No. 20-937

IN THE

Supreme Court of the United States

ROBERT ANDREWS,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

BRIEF OF *AMICI CURIAE* OFFICE OF THE PUBLIC DEFENDER OF THE STATE OF NEW JERSEY AND NATIONAL ASSOCIATION FOR PUBLIC DEFENSE IN SUPPORT OF THE PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

In an opinion dated, August 10, 2020, the New Jersey Supreme Court, based on *Fisher v. United States,* 425 U.S. 391 (1976), extended the "foregone conclusion" doctrine to cellphones and held that the Fifth Amendment to the United States Constitution does not protect an individual from being compelled to recall and truthfully disclose a password to his cellphone under circumstances where that disclosure may lead to the discovery of incriminating evidence. *State v. Andrews*, 234 A.3d 1254, 1274-75 (N.J. 2020). This brief is submitted on behalf of *amici curiae*, the New Jersey Office of the Public Defender (OPD) and the National Association for Public Defense (NAPD).

The OPD represents indigent criminal defendants before the Superior Court, Appellate Division and Supreme Court of New Jersey. Founded on July 1, 1967, the OPD is the first centralized state-wide public defender system in the United States, following the landmark decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963). The OPD was founded to create an established system by which no innocent person will be convicted because of an inability to afford an attorney. N.J. Stat. Ann. § 2A:158A-1 (West 2020). The OPD not only provides legal counsel at the Superior Court trial level in New Jersey's twenty-one counties, but also handles appeals, post-conviction relief proceedings, termination of parental rights, civil commitment cases and other

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[1] Pursuant to Rule 37.2, counsel for *amici curiae* states that counsel for petitioner and respondent received timely notice of intent to file this brief. All parties have consented in writing to the filing of this brief. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici* and its counsel, made a monetary contribution to the preparation or submission of this brief.

significant ancillary legal proceedings. The OPD represents approximately seventy-five to ninety percent of defendants in criminal cases at the state trial level and more than ninety percent of criminal defendants in appellate proceedings each year. Since its establishment, the OPD has appeared before this Court in several cases, including *Hilton v. Braunskill*, 481 U.S. 770 (1987), *New Jersey v. T.LO.*, 469 U.S. 325 (1985), *Carchman v. Nash*, 473 U.S. 716 (1985), *Miller v. Fenton*, 474 U.S. 104 (1985), and *Corbitt v. New Jersey*, 429 U.S. 212 (1978).

The NAPD is an association of more than 22,000 professionals who deliver the right to counsel throughout all U.S. states and territories. NAPD members include attorneys, investigators, social workers, administrators, and other support staff who are responsible for executing the constitutional right to effective assistance of counsel. NAPD's members are advocates in jails, in courtrooms, and in communities and are experts in not only theoretical best practices, but also in the practical, day-to-day delivery of legal services. Their collective expertise represents federal, state, county, and local systems through full-time, contract, and assigned counsel delivery mechanisms, dedicated juvenile, capital and appellate offices, and a diversity of traditional and holistic practice models. In addition, NAPD hosts annual conferences and webinars where discovery, investigation, cross-examination, and prosecutorial duties are addressed. NAPD also provides training to its members concerning zealous pretrial, trial, and appellate advocacy and strives to obtain optimal results for clients both at the trial level and on appeal.

This case presents issues of great public importance to the OPD and the NAPD, as both organizations have a strong interest in protecting the constitutional rights of

their clients, including the Fifth Amendment right against self-incrimination. It is the position of *amici curiae* that the decision of the New Jersey Supreme Court was wrongly decided and will negatively affect the clients and cases in which amici are involved on a regular basis. Their experience gives *amici* a unique perspective of the impact of this ruling on the everyday representation of clients in the State of New Jersey and across the United States.

SUMMARY OF ARGUMENT

This Court's post-*Fisher* jurisprudence makes clear that the foregone conclusion doctrine was never meant to apply to this type of compelled disclosure of facts contained in a person's mind. Compelling such disclosure puts a person in the precise dilemma the Fifth Amendment was designed to prevent: the choice of telling the truth and providing a link to evidence that will incriminate oneself; lying; or remaining silent and being jailed for contempt. The Court refers to this quandary in its opinions as the "cruel trilemma." The disclosure of a cellphone password is conceptually identical to compelling the disclosure of the combination to a safe, which this Court has repeatedly said is prohibited by the Fifth Amendment.

