 (2000), see *id.* at 22a, 26a, 27a-29a, the court held that petitioner could be compelled to produce the phone's passcode by entering it into the phone because the three facts he would implicitly assert by doing so were foregone conclusions, in that his implicit assertion of those facts by entering the passcode would add "'little or nothing to the sum total of the [State's] information.'" *Id.* at 28a (quoting *Fisher*, 425 U.S. at 411). The court declined to consider whether petitioner could be compelled to produce the passcode by disclosing it to police rather than by entering it into the phone without disclosing it. *Id.* at 29a n.7.

One justice dissented on the ground that compelling petitioner to enter the phone's passcode, in his view, would violate the Illinois Constitution. *Id.* at 57a-58a.

REASONS FOR DENYING THE PETITION

I. The Court Lacks Jurisdiction to Review the Illinois Supreme Court's Interlocutory Decision.

To start, the petition should be denied because the Court lacks jurisdiction over it. Although petitioner invokes this Court's jurisdiction under 28 U.S.C § 1257(a), Pet. 2, he fails to "demonstrate to this Court that it has jurisdiction to review the judgment." *Johnson v. California*, 541 U.S. 428, 431 (2004) (per curiam). Nor could he. This Court's jurisdiction to review state-court decisions is limited to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had," 28 U.S.C. § 1257, and the Illinois Supreme Court's decision is interlocutory, not final. Nor does the decision fit into the "four categories of . . . cases in which the Court has treated" a state interlocutory decision on a federal issue "as a final judgment . . . without awaiting the completion of the additional proceedings anticipated in the lower courts." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975). The Court should thus deny review, just as it did in *Pennsylvania v. Davis*, No. 19-1254, and *Andrews v. New Jersey*, No. 20-937, which likewise raised Fifth Amendment issues in interlocutory postures.

1. In the context of a state prosecution, "[t]he general rule is that finality . . . is defined by a judgment of conviction and the imposition of a sentence." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 54 (1989). Here, petitioner has not yet

been tried, much less convicted and sentenced. As a result, the additional proceedings following from the Illinois Supreme Court's decision—entry of an order compelling petitioner to enter the phone's passcode, followed by pre-trial motion practice, and an eventual trial—may moot the federal issue in a variety of ways. For example, petitioner might claim that he is unable to comply with an order to enter the phone's passcode because, given the passage of time, he no longer remembers it. If the trial court determines after a fact-intensive inquiry that petitioner cannot be compelled to unlock the phone for such practical, rather than constitutional, reasons, then the resolution of the federal issue will be immaterial to petitioner's case. Similarly, if petitioner unlocks the phone by entering its passcode, the subsequent search of the phone may produce no evidence beyond that already obtained by the State from other sources, making the federal issue irrelevant. Or, if material evidence is found on the phone, petitioner might succeed in excluding it on some basis other than the Fifth Amendment, such as an objection raised under the Illinois rules of evidence. Finally, even if the State finds material evidence on the phone and that evidence is admitted at trial, petitioner might be acquitted. Any one of these events would likely moot the federal issue presented in this petition.

2. None of the four exceptions identified in *Cox* apply. First, this is not a case "where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Cox*, 420 U.S. at 479. As an example of a case warranting invocation of the first exception, *Cox* pointed to *Mills v. Alabama*, 384

U.S. 214 (1966). See *ibid.* But in *Mills*, the petitioner "concede[d]" that he committed the conduct of which he was accused and that he had "no defense" other than his federal constitutional claim, such that further proceedings in the trial court "would be no more than a few formal gestures leading inexorably towards a conviction." 384 U.S. at 217. Not only did petitioner here not concede his guilt, each of the scenarios described above presents a way in which the Illinois Supreme Court's resolution of the Fifth Amendment issue would not determine the outcome of petitioner's case. If petitioner can no longer remember his passcode, if there is no non-cumulative evidence found on the phone, if evidence found on the phone is excluded at trial, or if the evidence is admitted but petitioner is acquitted, then not only would the state court's interlocutory ruling that petitioner may be compelled to unlock the phone by entering the passcode not have been "conclusive" or have "preordained" the "outcome of further proceedings," *Cox*, 420 U.S. at 479, it would have been entirely irrelevant to the outcome of those proceedings.

