

IN THE
Supreme Court of the United States

ROBERT ANDREWS,

Petitioner,

v.

NEW JERSEY,

Respondent.

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

**BRIEF FOR *AMICUS CURIAE* ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS OF
NEW JERSEY IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

The Association of Criminal Defense Lawyers of New Jersey (ACDL-NJ) is a non-profit corporation organized under the laws of New Jersey to protect and ensure by rule of law those individual rights guaranteed by the New Jersey and United States Constitutions; to encourage cooperation among lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and thereby promote justice and the common good. The ACDL-NJ is a state affiliate of the National Association of Criminal Defense Lawyers (NACDL), the preeminent national organization in the United States representing attorneys practicing in the field of criminal defense, including private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to ensuring fairness within America's criminal justice system.

A proper resolution of the issues raised in this case is of great concern to the hundreds of members of the ACDL-NJ, who are committed to the appropriate development of the law with respect to issues that affect the rights of individuals. The members of the ACDL-NJ and their clients will be directly affected by the United States Supreme Court's ruling on the matters at issue if

1. In accordance with Supreme Court Rule 37, *amicus curiae* states that no counsel for a party authored this brief, in whole or in part, and no person other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of *amicus curiae*'s intent to file and both parties have consented to the filing of this brief.

Certiorari is granted. The Petition presents a question of great importance to the ACDL-NJ, its members, and their clients.

Specifically, the instant Petition focuses on whether an individual can be compelled to recall and provide his or her mobile device password to law enforcement or other state actors. It is the ACDL-NJ's position that the forced compulsion of a suspect to make any potentially inculpatory statement is a violation of the Fifth Amendment. Furthermore, the ACDL-NJ and its members have an important interest in ensuring that the Foregone Conclusion Doctrine, if deemed constitutional, is applied in a manner consistent with the Supreme Court's precedents and that the doctrine is not misinterpreted beyond its intended limited application in a manner that violates suspected offenders' constitutional rights.

SUMMARY OF ARGUMENT

The New Jersey Supreme Court erroneously held below that the so-called Foregone Conclusion Doctrine can be used to compel individuals to provide potentially incriminating testimony to police. Specifically, the New Jersey Supreme Court held that, as long as it is a "foregone conclusion" that the accused is the owner of the target mobile phone, the suspect must provide authorities with the phone's password. Consequently, police and prosecutors have been granted unfettered access to the contents of a device that the United States Supreme Court has consistently recognized contains intimate, personal details about its owner worthy of greater privacy protections than merely showing that the phone belongs to the suspect. The New Jersey Supreme Court ruling runs contrary to this country's long-held constitutional

protection against self-incrimination, and extends existing Foregone Conclusion Doctrine jurisprudence well beyond its intended application. The practical impact of the New Jersey Supreme Court's error below is that prosecutors now prophylactically request language in their warrant applications intended to compel suspects to provide their mobile device passwords to investigators without any additional showing other than ordinary probable cause, and without consideration of the specific factual context in which the search is sought. With the New Jersey Supreme Court's decision below, the Fifth Amendment has been eroded to such an extent that it is unrecognizable.

Using the threat of contempt, trial courts throughout New Jersey now routinely force suspects to utter their passcodes in open court to facilitate State investigations, notwithstanding the suspects' invocation of their Fifth Amendment right against self-incrimination. This erosion of the Fifth Amendment is a matter of paramount importance, and without intervention from the United States Supreme Court, criminal suspects will continue to be forced into the compelled disclosure of potentially incriminating information.

The issue is not exclusive to New Jersey. Courts around the country are grappling with issues at the intersection of Fifth Amendment jurisprudence and the modern mobile technologies that have reshaped the way that Americans live, work, and socialize. Currently, the Fifth Amendment is being applied in dramatically different and uneven ways across the country on this issue. If the Petition is not granted, confusion regarding the application and scope of the Fifth Amendment and so-called Foregone Conclusion Doctrine in the context

of compelled passcode disclosure will continue. There is a significant public policy interest advanced by uniform application of a federal Constitutional right throughout the United States, and the Supreme Court's treatment of this case will further that important policy interest.

