No. 20-937

IN THE

Supreme Court of the United States

ROBERT ANDREWS,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

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

BRIEF OF LAURENT SACHAROFF, PROFESSOR OF LAW AT THE UNIVERSITY OF ARKANSAS, AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

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INTEREST OF AMICUS CURIAE [1]

Laurent Sacharoff is a law professor at the University of Arkansas who writes on the topic of compelling passwords, including *Unlocking the Fifth Amendment: Passwords and Encrypted Devices*, 87 Fordham L. Rev. 203 (2018), and *What Am I Really Saying When I Open My Smartphone? A Response to Orin S. Kerr*, 97 Texas L. Rev. Online 63 (2019). Courts often cite his work in this area. His interest is in the best interpretation of the Fifth Amendment and a robust recognition of individual liberties in the digital age. He joins this brief in his personal capacity, and the views here do not necessarily represent those of the University of Arkansas.

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[1] The parties have consented to the filing of this brief. Counsel of record for both parties received notice at least 10 days before the date of *Amicus Curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (and no party) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus* or his counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Amicus Curiae respectfully urges the Court to grant the petition for certiorari.

Locked devices such as smartphones have presented law enforcement and courts with a new quandary that defies existing legal tools. When law enforcement has a valid search warrant, may a court order a suspect or defendant either to disclose her password or to open the device herself? Or may the individual successfully rely upon the Fifth Amendment right against self-incrimination and refuse?

At the highest level, password cases present a conflict between two fundamental constitutional provisions. Law enforcement has obtained a warrant valid under the Fourth Amendment to search the device. The warrant entitles them to the documents on the device, which they have already seized. But the device is locked, and the individual enjoys a right against compelled testimony under the Fifth Amendment. How to harmonize these competing concerns? Even the analogy to the closest existing legal doctrine, the Court's act-of-production cases under *Fisher v. United States*, 425 U.S. 391 (1976) ("*Fisher*") and *United States v. Hubbell*, 530 U.S. 27 (2000), does not quite capture the situation.

This Court has yet to take a case that would clarify even the basic framework for how courts should analyze the compelled password cases. It should do so now by taking the decision below, *State*

v. Andrews, for review. *Andrews* illustrates a broader confusion over password cases. But it also erred in a particular and basic way that makes it low-hanging fruit. The Court could use this case to lop off, at least, one of the easier branches of the problem.

The threshold mistake *Andrews* and several other decisions make is their failure to distinguish two fundamentally different scenarios. In the first, a judge orders a suspect to disclose his password to the authorities so law enforcement can open the device. In the second, a judge orders the person to open the device herself in a way that discloses the password to no one else. This second question involves difficult analogies, especially to the act-of-production cases.

But the first question—compelled disclosure—is easy; the order compels ordinary, pure testimony that has nothing to do with the act-of-production cases and therefore does not even trigger the foregone conclusion exception. The Fifth Amendment, however, affords absolute protection against any order compelling a person to state, from his memory, a true or false statement such as a passcode. Decisions like the one below make the mistake of treating a disclosure case as if it were one that required a person to open the device without such disclosure, e.g., as occurred in *United States v. Doe (In re Grand Jury Subpoena Duces Tecum dated March 25, 2011)*, 670 F.3d 1335 (11th Cir. 2012), and overlook the Fifth Amendment protections.

An order to disclose a password does not even trigger *Fisher* because *Fisher* applies only when a court orders a person to produce *pre-existing* documents. *Fisher* held that the Fifth Amendment does not protect pre-existing documents because they were not compelled when created. When a Court orders a person to *state* her password, it has not ordered her to produce pre-existing documents; rather, it has ordered her to create, afresh, testimony. This Court could clarify that *Fisher*, the act-of-production inquiry, and the foregone conclusion exception, do not apply because the premise triggering *Fisher* does not exist.

If *Andrews* were the only decision to have applied *Fisher* and the foregone conclusion doctrine to an order to *disclose* a password, perhaps this Court could pass over it in silence. But with *Andrews*, New Jersey's highest court has created a split, and it has been joined by other courts in its fundamental error.

But even beyond this threshold error, the Court could use this case to address a far harder question: if a court orders a person to open her device in such a way that no one else learns the password, what kind of Fifth Amendment protections does she enjoy? These cases are also very common. In addressing this question, the Court could provide either specific, detailed guidance or perhaps at least a rough framework.