The second and third *Cox* exceptions are inapplicable for similar reasons. This case is not one in which "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. If any of the above-described scenarios plays out, there will be no need for further consideration of the Fifth Amendment issue. Nor is the case one "in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. If petitioner unlocks his phone, the State finds

evidence on the phone, that evidence is admitted, and petitioner is convicted based in part on that evidence, he can "once more seek review of his [Fifth Amendment] claim in the Supreme Court of [Illinois]—albeit unsuccessfully—and then seek certiorari on that claim from this Court." *Johnson*, 541 U.S. at 431.

Finally, petitioner's claim fails to satisfy the fourth *Cox* exception, for this is not a case "where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings to come." 420 U.S. at 482-483. As explained, petitioner's trial has yet to take place, and even if the Court were to grant certiorari and reverse, the State would remain free to prosecute petitioner without using any evidence that might be found on his cell phone. Thus, reversal of the decision below would not "be preclusive of any further litigation" but rather would "merely . . . determin[e] the admissibility of evidence in[ ] the state proceedings still to come," which is insufficient to render the decision below effectively final for purposes of this Court's jurisdiction. *Ibid.*; accord *Pierce County v. Guillen*, 537 U.S. 129, 141 n.5 (2003) (fourth *Cox* exception is inapplicable where "respondents remain free to try their tort case without the disputed documents"). The fact that reversal would not be preclusive, standing alone, means that the fourth exception is not satisfied.

Nor would "a refusal immediately to review the state court decision . . . seriously erode federal policy," as the fourth exception also requires. *Cox*, 420 U.S.

at 483. For one, as discussed, the outcome of petitioner's criminal prosecution ultimately may not turn on the Fifth Amendment issue at all, and so he cannot seriously argue that it would erode federal policy for this Court to leave the lower court's opinion in place. At bottom, petitioner's claim is simply an evidentiary dispute of the kind that is common to state criminal practice. Petitioner thus can "make no convincing claim of erosion of federal policy that is not common to all decisions rejecting a defendant's [Fifth Amendment] claim." *Johnson*, 541 U.S. at 430. And a "contrary conclusion would permit the fourth exception to swallow the rule," for "[a]ny federal issue finally decided on an interlocutory appeal in the state courts" that concerned the application of a Fifth Amendment evidentiary privilege "would qualify for immediate review." *Flynt v. Ohio*, 451 U.S. 619, 622 (1981) (per curiam).

3. Indeed, this Court has at least twice denied petitions that presented similar Fifth Amendment issues in interlocutory postures. See Br. in Opp. at 10-13, *Andrews v. New Jersey*, 141 S. Ct. 2323 (2021) (No. 20-937) (explaining that the Court lacked jurisdiction to review New Jersey Supreme Court's interlocutory order compelling the defendant to unlock his phone); Br. in Opp at 10-11, *Pennsylvania v. Davis*, 141 S. Ct. 237 (2020) (No. 19-1254) (explaining that certiorari was unwarranted because "this case arises on an interlocutory appeal," such that "there is no basis to say whether the evidence the Commonwealth seeks is actually important to secure a conviction"). The Court's decision to deny review in these cases makes sense: At minimum, the jurisdictional question is a substantial vehicle issue

that the Court would have to confront were it to grant certiorari in such a case. If the Court were interested in granting certiorari to consider the application of the foregone conclusion doctrine to a cell phone passcode, it should therefore await a case in which the Court unquestionably has jurisdiction. See *infra* pp. 13-14 (discussing *State v. Valdez*, 2023 UT 26, which resolved a Fifth Amendment claim regarding a cell phone passcode after a defendant's conviction). But because the Illinois Supreme Court's decision here is interlocutory, as in *Davis* and *Andrews*, this Court lacks jurisdiction to review it, and the petition should be denied for that reason alone.

II. The Court Should Not Grant Certiorari to Consider the Application of the Foregone Conclusion Doctrine to the Compelled Entry of a Phone's Passcode.