In addition, *Fisher*'s forty-five-year-old, narrow holding was not intended to be expanded beyond its factual setting of tax records, particularly not into the digital age. Cellphones have become an indispensable part of our everyday life. Nearly everyone has one and constantly uses it. We use cellphones to communicate with others (phone calls, emails, texting, and social media); to manage our finances (banking, bill payments, and cash apps); to engage in political and religious discourse

(campaign fundraising apps, livestreaming church services); to create and watch media (photographs, audio, and video); to navigate our streets (maps, GPS, and traffic alerts); to manage our schedules (calendars, planners, and to-do lists); and to store sensitive information (health records, diaries, and password lists). Thus, "[m]odern cellphones are not just another technological convenience. With all they may reveal, they hold for many Americans 'the privacies of life.'" *Riley v. California*, 573 U.S. 373, 403 (2014) (quoting *Boyd v. United States*, 116 U.S. 616, 625 (1886)).

The information contained in our cellphones is a far cry from the records at issue in *Fisher*, which were hard copies of several thousand tax records prepared by accountants, in the possession of the taxpayers' lawyers. Without much consideration of the vast technological advances that have occurred over the past few decades, a number of courts, including those of New Jersey, have taken a little-used doctrine and introduced it into a hi-tech world that the authors of the doctrine never anticipated. This Court has cautioned against proceeding in such a manner. *Carpenter v. United States*, 138 S. Ct. 2206, 2222 (2018) ("When confronting new concerns wrought by digital technology, this Court has been careful not to uncritically extend existing precedents."); *Riley,* 573 U.S. at 386 ("A search of the information on a cell phone bears little resemblance to the type of brief physical search considered [in prior precedents].").

As Petitioner has detailed, this case presents a concrete split among both federal and state courts on whether the Fifth Amendment prohibits compelled disclosure of cellphone passwords and New Jersey now falls on the wrong side of the split. Currently, whether a person must reveal a password and the legal standard

that will be applied depends arbitrarily on the state or district where the person lives, works, or is arrested. The Petition should be granted so this Court can resolve the conflict and end the confusion. In New Jersey and other like-minded states, prosecutors routinely seek to compel disclosure of passwords and, armed with the New Jersey Supreme Court's decision, courts will continue to grant those orders. If *Andrews* was wrongly decided, convictions and investigations in New Jersey, and other jurisdictions that follow its approach, involving this type of compelled disclosure will be subject to appellate and post-conviction attack. Finality is an important goal of the criminal justice system, but uncertainty will remain the longer the issue goes unresolved by the Court.

Moreover, *amici* respectfully submit that now is the time to reconsider *Fisher* altogether because it "failed to examine the historical backdrop to the Fifth Amendment," giving the Amendment an unduly narrow interpretation.[2] *Fisher*'s holding has proved difficult for lower courts to apply and, indeed, this Court has never applied *Fisher* to require disclosure under the Fifth Amendment in the forty-five years since the case was decided. A number of Supreme Court Justices have indicated that they are open to reconsidering *Fisher*, including current members of the Court. The Court should grant the Petition and take the opportunity to do so now to rectify the confusion that continues among lower courts.

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[2] *United States v. Hubbell*, 530 U.S. 27, 49-52 (2000) (Thomas, J., joined by Scalia, J., concurring); *Carpenter*, 138 S. Ct. at 2271 (Gorsuch, J. dissenting).

