No._____

IN THE

Supreme Court of the United States

KHEUNGHAM VONGPHAKDY,
Petitioner.

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN BAKER
FEDERAL PUBLIC DEFENDER

JARED P. MARTIN
ASSISTANT FEDERAL PUBLIC DEFENDER
Counsel of Record

ANN L. HESTER
ASSISTANT FEDERAL PUBLIC DEFENDER

OFFICE OF THE FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF NORTH CAROLINA
129 W. Trade Street, Suite 300
Charlotte, NC 28202
704-374-0720
Jared_P_Martin@fd.org

QUESTIONS PRESENTED

I. During a four-hour custodial interrogation, the interrogating officer never advised Vongphakdy of his *Miranda* rights. The government disputed neither that the interrogation violated *Miranda* nor that the evidence obtained was involuntary and unreliable. Did the Fourth Circuit's opinion concluding that Vongphakdy's statements were non-testimonial and outside the reach of the Fifth Amendment privilege against self-incrimination conflict with this Court's decisions?

II. The government did not argue on appeal that any error in admitting evidence of Vongphakdy's custodial statements was harmless beyond a reasonable doubt. Did the Court of Appeals err in concluding that any error would be harmless beyond a reasonable doubt when the government made no attempt to establish harmlessness?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Kheungkham Vongphakdy respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's unpublished panel opinion (Pet. App. A1-A5) is available at 2023 WL 6638122. The district court's judgment (Pet. App. A9-A14) is unreported.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on October 12, 2023. Pet App. A1-A8. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment states in relevant part: "[n]o person . . . shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law . . ." U.S. Const. Amend. V.

Section 1425(a) of Title 18 of the United States Code provides:

> (a) Whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship . . . . Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime) or 15 years (in the case of any other offense), or both.

STATEMENT OF THE CASE

This Court should grant certiorari because the Fourth Circuit's ruling that a person's involuntary and incriminating statements revealing comprehension and ability to speak a particular language are non-testimonial and outside the reach of the Fifth Amendment conflict with this Court's decisions and are wrong. *See Pennsylvania v. Muniz*, 496 U.S. 582, 589 (1990); *Doe v. United States*, 487 U.S. 201, 210 (1988). Further, in the absence of any government attempt to establish harmlessness, and where the disputed evidence was the crux of the government's effort to prove the requisite mental state for the offense of conviction, the Court of Appeals erred in ruling that any *Miranda* error would be harmless beyond a reasonable doubt.

A. Factual background

Vongphakdy was born in Laos in 1974, during a turbulent time in that region of the world. After "the swift fall of Saigon in 1975," many from Laos, Vietnam, and Cambodia fled communist persecution, and their mass exodus "marked the beginning of what would become one of the largest and longest refugee crises in history." *See* Fourth Circuit Joint Appendix (JA) at 561. In 1984, when Vongphakdy was nine years old, he and his family became part of this wave of refugees who fled their native lands in fear for their lives. *Id.* He and his family endured violence, constant hunger, and crowded and unsanitary living conditions in prison-like refugee camps for two-and-a-half years before coming to the United States. JA561-64.

After finally settling in the United States at the age of 12, Vongphakdy became a lawful permanent resident as a refugee. JA566; JA577-578. However, he struggled

with adapting to life in the new country. *Id.* He had received very little education in Laos, and he had received no education in the refugee camps. *Id.* English was not his first language, and he had to learn the Latin alphabet. *Id.* None of the family knew English when they entered the United States, and Vongphakdy continued to experience language barriers and comprehension issues into his adulthood. *Id.* In fact, Vongphakdy reported that he "did not speak English very well" in submitting immigration paperwork. *See* JA496-597.

In July 2011, Vongphakdy submitted an application for naturalization (N-400) stating that he had not committed a crime or offense for which he was not arrested. JA12-13. In his naturalization interview, he signed the application for naturalization in the presence of a U.S. Citizenship and Immigration Services (USCIS) officer and swore that the contents of his application were all true and correct. *Id.* Vongphakdy was granted a Certificate of Naturalization in August 2011. *Id.*

In November 2013, police officers asked Vongphakdy to come to a police station, where they interrogated him in a small, closed room with two officers who positioned themselves so that Vongphakdy was trapped in the room. JA650; JA705-706 (video and audio recording of Police Interview). *Id.* The officers never advised Vongphakdy of his *Miranda* rights. *Id*.

Vongphakdy had difficulty at times understanding the officers during the interrogation. *Id*. Officers repeatedly accused him of sexually abusing minors and asked him the same, accusatory questions over and over again. *Id.* Despite Vongphakdy's denials, officers told him that "you can see how guilty you look" and

that they did not believe him. *Id.* Officer O'Dell raised her voice and told Vongphakdy that she was frustrated. *Id.* Because of her frustration, she told Vongphakdy that she was going to take a break. *Id.* She instructed him to "hang out" in the room while she left. *Id.* He was left in the room alone for two hours. The interrogation lasted a total of four hours.