In *Fisher v. United States*, 425 U.S. 391, 410-413 (1976), this Court held that an act of production is not testimonial if the State can show with "reasonable particularity" that, at the time it sought to compel an actor to produce information, the State already knew of the materials, thereby making any testimonial aspect a "foregone conclusion." The term "foregone conclusion" is not in the text of the Fifth Amendment or anywhere else in the United States Constitution, for that matter. Forcing the accused to produce a password to a mobile device containing potentially incriminating evidence runs contrary to the intent of the founders, who "broadly sought to protect a citizen from 'be[ing] compelled to give evidence against himself.'" *United States v. Hubbell*, 530 U.S. 27, 53 (2000) (Thomas, J. dissenting). Because the Foregone Conclusion Doctrine is inconsistent with our founders' intent, *Fisher* should be overturned, or the holding should, at least, be expressly limited by this Court to exclude personal mobile device passwords within the coverage of this Fifth Amendment exception that has arisen from case law. If the Foregone Conclusion Doctrine is to be applicable to mobile device passcodes, government actors must establish more than merely that the phone belongs to the suspect, but instead that the contents that are to be viewed once the device is opened are a foregone conclusion based upon information already available to investigators. The former approach, as taken by the New Jersey Supreme Court, is logically detached from this

Court's Foregone Conclusion Doctrine jurisprudence, which was intended to apply, if constitutional, under precise and exceedingly limited circumstances that are not present in this case.

ARGUMENT

I. The United States Supreme Court's Review is Warranted Because the Rule of Law Adopted By the New Jersey Supreme Court Below Impacts Millions of Ordinary Citizens

The ubiquity and use of personal electronic devices such as smartphones, tablets, and other portable computing platforms are undeniable. In 2021, almost every American owns a smartphone. These devices contain every personal detail about their users. Everything from the mundane, like our day-to-day activities, to the professional, like our schedules, contacts, and emails, are housed on our mobile devices. We keep the most private information on our phones, such as passwords to bank accounts, protected health information, credit card numbers, and other highly sensitive information. The use of mobile technology is no longer a luxury; it is a requirement of modern life in the United States.

The contents of our mobile devices are so important to the private lives of citizens that the Supreme Court has remarked:

Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.' The fact that

technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.

Riley v. California, 573 U.S. 373, 403 (2014) (internal citations omitted).

The Foregone Conclusion Doctrine was first recognized as an exception to the Fifth Amendment privilege against self-incrimination by this Court in *Fisher v. United States*, 425 U.S. 391 (1976). The Court's *Fisher* decision predated the proliferation of the modern mobile device by at least three decades. However, in this digital age, the Court's holding in *Fisher* is being erroneously extended and utilized to compel individuals to recall and provide their memorized passwords, virtually without restriction, in aid of investigations and prosecutions against them.

The New Jersey Supreme Court, in its application of the Foregone Conclusion Doctrine in *State v. Andrews*, 243 N.J. 447 (2020), effectively created a bright line rule in New Jersey requiring individuals under criminal investigation to enter into the recesses of their minds and provide the memorized passwords to their electronic devices. The New Jersey Supreme Court's dramatic expansion of the Foregone Conclusion Doctrine into this broader category of digital information necessitates that the Court revisit the intended scope and breadth of the Fifth Amendment exception at this time. The law must constantly be revisited to adapt to the emerging, fast changing realities of our society, and this is a prime example of such a circumstance.