ARGUMENT

I. GRANTING THE PETITION WOULD RESOLVE CONFLICTS AMONG STATE AND FEDERAL COURTS ON AN IMPORTANT QUESTION OF FEDERAL LAW.

In 2018, this Court noted, "There are 396 million cell phone service accounts in the United States—for a Nation of 326 million people." *Carpenter,* 138 S. Ct. at 2211. No doubt, even more cellphones are in use today. "The vast majority of Americans – 96% – now own a cellphone of some kind. The share of Americans that own smartphones is now 81% . . . ." *Demographics of Mobile Device Ownership and Adoption in the United States-Mobile Fact Sheet*, Pew Res. Ctr. (June 12, 2019), https://www.pewinternet.org/fact-sheet/mobile/. Cellphones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley,* 573 U.S. at 385. Indeed, as recently argued by the Attorneys General from twenty-two states, including New Jersey, in an *amici curiae* brief asking this Court to grant certiorari in *Commonwealth v. Davis*, 220 A.3d 534 (Pa. 2019), "criminal cases without digital evidence are increasingly rare" and a grant of certiorari "could affect almost every criminal case." Br. of *Amici Curiae* States of Utah *et al.*, *Commonwealth of Pennsylvania v. Davis*, No. 19-1254 (U.S. May 26, 2020) at 1, 6 ("Br. of Attorneys General").

Both state courts of last resort and federal courts of appeal are split[3] on whether the Fifth Amendment protects a person from being compelled to disclose a password when such a disclosure may be incriminating—as well as the standard to apply—placing this important question squarely within the ambit of the Court's Rule 10. According to the State Attorneys General, cellphones are used "to commit just about every crime imaginable . . . . This sort of evidence is increasingly important to law enforcement and is often sought through a warrant." Br. of Attorneys General at 1. "Each year, law enforcement seizes thousands of electronic devices–smartphones, laptops and notebooks–that it cannot open without the suspect's password." Laurent Sacharoff, *Unlocking the Fifth Amendment: Passwords and Encrypted Devices*, 87 Fordham L. Rev. 203, 203, 207 (2018) (describing the Fifth Amendment law of compelled access to encrypted data as a "fundamental question bedeviling courts and scholars" and "that has split and confused the courts") (footnotes omitted). And yet, cellphones differ greatly "in both a quantitative and qualitative sense from other

[3] *Compare Andrews*, 234 A.3d at 1274 (applying the foregone conclusion doctrine to compel disclosure of password) *and Commonwealth v. Jones*, 117 N.E.3d 702, 711 (Mass. 2019) (same and focusing on the password itself, not the contents of the devise, in applying the foregone conclusion doctrine) *with Seo v. State*, 148 N.E.3d 952, 958 (Ind. 2020) (holding that compelled disclosure of a cellphone password would violate the privilege against self-incrimination) *and Commonwealth v. Davis*, 220 A.3d 534, 550 (Pa. 2019) (holding that the compelled disclosure of a cellphone password is privileged under the Fifth Amendment and, until the United States Supreme Court rules otherwise, the foregone conclusion doctrine is not applicable to passwords). *Compare United States v. Apple MacPro Comput.*, 851 F.3d 238, 248 (3d Cir. 2017) (finding no Fifth Amendment protection on the facts before it) *and Commonwealth v. Gelfatt*, 11 N.E.3d 605, 615 (Mass. 2014) (same) *with In re Grand Jury Subpoena Duces Tecum Dated Mar. 25, 2011,* 670 F.3d 1335, 1341 (11th Cir. 2012) (finding that the Fifth Amendment protects against compelled disclosure of passwords under the circumstances of that case). In Florida, appellate panels have split on the test to apply and the scope of the exception. *Compare Pollard v. State*, 287 So. 3d 649, 651 (Fla. Dist. Ct. App. 2019) *and G.A.Q.L.* v. *State*, 257 So. 3d 1058, 1062-63 (Fla. Dist. Ct. App. 2018) *with State v. Stahl,* 206 So. 3d 124, 136 (Fla. Dist. Ct. App. 2016).

objects that might be carried on an arrestee's person" because they reveal almost everything about a person's life in such intimate detail. *Riley*, 365 U.S. at 403.

