No. 23-5827

IN THE SUPREME COURT OF THE UNITED STATES

KEIRON K. SNEED,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Illinois

REPLY BRIEF FOR PETITIONER

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I. This Court has jurisdiction to decide the questions presented where the decision on the federal question is collateral to any further proceedings, and denying review would erode federal policy by preventing vindication of the Fifth Amendment right for which review is sought.

This Court has long held that the statutory provisions requiring a final judgement, for purposes of this Court's jurisdiction, should be given a "practical rather than a technical construction." *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). The decision here is one in that "small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, 337 U.S. at 546. In arguing that finality is lacking in this case, the State focuses too narrowly on the fact that further proceedings are contemplated because of the interlocutory nature of the Illinois Supreme Court's decision. BIO 6-7. It relies primarily on speculation, both as to this Court's unexpressed reasons for declining review of previous cases, BIO 10-11, and as to the many events that could conceivably happen as its case against Mr. Sneed proceeds. BIO 6-7, 9-10. It does so without grappling with the collateral nature of the Illinois Supreme Court's decision or the one consequence that will unquestionably follow if it takes effect: Mr. Sneed will be ordered to produce the passcode for the phone at issue. Pet. App. 29a, ¶¶115-16.[1] These concerns are central to the existence of finality in this case.

Judgements rejecting another Fifth Amendment claim, that a trial is barred by double jeopardy, are a leading example of pretrial criminal judgments that are considered final for purposes of jurisdiction under 28 U.S.C. § 1257, even though further proceedings

[1] Citations to the decision of the Illinois Supreme Court, *People v. Sneed*, 2023 IL 127968, contained in the petition appendix, also include citation to the relevant paragraphs marked within those opinions.

are set to take place in state court. *See Bullington v. Missouri*, 451 U.S. 430, 437 n.8 (1981) (*citing Harris v. Washington*, 404 U.S. 55 (1971), and *Abney v. United States*, 431 U.S. 651 (1977)). In the *Abney* case, this Court explained that a judgment upholding a pretrial order denying dismissal on double jeopardy grounds is considered final because it meets three criteria: (1) it fully disposes of the claimed issue, (2) it resolves an issue completely collateral to the underlying cause of action, and (3) it involves an important right which would be irreparably lost if review had to await the completion of further proceedings. *See Abney*, 431 U.S. at 658 (*citing Cohen*, 337 U.S. at 546).

In particular this Court explained that, by its nature, a double jeopardy claim is collateral to, and separable from, the issue of guilt at an impending trial. *Abney*, 431 U.S. at 659. It does not in anyway challenge the merits of the charge against the defendant or merely seek suppression of evidence, but rather contests a government's authority to hale him into court in the first place. *Id.* Further, the right conferred by the double jeopardy clause would not truly be vindicated if review were postponed because that right encompasses protection from having to endure a second trial, and not simply being convicted at a second trial. *Id.* at 660-62. In the same manner, orders denying a motion to reduce bail and denying dismissal of a case under the Speech or Debate clause are similarly appealable, because they resolve issues separate from guilt or innocence, and review must occur before trial to be fully effective. *Flanagan v. United States*, 465 U.S. 259, 266 (1984). The decision here is sufficiently final for the same reasons.

In the narrow situation presented by this case, where Mr. Sneed has properly asserted his right against self-incrimination as a shield against compelled action before trial (Pet. App. 109a-111a), the finality criteria of *Harris* and *Abney* are each met. First, it is undisputable, and the State does not contest, BIO 9, that the Illinois Supreme Court's decision fully and finally disposed of the federal issues by resolving them on their merits. Pet. App. 22a-27a, ¶¶ 86-104.

Second, the Fifth Amendment issues in this case are completely collateral and separable from the question of guilt or innocence to be resolved in the further anticipated proceedings. The trial court's original order, denying the State's motion to compel, had no other effect on the case than to prevent the State from forcing Mr. Sneed to participate in accessing the phone, Pet. App. 96a-97a, 108a, and in no way addressed what could or could not be used later during trial. Contrary to the State's contention that review of the decision below would merely determine the admissibility of evidence in further proceedings, BIO 9, the trial court's order had nothing to do with what, if any evidence the State would ultimately be allowed to present at trial, and did not even prohibit the State from searching the phone. The court specifically recognized the continuing validity of the search warrant and the State's right to obtain the contents of the phone under that warrant. Pet. App. 94a. The order only affected one means by which the State could seek to obtain evidence: compelled action by Mr. Sneed. Pet. App. 96a-97a, 108a. The Illinois Supreme Court's decision will have the opposite and singular effect of permitting that compelled action. Pet. App. 29a, ¶¶115-16. Because the elements of the Fifth Amendment issues are independent from the question of guilt or innocence, and separate from the question of whether he can constitutionally be convicted of the charged crimes, the order for which review is sought is sufficiently collateral to be considered final for purposes of jurisdiction. *See Abney*, 431 U.S. at 659-60; *Harris*, 404 U.S. at 56.