After Vongphakdy's interrogation, he was immediately arrested and charged in state court with child sex offenses alleged to have occurred in 2008 and 2009, before he became a naturalized citizen. *See* JA224. In April 2014, Vongphakdy pled guilty to two counts of a second-degree sex offense. He was sentenced to a term of imprisonment of between 116 and 158 months for these convictions. *Id.*

B. Procedural history of the instant offense

More than seven years later, in July 2021, a federal grand jury in the Western District of North Carolina charged Vongphakdy with naturalization fraud under 18 U.S.C. § 1425(a) based on his "no" response to the question on an immigration form that asks, "Have you ever committed a crime or offense for which you were not arrested?" *See* JA12-13. To establish a violation of § 1425(a), the government was required to prove that Vongphakdy acted "knowingly." 18 U.S.C. § 1325(a).

Before trial on the immigration fraud charges, defense counsel moved to suppress evidence of Vongphakdy's November 2013 custodial statements based on the Fifth Amendment and *Miranda*. JA647-673; JA122-160. Vongphakdy argued both that officers violated his *Miranda* rights and that his statements were involuntary, given the officers' coercive techniques and his specific background and language and

comprehension deficits. JA647-659. After initially denying Vongphakdy's motion to suppress his statements, the district court set an evidentiary hearing on Vongphakdy's motion for reconsideration, where the government stated that it "is not planning to use any of that evidence in its case in chief." JA258. However, the government informed the Court that it *would* present testimonial evidence from Officer O'Dell concerning whether "the conversation" with Vongphakdy during the interrogation "took place in English, whether or not she had to repeat questions, and her understanding of his ability to speak English fluently with her." JA263. Defense counsel objected to "any kind of testimony from the officer about what occurred in that interview." JA263-264. Defense counsel explained that "the officer testifying to anything my client said or did during that interview is inadmissible because my client was never given his *Miranda* rights and he was clearly in custody and being interrogated." *Id.*

At trial, defense counsel again asked the court to exclude "any testimony" about Vongphakdy's statements made during the interrogation as a "violation" of Vongphakdy's Fifth Amendment Rights. JA477. The court nevertheless permitted the government to ask "questions that would elicit answers along the line of he seemed to have no trouble understanding what I was saying and interactions like that." JA478. Defense counsel responded that "even if it's relevant, it's still a violation of his Fifth Amendment rights to talk about that conversation at all." *Id.*

At trial, Vongphakdy offered evidence that the question on the naturalization application was confusing; that his difficulties with the English language made it even

harder to understand the question; and that he therefore didn't knowingly make a false statement on the application. JA400-410. However, the court allowed Officer O'Dell to testify, over defense objection, that Vongphakdy spoke in English when she questioned him; that she did not have "any difficulties understanding him"; that she did not "feel like there was a language barrier"; that she did not have "any concerns that Mr. Vongphakdy did not understand"; and that she did not use an interpreter. JA337.

The government relied on O'Dell's testimony in both its opening and closing statements. JA286, JA390-391. In opening, the government argued: "you'll also hear testimony [from O'Dell] that he speaks and understands English well and that he should have known how to answer that question correctly." JA286. And in closing the government argued that O'Dell "was able to speak with him in English. She did not have any difficulty understanding his statements that were made to her in English. He did not request an interpreter." JA 290-91. The government further argued that O'Dell's interaction did not reflect that Vongphakdy had an "inability to understand English." JA290-291. The jury returned a verdict of guilty.

C. The Fourth Circuit's ruling below

On appeal to the Fourth Circuit, Vongphakdy argued that O'Dell's testimony about his ability to speak and understand English during the interrogation violated *Miranda* and was inadmissible. First, he argued that the government erroneously characterized the evidence as non-testimonial. Second, he argued that the government had not contested that his statements made during O'Dell's interrogation were

involuntary because officers exploited his language and comprehension barriers, his lack of understanding his rights, and his childhood experiences with violent authorities with coercive psychological tactics. Third, he pointed out that the government had made no attempt to demonstrate that admission of Vongphakdy's statements was harmless and could not do so because O'Dell was the only witness who had personal recollection of Vongphakdy's ability to comprehend the English language and effectively communicate in English. He argued that the government relied on her testimony describing his ability to understand her in both its opening and closing statements.

