No. 20210175-SC

IN THE
UTAH SUPREME COURT

State of Utah,

Plaintiff-Petitioner,

v.

Alfonso Valdez,

Defendant-Respondent.

Brief of Amicus Curiae National Association of Criminal Defense Lawyers

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On writ of certiorari to the Utah Court of Appeals

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STATEMENT OF INTEREST

The National Association of Criminal Defense Lawyers (NACDL), founded in 1958, is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL has a nationwide membership of many thousands of direct members, including many in Utah, and up to 40,000 members with affiliates comprised of private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. It has a particular interest in cases that involve the Fifth Amendment right against self-incrimination and the compelled decryption of digital devices. NACDL has filed many amicus briefs in cases involving digital privacy rights, including *Carpenter v. United States*, 138 S. Ct. 2206 (2018); *Riley v. California*, 573 U.S. 373 (2014); and *United States v. Jones*, 565 U.S. 400 (2012).

This case presents a matter of first impression in Utah; whether the State's elicitation and use of testimony about Alfonso Valdez's refusal to provide a swipe code for his cell phone constituted impermissible commentary on an exercise of his Fifth Amendment right to remain silent. The resolution of this question will impact not only Valdez, but all criminal defendants in the State of Utah. This Court's decision will also add an important voice to the developing conversation in this critical area of law. NACDL regularly provides advice to its members on issues pertaining to technology and criminal justice and has many years of experience examining new issues related to self-incrimination, privacy, and cell phones. As an association with members in Utah and many other jurisdictions that have

not yet resolved this issue, NACDL has a vested interest in having its voice heard in resolving this important question.

ARGUMENT SUMMARY

The Fifth Amendment unequivocally prohibits comment to the jury on the Defendant's exercise of a right to remain silent. Yet here the State, over the Defendant's objection, asked the jury to infer the Defendant's guilt from his refusal to disclose the passcode to his phone. This was a clear constitutional violation, not addressed in the State's brief, and it is an additional basis to affirm.

Adopted amid monumental changes in criminal procedure, the words of the Fifth Amendment's self-incrimination clause should be given their ordinary meaning, reflecting the aspirational spirit of colonial resistance to British control—not a codification of historical practices the State seeks to revive. Indeed, the Fourteenth Amendment's early interpretations should serve as a cautionary tale—illustrating the danger of looking to historical practices as a means of limiting the scope of an amendment written in words that sharply contrast with existing practices.

Here, both the text and structure of the Fifth Amendment lay out a bright line against compelling a defendant to be a witness against himself. So this Court should reject the State's efforts to expand an exception that has no foundation in the governing text.

Finally, the State argues, without citation to authority, that a Fourth Amendment warrant may be employed to defeat a Fifth Amendment privilege. But the opposite is true. The State has never been able to obtain a warrant for the contents of the Defendant's mind. This Court should not take that step.

ARGUMENT

I. The Fifth Amendment Prohibits Using Mr. Valdez's Refused Passcode Disclosure as Evidence of Guilt.

During Mr. Valdez's arrest, a cell phone was found on his person and seized by police. *See* R. 1473. The phone was secured with a passcode, meaning a user could not access its contents without providing the correct code. *See id.* When police obtained a warrant to search the phone, they asked Mr. Valdez to unlock the phone using a passcode, something he refused to do. *Id.* at 1474–75. At trial, the prosecution introduced Mr. Valdez's refusal to provide the passcode as evidence of guilt, *id.* at 1474–75, 1767–68, something that has been strictly prohibited by the United States Supreme Court for more than fifty years.

Permitting the State to use a criminal defendant's silence as evidence of guilt would set a dangerous precedent. For the reasons below, this Court should affirm the appellate court's decision.

A. It Is Settled Law that the State Cannot Raise a Criminal Defendant's Silence as Evidence of Their Guilt.

While the Fifth Amendment does not forbid "'the mere mention' of a defendant's decision" to remain silent, *State v. Saenz*, 2016 UT App 69, ¶ 10 (citing *State v. Harmon*, 956 P.2d 262, 268 (Utah 1998)), it is long-settled that the Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California*, 380 U.S. 609, 615 (1965); *see also, e.g.*, *United States v. Robinson*, 485 U.S. 25, 32 (1988) ("Where the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, *Griffin*

holds that the privilege against compulsory self-incrimination is violated."); *Baxter v. Palmigiano*, 425 U.S. 308, 318-319 (1976) ("In criminal cases, where the stakes are higher and the State's sole interest is to convict, *Griffin* prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt."); *State v. Byrd*, 937 P.2d 532, 534 (Utah Ct. App. 1997) ("The United States Supreme Court has held that, under the Due Process Clause of the Fourteenth Amendment, the prosecution may not use a defendant's post-*Miranda* silence for impeachment purposes. . . . Similarly, the prosecution may not use a defendant's post-*Miranda* silence as substantive evidence of guilt.") (citations omitted).