Trial judges are frequently faced with this issue because everyone has a cellphone, from which prosecutors are constantly trying to obtain evidence. Prosecutors think the potential evidence in cellphones is critical, but the Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." And trial judges are left with a bewildering array of conflicting case law to interpret. Whether a person may be compelled to disclose a password varies depending on the state or district where the person lives, works, or is arrested. For example, three contiguous states – all adjoining the Delaware River – have different controlling case law. In Pennsylvania, a person would be protected by the Fifth Amendment and would not have to disclose their cellphone password to law enforcement. *Davis*, 220 A.3d at 551. A similarly situated person in New Jersey would be compelled to disclose their password, pursuant to the decision by the New Jersey Supreme Court in this case. *Andrews*, 234 A.3d at 1274. In New York, it is unclear how the courts would rule because no court has published a decision reaching the issue. Our federal constitutional rights mean very little if they are not applied consistently across the nation. The Fifth Amendment protects all individuals in every state from self-incrimination, but until this Court resolves this issue there will be disparate results.

It is respectfully submitted that this Court should grant the Petition and resolve the conflict and confusion.

II. THE FOREGONE CONCLUSION DOCTRINE DOES NOT COMPEL THE DISCLOSURE OF A MEMORIZED CELLPHONE PASSWORD.

The Fifth Amendment of the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." This privilege extends to any compelled testimony that "would furnish a link in the chain of evidence needed to prosecute the claimant." *Hubbell,* 530 U.S. at 38; *Hoffman v. United States*, 341 U.S. 479, 486 (1951). The State must produce evidence against an individual through "the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Estelle v. Smith,* 451 U.S. 454, 462 (1981). The historical purpose of the Fifth Amendment was to prevent the practice of the Star Chamber and ecclesiastical courts from using "legal compulsion to extract from the accused a sworn communication of facts which would incriminate him." *Doe v. United States*, 487 U.S. 201, 212 (1988) (*Doe II*). *Doe II* went on to state:

> The Court in *Murphy v. Waterfront Comm'n of New York Harbor,* 378 U.S. 52 (1964), explained that the privilege is founded on
>
> > "our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt . . . ."
>
> These policies are served when the privilege is asserted to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government.

Id. at 212-13 (footnote omitted).

The Court has repeatedly, in a post-*Fisher* era, endorsed the principle that the Fifth Amendment privilege against self-incrimination protects against the compulsion of facts or thoughts in a person's mind that would provide a link in the chain of evidence needed to incriminate him—*i.e.*, subjecting a person to the "cruel

trilemma." *Id.* at 212. The courts that have expansively extended the one-time application of the foregone conclusion doctrine to the compulsion of cellphone passwords have ignored this precedent. Such disclosure compels a person to reveal facts in their mind to be used in the chain to obtain evidence against them. "There are very few instances in which a verbal statement, either oral or written, will not convey information or assert facts." *Id.* at 213. "The vast majority of verbal statements thus will be testimonial and, to that extent at least, will fall within the privilege." *Id.* at 213-14.

The origin of the foregone conclusion rule derives from the unique set of facts presented in *Fisher.* The documents subject to the summons were prepared by Fisher's accountants and were in the hands of Fisher's attorneys. 425 U.S. at 394. The summons was served on the attorneys. *Id.* To raise a Fifth Amendment objection, the attorneys therefore had to show that the documents at issue were in the possession of the client and transferred to the attorneys for the purpose of receiving legal advice. The Court held that while the substance of the documents prepared by the accountants was not protected by the Fifth Amendment, the act of producing the documents in response to a summons has a testimonial component. *Id.* at 410. The testimonial component consisted of (1) the existence of the documents, (2) that they were in the person's possession, and (3) that the documents were those described in the summons. As such, if compelled and incriminating, that testimonial component would be protected by the Fifth Amendment. Under the facts and circumstances of the case, however, the Court held that the existence and possession of the documents was not testimony within the protection of the Fifth Amendment:

> It is doubtful that implicitly admitting the existence and possession of the papers rises to the level of testimony within the protection of the Fifth Amendment. The papers belong to the accountant, were prepared by him, and are the kind usually prepared by an accountant working on the tax returns of his client. Surely the Government is in no way relying on the "truth-telling" of the taxpayer to prove the existence of or his access to the documents. 8 Wigmore s 2264, p. 380. The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers. Under these circumstances by enforcement of the summons "no constitutional rights are touched. The question is not of testimony but of surrender." *In re Harris*, 221 U.S. 274, 279 (1911).