Third, the right against self-incrimination, when it is asserted before trial to prevent compelled action, is exactly the kind of right "the legal and practical value of which would be destroyed if it were not vindicated before trial." *United States v. MacDonald*, 435 U.S. 850, 860 (1978). The core of the right against self-incrimination is "our fierce unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt[.]" *Pennsylvania v. Muniz*, 496 U.S. 582, 596 (1990) (*quoting Doe v. United States*, 487 U.S. 201, 212 (1988))(internal quotation marks omitted). As such, similar

to the neighboring right against double jeopardy, it is not merely a right not to be convicted on evidence that has been improperly compelled, but not to be subjected to this cruel choice at all when the right has been asserted. *Cf. Flanagan*, 465 U.S. at 266 ("The right guaranteed by the Double Jeopardy Clause is more than the right not to be convicted in a second prosecution for an offense: it is the right not to be 'placed in jeopardy'–that is, not to be tried for the offense."); *see also Michigan v. Tucker*, 417 U.S. 433, 440-41 (1974) ("an inability to protect the right [against self-incrimination] at one stage of a proceeding may make its invocation useless at a later stage.") Should review be deferred, Mr. Sneed will be subjected to the very evil the right was designed to protect against when, in the criminal proceedings against him, he is ordered to produce a passcode and is faced with the "cruel trilemma" of the choice between honest compliance, falsity, or refusal along with the likely burden of contempt charges. *See Muniz*, 496 U.S. at 596.

The State's argument against jurisdiction relies almost entirely on the four categories of interlocutory cases identified as final in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). BIO 7-10. In *Cox*, this Court recognized that there were "at least four categories" of cases that are final for jurisdictional purposes, despite additional proceedings being anticipated in lower state courts. 420 U.S. at 477. To the extent the kind of "separable or collateral matters" that are final under *Harris* and *Abney* were not specifically addressed in *Cox*, they may be considered a separate class of cases under which finality can be determined. *See* Stephen M. Shapiro et al., *Supreme Court Practice*,§§ 3.6-3.7, pp. 3-23 to 3-26, 3-29 to 3-31 (11th ed. 2019) (discussing "separable and collateral matters" separately from the categories of cases outlined in *Cox*). Thus, regardless of the *Cox* categories, this Court has jurisdiction under *Harris* and *Abney*.

However, the relevant criteria for collateral orders described in *Abney* also closely mirror those of the fourth category of cases described in *Cox*, and they seem to have similar roots. Under the fourth *Cox* category, a judgment is considered final when: (1) the federal

issue has been finally decided (though further proceedings are pending that could render review of the issue unnecessary); (2) reversal of the state court decision would preclude further litigation on the relevant cause of action (and not merely address evidentiary issues in the upcoming proceedings); and (3) refusal to immediately review the state court decision might seriously erode federal policy. *Cox*, 420 U.S. at 482-83. The first criterion, a final decision on the federal issue, is readily comparable to the first criterion in *Abney* of a decision that fully disposes of the claim at issue. *See* 431 U.S. at 658. This has undeniably been met here, where the Illinois Supreme Court issued a final decision resolving the federal issues on their merits. Pet. App. 22a-27a, ¶¶ 86-104.

With regard to the second and third criteria, some of the examples of the fourth category that this Court provided in *Cox* are illustrative. This Court identified *Construction Laborers v. Curry*, 371 U.S. 542 (1963) as a case in the fourth category, noting that one of the two independent bases for jurisdiction in that case was that the question at issue was deemed "separable from the merits and ripe for review in this Court, particularly 'when postponing review would seriously erode the national labor policy requiring the subject matter of respondents' cause to be heard by the . . . Board, not by the state courts.'" *Cox*, 420 U.S. at 483 (*quoting Curry*, 371 U.S. at 550). Similarly, in *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963), the decision was final because the question of venue that was at issue was "a 'separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Cox*, 420 U.S. at 483-84 (*quoting Langdeau*, 371 U.S. at 558). Further, it would serve federal policy to determine the venue in which the banks involved could be sued before further complicated litigation took place. *Cox*, 420 U.S. at 484. Based on these examples, the second criterion of *Cox* is met where the claim at issue is sufficiently collateral to the underlying action that it can be decided separately, without being affected by further

proceedings. The third criterion is met where there is a sufficiently clear federal interest that would suffer if review were not granted.