Ignoring the jurisdictional obstacle, petitioner contends that the Court's review is warranted to resolve two divisions in authority that he claims are implicated by the decision below: (1) whether the foregone conclusion doctrine is applicable to the compelled entry of passcodes to unlock encrypted devices and (2) whether, if so, the proper focus of the doctrine (that is, the facts the government must show it already knows) is the passcode itself or the contents of the encrypted device. Pet. 8-9. But neither alleged split warrants the Court's review, even setting aside the petition's jurisdictional defect. First, there is no division as to whether the foregone conclusion doctrine applies to the compelled entry of cell phone passcodes; every court that has considered the question has concluded, like the Illinois Supreme Court below, that it does. Second, any division as to whether the doctrine in this context focuses on the

passcode or the cell phone's contents is shallow, nascent, and lopsided, warranting (at minimum) further percolation. Finally, the decision below is fully consistent with this Court's precedent. The Court should deny review.

A. Petitioner's first question presented does not warrant review.

Petitioner's primary argument is that there is a division of authority as to whether the foregone conclusion doctrine applies to the compelled entry of passcodes to unlock an encrypted device. Pet. 9-13. Petitioner is incorrect. To the State's knowledge, every court to consider the question has reached the same conclusion as the Illinois Supreme Court did: that the doctrine applies. See Pet. App. 29a; *State v. Andrews*, 234 A.3d 1254, 1273-74 (N.J. 2020); *Seo v. State*, 148 N.E.3d 952, 955 (Ind. 2020); *Commonwealth v. Jones*, 117 N.E.3d 702, 709-11 (Mass. 2019). Petitioner's contrary view rests on two state supreme court cases, *Commonwealth v. Davis*, 220 A.3d 534 (Pa. 2019), and *Seo v. State*, 148 N.E.3d 952 (Ind. 2020). But both are entirely consistent with the decision below on this question.

To start, *Davis* does not implicate any division of authority as to whether the foregone conclusion doctrine applies to the compelled entry of a passcode because the case did not address that question at all. *Davis* concerned "[w]hether a defendant may be compelled to *disclose* a password" to the State, 220 A.3d at 537 (emphasis added), not whether a defendant can be compelled to *enter* a password to unlock a device. In concluding that a defendant could not be so compelled, the Pennsylvania Supreme Court held only that the foregone conclusion doctrine was "inapplicable to

compel the disclosure of a defendant's password." *Id.* at 551. Indeed, the state court expressly distinguished the compelled disclosure of a passcode from the compelled entry of a passcode, observing that the latter question was "not at issue." *Id.* at 541. Petitioner's attempt to characterize *Davis* as holding that the foregone conclusion doctrine "d[oes] not apply to the compelled production of computer passwords at all," Pet. 9, thus cannot be squared with the opinion itself. *Davis* does not conflict with the decision below.

The same is true of *State v. Valdez*, 2023 UT 26, which was decided after the filing of the petition here. *Valdez* held that the prosecution's comment at a defendant's criminal trial on the defendant's refusal to provide the police his passcode violated the Fifth Amendment. See *id.* ¶¶ 9, 36. But, like *Davis*, *Valdez* does not implicate any division of authority as to whether the foregone conclusion doctrine applies to the compelled entry of a passcode because the police "asked Valdez to verbally provide his passcode." *Id.* ¶ 8. *Valdez* also makes clear why the distinction courts (including the Illinois Supreme Court in its decision below, see Pet. App. 29a n.7) have drawn between the compelled entry of a passcode and the compelled disclosure of a passcode properly respects the Fifth Amendment privilege. See *id.* ¶ 43 (explaining that "the two scenarios present distinct issues under the Fifth Amendment"); see also *Jones*, 117 N.E.3d at 710 n.9 (recognizing debate over "whether the foregone conclusion exception can apply in cases where the government seeks to compel the defendant to disclose—whether orally or in writing—the actual

password, as opposed to cases requiring merely physically entering it into the device"). As the Utah Supreme Court explained, the foregone conclusion doctrine applies "in cases involving compelled acts of producing evidence to determine whether the act has any testimonial value because the act implicitly conveys information," but this "analysis is not necessary in a case involving a verbal statement that explicitly provides information." *Valdez*, 2023 UT 26, ¶ 36; accord *id.* ¶ 65 (foregone conclusion doctrine is "inapplicable outside of the act-of-production context"); see also Orin S. Kerr, *Compelled Decryption and the Privilege Against Self-Incrimination*, 97 Tex. L. Rev. 767, 779 (2019) (explaining that disclosing a passcode reveals the substance of the passcode to the government, while entering the passcode does not).