Fisher, 425 U.S. at 41.

Justice White made it abundantly clear that the opinion was limited to the distinct facts before the Court, explaining, "Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his 'private papers.'" *Id.* at 414 (citing *Boyd*, 116 U.S. at 634-635). It is not surprising then that *Fisher* was the first, *and only*, Supreme Court decision to conclude that the testimony inherent in the act of production was a foregone conclusion. *United States v. Doe*, 465 U.S. 605, 617 (1984) (*Doe I*) (holding that the act of producing documents was privileged under the Fifth Amendment); *Hubbell*, 530 U.S. at 44. The attorneys in *Fisher* were forced to admit that they had possession of the documents and received them from their clients to establish a foundation to raise the Fifth Amendment issue. As a result, the existence and possession of the papers was a "foregone conclusion." But where there was no such concession by the attorneys or anyone else, this Court would not have found the existence of a foregone conclusion. *Id. Fisher* was not intended to apply beyond its facts to the situation present in this case, where a person is being

compelled to reveal a fact in his mind and is thereby subject to the "cruel trilemma." *Doe II*, 487 U.S. at 212. That point is demonstrated by the Court's post-*Fisher* cases, *Doe II*, *Hubbell*, and *Pennsylvania v. Muniz*, 496 U.S. 582 (1990).

In *Doe II*, decided twelve years after *Fisher*, the target of a grand jury was ordered to sign a consent form directing foreign banks to disclose records of any and all accounts for which the target had the right of withdrawal. 487 U.S. at 203, 206. All members of the Court agreed that "'[t]he expression of the contents of an individual's mind' is a testimonial communication and protected by the Fifth Amendment." *Id.* at 210, n.9 (quoting *Doe II*, 487 U.S. at 219, n.1 (Stevens, J., dissenting)). In a footnote, Justice Blackmun clarified the disagreement between the majority and Justice Stevens, the sole dissenting Justice. *Id.* at 210 n.9. The majority did not believe that the document the petitioner was forced to execute was an expression of the contents of his mind because the form did not acknowledge an account in a foreign bank, state that it was controlled by the target, or indicate whether documents or other information relating to the target existed at any bank. *Id.* at 215. Instead, the majority wrote, "such compulsion is more like 'be[ing] forced to surrender a key to a strongbox containing incriminating documents' than it is like 'be[ing] compelled to reveal the combination to [petitioner's] wall safe.'" *Id.* at 210, n.9 (quoting 487 U.S. at 219 (Stevens, J., dissenting)). *Doe II* also reaffirmed the Court's position that one of the evils that the Fifth Amendment was designed to eliminate is the "cruel trilemma." *Id.* at 212-213.

Two years later in *Muniz,* this Court concluded that the Fifth Amendment "spare[s] the accused from having to reveal, directly or indirectly, his knowledge of

facts relating him to the offense or from having to share his thoughts and beliefs with the Government." 496 U.S. at 595 (internal quotation marks omitted) (quoting *Doe II*, 487 U.S. at 213). Muniz was arrested for driving while intoxicated after failing sobriety tests. *Id.* at 585. While under arrest, he was asked the date of his sixth birthday. *Id.* at 586. In reaching its decision, the Court reiterated that the purpose of the Fifth Amendment was to preclude a person from being confronted with the "cruel trilemma" and that the vast majority of verbal statements will be testimonial because they convey information or assert facts. *Id.* at 596-97. The Court held that Muniz's Fifth Amendment rights were violated when he was asked the date of his sixth birthday and confronted with the trilemma.

> Muniz was left with the choice of incriminating himself by admitting that he did not then know the date of his sixth birthday, or answering untruthfully by reporting a date that he did not then believe to be accurate (an incorrect guess would be incriminating as well as untruthful). The content of his truthful answer supported an inference that his mental faculties were impaired, because his assertion (he did not know the date of his sixth birthday) was different from the assertion (he knew the date was (correct date)) that the trier of fact might reasonably have expected a lucid person to provide. Hence, the incriminating inference of impaired mental faculties stemmed, not just from the fact that Muniz slurred his response, but also from a testimonial aspect of that response.

