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 *AMICUS CURIAE* OF THE CORDELL INSTITUTE OF WASHINGTON UNIVERSITY IN ST. LOUIS, THE RUTHERFORD INSTITUTE, AND THE AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Cordell Institute of Washington University in St. Louis ("The Cordell Institute"), the Rutherford Institute, and Americans for Prosperity Foundation ("AFPF") respectfully submit this brief *amicus curiae* in support of Petitioner Robert Andrews and his petition for writ of certiorari.

Founded in 1853, Washington University in St. Louis is an internationally known university whose mission is to discover and disseminate knowledge, and protect the freedom of inquiry through research, teaching and learning. The Cordell Institute is a collaboration between the University's schools of law and medicine, founded to work on legal and other problems at the intersection of law and human information technologies like smartphones. The Cordell Institute leadership and staff include includes law professors and attorneys who work at the forefront of privacy law, information law, and constitutional civil liberties. The Cordell Institute submits that this extensive knowledge and experience in the subject of the Petition, along with extensive

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[1] Pursuant to this Court's Rule 37.2, this *amicus* brief is filed with the parties' consent. Counsel of record for all listed parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

appellate litigation experience, will provide a useful additional viewpoint to assist the Court in its consideration of this petition for certiorari and case.

The Rutherford Institute is an international nonprofit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom, ensuring that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed to persons by Constitution and laws of the United States.

AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. AFPF works toward these goals, in part, by defending the individual rights and constitutional freedoms that are essential to ensuring that all members of society have an equal opportunity to thrive. As part of this mission, it appears as an amicus curiae before state and federal courts. AFPF is interested in this case because it believes the Fifth Amendment holds that no individual, including the one in the case below, should be compelled to be a witness against himself. The lower courts have splintered on this issue, and this case is the right vehicle to resolve that split.

SUMMARY OF ARGUMENT

This Court should grant certiorari in this case in order to resolve splits among the federal circuits and state courts of last resort and to correct decisions which conflict with this Court's historical understanding of the right against self-incrimination. In the compelled decryption cases, courts not only disagree about how this Court's self-incrimination doctrine should be applied, they also disagree about whether the Fifth Amendment right against self-incrimination prohibits the government from compelling a person to speak, write or otherwise communicate pure testimony of an incriminating nature. This confusion stems from this Court's decision in *Fisher v. United States*, 425 U.S. 391 (1976) and its concept of "testimonial communications."

This case is an excellent vehicle for this Court to resolve the confusion and clarify its decision in *Fisher* because the decision below, and all compelled decryption cases, are united by their application of *Fisher*'s framework. Moreover, compelling decryption also compels the creation of pure testimony, whether spoken, written or otherwise. As a result, the compelled decryption cases and the case below are also united by the question of whether the Fifth Amendment prohibits the compulsion of pure testimony. *State v. Andrews*, 243 N.J. 447, 480–81 (2020).

Further, the decision below has decided important questions of federal law in a way that conflicts with

relevant decisions of this Court. This Court's current and historical understanding of the right against self-incrimination has always aligned with its common law origins, under which the Fifth Amendment prohibits the government from subjecting a person to the cruel trilemma of telling the truth and accusing oneself, committing perjury, or declining to answer and being held in contempt. *Pennsylvania v. Muniz*, 496 U.S. 582; 596–97 (1990). The decision below applied *Fisher* but contradicted this Court's clear instruction by compelling Petitioner to choose between self-accusation through decryption, perjury, or contempt for failing to comply. The compelled decryption of digital devices also contradicts this Court's unequivocal recognition that exposing the contents of a cell phone or computer to the government is more harmful to privacy than even "the most exhaustive search of a house." *Riley v. California*, 573 U.S. 373, 396 (2014); *Carpenter v. United States*, 138 S. Ct. 2206 (2018). Compelled decryption, moreover, exposes the entirety of a device to the eyes of the state. The confusion, splits, and contradictions with this Court's precedent are certain to continue if *Fisher* is not reexamined.

ARGUMENT

I. THERE ARE SIGNIFICANT DIVISIONS IN AUTHORITY AMONG FEDERAL CIRCUIT AND STATE COURTS OF LAST RESORT IN THEIR APPLICATION OF THE FIFTH AMENDMENT TO COMPELLED UNLOCKING OF DIGITAL DEVICES.