The Fifth Amendment to the United States Constitution provides that “no person shall . . . be compelled in any criminal case to be a witness against himself[.]” U.S. Const. amend. V; *Fisher v. United States*, 425 U.S. 391, 398 (1976). This Court has explained that the Fifth Amendment protects a person “against being incriminated by one’s own compelled testimonial communications.” *Fisher*, 425 U.S. at 409. Communications are considered “testimonial” and, therefore encompassed by the Fifth Amendment privilege against self-incrimination, where the subject communication tends “to reveal, directly or indirectly, [one’s] knowledge of facts” or those communications that “disclose the contents of [one’s] own mind[.]” *Doe v. U.S. (“Doe II”)*, 487 U.S. 201, 211, 213 (1988). As this Court previously noted, “[i]t is the extortion of information from the accused, the attempt to force him to disclose the contents of his own mind that implicates the Self-Incrimination clause[.]” *Id.* at 211. Being compelled to disclose or reveal one’s mobile device password, like “be[ing] compelled to reveal the combination to [petitioner’s] wall safe,” communicates the contents of one’s mind directly to the State and is, therefore, testimonial. *See Id.* at 210 n. 9.

The Fifth Amendment does not only apply to the verbal utterances of the accused. In *Fisher*, this Court established what has been called the Act of Production Doctrine. The Act of Production Doctrine recognizes that the production of subpoenaed *documents* alone may have testimonial aspects, including the communication of information about the documents’ existence, custody, and authenticity, thereby falling within the coverage of Fifth Amendment right against self-incrimination. *Fisher*, 425 U.S. at 409.

The Foregone Conclusion Doctrine was established as an exception to the Act of Production Doctrine in *Fisher*, and stands for the proposition that, if the government can prove that it already knows the information being conveyed by the subject act of production, then the testimonial aspect of the act of production doctrine becomes a foregone conclusion and the suspect “adds little or nothing to the sum total of the Government’s information by conceding that he in fact has the [requested information].” *Id.* at 411. In those situations, compulsion is not protected by the Fifth Amendment privilege under existing case law from this Court. However, in applying the Foregone Conclusion Doctrine to the facts presented in *State v. Andrews*, the New Jersey Supreme Court eliminated the line between the intended application of the Foregone Conclusion Doctrine to a given act of production and a testimonial utterance protected by the Fifth Amendment. Mere ownership of a mobile device was not the intended test to assess whether the Foregone Conclusion Doctrine applies. Nowhere in *Fisher* does it say that the Act of Production Doctrine is intended to apply to a testimonial utterance like a request to verbally supply one’s password to their mobile device. Yet, the New Jersey Supreme Court held just that.

In the context of the Fifth Amendment right against self-incrimination, several time tested guiding principles can be derived from this Court’s jurisprudence. First, compulsion of a physical act is generally not testimonial, and therefore not protected. *See, e.g., United States v. Dionisio*, 410 U.S. 1, 7 (1973) (compelling individual to stand in a lineup is not privileged); *Schmerber v. California*, 384 U.S. 757, 765 (1966) (compelled provision of a handwriting exemplar is not privileged); *Gilbert v. California*, 388 U.S.

263, 266 (1967) (taking a voice exemplar is not privileged). Second, a physical, non-verbal act of production may be testimonial where the act expresses some explicit or implicit statement that the provided documents exist, are in that individual's possession, or are authentic. *See U.S. v. Hubbell*, 530 U.S. 27, 45 (2000) (finding that the act of producing the documents at issue had testimonial aspects, at least with respect to the existence and location of the documents, and therefore was privileged). Finally, the vast majority of verbal responses, whether written or oral, will be testimonial and thus protected by the Fifth Amendment privilege. *See Doe II*, 487 U.S. at 213-214; *See also Pennsylvania v. Muniz*, 496 U.S. 582 (1990) (“Whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief . . . the response contains a testimonial component.”)

Here, disclosure of a password is unquestionably a verbal response and thus privileged, without exception. The New Jersey Supreme Court held that the disclosure of a passcode was testimonial, but nonetheless inconsistently concluded that the Foregone Conclusion Doctrine applied without explaining how this case presents an analogous circumstance to that of *Fisher. Andrews*, 243 N.J. at 480. The New Jersey Supreme Court simply missed a step in its analysis, shaving a proverbial square peg down to fit into a round hole. This Court has never applied the Foregone Conclusion Doctrine to verbal testimony for good reason—it would go completely against the bedrock principles of the Fifth Amendment to do so. The New Jersey Supreme Court's reliance upon Foregone Conclusion Doctrine jurisprudence in an acknowledged testimonial setting simply cannot be reconciled with existing law.