A rough framework would answer fundamental threshold questions about orders compelling a person to open a device without disclosing the password.

First, should courts even analogize to the act-of-production cases, or should they start from first principles? If they analogize to the act-of-production cases, how do those cases apply to devices, and especially, how does the controversial foregone conclusion doctrine apply?

Second, this Court could take a bolder route and reject the analogy to the act-of-production cases. In doing so, it could start from first principles for cell phones and compelled passwords. Such an approach could treat entering a password as enjoying the same, full Fifth Amendment protections as disclosing a password. This approach would harmonize password cases and end the strange existing doctrine of treating act-of-production testimony as somehow lesser.

This brief will first address the core question raised by the decision below: the distinction between the type of testimony at issue when a person must disclose her password versus merely opening the device. It will then consider the separate scenario in which a court orders a person to open the device without disclosing her password.

ARGUMENT

I. CONFUSION BETWEEN PURE TESTIMONY AND QUASI TESTIMONY EXISTS IN LOWER COURTS

In cellphone password cases, courts have become increasingly confused between two distinct categories. First, a judge orders a suspect to disclose his password to the authorities so law enforcement can open the device. Second, a judge orders the person to open the device herself in a way that discloses the password to no one else. The distinction matters because it determines into which line of Supreme Court decisions the analysis must be channeled. When courts conflate the categories, as the New Jersey Supreme Court did in *Andrews*, they apply doctrines applicable to one category to the other category.

The confusion arises because this Court in *Fisher* inadvertently created two classes of testimony, denominated as "pure" and "quasi" testimony in this brief. Pure testimony uses *language*, or its equivalent, to communicate a true or false statement. As this Court noted in *Pennsylvania v. Muniz*, "the vast majority of verbal statements thus will be testimonial" because they likely "convey information or assert facts." 496 U.S. 582, 597 (1990) (citation omitted). Law enforcement relies upon the truth value to further its investigation or as evidence at trial. The content itself is incriminatory or will lead to incriminatory information. *Hoffman v. United States*, 341 U.S. 479 (1951).

Moreover, acts that are *intended* to be symbolic speech, such as nodding "yes," or burning a draft card, also count as testimonial. Whether a person uses language or an act, she wants the other person to recognize those acts as communicative. If I merely loosen my neck, a person might infer it is stiff, but I have not communicated in an ordinarily testimonial way; if I nod in response to a question, I likely intend that act to be meaningful, i.e., "yes."

The use of language to express a true or false statement brings that statement within the "core" of Fifth Amendment protection. *Muniz*, 496 U.S. at 596. It means a person must choose to tell the truth, lie, or remain silent. This quandary, the "cruel trilemma," puts the defendant in an untenable position. *Id.* at 597. The Fifth Amendment removes that oppressive coercion in relation to criminal cases.

Quasi testimony, by contrast, is the type of testimony created by *Fisher* and used in act-of-production cases in which the government subpoenas documents from a witness. *Fisher* held that the contents of these pre-existing documents are not protected by the Fifth Amendment because the government did not compel the person to create them. 425 U.S. at 403-04. *Fisher* created a discrete category: cases involving *pre-existing documents*, in which the government seeks production of those documents.

But *Fisher* created an exception to the rule that compelling a document production does not implicate the Fifth Amendment. It held that the very act of

producing the documents could be testimonial itself. The person producing the documents, as an inevitable by-product of that production, communicates facts including the fact that the documents exist, that she possesses them (since she physically handed them over), and that they are authentic (since they came from her files and since she thought they were responsive).

However, even as *Fisher* announced the act of production could have a testimonial aspect, it quickly created a limit called the "foregone conclusion" exception. Under the foregone conclusion exception, roughly speaking, if the government already knows the testimony, it can compel it. And just as a reminder, the testimony at issue is the testimonial aspect of the act of production—the implicit communication concerning the existence of the documents, possession, and authenticity. *Fisher* explained that if the government meets the foregone conclusion exception, the testimony is not "sufficiently" testimonial. It is a lesser form of testimony, apparently, because it "adds little" to the government's case.

For example, suppose the government demands a witness produce her bank statement for a particular month from a particular bank. The content of the bank statement is not protected, but producing it will tend to show it exists, she possesses it, and that it is authentic. *E.g., United States v. Greenfield*, 831 F.3d 106, 112-13 (2d Cir. 2016). This information might be useful to the government's case in addition to or in conjunction with the contents of the bank statement.

