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

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REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION & STATUTES

OTHER AUTHORITIES

INTRODUCTION

The state court opinion from which Mr. Andrews appeals is a final decision on the merits of his federal Fifth Amendment claim, and jurisdiction is proper under the fourth exception in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482–83 (1975). This case directly conflicts with *Commonwealth v. Davis*, 220 A.3d 534 (Pa. 2019), *cert. denied*, No. 19-1254, 2020 WL 5882240 (2020), because it involves an order to disclose, not enter, a passcode. If the order is read to compel either disclosure or entry of a passcode, this case provides an excellent opportunity to not only address the split on disclosure, but also on whether and how the foregone conclusion rationale applies to password entry. In the alternative, because the State appears to have abandoned its defense of the password disclosure order at issue, the Court should grant certiorari, vacate the New Jersey Supreme Court opinion, and remand to the state court for further proceedings.

I. THE COURT HAS JURISDICTION TO HEAR THIS CASE.

This Court has jurisdiction to adjudicate Mr. Andrews's Fifth Amendment cause of action before his rights are irreparably violated. *See Maness v. Myers*, 419 U.S. 449, 460 (1975). Jurisdiction is proper under the fourth exception in *Cox Broadcasting Corp. v. Cohn*—the one that applied in *Cox* itself. *See* 420 U.S. 469, 482–83 (1975). Under this exception, interlocutory review is permitted when (1) a "federal issue has been finally decided in the state courts," (2) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," and (3) failure to consider the state court decision immediately "might seriously erode federal policy." *Id.* All three requirements are met here.

First, the Supreme Court of New Jersey has issued a final decision on the merits of the federal Fifth Amendment issue. Second, reversal by this Court would preclude further litigation on the relevant "cause of action": Mr. Andrews's claim that the Fifth Amendment precludes compulsion of his passcodes. If the state court's ruling is reversed, that reversal would preclude any further litigation regarding Mr. Andrews's Fifth Amendment right not to disclose his passcode.[1] Like "[o]rders denying motions to dismiss an indictment on double jeopardy or Speech or Debate grounds," the order compelling Mr. Andrews to disclose his passcode "finally resolve[s] issues that are separate from guilt or innocence." *Flanagan v. United States*, 465 U.S. 259, 266–67 (1984) (interpreting jurisdiction of federal

[1] The State argues that the fourth *Cox* factor is not satisfied because reversal by this Court on the federal Fifth Amendment issue would not preclude all further litigation, including trial on state criminal law claims. *See* BIO 12. But the fourth *Cox* factor focuses on whether further litigation on the *relevant cause of action* is precluded. Here, it would be.

The State is, of course, correct that even if it is true that if Mr. Andrews prevails on his Fifth Amendment claim, the criminal case can proceed. That is because the criminal charges are not based on the contents of the cell phones, for the State has no knowledge of their contents. BIO 10 ("[I]t is not certain whether the phones contain evidence that materially adds to the case against Petitioner, or only includes evidence the State already has."). The motion to compel is thus substantially a separate and independent matter from of the ongoing criminal case.

courts of appeals over "final decisions of the district court").

Third, declining review now would "seriously erode federal policy" by forcing Mr. Andrews to confront the "cruel trilemma" from which the Fifth Amendment was designed to protect. Just two months before it issued *Cox*, this Court endorsed "precompliance review" of self-incrimination claims "in view of the place this privilege occupies in the Constitution and in our adversary system of justice, as well as the traditional respect for the individual that undergirds the privilege . . . ." *Maness*, 419 U.S. at 461. Like orders denying relief under the Double Jeopardy Clause—which promises "more than the right not to be convicted in a second prosecution for an offense" but instead "the right not to be 'placed in jeopardy,'" *Flanagan*, 465 U.S. at 266–67—the privilege against self-incrimination guarantees the right to not be "subject[ed] . . . 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)).