Id. at 598-99. The compelled statement revealing the contents of Muniz's mind was protected by the privilege. *Id.* at 600.

In *Hubbell*, decided twenty-four years after *Fisher*, this Court returned to the safe key and combination analogy to describe the contours of the Fifth Amendment. The Government served a subpoena on Hubbell seeking production of eleven categories of documents. 530 U.S. at 31. Hubbell initially refused, asserting his Fifth

Amendment rights, but he thereafter received immunity and was compelled to make the production. *Id.* Hubbell produced thousands of documents and was then indicted based on the documents he produced. *Id.* After he moved to dismiss the indictment, the Court agreed that the use of the documents he produced violated his Fifth Amendment rights.

> It was unquestionably necessary for respondent to make extensive use of "the contents of his own mind" in identifying the hundreds of documents responsive to the requests in the subpoena. *See Curcio v. United States,* 354 U.S. 118, 128 (1957); *Doe v. United States,* 487 U.S., at 210. *The assembly of those documents was like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox*.

Id. at 43 (emphasis added).

The Court thus reinforced its holding that the Fifth Amendment protects a person from being compelled to disclose facts or ideas in his head and that it would violate the Fifth Amendment to compel someone to disclose the combination to a safe that contained incriminating documents. *Id.* at 43. That rationale is conceptually identical to forcing a defendant to disclose a password that would unlock a cellphone and therefore should produce an identical result. Neither are permissible under the Fifth Amendment.

These cases make clear that the Fifth Amendment protects persons from being compelled to provide information when they are forced to confront the "cruel trilemma" and/or forced to disclose facts or thoughts in their mind, like a safe combination, that would provide a link in the chain of evidence needed to incriminate them. That is exactly the situation Mr. Andrews faced. It is exactly the situation

many of *amici's* clients face every day. *Amici* respectfully asks this Court to grant certiorari and correct the misapplication of the foregone conclusion doctrine.

III. FISHER WAS WRONGLY DECIDED AND SHOULD BE REVERSED.

There has been considerable support over the years for the proposition that the Fifth Amendment was intended to mirror existing English common law and, at the time of the adoption of the Fifth Amendment, the common law barred the compelled production of incriminating documents. Thus, many have argued that *Fisher* was wrongly decided. Current members of this Court have agreed and have expressly written that they are interested in reconsidering *Fisher*.

Justice Thomas stated in a concurring opinion, joined by Justice Scalia, that *Fisher* failed to examine the historical backdrop to the Fifth Amendment resulting in an unduly narrow reading of the Self-Incrimination Clause.

> I write separately to note that this doctrine may be inconsistent with the original meaning of the Fifth Amendment's Self-Incrimination Clause. A substantial body of evidence suggests that the Fifth Amendment privilege protects against the compelled production not just of incriminating testimony, but of any incriminating evidence. In a future case, I would be willing to reconsider the scope and meaning of the Self-Incrimination Clause.
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> . . . .
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> The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The key word at issue in this case is "witness." The Court's opinion, relying on prior cases, essentially defines "witness" as a person who provides testimony, and thus restricts the Fifth Amendment's ban to only those communications "that are 'testimonial' in character." *Ante,* at 2042. None of this Court's cases, however, has undertaken an analysis of the meaning of the term at the time of the founding. A review of that period reveals substantial support for the view that the term "witness" meant a person who gives or furnishes evidence, a broader meaning than that

> which our case law currently ascribes to the term. If this is so, a person who responds to a subpoena *duces tecum* would be just as much a "witness" as a person who responds to a subpoena *ad testificandum.*

Hubbell, 530 U.S. at 49-50 (Thomas, J., joined by Scalia, J., concurring).