Here, the second criterion of the fourth *Cox* category is met for the same reason that the decision below can be considered collateral under *Harris* and *Abney*. Whether the State has authority to compel Mr. Sneed to produce a passcode is not related to the merits of the underlying criminal action for forgery, and a decision on that question by this Court will not be affected by further proceedings. The order here does not merely determine the nature and admissibility of evidence. BIO 9. Indeed, the State acknowledges that there may not even be evidence on the phone at issue that it will use in its prosecution. BIO 7. There can be no reasonable claim that the order below only addresses the disposition of evidence when the State has not shown that there is in fact any relevant evidence. Pet. App. 95a-97a. More importantly, for purposes of *Cox*, reversal of the decision below would preclude any further litigation on the State's authority to compel Mr. Sneed to enter the passcode because the Illinois Supreme Court fully decided the merits of that issue. Pet. App. 22a-27a, ¶¶ 86-104.

The fact that *all* further litigation would not be precluded, as the State asserts, BIO 9, is not the relevant question. As the example of *Langdeau* makes clear, the "relevant cause of action" on which litigation must be precluded is the question at issue. In that case, it was the question of which court had proper venue to hear an action against two national banks. 371 U.S. at 557-58. The question was appealable because it could be decided separately from the merits of the plaintiff's underlying cause of action. *Id.* at 558. Just as the venue question in *Langdeau* could be decided, despite the fact that it would not then preclude the plaintiff from bringing the underlying suit, the Fifth Amendment question here can be decided, despite the fact that it will not preclude the State from further pursuing its prosecution. Indeed, it is the first category of cases, not the fourth,

in which the federal issue must be entirely "conclusive" of further proceedings. *Cox*, 420 U.S. at 479. Because reversing the decision below will preclude further litigation on the relevant question, regardless of the merits of the underlying prosecution, this case meets the second criterion for the fourth category of cases under *Cox*. *See id.* at 482-84.

Finally, denial of review would erode federal policy because it would force Mr. Sneed, and all others in Illinois subjected to an order to compel, to face the "cruel trilemma" against which the Fifth Amendment right was designed to protect–self-incriminating compliance, falsity, or refusal with the concomitant specter of contempt. *See Muniz*, 496 U.S. at 596. Moreover, it would continue to leave open the questions presented on the application of the foregone conclusion rationale, which could conceivably "affect almost every criminal case." Brief of *Amici Curiae* States of Utah *et al.* Supporting Petitioner at 1, *Pennsylvania v. Davis*, 141 S. Ct. 237, *denying certiorari* (May 26, 2020) (No. 19-1254). Certainly every person accused of a crime who owns a digital device, and every law enforcement agency wishing to access such a device, will be left wondering whether access to the device can be compelled or not. This is no less serious than the federal policy at issue in *Cox*, where this Court found it would be "intolerable" to leave an important First Amendment question about freedom of the press in an unsettled constitutional posture. *Cox*, 420 U.S. at 484-85. Leaving the questions presented undecided here would do the same with an important Fifth Amendment right.

Neither would this mean that any federal issue decided in an interlocutory appeal, even one involving the right against self-incrimination, would automatically qualify for immediate review, as the State argues. BIO 10, *citing Flynt v. Ohio*, 451 U.S. 619, 622 (1981)(per curiam). The situation here is a narrow one, limited to circumstances involving a challenge to the compulsion itself before the State has obtained any evidence from the accused. This is unlike the familiar situation in which a government has already

obtained self-incriminating evidence, such as a confession or inculpatory statement, and a challenge is made to the admissibility of that evidence–the only practical concern once the evidence has been obtained. *See, e.g., United States v. Green*, 272 F.3d 748, 749-52 (5th Cir. 2001) (reviewing , post-trial, a claim that self-incriminating evidence should have been suppressed). In such situations, review can reasonably await the conclusion of the underlying criminal proceedings because the question is practically limited to the nature and admissibility of evidence. See *Cox*, 420 U.S. at 483.