The Fifth Amendment was adopted in response to the much reviled Star Chamber practices of fifteenth, sixteen, and seventeenth century England where extra-judicial panels would force individuals deemed too powerful to be brought before the ordinary common law courts to, among other acts antithetical to our modern constitutional principles, answer questions used to implicate themselves in crimes. *Doe II*, 487 U.S. at 212. As this Court has remarked, the Fifth Amendment privilege “reflects a judgment that the prosecution should not be free to build up a criminal case, in whole or in part, with the assistance of enforced *disclosures* by the accused.” *Id.* (emphasis in original). It was built upon “our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt.” *Id.* (internal citations and quotation marks omitted).

Requiring the accused to disclose a password injects the accused directly into the “cruel trilemma” recognized in *Doe II*—i.e., when forced to disclose a password one must decide to truthfully answer and lead the prosecution to potentially incriminating evidence (self-accusation), lie (perjury), or refuse complying with an order to disclose the password (contempt). This Court has now long since recognized that it does not matter that the password itself might not itself be inculpatory, just that it may lead to potentially incriminating evidence. *See Hubbell*, 530 U.S. at 38 (“Compelled testimony that communicates information that may ‘lead to incriminating evidence’ is privileged even if the information itself is not inculpatory.”). The New Jersey Supreme Court did not properly apply *Hubbell* by failing to appreciate that the provision of Mr. Andrews’ password was the *sine qua non* of the self-incriminatory disclosure at issue. Accordingly,

the ACDL-NJ urges this Court to act before the Fifth Amendment is winnowed away into obscurity.

An individual should never be compelled to enter the recesses of his or her mind, recall a memorized password, and disclose it to the government, only for it to be used to lead to potentially incriminating evidence. Yet, courts across the country, including the New Jersey Supreme Court, are using this Court's narrow Act of Production holding in *Fisher* to do just that. The Petition should be granted to avoid the continued abrogation of individuals' constitutional rights, and to reaffirm the sanctity of bedrock Fifth Amendment principles in our modern technology driven society.

II. If The Petition Is Not Granted, Confusion Regarding The Application and Scope of a Fundamental Constitutional Right Will Continue

State and federal courts throughout the United States are grappling with the scope and application of the Foregone Conclusion Doctrine and the application of the Act of Production Doctrine to modern mobile technology. Without this Court's guidance, an individual's constitutionally protected Fifth Amendment right will substantively vary between different states, and will be applied inconsistently between state and federal courts as well. For example, in Pennsylvania a password cannot be compelled, while in the neighboring state of New Jersey it can. What the New Jersey Supreme Court categorizes as a mere "foregone conclusion," Pennsylvania fervently rejects, finding that no exception applies due to the unique nature of a chosen passcode protecting the private contents of a personal device. *See State v. Andrews*, 243 N.J. 447; *Commonwealth v. Davis*, 220 A.3d 534 (Pa. 2019).

Likewise, while a United States District Court in the Northern District of California granted a defendant's motion to suppress and excluded from evidence a defendant's statement regarding her cellphone passcode, noting in the process that the Foregone Conclusion Doctrine did not apply, the Fourth Circuit Court of Appeals has held that any self-incriminating testimony that a defendant may have provided by revealing the password was already a "foregone conclusion" because the government independently proved that the defendant was the sole user and possessor of the subject device. *See United States v. Maffei*, No. 18-CR-00174-YGR-1, 2019 WL 1864712, at *1 (N.D. Cal. Apr. 25, 2019); *United States v. Gavegnano*, 305 F. App'x 954, 956 (4th Cir. 2009).

This Court's decision in *Fisher* was the one and only time that the Court has ever used the Foregone Conclusion Doctrine to limit the Fifth Amendment right against self-incrimination. *Fisher* and its progeny apply the exception only to the compelled production of *documents*, not to the digital universe with its vast capacity for storing private information. *Fisher*, 425 U.S. 391; *Doe*, 487 U.S. 201; *Hubbell*, 530 U.S. 27. This Court has not provided any further guidance to lower courts on this exception since 2000 when *Hubbell* was decided. During the intervening twenty years, lower courts have attempted to fit the framework surrounding compelled production of documents to modern day technologies like passcode-protected cell phones with varying results. On such a basic aspect of constitutional law having such broad implications, the Court's guidance is now essential.