Here, despite this foundational holding (and its many affirmations), the trial court overruled Mr. Valdez's objection to the use of his refused disclosure of the passcode as evidence of guilt and asserted that, "[t]here are a lot of times when people refuse to answer questions and the officer has the right to say this person invoked their Fifth Amendment Right . . . . It happens. We get that all the time. I don't think that's an unusual scenario of circumstance." R. 1474. The State proceeded to introduce Mr. Valdez's refusal to comply with the warrant for his passcode as evidence of his guilt. R. 1474-75. This was fundamental constitutional error, as explained by the appellate court. *See State v. Valdez*, 2021 UT App 13, ¶¶ 48, 53 ("[T]he State's evidentiary use of Valdez's refusal to provide the swipe code violated Valdez's rights under the Fifth Amendment, and the trial court erred by allowing such evidence to come in and by allowing the State to use it in this manner. . . . [And] the State has not carried its burden of demonstrating that the error was harmless beyond a reasonable doubt.").

No matter how this Court resolves the other issues in this case, it remains error for the State to comment on a defendant's silence as evidencing guilt, something the State did here. Therefore, this Court should affirm.

B. The Words of the Fifth Amendment's Privilege Against Compelled Self-Incrimination Should Be Given Their Plain Meaning.

The United States Constitution arose in a time of "epochal change[s]" in criminal procedure. John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1068-69 (1994). Pre-1791 "criminal procedure reflected less tenderness toward the silence of the criminal accused than the received wisdom has claimed. The system could more reasonably be said to have depended on self-incrimination than to have eschewed it, and this dependence increased rather than decreased . . . in colonial America." Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1087 (1994). Under this system, pre-ratification, "any notion of the defendant's privilege against self-incrimination was but a phantom of the law." *Id.* at 1104.

The same was true in England. The Latin maxim *nemo tenetur prodere seipsum*, that a defendant could not be compelled to accuse himself, cropped up "during the Tudor-Stuart constitutional struggles." Langbein, *supra*, at 1081, 83-84. But it was "an abstract principle or maxim worthy of respect" that "*had no determinate meaning when applied to criminal procedure within the common law courts*." *Id.* at 1081. Thus, although the maxim makes occasional appearance in the legal cases preceding the Founding, "the slogan did not make the privilege; it was the privilege, which developed much later, that absorbed and

perpetuated the slogan" through the work "of defense counsel in the late eighteenth and early nineteenth centuries." *Id.* at 1083-84. Across the decades immediately preceding and following the adoption of the Constitution, "defense counsel broke up the" old criminal procedure that forced the defendant to the center of a proceeding, giving rise to "the privilege against self-incrimination." *Id.* at 1069-71.

Adopted in the middle of this transformation, rather than at its conclusion, the "constitutional provisions of the late eighteenth century protecting against compulsory self-incrimination were . . . reflections of the contentious prerevolutionary constitutional debate, in which North American advocates made sweeping and often antiquarian legal claims protecting or expanding their power to resist Imperial control." Moglen, *supra*, at 1087.

In short, the Fifth Amendment's enacted text did not constitutionalize a well-developed common law doctrine; rather, it employed ordinary language, evoking a maxim with deep historical roots that was just beginning to find meaningful legal currency.

C. The Fourteenth Amendment's History Is Useful Guidance When Considering an Amendment's Curative Purpose.

Some jurists have pointed to the sorry plight of the criminal defendant at the time of the Founding as evidence to limit the scope of the Fifth Amendment's protections against self-incrimination. *E.g.*, *Mitchell v. United States*, 526 U.S. 314, 332-33 (1999) (Scalia, J., dissenting). But because the Fifth Amendment employs ordinary language that contrasts with historical practice that was in a state of flux when it was adopted, it is not only a mistake but also dangerous to look to historical practices to limit the meaning and scope of a criminal defendant's right not to be a witness against himself.

For an illustration of this peril, one need only look to the tragic history of the Fourteenth Amendment's early interpretation. By its text, the Fourteenth Amendment represented a fundamental transformation of American law and practice—not a codification of some common law predecessor. Still, in *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896), and other cases of its period, the Supreme Court used history and earlier judicial practice to limit the scope of the Fourteenth Amendment—without meaningful inquiry into the ordinary meaning of the enacted text—entrenching segregation and Jim Crow in American law for more than half a century, with consequences that reverberate to this very day. Many modern originalists see *Plessy*'s overruling in *Brown v. Board of Education*, 347 U.S. 483 (1954), as a better reflection of the Fourteenth Amendment's original meaning—even though *Brown* was decided almost a century after the Fourteenth Amendment was adopted. *E.g.*, Michael W. McConnell, *The Originalist Case for* Brown v. Board of Education, 19 HARV. J.L. & PUB. POL'Y 457, 458 (1996).

Like the Fourteenth Amendment's unequivocal statement that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws," the Fifth Amendment's assertion that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself," contrasts with the practices that preceded it. U.S. CONST. amends. V, XIV. Thus, while history may evidence some of the nascent applications of the privilege against self-incrimination, the Court should be cautious before applying early cases or historical practices in criminal procedure as definitive limits on the Fifth Amendment's scope.