As this Court has explained, the privilege reflects "our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life." *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964) (cleaned up), *abrogated on other grounds by United States v. Balsys*, 524 U.S. 666 (1998). Once that private enclave has been breached, it cannot be restored. *See Perlman v. United States*, 247 U.S. 7, 13 (1918) (allowing immediate review of order directing third party to produce documents over Fifth Amendment claim because if he were forced to "seek a remedy at some other time and in some other way," he would be "powerless to avert the mischief of the order"); *see also Southland Corp. v. Keating*, 465 U.S. 1, 7–8 (1984) (invoking the fourth *Cox* exception to review a California Supreme Court decision denying enforcement of an arbitration contract because waiting "until the state court litigation has run its course would defeat the core purpose of a contract to arbitrate").[2]

Overall, the Court has adopted a "practical rather than a technical construction" of the statutory finality requirements in 28 U.S.C. § 1257 and its federal-court analogue, 28 U.S.C. § 1291. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *see Cox*, 420 U.S. at 478 n.7 (citing *Cohen*). And the Court has identified as a "core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered." *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976).

Just as First Amendment claims sometimes require immediate action,[3] so, too, does Mr. Andrews's

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[2] *See* Note, *The Finality Rule for Supreme Court Review of State Court Orders*, 91 Harv. L. Rev. 1004, 1028 (1978) (advocating jurisdiction "where an appellant seeks protection for a federal right which is specifically designed to afford protection against the proceedings in a state court" because "the right is meaningful only if vindicated before the completion of the proceedings").

[3] *See, e.g.*, *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 44 (1977) (invoking *Cohen*'s collateral order doctrine and citing *Cox*, to conclude that an order from the Illinois Supreme Court denying a stay of an injunction prohibiting Nazis from marching was a "final judgment" for purposes of jurisdiction in this Court); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 247 (1974) (cited in *Cox*, 420 U.S. at 484–85) (exercising jurisdiction to review Florida Supreme Court interlocutory decision because

assertion that he cannot be compelled to confront the "cruel trilemma." Few "federal policies" are more longstanding, and more intimately connected with the limits of state power enshrined in the Bill of Rights, than the Fifth Amendment privilege against self-incrimination.[4] *See Maness*, 419 U.S. 449; *Muniz*, 496 U.S. 582; *Murphy*, 378 U.S. 52. *Cox*'s fourth exception exists for cases like this. The Court has jurisdiction.

II. THIS CASE IS AN EXCELLENT VEHICLE FOR CONSIDERING THE QUESTION PRESENTED AND RESOLVING THE CONFLICTS IN THE LOWER COURTS.

As shown in the Petition, state and federal courts are divided on the scope of the Fifth Amendment's protections against compelled password disclosure and use. The State acknowledges as much. *See* BIO 18 (recognizing the court below "expressly disagree[d] with the holding in *Davis*"); *id.* at 18–19 (describing the "contours of the dispute" between the

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"an uneasy and unsettled constitutional posture of [the state statute] could only further harm the operation of a free press"); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (exercising jurisdiction over appeals of state court orders compelling testimony from newspersons over their First Amendment objections).

[4] Indeed, this same type of irreparable harm—compelled disclosure of information—motivated the Court's decision in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). There, the Court invoked the fourth *Cox* exception to permit immediate review, on Confrontation Clause grounds, of a state supreme court ruling requiring a state agency to disclose to a criminal defendant a confidential file regarding a key witness against him. *Id.* at 47–49. While this Court later called *Ritchie* "an extraordinary case," *Jefferson v. City of Tarrant*, 522 U.S. 75, 83–84 (1997), so is this one, which, as explained above, falls well within—and would not constitute any "expansion of," *id.* at 83—the *Cox* exceptions.

separate "camp[s]" on the application of the foregone conclusion exception). Indeed, New Jersey previously urged this Court to hear the *Davis* case to resolve the same splits implicated here. *See* Brief of *Amici Curiae* States of Utah, *et al.* at 1, 17, *Pennsylvania v. Davis*, 2020 WL 5882240 (2020) (No. 19–1254) (recognizing that "lower courts have split" on this "important Fifth Amendment question").