The New Jersey Supreme Court no doubt expanded *Fisher*, holding that the Foregone Conclusion Doctrine

applies to the act of unlocking devices, which may reveal many private aspects of an everyday person's life. *See Andrews*, 243 N.J. 447. The ruling goes far beyond just the production of business records that *Fisher* envisioned. Contrary to what the New Jersey Supreme Court held below, various other state and federal courts have concluded that, unlike the production of a document, revealing a digital passcode impermissibly requires a person to communicate the contents of his mind. *See e.g., Davis*, 220 A.3d 534; *Seo v. State*, 148 N.E.3d 952 (Ind. 2020); *United States v. Maffei*, No. 18-CR-00174-YGR-1, 2019 WL 1864712 (N.D. Cal. Apr. 25, 2019).

Fisher presents a non-textual and narrow exception to the Fifth Amendment: if the government can show that the existence, possession or control, and authenticity of the identified documents or materials it seeks add “little or nothing to the sum total of the Government’s information” then the otherwise protected, testimonial act of producing those documents operates not as “testimony but surrender.” *Fisher*, 425 U.S. at 411. (quoting *In re Harris*, 221 U.S. 274, 279). However, breaking with the logic of *Fisher*, in its *Andrews* decision, the New Jersey Supreme Court held that the act of producing a passcode is testimonial, but nonetheless rationalized holding that passcodes are not protected by the Fifth Amendment by mistakenly characterizing them as “a series of characters without independent evidentiary significance and are therefore of ‘minimal testimonial value.’” 243 N.J. at 480 (quoting *U.S. v. Apple MacPro Computer*, 851 F.3d 238, 248 n.7 (3d Cir. 2017)). Passcodes are so much more than that overtly simplistic explanation. The New Jersey Supreme Court’s characterization is not only detached from the realities of modern technology that this Court

has eloquently recognized in a series of recent decisions, it is plainly devoid of any support from the precedents of this Court that it seeks to rely upon.

Specifically, the New Jersey Supreme Court ignored the nature and quality of the information being accessed through the revelation of Mr. Andrews' mobile device passcode, and in so doing, the New Jersey Supreme Court thus broadened *Fisher* well outside of its intended application. *Id.* The four-justice majority of the New Jersey Supreme Court below opined that compelled production of a passcode is analogous to the line of cases stating that a criminal defendant may be "compelled to display their physical characteristics and commit physical acts because the display of physical characteristics is not coterminous with communications that relay facts" like handwriting exemplars and voice samples. *Andrews*, 243 N.J. at 466 (citing *Hubbell*, 530 U.S. at 35; *Gilbert v. California*, 388 U.S. 263, 266 (1967); *United States v. Dionisio*, 410 U.S. 1, 7 (1973)). However, as Associate Justice Jaynee LaVecchia of the New Jersey Supreme Court aptly wrote in her blistering *Andrews* dissent, joined by fellow Associate Justices Albin and Timpone, "no case from the United States Supreme Court presently requires [an individual's forced disclosure of the contents of their minds]... and that protection deserves the utmost respect." *Andrews*, 243 N.J. at 485 (LaVecchia, J., dissenting). The logical gap between the reasoning of the New Jersey Supreme Court in *Andrews* and this Court's *Fisher* jurisprudence is so wide that the two cannot be reconciled without further guidance from this Court. If *Fisher* was truly intended to apply to mobile device passcodes on the strength of the mere fact that the owner of the mobile device is known, as the New Jersey Supreme Court has

now held, there is neither precedent from this Court or textual support in the Fifth Amendment itself for that premise. With its *Andrews* decision, the New Jersey Supreme Court has authorized prosecutors to engage in Star Chamber practices that should be condemned rather than facilitated. The practical impact of *Andrews* has been that prosecutors now prophylactically gain entry into the mobile devices of suspects without more than demonstrating that the device belongs to the suspect.