However, in this specific circumstance which arises before Mr. Sneed has been subjected to an order compelling action, review is warranted to prevent the State from improperly imposing the harsh expedient of compelled action to obtain evidence in the first place. This Court has jurisdiction.

II. The questions presented warrant review by this Court where they address growing national conflicts on the application of the foregone conclusion rationale to the compelled production and use of passcodes.

The State does not contest that the questions presented by Mr. Sneed's petition are important and recurring concerns that will continue to sow confusion in criminal cases and hang over the heads of individuals and law enforcement alike until they are resolved. Pet. 16-20. Instead, its argument that they do not warrant review depends on the contentions either, that there is not a clear division among the courts, or that the division is nascent and requires more time to develop. BIO 11-18. The State is incorrect on both counts.

A. There is a clear and growing divide between state supreme courts on the applicability of the foregone conclusion doctrine to the compelled production or entry of a passcode.

Contrary to the State's position, BIO 12-13, the Pennsylvania Supreme Court's decision in *Commonwealth v. Davis*, 220 A. 3d 534 (Pa. 2019), does implicate a clear division of authority with the Illinois Supreme Court in regard to whether the forgone

conclusion rationale is applicable in the context of either disclosure or entry of a passcode. Though the order at issue in *Davis* was one requiring disclosure of a password, 220 A.3d at 539, the distinction between disclosure and entry was not the basis for its refusal to apply the foregone conclusion rationale. *See* 220 A.3d at 548-49. Indeed, in asserting that the *Davis* court expressly distinguished between the two scenarios, the State cites not to the court's own analysis, but to its recounting of the arguments made by one of the parties. BIO 13; *Davis*, 220 A.3d at 541. That argument, noted in passing, briefly stated that while an order to enter a password was "not at issue[,]" such an action would still be testimonial. *Davis*, 220 A.3d at 541.

Far from relying on the disclosure/entry distinction, the *Davis* court found that the foregone conclusion rationale, as an "exception" to the Fifth Amendment protection was "extremely limited," and had only been considered in the context of "specific existing business or financial records." *Id.* at 549. The court specifically relied on its finding that such records are a "unique category of material" long subject to compelled production, and that this Court has never applied the rationale beyond such documents. *Id.* The *Davis* court concluded that, unlike documentary requests or demands for physical evidence, "the compulsion of a password to a computer cannot fit within this exception." *Id.* at 550. While the Illinois Supreme Court only addressed the compelled entry of a passcode,[2] it directly rejected the reasoning in *Davis* without any discussion of the potential difference between disclosure and entry of a passcode, ultimately finding that there was nothing in the history of the rationale to suggest it could not apply to "acts of producing passcodes to cell phones." Pet. App. 26a, ¶ 102.

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[2] Notably, the State initially sought an order for Mr. Sneed to provide or enter the passcode in this case (Pet. App. 108a), and it was only in the Illinois Supreme Court that it limited its discussion to the act of entering a passcode rather than disclosing it. Pet. App. 18a, ¶ 69n.5.

In addition, the New Jersey Supreme Court squarely split with *Davis* on the applicability of the foregone conclusion rationale in *State v. Andrews*, 234 A.3d 1254, 1270-71, 1273-74 (N.J. 2020). That case also involved a motion to compel the disclosure, rather than the entry, of two passcodes. *Andrews*, 234 A.3d at 1259, 1261. The *Andrews* court, like the *Davis* court, did not base its decision on the disclosure/entry distinction, but treated the two situations as interchangeable. *See id.* at 1273 ("Communicating or entering a passcode . . . is a testimonial act of production.") The Utah Supreme Court's recent decision in *State v. Valdez*, 2023 UT 26, issued after the filing of Mr. Sneed's petition, also is in direct conflict with *Andrews* on this issue. The State is correct (BIO 13-14), that the *Valdez* court based its refusal to apply the foregone conclusion rationale on the fact the order at issue called for disclosure (and therefore called for pure testimony). *Valdez*, 2023 UT 26, ¶¶ 57, 64-65. However, this does not negate the existence of a conflict over the applicability of the rationale, but rather demonstrates that the conflict is broad and growing.