Notwithstanding these divisions, the State contends that this case is not the right vehicle for resolving the conflicts. None of the State's contentions withstand scrutiny.

A. The Order and Decision Appealed from Require Oral Disclosure of Mr. Andrews's Passcodes.

Having argued successfully below that Mr. Andrews has no Fifth Amendment privilege against being compelled to *disclose* his passcode, as the court order at issue requires, the State now seeks to evade review by suggesting, based on a few statements by counsel at oral argument, that this case is not about password disclosure after all. Instead, the State claims Mr. Andrews can comply with the superior court's order by entering his passcodes directly into his devices, without disclosing them to the State. BIO 17.

But that is not what the order requires. Nor is it what the New Jersey Supreme Court held. At every step in this case, all parties—the State, Mr. Andrews, and the courts—have understood that the State was seeking to compel Mr. Andrews to disclose his passcodes. Indeed, that is just what the State asked for: in superior court, it moved to "compel [Mr. Andrews] *to disclose* his PINs or passwords" to his two iPhones. Pet. App. 99a (emphasis added). The superior court granted that motion, ordering "discovery" of Mr. Andrews's passcodes and requiring Mr. Andrews to produce his "PIN or passcode" *in camera* prior to "*disclosure to the State*." Pet. App. 116a (emphasis added). On appeal from that order, the intermediate appellate court stated the issue as whether the State could compel Mr. Andrews "*to disclose* the personal identification numbers and passwords" to his phones. Pet. App. 77a (emphasis added); *see also* Pet. App. 80a (describing State's "motion to compel [Mr. Andrews] to disclose passcodes required to unlock [his] iPhones."), 81a (same).

The very first line of the New Jersey Supreme Court's opinion framed the question presented: as "*whether a court order requiring a criminal defendant to disclose the passcodes* to his passcode-protected cellphones violates the Self-Incrimination Clause." Pet. App. 1a (emphasis added).

The record is clear: Mr. Andrews was ordered to disclose his passcodes to the State, and that is the issue the Supreme Court of New Jersey decided.

The fact that the State's attorney at oral argument below said the State would be satisfied with a *different* order—one that compelled Mr. Andrews to enter the passcodes without disclosing them—does not alter what is at issue here. At no point has the State sought to amend or withdraw the order that compels Mr. Andrews to disclose his passcodes. *See* Pet. App. 115a–116a.

This petition squarely presents the split between *Davis* and the decision below. The Pennsylvania Supreme Court held that disclosure of a memorized passcode is barred by the Fifth

Amendment; the New Jersey Supreme Court held the opposite. The Court should grant the petition and resolve the question presented.

B. Even If the Order at Issue Here Requires Either Disclosure or Entry, the Case Warrants Certiorari.

Even if the order at issue were interpreted to permit Mr. Andrews to comply by *either* disclosing his passcodes *or* directly entering them into his device, that would bolster, not weaken, the case for certiorari.

As the State itself recognizes, BIO 18–19, state and federal courts are divided in multiple ways over application of the self-incrimination privilege to both the compelled *disclosure* and *entry* of passcodes. A case that, in the State's own telling, presents *both* scenarios would allow the Court to provide comprehensive guidance on proper application of the privilege.

In that event, this case would allow the Court to address both whether oral disclosure and entry of passcodes can be compelled, and whether and how the foregone conclusion exception applies. Pet. 11–15 (discussing conflicting decisions on foregone conclusion exception).