The Pennsylvania Supreme Court applied the Fifth Amendment jurisprudence to an indistinguishable set of facts from *Andrews*, and stressed an opposite conclusion—that the foregone conclusion exception is inapplicable. *See Davis*, 220 A.3d at 548-451. The *Davis* Court concluded, as did Associate Justice LaVecchia’s dissent in *Andrews*, that the foregone conclusion exception applies only to business records until this Court holds otherwise. *Id.*; *Andrews* 243 N.J. (LaVecchia, J., dissenting). The *Davis* court refused to extend the Fifth Amendment exception to passcode-protected devices, where an individual would be forced to reveal the contents of his mind. *Davis*, 220 A.3d at 548. *Davis* viewed the Commonwealth’s demand for Davis’ passcode “not as an end” or a mere “foregone conclusion,” but “as a pathway to the files being withheld.” *Id.* Under this Court’s jurisprudence, *Davis* held that “the Commonwealth is seeking the electronic equivalent to a combination to a wall safe.” *Id.* The Pennsylvania Supreme Court and the *Andrews* dissenters have isolated the precise reason why Certiorari is necessary at this juncture. Like a mere act of production by an investigative target might reveal inculpatory facts, so too does the verbal provision of a passcode that serves as a conduit for the deepest recesses of an individual’s private

affairs. Each are equally deserving of Fifth Amendment protection.

In *Seo*, the Indiana Supreme Court expressed confusion as to when the Foregone Conclusion Doctrine applies. 148 N.E.3d 952. The Indiana Supreme Court found the Fifth Amendment exception inapplicable because investigators had not shown that any particular files existed on the subject's device or that the owner of the device possessed those files. *Id.* The Indiana Supreme Court signaled alignment with the protections afforded by the Pennsylvania Supreme Court in *Davis*, stating that *the factual context* "highlights concerns with extending the limited foregone conclusion exception to the compelled production of an unlocked smartphone." *Seo*, 148 N.E.3d at 955. With such uncertainty, the proper development of the law is threatened without action on the Petition now before the Court.

It is especially noteworthy that New Jersey and Pennsylvania Supreme Courts were met with indistinguishable facts and came to opposite conclusions. Even among the state Supreme Courts that have come out on different sides of the issue, the matters have been decided by thin majorities, with significant dissents. While the high courts of some states acknowledge that digital is different and should be treated differently, like this Court noted in *Riley*, other state supreme courts attempt to equate producing physical documents to producing a passcode to decrypt a device that stores intimate details of a person's life. *See Riley* 573 U.S. 373. The Courts addressing this issue are interpreting the same constitutional right. It cannot be both ways.

As this Court discussed in *Carpenter*, passcodes are carefully chosen sequences of numbers or letters that are meant to give an individual privacy and protection. *See Carpenter v. U.S.*, 138 S. Ct. 2206, 2217 (2018). The New Jersey Supreme Court's dismissal and minimization of the importance of a passcode runs counter to that notion.

Continued confusion relating to application of the Foregone Conclusion Doctrine has created a material difference in the scope of an individual's Fifth Amendment rights depending solely on state borders. A federal constitutional right should not be so unevenly applied. Courts are trying to analogize whether a passcode is more akin to handing over a key to a lockbox or being compelled to provide a combination to a wall safe based on this Court's discussion in *Hubbell*. *Hubbell*, 530 U.S. at 43. One is a physical act and unprotected; the other involves delving into the contents of the mind. State supreme courts are grappling with the expansion of ever-changing technological advancements and trying to situate those advancements within doctrine that did not anticipate the technology we have today, will have tomorrow, and in the years to come. The Court must, therefore, act on the Petition.

Even more confusion exists regarding what the government needs to show to meet the Foregone Conclusion Doctrine's exception to the Fifth Amendment. Court opinions diverge: does the government need to show the existence, possession or control, and authenticity of the passcode, or the nature and character of the documents presumably contained within the device?