The Indiana Supreme Court's decision in *Seo v. State*, 148 N.E.3d 952 (Ind. 2020) similarly demonstrates the growth of this divide. Though, as the State says, the *Seo* court did not find the foregone conclusion doctrine "categorically inapplicable," BIO 14-15 (a phrase not used in the petition , Pet. 11-12), that court expressed clear concerns with applying the rationale "to the compelled production of an unlocked smartphone[.]" *Seo*, 148 N.E.3d at 958-62. The Illinois Supreme Court considered, and directly rejected those concerns in its decision below, finding the rationale applicable. Pet. App. 23a-26a, ¶¶ 90-92, 98-102. The expanding divide demonstrated in these cases merits review by this Court.

B. The division among courts on the proper application of the foregone conclusion rationale, if it is to be applied, is clearly defined and ripe for resolution.

If the forgone conclusion rationale is applicable in this context, there is a well-established divide on what burden the government must carry in order to meet

its requirements, which is neither nascent nor shallow, as the State contends. BIO 15-16. Reduced to its simplest terms, on one side is the position that the government must show knowledge of the contents of the device it seeks to have decrypted, represented by the Indiana Supreme Court and the Eleventh Circuit Court of Appeals. *See Seo*, 148 N.E.3d at 957-58; *In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d 1335, 1346-47, 1349 (11th Cir. 2012). On the other side is the position that the government need only establish knowledge of the passcode involved, represented by the Massachusetts and New Jersey Supreme Courts, and most recently, the Illinois Supreme Court in the decision below. *See Commonwealth v. Gelfgatt*, 11 N.E.3d 605, 615-16 (Mass. 2014); *Commonwealth v. Jones*, 117 N.E.3d 702, 710-11 (Mass. 2019); *Andrews*, 234 A.3d at 1274-75; Pet. App. 26a-27a, ¶ 104.

In the face of an undeniable split of authority, the State argues that review is not warranted because the Indiana Supreme Court's decision in *Seo* stands alone among courts of last resort. BIO 15-16. In doing so the State seeks to isolate Indiana from the Eleventh Circuit Court of Appeals, which held that the government could not compel the decryption and production of multiple hard drives and their contents, because it had not shown its knowledge that any relevant files existed on the hard drives. *In re Grand Jury*, 670 F.3d at 1346-47, 1349. The State argues that because the subpoena in that case involved compelling the production of the "unencrypted contents" of the devices, rather than "compelled access" in order to search a device, that decision is not applicable. BIO 18. However, this is a distinction without a difference. The "act" the Eleventh Circuit discussed as being compelled was "[r]equiring Doe to use a decryption password[.]" *In re Grand Jury*, 670 F.3d at 1346. Compelling decryption as it was discussed in that case bears no practical difference from compelling the production of an unlocked device, as was rejected in *Seo*. 148 N.E.3d at 957-58. The Eleventh Circuit's decision stands

solidly with the Indiana Supreme Court's decision in requiring the foregone conclusion rationale to be focused on the contents of the device being decrypted through the use of a passcode. *Id.*; *In re Grand Jury*, 670 F.3d at 1347-49.

The decision of the Third Circuit Court of Appeals in *United States v. Apple MacPro Computer*, 851 F.3d 238, 247-48 (3rd Cir. 2017), simply illustrates that the boundaries of the conflict over the focus of the foregone conclusion rationale have been well established. The State is certainly correct about the procedural posture of the Third Circuit's decision (on plain-error review) and that it did not rely on a conclusion as to what the proper focus of the rationale was. *Apple MacPro Computer*, 851 F.3d at 248n.7. However, the Third Circuit clearly identified the two alternative positions that have since been taken by the state supreme courts. *Id.* The fact that it did so before the majority of those cases were decided (all except *Gelfgatt*), shows how well established the two competing positions are.

Moreover, as cited in the petition, lower courts have lined up behind the same two positions staked out by the courts above, drawing clear battle lines on the issue. *See* Pet. 13, 15. Though an issue may not merit review merely because of disputes among intermediate appellate courts or federal district courts, BIO 17, the State's larger argument is that the conflict here is not developed enough to merit review. BIO 15. The fact that the conflicting decisions of the Florida Courts of Appeal, as well as the conflicting scholarly opinions of Professors Sacharoff and Kerr, all line up into the same two camps, Pet. 15-16, shows that the conflict at issue has been clearly defined.

This petition squarely presents the two splits in authority impacted by the Illinois Supreme Court's decision below, and this Court should grant the petition and resolve the questions presented.

III. The decision of the Illinois Supreme Court applying the forgone conclusion rationale as an exception to Fifth Amendment protection was incorrect.