Petitioner is also wrong to assert that *Seo* held the foregone conclusion doctrine categorically inapplicable to the compelled entry of a passcode. Pet. 11-12. To the contrary, the Indiana Supreme Court there held—consistent with the decision below—that "the compelled production of an unlocked smartphone is testimonial and entitled to Fifth Amendment protection" unless "the State demonstrates that the foregone conclusion exception applies." *Seo*, 148 N.E.3d at 955. The court proceeded to reject the State's argument that it had satisfied the doctrine, holding that the State had not established that it already knew the information that compelling the defendant to unlock her phone would reveal. *Id.* at 958. Although the court expressed "concerns" about applying the foregone conclusion doctrine to the compelled entry of a passcode, *ibid.*, it did not conclude (as petitioner implicitly concedes, Pet. 11) that

the doctrine is categorically inapplicable; it held only that, assuming the doctrine *could* apply, the State had not shown that it applied "to these facts," 148 N.E.3d at 958; see also *id.* at 962 (declining to "make a general pronouncement" on doctrine's general applicability "because it simply does not apply . . . . on these facts"). There is thus no division of authority as to whether the foregone conclusion doctrine applies to the compelled entry of a passcode.

B. Petitioner's second question presented does not warrant review.

Petitioner also asserts that there is a division of authority as to whether, when applying the foregone conclusion doctrine to the compelled entry of a cell phone's passcode to unlock the phone, the proper focus is on the passcode or the phone's contents—that is, whether, by entering a phone's passcode, a person implicitly admits (a) that the passcode exists, he possesses it, and it is authentic (such that the State must show only that it already had information that the person knows the passcode); or (b) that whatever contents the phone might contain exist, the person possesses them, and they are authentic (such that the State must show that it already had information about the specific contents of the phone). Pet. Br. 13-16. But this division is shallow, nascent, and lopsided, consisting largely of one outlier opinion (*Seo*) that has been rejected by the handful of state supreme courts to have considered the issue and that, to the State's knowledge, has not been addressed by any federal court of appeals. The Court should thus deny certiorari so that the issue can continue to percolate in state and federal courts. See *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995)

(Ginsburg, J., dissenting) ("[W]hen frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.").

1. Contrary to petitioner's assertion, Pet. 15, the division of authority as to the proper focus of the foregone conclusion doctrine in this context is shallow and nascent. Only one state supreme court—the Indiana Supreme Court in *Seo*—holds that the proper focus of a foregone conclusion analysis is the phone's contents, such that the State in a compelled-decryption case must show that it has information that "particular files on the device exist" to compel a defendant to enter a passcode. See 148 N.E.3d at 958. *Seo* created a split with the Massachusetts Supreme Court's opinion in *Commonwealth v. Jones*, which held that the proper focus of such an analysis is the passcode itself. See 117 N.E.3d at 710. But since *Seo*, only two state high courts have considered the issue—the Illinois Supreme Court in the decision below and the New Jersey Supreme Court in *State v. Andrews*, 234 A.3d 1254 (N.J. 2020)—and both have rejected *Seo*'s analysis. Any split is thus nascent and shallow. At minimum, it warrants further percolation so that the Court can obtain the "insights" of additional state and federal courts on the issue. See *Maslenjak v. United States*, 582 U.S. 335, 354 (2017) (Gorsuch, J., concurring). Additional time might also further establish that *Seo* is an outlier, or even convince that court to adopt the majority position on the question presented. Regardless, certiorari is not warranted at this time.

2. Petitioner's efforts to allege a broader division warranting the Court's review lack merit. Petitioner observes that the Florida intermediate appellate court is divided regarding what facts must be foregone conclusions to compel someone to unlock a phone, Pet. 13, 15, but an intramural dispute between intermediate appellate courts of the same state does not warrant certiorari review, see S. Ct. Rule 10(b); Stephen M. Shapiro et al., *Supreme Court Practice* §§ 4.8-4.9 (10th ed. 2013).[2] If anything, the disagreement between districts of the Florida intermediate appellate court suggests that the Florida Supreme Court will ultimately be called upon to resolve the conflict, at which point its decision on the issue may provide a valuable additional perspective for the Court to consider.