The witness can therefore claim a Fifth Amendment privilege. But if the government already knows she has that particular bank statement, it has met the foregone conclusion doctrine test. *Id.* It can compel production. The exception to the exception is met.

As a result of the foregone conclusion exception, this Court has effectively rendered act-of-production testimony "quasi" or "lower." The government can compel the information *even though it is testimonial*. This Court has never expressly divided "pure" testimony from "quasi" testimony by labels. It may never have had in mind to create two classes of testimony, one pure and unassailable, the other quasi and defeasible. But it has effectively done so in *Fisher*, at least with respect to document productions.

What motivated this Court in *Fisher* to confer lesser status on the testimony accompanying the act of production? The likely answer is fairly straightforward: *all* productions of documents communicate, as a byproduct, that the documents exist, the witness possesses them, and that they are authentic. Sacharoff, 87 Fordham L. Rev. at 218. As a result, if this Court conferred full protection to this testimony, it would swallow the main holding of *Fisher* that documents do not enjoy Fifth Amendment protection. That is, even if the contents are not protected, every witness ordered to produce documents could simply say that the act is testimonial, by necessity, and then she could always withstand production.

A. *Fisher* Applies to Pre-Existing Documents Only

Fisher and the entire act-of-production scaffolding apply only when the government seeks to compel production of *pre-existing* documents. The act-of-production testimony is in addition to the message communicated by the content of these documents. The witness cannot, after *Fisher*, claim a Fifth Amendment privilege in the content of the documents themselves. She argues instead that the act of producing them is at least testimonial. Once she makes this argument, the government will seek to meet the foregone conclusion exception as an exception to her reliance on the act-of-production type testimony.

But if the government compels the content itself, if it compels a person to *create* the document, then we never get to the secondary question of whether the act of producing that newly-created document is also testimonial. It might be, but it does not matter. Compulsion to *create* the document obviously compels testimony in the pure sense and is banned by the Fifth Amendment. *Fisher* and its corollaries, act-of-production testimony and the foregone conclusion exception, only follow if the document sought is *pre-existing*.

B. *Fisher* Does Not Apply to Compelled Disclosure of a Password

The same limit to *Fisher* applies to digital devices. In any password case, a court must first

decide whether the government compels pure testimony entitled to full Fifth Amendment protection, or quasi testimony analogous to the act of producing documents.

If the government orders a person to open her device only, this compulsion resembles a subpoena compelling a person to produce documents. As with documents, the suspect performs an act – opening the device – and this act makes the documents sought available to law enforcement. As suggested below, the foregone conclusion doctrine should probably not apply here either, but if it applies at all, it applies to this situation only.

But when a court compels a person to *disclose* her passcode, as in the decision below, neither the act-of-production cases nor their foregone conclusion exception applies at all. First, the court is compelling pure testimony. The witness must use language to intentionally communicate a true or false statement upon which law enforcement will rely to further its case.

For example, suppose a person's passcode is "1234." If a court compels her to disclose it, she can say, "1234," or "4567" or refuse to answer. If she says, "1234," she uses those numbers, she intends those sounds she utters, to be understood not as random sounds but as communicating the numbers that will open the phone. She uses language, albeit numbers, to communicate a message: "the passcode to this device is 1234." This is not an implicit message but an explicit one. Sacharoff, 87 Fordham

L. Rev. at 223 (noting most scholars and many courts agree that compelling oral disclosure of a passcode enjoys full Fifth Amendment protection).

Second, *Fisher*, the act of production, and the foregone conclusion, are triggered *only* when a person is compelled to produce pre-existing documents. The content is not protected, so the person must fall back on the act-of-production theory. But in *Andrews*, the court compelled disclosure of the password from the person's mind, and not the production of any pre-existing document. *Fisher* therefore does not apply.

The decision below tried to avoid this straightforward conclusion by labeling the case as one ordering the "production" of the password and applied the foregone conclusion doctrine to the "act of producing the password." *Andrews*, 234 A.3d at 1273; *id* at 1274 ("we view the compelled act of production in this case to be that of producing the passcodes."). This cynical mislabeling, however, does not change the reality of the order. There is no "production" here. The trial court did not order Andrews to produce a pre-existing document.

For example, suppose a court ordered a person to write down on a piece of paper whether she possessed cocaine when she was arrested. She writes, "yes." The court then orders her to *produce* that piece of paper to the prosecutor. One could say this is an act-of-production case and apply the entire *Fisher* scaffolding to the situation. Handing over the piece of paper communicates its existence, the fact

that she possesses it, and that it is authentic. The government could then claim it meets the foregone conclusion exception because the government knows she possesses the piece of paper; she literally just wrote it. The same would apply if the court required her to write down her password and hand it over.