Disclosure and entry implicate the same Fifth Amendment concerns. *See Doe*, 487 U.S. at 213 (self-incrimination is intended to "spare the accused from having to reveal, *directly or indirectly*, his knowledge of facts relating him to the offense") (emphasis added). "It is the extortion of information from the accused" that triggers the privilege, *Muniz*, 496 U.S. at 594 (cleaned up), not the particular means through which that extortion occurs. *See Schmerber v. California*, 384 U.S. 757, 761 n.5 (1966). The compelled incrimination is accomplished when the disclosure or entry occurs, even if it provides only a link to additional incriminating evidence. *United States v. Hubbell*, 530 U.S. 27, 38 (2000); *Hoffman v. United States*, 341 U.S. 479, 488 (1951) (Fifth Amendment privilege extends if answers could "forge links in a chain"). And like compelled disclosure, compelled entry of a passcode places the accused in the "modern-day analog of the historic[al] trilemma" of self-incrimination, perjury, or contempt. *Muniz*, 487 U.S. at 596.

Moreover, as with disclosure, the courts below are in disarray about whether and how the foregone conclusion doctrine applies to entry. *See Seo v. State*, 148 N.E.3d 952, 962 (Ind. 2020) ("Not only was the [foregone conclusion] exception crafted for a vastly different context, but extending it further would mean expanding a decades-old and narrowly defined legal exception to dynamically developing technology."); *see also* Pet. 11–15 (and cases cited therein).

Thus, if the State's representation is treated as modifying the order at issue to require either entry or disclosure, the Court would have the opportunity to address both disclosure and entry. Mr. Andrews's position is that he is entitled to assert the privilege either way. And, contrary to the State's assertions, BIO 19, this case would allow the Court to resolve both splits in an outcome-determinative way: the Court can reaffirm that *entry*, too, is testimonial. And where it is compelled and self-incriminating, it is therefore privileged—a privilege which cannot be overcome as a "foregone conclusion."

Finally, whether Mr. Andrews is compelled to speak his passcodes or enter them directly into his phones, the issue is an important, frequently recurring question of constitutional law affecting nearly every American. *See* Pet. at 18–21 (discussing prevalence of smartphone ownership and frequency of law enforcement searches of these devices). Cell phones are "such a pervasive and insistent part of daily life" that the question presented by this petition has potential to affect virtually anyone. *Carpenter v. United States*, 138 S. Ct. 2206, 2210 (2018) (quoting *Riley v. California*, 573 U.S. 373, 385 (2014)).

III. IN THE ALTERNATIVE, THE COURT SHOULD GRANT CERTIORARI, VACATE, AND REMAND FOR FURTHER PROCEEDINGS.

This case is an ideal vehicle for resolving the confusion that exists in the lower courts, and the Court should grant certiorari. However, in the alternative, if the State is now defending only legal compulsion to enter a passcode, and not the order to disclose it, the Court should grant certiorari, vacate the New Jersey Supreme Court opinion, and remand the case for further proceedings. *See* 28 U.S.C. § 2106.

GVR is appropriate when the prevailing party below is no longer defending the legal position it took below. *See Stutson v. United States*, 516 U.S. 193, 195–96 (1996). Here, the State has abandoned any defense of the New Jersey Supreme Court's decision requiring password disclosure. *See* BIO 22–30 (only defending propriety of compelling entry of a passcode). And the State now represents that Mr. Andrews is not required to disclose his passcode. BIO 2 ("[I]n this case, Petitioner will be allowed to directly enter the passcode *without* divulging it"); *id.* at 17 (This case "will *not* present the disagreement as to whether he can be required to verbally disclose that passcode."). Thus, the State appears to have abandoned a complete defense of the decision below. A GVR would vacate that decision and allow the New Jersey Supreme Court to revisit its decision, in light of the State's change in position. *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 166–67 (1996) (Court has "GVR'd in light of a wide range of developments," including confessions of error or other positions newly taken by state attorneys general).

CONCLUSION

This Court should grant certiorari for full briefing and argument on the question presented. But if it does not do so, it should grant, vacate, and remand for further proceedings.

Respectfully Submitted,

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