Petitioner also cites two decisions of the federal courts of appeals that he says contribute to the division of authority on this question, Pet. 14-15, but both opinions are inapposite. *United States v. Apple MacPro Computer*, 851 F.3d 238 (3d Cir. 2017), arose on plain-error review, and the Third Circuit expressly declined to resolve the question on which petitioner seeks certiorari, concluding only that the magistrate did not plainly err in compelling decryption. Indeed, the court explained that it was "not concluding that the Government's knowledge of the *content* of the devices is

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[2] Petitioner's citation to Kerr, *supra*, as "collecting cases" relating to decrypting digital devices does not deepen the division in authority, see Pet. 15, for the only cases collected in the cited footnote beyond those discussed in the petition are a handful of district court decisions, see Kerr, *supra*, at 768 n.4, and disagreement among district courts does not warrant this Court's intervention, see S. Ct. Rule 10(b).

necessarily the correct focus of the 'foregone conclusion' inquiry in the context of a compelled decryption order," given the "very sound argument" that could be made in favor of "the *password*" as the focus of the inquiry. *Id.* at 248 n.7 (emphasis added). *Apple MacPro* thus does not rest on any holding relevant here.

The other federal case petitioner cites, *In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d 1335 (11th Cir. 2012), also does not address the question presented. That case did not concern the compelled unlocking of a device so that the government could search its contents, but rather the compelled production of the "unencrypted contents" of a device and "any and all containers or folders thereon." *Id.* at 1339. Because the government did not seek compelled access to a device to allow a search for evidence but the compelled production of the evidence itself, the Eleventh Circuit focused on the testimony implicit in producing evidence hidden on a device, not the testimony implicit in unlocking a device. The Eleventh Circuit's conclusion that producing the contents of the device "would be tantamount to testimony by [the accused] of his knowledge of the existence and location of potentially incriminating files" and "of his possession, control, and access to" those files, *id.* at 1346, thus has no bearing on this case.

C. The decision below is correct.

Finally, this Court's review is unwarranted because the Illinois Supreme Court correctly rejected petitioner's Fifth Amendment claim. The court correctly applied this Court's precedent governing compelled acts of production to the compelled act of

production before it—the act of producing a cell phone's passcode by entering it into the phone—and correctly held that petitioner could be compelled to perform that act because the facts he would implicitly assert by doing so were foregone conclusions.

1. As this Court has held, under the Fifth Amendment foregone conclusion doctrine, a testimonial act of producing a piece of evidence may be compelled if the facts that the person would implicitly assert by performing the act are already foregone conclusions, such that the person's performance of the act "adds little or nothing to the sum total of the Government's information." *Fisher*, 425 U.S. at 411. These facts are that (1) the evidence exists, (2) the person possesses or controls it, and (3) the evidence is authentic, meaning that the evidence the person produced is the evidence the person was ordered to produce. See *id.* at 410; see also *Hubbell*, 530 U.S. at 40-41. Accordingly, these are the facts that the State must show are already foregone conclusions. *Fisher*, 425 U.S. at 410-413.

This Court has emphasized that the testimony at issue under the foregone conclusion doctrine is the testimony inherent in the act of producing the evidence, not in the contents of the evidence ultimately produced. See *Hubbell*, 530 U.S. at 40 ("[t]he 'compelled testimony' that is relevant in this case is not to be found in the documents produced" but "the testimony inherent in the act of producing those documents"); *Balt. City Dep't of Soc. Servs. v. Bouknight*, 493 U.S. 549, 555 (1990) ("The Fifth Amendment's protections may . . . be implicated because the act of complying with the government's demand testifies to the existence, possession, or

authenticity of the things produced. But a person may not claim the Amendment's protections based upon the incrimination that may result from the contents or nature of the thing demanded." (internal citations omitted)); *Fisher*, 425 U.S. at 409-410 (distinguishing between the relevant "communicative aspects" of "[t]he act of producing evidence in response to a subpoena" from the irrelevant "contents" of the evidence produced, which were not themselves the product of compulsion); see also Kerr, *supra*, at 776-778 (emphasizing this distinction in this Court's case law).