But, of course, the above scenario would be ridiculous. One never gets to whether the foregone conclusion applies here because she would not be arguing that her act of producing the piece of paper is protected in the first place. Rather, she would argue that her act of *creating* the piece of paper is protected, because that is not just an act, but a true-false written communication. The government cannot compel her to write down whether she possessed cocaine, or her password, in order to hand it over. *Fisher* does not apply to this scenario because we are not dealing with pre-existing documents.

By contrast, if the government *did* subpoena her for all pre-existing documents that contained her password, such as a post-it note on her desk, then the act-of-production doctrine would apply. But under the foregone conclusion exception, the government would need to show it knew she had the post-it note.

This Court should grant certiorari of the decision below if only to clarify this basic point. Other courts beyond *Andrews* have mistakenly held that the foregone conclusion doctrine applies to an order to disclose a password rather than some pre-existing document. *State v. Stahl*, 206 So. 3d 124, 136 (Fla.

Dist. Ct. App. 2016); *see also Commonwealth v. Davis*, 220 A.3d 534, 554 (2019) (Baer, J., dissenting with two others). The Florida Supreme Court recently took cert to resolve precisely this question after a split in Florida's appellate courts. *State v. Garcia*, Case No. SC20-1419, 2020 WL 7230441 (Fla. Dec. 8, 2020) (*granting cert*).

II. THIS COURT SHOULD RESOLVE WHETHER AND HOW TO APPLY THE ACT-OF-PRODUCTION CASES TO COMPELLED DISCLOSURE OF PASSWORD CASES

The harder question involves an order that a person open her device without disclosing her password. Almost all courts analogize such a case to the act-of-production cases. Scholars do, as well. It is in applying this analogy where differences arise. *Compare* Orin Kerr, *Compelled Decryption and the Privilege Against Self-Incrimination*, 97 Texas L. Rev. 767 (2019) with Sacharoff, 97 Texas L. Rev. at 68. The confusion arises in part because the act-of-production cases do not entirely explain in what way the act is actually testimonial; the problem lies with the premise in *Fisher*. Sacharoff, 97 Texas L. Rev. at 66. But even upon the best understanding of *Fisher*, courts disagree on how the analogy applies.

A. How the Act-of-Production Analogy Should Apply to Password Cases

This brief will consider how the act-of-production analogy *should* apply before showing how other courts have argued it should apply. In doing so, we

simply match like to like. For a document subpoena, we have (i) an order to compel (ii) the physical act of producing documents (iii) giving law enforcement the ability to review the content of the documents. For a phone, we have (i) an order to compel (ii) the act of opening the phone (iii) giving law enforcement the ability to review the content of the documents. Only the acts differ, and that difference does not matter a great deal because in both cases, the act makes the documents available.

Moreover, the testimony implicitly communicated by each act similarly match. In a subpoena situation, the act of physically handing over the documents implicitly testifies about those documents: their existence, possession, and authenticity. For a phone, the act of opening it likewise implicitly testifies to the existence, possession, and authenticity of its contents.

In each case, the act implicitly communicates for the same reason. By handing the documents over, the witness suggests that she possessed them. When a suspect opens a phone, that act suggest she possesses what is on it. The inference is very powerful and natural in both cases. And in both cases, a jury may decide not to draw the inference. It might decide that the person who produced the documents is the lawyer, or accountant, or even the spouse of the real possessor. For phones, it might decide that the phone is not that of the witness. But in either case, the act of production *tends* to be incriminatory evidence concerning possession of the

documents (as well as their existence and authenticity).

Once we see that the act of opening the phone implicitly communicates information about the documents, it then follows that the foregone conclusion exception must apply to that same communicative aspect of the act. The government must show with a subpoena that it knows the documents already exist, the person possesses them, and that they are authentic. Similarly, with the act of opening a phone to render the documents accessible, the foregone conclusion requires the government know the existence, possession, and authenticity of the documents or files on the device. Several courts have correctly taken this approach. *E.g., Eunjoo Seo v. State*, 148 N.E.3d 952, 957 (Ind. 2020) (citing cases).