Justice Thomas concluded by saying that, considering the historical evidence that the Fifth Amendment is broader than its interpretation in *Fisher*, he "remain[s] open to reconsideration of that decision and its progeny in a proper case." *Id.* at 56. Justice Gorsuch agreed in *Carpenter*, writing:

> But if we were to overthrow *Jackson*[4] too and deny Fourth Amendment protection to *any* subpoenaed materials, we would do well to reconsider the scope of the Fifth Amendment while we're at it. Our precedents treat the right against self-incrimination as applicable only to testimony, not the production of incriminating evidence. *See Fisher v. United States*, 425 U.S. 391, 401 (1976). But there is substantial evidence that the privilege against self-incrimination was also originally understood to protect a person from being forced to turn over potentially incriminating evidence. Nagareda,[5] *supra,* at 1605–1623; *Rex v. Purnell,* 96 Eng. Rep. 20 (K.B. 1748); Slobogin,[6] Privacy at Risk 145 (2007).

Carpenter, 138 S.Ct. at 2271 (Gorsuch, J., dissenting).

The criticism of *Fisher* and focus on the English common law is not new. In his concurrence in *Fisher*, Justice Brennan stated that the Fifth Amendment protection extends to the production of books and papers based on his analysis of the English common law. *Fisher*, 425 U.S. at 414-30 (Brennan, J., concurring). Justice Brennan

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[4] *Ex Parte Jackson*, 96 U.S. 727 (1878).

[5] Richard A. Nagareda, *Compulsion "To Be a Witness" and the Resurrection of Boyd*, 74 N.Y.U. L. Rev. 1575, 1606 & nn.124-25 (1999).

[6] Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society*," 42 Duke L.J. 727 (1993).

concluded, "[w]ithout a doubt, the common-law privilege against self-incrimination in England extended to protection against the production of incriminating personal papers prior to the adoption of the United States Constitutions." *Id.* at 418, n.4 (citing *Roe v. Harvey*, 98 Eng. Rep. 302, 305 (K.B. 1769); *King v. Heydon*, 96 Eng. Rep. 195 (K.B. 1762); *King v. Purnell*, 95 Eng.Rep. 595, 597 (K.B. 1748); *King v. Cornelius*, 93 Eng. Rep. 1133, 1134 (K.B. 1744); *Queen v. Mead*, 92 Eng. Rep. 119 (K.B. 1703); *King v. Worsenham*, 91 Eng. Rep. 1370 (K.B. 1701)). *See also United States v. Patane*, 542 U.S. 630, 645 (2004) (Souter, J., joined by Stevens, J. and Ginsburg, J., dissenting) ("The plurality repeatedly says that the Fifth Amendment does not address the admissibility of nontestimonial evidence, an overstatement that is beside the point."). Justice Alito concurs with this assessment of the common law but is critical of *Fisher* for different reasons. *See* Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. Pitt. L. Rev. 27, 45-51 (1986). *See also, e.g.*, Bryan H. Choi, *The Privilege Against Cellphone Incrimination*, 97 Tex. L. Rev. Online 73, 74 n.6 (2019); Nagareda, 74 N.Y.U. L. Rev. at 1606 & nn.124-25; Robert Heidt, *The Fifth Amendment Privilege and Documents – Cutting Fisher's Tangled Line*, 49 Mo. L. Rev. 439, 443 (1984).

A number of lower court decisions rely on a tenuous extension of the foregone conclusion doctrine to cellphones, as did the New Jersey Supreme Court in this case. If *Fisher* is revisited and reversed, the foundational basis for the doctrine and the doctrine itself should fall by the wayside. A number of other cases declined to extend the doctrine to cellphones based in part on the conclusion that *Fisher* has been little used, is limited to its facts, and its viability going forward stands on shaky grounds.

See Seo, 148 N.E.3d at 961; *Davis*, 220 A.3d at 549. This Court should grant the Petition for Certiorari and reconsider *Fisher,* taking into consideration the history and intent at the time of the drafting of the Fifth Amendment.

The Fifth Amendment unquestionably protects people from being compelled to incriminate themselves. The current split among federal and state courts over whether individuals can be compelled to produce their cellphone passwords affords some people the benefit of the protection against self-incrimination and leaves others with no protection at all. To put an end to these inconsistent results, this Court must intervene.

CONCLUSION

The Petition for Writ of Certiorari should be granted because review of this clear split of authority on the Fifth Amendment is necessary.

Respectfully Submitted,

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