In *Andrews*, the New Jersey Supreme Court applied the physical production of documents framework to passcode-protected devices. *Andrews*, 243 N.J. 447. After finding the Foregone Conclusion Doctrine compels the production of passcodes, the Court further found that the State had met its burden to compel Andrews to produce the passcodes, overcoming his Fifth Amendment privilege. *Id.* The New Jersey Supreme Court applied the Foregone Conclusion Doctrine to the passcode itself, finding that because the passcodes existed, were in Andrews' possession or control, and could be authenticated, the test was satisfied. *Id.* The Supreme Court of Massachusetts and the intermediate appellate court for the Second District of Florida have articulated the applicable test in the same manner. *See, e.g., Commonwealth v. Gelfgatt*, 11 N.E.3d 605 (Mass. 2014); *State v. Stahl*, So. 3d 124, 136 (Fla. Dist. Ct. App. 2016). The ACDL-NJ respectfully submits that the courts in *Andrews*, *Gelfgatt* and *Stahl* impermissibly broadened the Foregone Conclusion Doctrine. Today, a majority of cell phone users have smartphones requiring some type of privacy protecting passcode. Thus, the notion that mere possession or control, coupled with authentication, is enough to subvert the Fifth Amendment falls well short of what can be gleaned from this Court's Fifth Amendment jurisprudence, to date.

Unlike the New Jersey Supreme Court's decision in *Andrews* and the decisions of those courts that have mirrored its flawed logic, a series of courts throughout the country have concluded that the Foregone Conclusion Doctrine is inapplicable to mobile device passcodes and should not be extended beyond its limited scope pertaining to production of business records. *See e.g., Davis*, 220 A.3d 534; *Seo*, 148 N.E.3d 952; *G.A.Q.L. v. State*, 257 So.

3d 1058, 1063 (Fla. Dist. Ct. App. 2018). These courts have properly reasoned that, to assess if the exception applies, the government's showing turns on the contents being sought once the passcode is received. *Id.* This is the proper analysis, should the Foregone Conclusion Doctrine even apply. To ignore the contents being sought once the passcode is received is not only illogical, it eviscerates the protections that this Court intended to extend to individuals under the Fifth Amendment's Act of Production Doctrine entirely.

Demonstrating the lack of uniformity and split among the courts that have addressed the issue presented here, it has been tackled by intermediary appellate courts in Florida more than once, and each time there was different result. The District Court of Appeal of the State of Florida, Fourth District, feared that applying the foregone conclusion exception to the compelled production of passcodes would swallow Fifth Amendment protections. *G.A.Q.L. v. State*, 257 So. 3d 1058, 1063 (Fla. Dist. Ct. App. 2018). Like *Davis* and *Seo*, Florida's Fourth District reasoned that a passcode is more akin to a safe combination than it is to a key to a lockbox. The Fourth District also joined *Davis* and *Seo* in acknowledging that the exception must analyze the contents sought behind the passcode, not merely the passcode itself. *Id.*

However, just two years prior, the District Court of Appeal of the State of Florida, Second District, applied the Foregone Conclusion Doctrine in the same manner as the New Jersey Supreme Court did in *Andrews*. That is, to the passcode itself and not to the contents device sought behind the passcode. *See State v. Stahl*, 206 So. 3d 124 (Fla. Dist. Ct. App. 2016). Later, in 2019, the District Court

of Appeal of the State of Florida, First District, agreed with the Fourth District that “on the assumption that the foregone conclusion exception applies to core testimonial communications” the State must show what information exists “beyond the password-protected cellphone wall.” *Pollard v. State*, 287 So.3d 649 (Fla. Dist. Ct. App. 2019) (citing *In re Grand Jury Subpoena*, 670 F.3d 1335, 1347 (11th Cir. 2012)).