The State argues that the Illinois Supreme Court's decision below correctly applied the foregone conclusion rationale in holding that Mr. Sneed could be compelled to enter the passcode to the phone at issue in this case. BIO 18-21. One of the main flaws in the State's reasoning, and that of the decision below, is the misinterpretation of what is actually being produced, which the State says was correctly considered to be the passcode. BIO 20. But where the State is seeking the entry of the passcode without its disclosure, Pet. App. 18 a, ¶ 69 n.5, the passcode is not being produced at all, and what is being produced by that act are the unencrypted contents of the phone. The State is correct that the content of particular evidence being produced, such as the information contained within subpoenaed documents, is not the relevant testimonial information. BIO 22-23; *United States v. Hubbell*, 530 U.S. 27, 40 (2000). But the information conveyed about the existence, possession, and authenticity of the specific documents themselves is the compelled testimony at issue. See *Hubbell*, 530 U.S. at 40-41. As such, the testimony inherent in the act of production being sought in this case is directly related to information about the files or documents to be found within the phone. *See In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d 1335, 1346 (11th Cir. 2012).

The State fails to support its further argument that this Court has applied the foregone conclusion rationale to situations beyond the production of documents involving third parties, BIO 21, as the examples it relies on did not involve the rationale at all. In *Balt. City Dep't of Soc. Servs. v. Bauknight*, 493 U.S. 549, 555 (1990), this Court suggested that under the act-of-production doctrine, producing a child would have testimonial aspects and implicate the right against self-incrimination. But it did not discuss the foregone conclusion rationale, and found compelled production was permitted

on the completely unrelated basis that the accused had assumed custodial duties regarding the child, and production was required as part of a "noncriminal regulatory regime." *Bauknight*, 493 U.S. at 555-56, 559-61.

Neither did this Court discuss the rationale, much less determine that it was applicable, in *United States v. Patane*, 542 U.S. 630 (2004). Rather, in a footnote at the end of the decision, this Court explicitly said that it was not clear if the government could have compelled production of the firearm at issue, though there was a reasonable argument for it. *Patane*, 542 U.S. at 644 n.7. Finally, the references to hand writing exemplars in *Fisher v. United States*, 425 U.S. 391, 408, 411 (1976), did not accompany a conclusion that they could be compelled under the foregone conclusion rationale. Instead, this Court noted that they were not testimonial because, in *Gilbert v. California*, 388 U.S. 263, 266-67 (1967), it found them to be only an identifying physical characteristic, and outside the Fifth Amendment's protection. *Fisher*, 425 U.S. at 408, 411. None of these cases support expanding the rationale beyond the kind of business and financial documents contemplated in *Fisher*.

Finally, the State appears to argue that, if the foregone conclusion rationale is focused on a passcode, it need not have an independent source to establish the authenticity of the relevant evidence before production. BIO 21-22. But none of the cases to which it cites support this conclusion. All involved an analysis of whether there was an independent source to authenticate specific documents, and the foregone conclusion rationale was only fulfilled where such a source was present. *See United States v. Greenfield*, 831 F.3d 106, 118-24 (2d Cir. 2016); *In re Grand Jury Subpoena Dated April 18, 2003*, 383 F.3d 905, 912-13 (9th Cir. 2004); *United States v. Stone*, 976 F.2d 909, 911-12 (4th Cir. 1992) (finding authentication of beach house records a foregone conclusion where they could be authenticated by the utility companies and rental agent); *United States v. Clark*, 847 F.2d 1467, 1473 (10th Cir. 1988) (finding authentication of tax documents

a foregone conclusion where accountant who prepared them could authenticate them); *United States v. Rue*, 819 F.2d 1488, 1494 (8th Cir. 1987) (finding the authentication of a doctor's patient cards a foregone conclusion where they could be authenticated through comparison to other documents, the patients themselves, and an agent who had examined a blank patient card). *Greenfield* and *Rue* in particular recognized that the appropriate time for the foregone conclusion analysis is the time at which the demand for compulsion is issued, and not after production. *Greenfield*, 831 F.3d at 124; *Rue*, 819 F.2d at 1493.

As laid out in the petition, Pet. 20-29, the Illinois Supreme Court's decision was incorrect to authorize an order compelling Mr. Sneed to enter the passcode for the phone at issue. This Court should grant review and correct these errors.

CONCLUSION

For the foregoing reasons, petitioner, Keiron K. Sneed, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Supreme Court.

Respectfully submitted,

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