The Fourth Circuit affirmed, finding that Vongphakdy's statements admitted into evidence were non-testimonial because "the language spoken by a person during otherwise privileged communications, while potentially incriminating, does not, by itself, 'relate a factual assertion or disclose information' and that it is therefore not testimonial evidence subject to suppression under *Miranda*." *United States v. Vongphakdy*, 2023 WL 6638122, *1 (4th Cir. 2023) (quoting *United States v. Oriakhi*, 57 F.3d 1290, 1299 (4th Cir. 1995)). And even though the government did not claim that admission of the evidence was harmless, the Fourth Circuit found harmlessness on its own. *Id.* at *2. The Fourth Circuit held: "assuming that a *Miranda* violation occurred, we conclude that the Government has met its burden to establish "that the admission of the [statement] did not contribute to [Vongphakdy's] conviction." *Id.*

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's ruling on two important federal questions conflicts with this Court's decisions and is wrong.

The Fourth Circuit's rulings conflict with this Court's decisions in two ways. First, under this Court's well-established precedent, a defendant's thought processes, understanding, and knowledge revealed during custodial interrogations are testimonial in character and are therefore protected by the Fifth Amendment and by *Miranda*'s prophylactic rule. The Fourth Circuit's holding that Vongphakdy's statements revealing his mental processes and understanding of O'Dell's questioning were non-testimonial and not protected by the Fifth Amendment privilege against self-incrimination cannot be squared with this Court's precedents. Second, the Fourth Circuit's holding that the error is harmless violates this Court's precedents requiring that the government prove harmlessness beyond a reasonable doubt. This Court should grant certiorari because the Court of Appeals has decided these important federal questions in a way that conflicts with relevant decisions of this Court.

A. The Court of Appeals' ruling that Vongphakdy's custodial statements were non-testimonial conflicts with this Court's precedents.

This Court has held that the Fifth Amendment privilege against self-incrimination applies to "evidence of a testimonial or communicative nature." *Pennsylvania v. Muniz*, 496 U.S. 582, 589 (1990). An accused's communication is testimonial if it "explicitly or implicitly, relate[s] a factual assertion or disclose[s] information." *Doe v. United States*, 487 U.S. 201, 210 (1988).

Under this Court's precedent, a defendant's statements revealing his thought processes and ability to understand questions during custodial interrogation are testimonial and protected by the Fifth Amendment. For instance, in *Muniz*, the defendant was convicted of driving under the influence of alcohol after the trial court admitted video evidence showing that he was unable to answer the officer's question. *Muniz*, 496 U.S. at 585-87. The officer asked Muniz, "When you turned six years old, do you remember what the date was?" And Muniz responded, "No, I don't." *Id.* at 586. The Supreme Court held that "the sixth birthday question . . . required a testimonial response." *Id.* at 598. The Court reasoned that the content of Muniz's answer was incriminating and testimonial because "the trier of fact could infer from Muniz's answer (that he did not know the proper date) that his mental state was confused." *Id.* at 592. Because the "incriminating inference" of "mental confusion" stemmed from a "testimonial aspect" of Muniz's response, the admission of his inability to understand and accurately answer the question violated his Fifth Amendment privilege against self-incrimination and should have been suppressed. *Id.* at 593.

This Court explained in *Muniz* that nontestimonial evidence about physical characteristics of speech includes the "slurring of speech," "lack of muscular coordination," and "the physical properties of the sound produced" by an individual's voice. *Muniz*, 496 U.S. at 592. Such physical characteristics are not protected by the Fifth Amendment because they do not require the "disclos[ure] [of] any knowledge . . . [the suspect] might have,' or [require the suspect] 'to speak his guilt.'" *Id.* at 594.

Here, O'Dell did not testify to any physical characteristics of Vogphakdy's speech. O'Dell testified only about Vongphakdy's understanding of her questions and his purported "knowledge" of the English language. The government used this evidence so that "the trier of fact could infer" that Vongphakdy had the ability to understand and effectively communicate in English, which undercut his defense that he didn't knowingly give false answers to questions on the naturalization form. *Id.* at 592.

Vongphakdy's responses revealing understanding of the English language are no different than the responses in *Muniz* that revealed the driver's impairment and mental confusion. As in *Muniz*, the "incriminating inference" of Vongphakdy's thought processes stemmed from a "testimonial aspect" of his response, and the admission of O'Dell's testimony violated his Fifth Amendment Right against self-incrimination. *Id.* at 593.

Other decisions of this Court have similarly recognized that a defendant's thought processes and knowledge revealed through statements made in response to custodial interrogations are testimonial in character and therefore are protected by the Fifth Amendment. *See United States v. Nobles*, 422 U.S. 225, 233 (1975) ("The Fifth Amendment privilege against compulsory self-incrimination ... protects 'a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation'"); *Doe*, 487 U.S. at 210, f.n. 9 (noting agreement that "[t]he expression of the contents of an individual's mind" is testimonial communication for purposes of the Fifth Amendment); *United States v. Wade*, 388 U.S. 218, 223 (1967)

(recognizing that the privilege protects against requiring an individual "to disclose any knowledge he might have," or "to speak his guilt"); *Kastigar v. United States*, 406 U.S. 441, 458 (1972) ("a prohibition on use and derivative use secures a witness' Fifth Amendment privilege against infringement by the Federal Government").