B. Many Courts Have Erroneously Applied the Act-of-Production Analogy

But many courts have applied, in rough parlance, the foregone conclusion doctrine to the password only. *See, e.g., Commonwealth v. Jones*, 117 N.E.3d 702, 710 (Mass. 2019); *see also* Kerr, 97 Texas L. Rev. at 767. These courts reason that the *only* fact implicitly communicated by the act of opening a phone is knowledge of the password, and therefore the foregone conclusion doctrine applies only to whether the person knows the password to the device. But this view is not faithful to the analogy. It would be like saying that when a person physically produces documents, all that act communicates is

their physical ability to produce the documents and not the existence, possession, or authenticity of the documents themselves. And that is simply not how the act-of-production cases work.

These courts mistakenly resist a faithful analogy to the act-of-production cases because they argue that a password situation differs from those cases. In a password case, the government has a warrant and already possesses the documents. Fine—but then do not analogize to the act-of-production cases at all. In analogizing, but then altering the analogy, these lower courts take us completely away from the actual principle undergirding the act of production cases: that production communicates something about the documents themselves, such as existence or possession. If the act-of-production cases are not truly analogous, then the government should not be able to take advantage of the foregone conclusion exception. These courts have, in essence, plucked out the portions of the analogy that benefit law enforcement without any guiding, neutral principle. Better to start from first principles and appropriately weigh the interests at stake.

If this Court grants certiorari for the decision below, it could clarify this area of the law as well. This Court could say, essentially, that *if* we are going to analogize the act of opening a phone to that of a document production, then we must remain faithful to that analogy. Of course, this Court might be wise to make a bolder statement: that the act-of-production cases are too disanalogous to rely upon. It could say that almost all courts have gone down the

wrong path when they analogize opening a device to producing documents. This too would be very helpful guidance to courts below.

III. THIS COURT COULD POINT LOWER COURTS AWAY FROM THE ACT-OF-PRODUCTION ANALOGY AND BACK TO FIRST PRINCIPLES

This Court could review the decision below to provide broader guidance for locked device cases. The act-of-production analogy is not terribly helpful. Both sides of the argument, law enforcement and the individual suspect, have grounds to complain. From the point of view of law enforcement, they already *possess* the documents based on a warrant because they already possess the device. For them, it is a seizure case. They are not asking the individual to produce the documents, but merely remove an obstacle. An order to open such a device differs from requiring an individual to respond to a subpoena, review the specification, comb through her own documents, and select those that are responsive for production.

Individuals such as witnesses, suspects, and defendants argue that the situation with a device is *worse* than a document production. A document production is limited, and the individual retains control over what is produced. Once a person opens her device, by contrast, law enforcement has access to all documents and files. They can search practically without limit and engage in fishing expeditions if they so choose. Moreover, smartphones

contain vastly more data, and types of data, including personal data, than would ever be produced in an ordinary document production. They contain photos, videos, location data, passwords, links to bank accounts, shopping history – basically a person's entire life.

Smartphones function more like a part of our mind. Bryan H. Choi, *The Privilege Against Cell Phone Incrimination*, 97 Texas L. Rev. 73, 75 (2019). They have become an integral part of our memory, and we use them to accomplish numerous mental tasks. To the extent the Fifth Amendment protects a private mental sphere in connection with criminal investigations, at least, it should have a special application to these special devices. *Cf. Riley v. California*, 573 U.S. 373 (2014).

For these reasons, this Court may want to hint to lower courts that they should sidestep the act-of-production analogy and start from first principles. In doing so, this Court might follow the suggestion of Justice Thomas in *Hubbell* – that *Fisher* simply got it wrong. *Hubbell*, 530 U.S. at 49 (Thomas, J., concurring); *see also Carpenter v. United* States, 138 S. Ct. 2206, 2271 (2018) (Gorsuch, J., dissenting). The Fifth Amendment, as originally understood, forbids compelling a person to *furnish* evidence against himself. Richard A. Nagareda, *Compulsion "To Be a Witness" and the Resurrection of Boyd*, 74 N.Y.U. L. Rev. 1575 (1999). It is not limited to compelled testimony. True, it uses the term "witness," but Professor Nagareda has built a

powerful case that the framers intended the clause to mirror the legal practice and understanding of the day, as well as the equivalent ban contained in state constitutions. That practice, and those state provisions, banned the broader attempt to require a person to furnish evidence such as papers or, in the case of devices, files and documents.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* urges this Court to grant the petition for a writ of certiorari.

February 12, 2021 Respectfully submitted,

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