A. Splits regarding the decryption of digital devices

Petitioner is correct that the decision below conflicts with the decisions of state courts of last resort and federal courts of appeals as to whether and how the Foregone Conclusion Doctrine can be applied to government mandates compelling decryption, password disclosure, and similar acts. Pet. for Cert. 6–7. In fact, the confusion pervading this area of law (collectively, the "compelled decryption cases") is even deeper. The divergent applications of *Fisher v. United States*, 425 U.S. 391 (1976) and the wider body of self-incrimination cases which apply the concept of 'testimonial communications' ("communications theory") is so great that courts are unable to understand or agree upon fundamental aspects of the Fifth Amendment. Michael Washington, *Compelled Decryption and the Right Against Self-Incrimination:* Obsta Principiis pt. 3 (2020) (JSD dissertation, Washington University in St. Louis School of Law), https://ssrn.com/abstract=3771879 [hereinafter Washington, *Obsta Principiis*].

The compelled decryption cases show that courts are confused about the definitions of the terms "testimonial," "communicative," and "communication." *Compare, e.g.*, *State v. Diamond*, 905 N.W.2d 870, 877 n.8 (Minn. 2018) (finding that decrypting a phone by fingerprint is not "testimonial" even if it reveals the contents of one's mind), *with, e.g.*, *United States v. Warrant*, No. 19-MJ-71283-VKD-1, 2019 WL 4047615 *2–*3 (N.D. Cal. Aug. 26, 2019) ("[C]ompelling an individual…to use his or her finger or face to unlock a device represents incriminating testimony…because it amounts to an assertion of fact."). Courts are also divided over what can be communicated by or inferred from a given act. *Compare, e.g.*, *Commonwealth v. Gelfgatt*, 468 Mass. 512, 524 (2014) (holding that decryption would communicate the facts of "ownership and control of the computers and their contents, knowledge of the fact of encryption, and knowledge of the encryption key"), *with, e.g.*, *Commonwealth v. Jones*, 481 Mass. 540, 547; 547 n. 8 (2019) (holding that identical facts would not communicate "the fact of 'ownership' of the device or its contents" or the fact of control, but only knowledge of the password). Courts are divided over whether a fact must be intentionally or successfully "received" by the government. *Compare, e.g.*, *United States v. Oloyede*, 933 F.3d 302, 309 (4th Cir. 2019) (finding that no "communication" occurred under the Act of Production Doctrine when defendant was compelled to enter her password into her phone because "she simply used the unexpressed contents of her mind to type in the passcode herself."), *with, e.g.*, *In re Boucher*, No. 2:06-MJ-91, 2007 WL 4246473 *4

(D. Vt. Nov. 29, 2007) (finding that even if "no one views or records the password" as it is being entered, "it would not change the testimonial significance of the act.").

Courts are similarly split over the familiar metaphor that the Fifth Amendment prohibits the government from compelling a person to "disclose the contents of his own mind." *Curcio v. United States*, 354 U.S. 118, 128 (1957). In the compelled decryption cases, some courts invoke this rule, *e.g.*, *Pollard v. State*, 287 So.3d 649, 653 (Fla. Dist. Ct. App. June 20, 2019), while others make no mention of it, *e.g.*, *State v. White*, No. A-4971-17T4, 2019 WL 2375391 (N.J. Super. Ct. June 5, 2019). When the rule is invoked, some courts apply the rule to the facts of the case, *e.g.*, *United States v. Kirschner*, 823 F. Supp. 2d 665, 669 (E.D. Mich. 2010); *G.A.Q.L. v. State*, 257 So. 3d 1058, 1059 (Fla. Dist. Ct. App. 2018), while others articulate the rule but never apply it, *e.g.*, *United States v. Sanchez*, 334 F.Supp.3d 1284, 1295 (N.D. Ga. 2018). Even when the rule is applied, outcomes differ widely. The Supreme Court of Pennsylvania determined that compelling a person to "produce" a password necessarily compelled him to divulge the contents of his mind, *Commonwealth v. Davis*, 220 A.3d 534, 548 (Pa. 2019), while the Florida District Court of Appeals found the same act would neither "betray any knowledge" nor "implicitly relate a factual assertion or disclose information," *State v. Stahl*, 206 So.3d 124, 134 (Fla. Dist. Ct. App. 2016) (punctuation omitted). In the present case, the Supreme Court of New Jersey invoked the former rule, but determined that the

disclosure of the contents of one's mind was irrelevant in light of *Fisher's* Foregone Conclusion Doctrine. *State v. Andrews*, 243 N.J. 447, 478; 480–81 (2020).