D. The Fifth Amendment's Own Language Demonstrates the Self-Incrimination Clause's Only Limitation Is That It Is Reserved for Criminal Cases.

The familiar "canon of construction—*expressio unius est exclusio alterius* (expressio unius)—holds that 'to express or include one thing implies the exclusion of the other, or of the alternative.'" *McKitrick v. Gibson*, 2021 UT 48, ¶ 38 (quoting *Expressio unius est exclusio alterius*, *Black's Law Dictionary* (11th ed. 2019)). Here, comparing the Fifth Amendment's privilege against self-incrimination to the other provisions immediately surrounding it illustrates the relative absoluteness of this privilege. For example, the Fifth Amendment begins with the assertion that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, *unless* on a presentment or indictment of a Grand Jury, *except* in cases arising in the land or naval forces, or in the Militia, *when* in actual service in time of War or public danger." U.S. CONST. amend. V (emphasis added). Three times the drafters illustrated their ability to limit the scope of a right's application, with the limiting language "unless," "except," and "when." Again, immediately following the self-incrimination clause, the drafters included limiting language: "nor be deprived of life, liberty, or property, *without* due process of law; nor shall private property be taken for public use, *without* just compensation." *Id.* (emphasis added).

The self-incrimination clause includes only one limitation—it applies only "*in* any criminal case." *Id.* (emphasis added). Within the sphere of criminal cases, the text is absolute: "[n]o person . . . shall be compelled . . . to be a witness against himself"—full stop. *Id.* By asking this Court to permit the defendant's silence to be used against him, the

State asks this Court to ignore this bright line in the structure of the Fifth Amendment's text. It should not do so. *McKitrick*, 2021 UT 48, ¶ 38 (holding "that the expression of one [term] should be interpreted as the exclusion of another." (quoting *Bagley v. Bagley*, 2016 UT 48, ¶ 10) (alteration in original)).

II. The State's Search Warrant Authority Does Not Override a Defendant's Fifth Amendment Rights.

The Fifth Amendment protection against compelled self-incrimination cannot be defeated by a search warrant, even if that search warrant is issued consistent with Fourth Amendment standards. *See In re Addonizio*, 248 A.2d 531, 543-44 (N.J. 1968) ("[The Fifth Amendment] is more pervasive than the Fourth, for it seems evident that a subpoena upon . . . a defendant could not be used to obtain things which could be seized from him under a search warrant. For example, he could not be subpoenaed to produce the gun or the loot, *no matter how probable the cause*, for the Fifth protects the individual from coercion upon him to come forward with anything that can incriminate him.") (emphasis added) (citing *Schmerber v. California*, 384 U.S. 757, 763-65 (1966)). Rather than assume the amendments operate in silos, a more appropriate consideration is that they work in harmony and their protections must be balanced. *See* Bryan H. Choi, *For Whom the Data Tolls: A Reunified Theory of Fourth and Fifth Amendment Jurisprudence*, 37 CARDOZO L. REV. 185, 189, 192 (2015).

Law enforcement's need to search new technologies has not impacted the primacy of Fifth Amendment protections, as demonstrated by the many courts that have rejected—on Fifth Amendment grounds—the government's efforts to compel a defendant to speak

the letters, numbers, or pattern of his password. *See, e.g.*, *Eunjoo Seo v. State*, 148 N.E.3d 952, 962 (Ind. 2020) (finding that forcing a defendant to unlock her iPhone would violate her Fifth Amendment right against self-incrimination); *G.A.Q.L. v. State*, 257 So.3d 1058, 1061–62 (Fla. Dist. Ct. App. 2018) ("[B]eing forced to produce a password is testimonial and can violate the Fifth Amendment privilege against compelled self-incrimination"); *In re Grand Jury Subpoena Duces Tecum Dated Mar. 25, 2011*, 670 F.3d 1335, 1349 (11th Cir. 2012) (holding that the Fifth Amendment protects an individual's refusal to decrypt their devices); *United States v. Kirschner*, 823 F. Supp. 2d 665, 669 (E.D. Mich. 2010) (requiring a defendant to produce his computer password would violate his Fifth Amendment privilege). Here, the State concedes this point (at 30), admitting that a "valid" Fifth Amendment claim would defeat its ability to execute search warrants. Given the significant Fifth Amendment rights at issue, this Court should not permit the State to use a warrant to compel a passcode.

CONCLUSION

The State's effort to compel Valdez to disclose his passcode and its later use of his refusal as evidence against him at trial violated the Fifth Amendment's absolute declaration that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The Court of Appeals recognized this and its decision, supported by both existing precedent and the original meaning of the Fifth Amendment's text, should be affirmed.

DATED this 22nd day of October, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this Brief contains 2747 words, excluding the table of contents, table of authorities, and certificates of counsel. I also certify that in compliance with rule 21(h), Utah Rules of Appellate Procedure, this brief does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October, 2021, I caused to be served to the counsel listed below an electronic copy of the foregoing by email.

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