The split among the various federal courts are along the same lines. For example, the Third Circuit Court of Appeals held that the Fifth Amendment does not protect an act of production when the potentially testimonial component of the act of production, such as the existence, custody, and authenticity of evidence, is a “foregone conclusion” that does not add anything to the information that the Government already knows. *United States v. Apple MacPro Computer*, 851 F.3d 238, 247 (3d Cir. 2017). Similarly, the Fourth Circuit Court of Appeals held that the Fifth Amendment is not violated when a suspect provides the password to a device, and the Government is aware that the suspect is the sole user and owner of the device, therefore satisfying the Foregone Conclusion Doctrine. *United States v. Gavegnano*, 305 F. App’x 954, 956 (4th Cir. 2009). However, the United States District Court for the Northern District of California granted a defendant’s motion to suppress and excluded from evidence the defendant’s statement regarding her cell phone passcode and noted the Foregone Conclusion Doctrine did not apply. *United States v. Maffei*, No. 18-CR-00174-YGR-1, 2019 WL 1864712, at *1 (N.D. Cal. Apr. 25, 2019).

The current uneven and disjointed method of adjudicating the issue now before this Court throughout the country is a detriment to our constitutional system. The manner that one's rights under the Fifth Amendment to the United States Constitution is adjudicated should not depend on what state or local jurisdiction within a state the target of a criminal investigation finds himself or herself in at the time of a governmental inquiry. This Court should provide guidance to eliminate the diametrically opposite approaches to handling the same issue that have emerged in the nation. The split is pronounced, dramatic, and should no longer evade review by the United States Supreme Court.

III. *Fisher* Should Be Revisited

In *Fisher*, this Court held that under the Foregone Conclusion Doctrine, an act of production is not testimonial if the State can show with "reasonable particularity" that, at the time it sought to compel an actor to produce information, the State already knew of the materials, thereby making any testimonial aspect a "foregone conclusion." *Fisher*, 425 U.S. at 410-13. As a result, the self-incrimination privilege did not bar the production of the documents sought. *Id.* at 413. Since *Fisher*, this Court has never again applied the Foregone Conclusion Doctrine to the Fifth Amendment. This Court should consider overruling *Fisher*.

The term "foregone conclusion" is not in the text of the Fifth Amendment or the Constitution. For many years the Fifth Amendment prohibited all compelled testimony, as well as any compelled evidence that would lead to incrimination. *Boyd v. United States*, 116 U.S.

616, 634–635 (1886). The late Justice Scalia and Justice Thomas have both properly questioned whether compelling incriminating testimony or evidence is consistent with the Fifth Amendment, stating that compelling such evidence “may be inconsistent with the original meaning of the Fifth Amendment’s Self-Incrimination Clause.” *United States v. Hubbell*, 530 U.S. 27, 49 (2000) (Thomas, J., dissenting). Further, “the privilege against self-incrimination was enshrined in the Virginia Declaration of Rights in 1776,” which provided that “no one may ‘be compelled to give evidence against himself.’ ” *Id.* at 52. (citing Virginia Declaration of Rights § 8 (1776), in 1 *The Bill of Rights: A Documentary History* 235 (B. Schwartz ed.1971)).

This Court must assure “preservation of that degree of privacy against government that existed when the [Fifth] Amendment was adopted” and not only protect “the specific rights known at the founding; it means protecting their modern analogues too.” *Carpenter v. United States*, 138 S. Ct. 2206, 2271 (2018) (Gorsuch, J., dissenting). The modern analogues include cellphones, “which 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 v. California*, 573 U.S. 373, 385 (2014) (Roberts, C.J., majority).

There is no support for the Foregone Conclusion Doctrine in anything from our founders, or in the text of the Constitution itself. Forcing an accused to produce a password to a cell phone containing potentially incriminating evidence runs contrary to the intent of the founders, who “broadly sought to protect a citizen from ‘be[ing] compelled to give evidence against himself.’ ” *Hubbell*, 530 U.S. at 53 (Thomas, J. dissenting). Because

the Foregone Conclusion Doctrine is inconsistent with the founders' intent to protect against compelled incrimination broadly, *Fisher* should now be overruled.

CONCLUSION

For the foregoing reasons, as well as those expressed in the Petition, the ACDL-NJ urges this Court to grant the Petition for Writ of Certiorari.

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