The Illinois Supreme Court correctly applied this rule to the act of production before it: the act of producing a cell phone's passcode by entering it into a phone. The court correctly identified the facts that petitioner would implicitly assert by entering the phone's passcode as the facts that (1) the passcode exists, (2) petitioner knows it, and (3) the passcode he entered is authentic, in that it is actually the passcode to the phone. Pet. App. 20a, 22a; see also *Andrews*, 234 A.3d at 1274; *Jones*, 117 N.E.3d at 711. The court then correctly determined that those three facts added little or nothing to the information the State already had, and thus were foregone conclusions. Pet. App. 27a-29a. The fact that the phone was passcode-protected rendered the existence of the passcode a foregone conclusion. *Id.* at 27a. The fact that the phone was seized from petitioner and that he identified it as his own in court filings made his knowledge of the passcode a foregone conclusion. *Ibid.* And the authenticity of the passcode he would enter was a foregone conclusion because the State could confirm it by observing whether the phone remained locked after its entry. *Id.* at 28a;

see *Hubbell*, 530 U.S. at 44-45 (authenticity of subpoenaed documents in *Fisher* was foregone conclusion because the government could "independently confirm" their authenticity after their production by consulting the accountants who created them).

2. Petitioner's counterarguments lack merit. Petitioner argues that the foregone conclusion doctrine is applicable only to acts of producing documents, and specifically "documents that involve a third party." Pet. 21-25. But this Court has recognized that the doctrine is not limited to the production of documents. See *Bouknight*, 493 U.S. at 554-555 (respondent could be compelled to produce her child because the State already knew she possessed or controlled the child and could independently confirm the child's authenticity (*i.e.*, identity)); see also *Fisher*, 425 U.S. at 411 (person may be compelled to produce a handwriting exemplar, which implicitly asserts that one has the ability to write and that the exemplar is one's handwriting, because "the first would be a near truism and the latter self-evident"); *United States v. Patane*, 542 U.S. 630, 644 n.7 (2004) (noting "reasonable argument" that defendant could have been compelled to produce a handgun because he had already admitted to possessing it).

And petitioner mistakes the significance of the involvement of third parties in the creation of the documents at issue in *Fisher*. See Pet. 22, 26, 31. The fact that the documents were created by third-party accountants was significant only because the authenticity of any documents produced could be confirmed by consulting those accountants, rendering their authenticity a foregone conclusion. Contrary to

petitioner's suggestion, see Pet. 28, the State is not required to show that it is a foregone conclusion that evidence a person has yet to produce will be authentic. Rather, authenticity is a foregone conclusion as long as the State's ability to authenticate the evidence produced, independent of the assertion of authenticity implicit in the act of production, is a foregone conclusion. See *Hubbell*, 530 U.S. at 44-45; *United States v. Greenfield*, 831 F.3d 106, 118-119 (2d Cir. 2016) (authenticity is foregone conclusion if "the Government can prove that it is a foregone conclusion that the [evidence] . . . could be authenticated by the Government independent of [the person's] production of [it] when the [order] was issued"); *In re Grand Jury Subpoena Dated April 18, 2003*, 383 F.3d 905, 912 (9th Cir. 2004) (similar); *United States v. Stone*, 976 F.2d 909, 911-912 (4th Cir. 1992) (similar); *United States v. Clark*, 847 F.2d 1467, 1473 (10th Cir. 1988) (similar); *United States v. Rue*, 819 F.2d 1488, 1494 (8th Cir. 1987) (similar). Accordingly, the Illinois Supreme Court correctly held that the foregone conclusion doctrine applied to petitioner's act of entering his passcode into his cell phone.

Petitioner also argues that the facts he would implicitly assert by entering the cell phone's passcode are not only the existence, possession, and authenticity of the passcode, but any additional facts that might be reasonably inferred from the act, such as fact relating to his knowledge and possession of whatever files the State may discover on the phone when it performs its search. Pet. 25-29. But this Court has repeatedly rejected this argument that the contents of the evidence produced, rather

than the act of producing the evidence itself, are the proper focus of analysis under the foregone conclusion doctrine. See *supra* pp. 19-20 (discussing *Hubbell*, 530 U.S. at 40; *Bouknight*, 493 U.S. at 555; and *Fisher*, 425 U.S. at 409-410). Thus, contrary to petitioner's arguments, the decision below is correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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