Accordingly, because Vongphakdy's interrogation disclosed his knowledge and understanding of the English language, those statements made are protected by the Fifth Amendment, and officers were required to administer *Miranda* warnings before eliciting them through interrogation. Even though O'Dell failed to provide Vongphakdy the required *Miranda* warnings, the district court allowed her to testify that Vongphakdy "seemed to have no trouble understanding" her questions. JA337. And O'Dell testified that she did not have "any concerns that Mr. Vongphakdy did not understand" her questions and that she did not have any difficulties "understanding him." JA337. The court allowed this testimony regarding Vongphakdy's unwarned, incriminating statements even though these statements "relate[d] a factual assertion or disclose[d] information" regarding Vongphakdy's comprehension and ability to understand English. *See Doe*, 487 U.S. at 210. Using this evidence, the government asked "the trier of fact" to "infer" that Vongphakdy understood English to discredit Vongphakdy's defense that his English-language deficits caused him to misunderstand the confusing question on the naturalization application. *See* JA286, JA390-391; *Muniz*, 496 U.S. at 592. Because O'Dell's testimony disclosed the "expression of the contents of . . . [Vongphakdy's] mind," the statements she testified

about were testimonial and should have been suppressed. *See Doe*, 487 U.S. at 210, f.n. 9.

B. The Court of Appeals' mis-application of this Court's harmless-error decisions requires this Court's review.

This Court has "repeatedly reaffirmed the principle" that, to uphold a conviction in the face of a constitutional error, the reviewing court must be able to "confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Rose v. Clark*, 478 U.S. 570 (1986). Further, this Court held in *Chapman v. California*: "Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless." 386 U.S. 18, 24 (1967); *see also United States v. Olano*, 507 U.S. 725, 734-35 (1993) (acknowledging that in cases of preserved error, government "bears the burden of persuasion with respect to prejudice" and that "burden shifting" to defendant occurs on plain-error review); *United States v. Vonn*, 535 U.S. 55, 62 (2002) (Rule 52(a) provides "generally for 'harmless-error' review, that is, consideration of error raised by a defendant's timely objection, but subject to an opportunity on the Government's part to carry the burden of showing that any error was harmless, as having no effect on the defendant's substantial rights."); *Greer v. United States*, 141 S. Ct. 2090, 2102 (2021) (Sotomayor, J., concurring) ("the Government retains the burden to show that any constitutional error is harmless beyond a reasonable doubt").

Despite this abundant precedent placing the burden on the government to prove a constitutional error harmless beyond a reasonable doubt, the Fourth Circuit

effectively shifted the burden to Vongphakdy to disprove harmlessness. And this is a case where the disputed evidence formed the crux of the government's proof of the requisite mental state of knowledge.

Here, the government did not argue that its use of evidence about Vongphakdy's statements made in the unwarned interrogation was harmless beyond a reasonable doubt. Considering the centrality of that evidence to its proof that Vongphakdy acted knowingly when he falsely answered "no" to the question on the naturalization form, the government's failure to argue harmlessness is unsurprising. O'Dell was the only witness who had personal recollection of Vongphakdy's ability to comprehend the English language and effectively communicate in English. And the government relied on this portion of her testimony in both its opening and closing statements arguing that Vongphakdy had an ability "to understand English" during O'Dell's interrogation. JA286, JA390-391. Because proving a violation of § 1425(a) requires proof of a "knowing" mental state, this evidence was of the utmost "importance . . . to the government's case" and negatively impacted the "credibility of other evidence" Vongphakdy relied on to establish his difficulties with understanding the English language. *United States v. Giddins*, 858 F.3d 870, 886 (4th Cir. 2017).

Under these circumstances, the Fourth Circuit's ruling that the error was harmless beyond a reasonable doubt, which shifted the burden of persuasion to Vongphakdy in the face of the government's decision not to argue that the error was harmless beyond a reasonable doubt, conflicts with this Court's well-established

decisions governing harmless error. This error by the Fourth Circuit provides this Court with an additional reason to grant certiorari on an important federal question.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

John Baker
FEDERAL PUBLIC DEFENDER FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

/s/ Jared P. Martin
Assistant Federal Public Defender
Counsel of Record

Ann L. Hester
Assistant Federal Public Defender
129 West Trade Street
Suite 300
Charlotte, NC 28202
704-374-0720
Jared_P_Martin@fd.org

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