As a consequence, there is deep and pervasive confusion among courts at all levels about whether the Fifth Amendment prohibits the government from compelling a person to speak or write incriminating information in the context of digital devices. Whereas, for example, some courts find there to be only "*some* support for the idea that the written disclosure of [a] password would amount to direct testimony," *Jones*, 481 Mass. at 547 n. 9 (emphasis supplied), others insist that "[a]t its core," this issue is about "which vision of the right…prevails: those of the Founders who erred on the side of personal liberty or those who defend state powers to extract testimony and see no problem in 'merely compel[ling a defendant] to unlock [a] phone by entering the passcode himself.'" *Pollard*, 287 So.3d at 664.

B. This case presents an excellent vehicle for this Court to resolve these divisions in authority and to clarify its decision in *Fisher*.

This case presents an excellent vehicle for the Court to resolve these splits and disagreements. Below, the Supreme Court of New Jersey held that the compulsion of pure testimony was acceptable under *Fisher*'s Foregone Conclusion Doctrine, *Andrews*, 243 N.J. at 480–81. In so doing, it squarely presented the important question of whether the Fifth Amendment does or does not prohibit the government from

compelling a person to speak or write incriminating information.

This case is capable of addressing *all* compelled decryption cases for two reasons. First, all forms of compelled decryption force the accused to speak, write, or otherwise communicate his password or key—directly to the government, directly into a device or in some other manner—and so necessarily compel the creation of incriminating testimony.

Second, the process of encryption and decryption necessarily results in the creation of new data that did not previously exist. Indeed, the creation of new data defines the very meaning of the word 'decrypt': "[t]o *convert…into plaintext* by proper application of the key." *Decrypt*, Oxford English Dictionary Online (Dec. 2020) (emphasis supplied). Assuming that either the underlying data, or an accused's relationship with the data, device or password, is a "link in the chain of evidence" necessary to prosecute the accused, *Maness v. Meyers*, 419 U.S. 449, 461 (1975), all instances of compelled decryption necessarily compel the creation of incriminating data which did not previously exist, and so all compelled decryption cases are united by the question of whether the Fifth Amendment prohibits the government from compelling the creation of incriminating writings. Thus, this case is an excellent vehicle for this Court to provide much needed guidance on the most fundamental questions of Fifth Amendment protection and to resolve the splits and disagreements among the courts.

II. THE NEW JERSEY SUPREME COURT HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH BOTH THE RELEVANT DECISIONS OF THIS COURT AND THE HISTORY AND TRADITIONS OF THE FIFTH AMENDMENT

A. The historical understanding of the right against self-incrimination.

The Fifth Amendment's proclamation that no person shall "be compelled…to be a witness against himself," U.S. Const. amend. V, is a "generic" invocation of the common law right against self-incrimination and its principles "in their full efficacy," *Bram v. United States*, 168 U.S. 532, 543; 544 (1897). The common law right against self-incrimination arose as the maxim *nemo tenetur prodere seipsum*—meaning that no man is bound to accuse himself—in direct response to the Star Chamber and High Commission's use of inquisitorial procedure to stamp out religious heresy and political dissent. Leonard W. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* 107–09 (1968) [hereinafter Levy, *Origins*]; R.H. Helmholz et al., *The Privilege Against Self-Incrimination: Its Origins and Development* 17 (1997).

Using *fama*, or rumor, as a pretext, the High Commission would sweep up suspected dissidents in mass arrests and force the arrestees to swear an oath to truthfully answer all questions put to them before they would be informed of their alleged offenses. Levy, *Origins*, at 24–25. As a result, everyone forced to

swear the oath *ex officio* was firmly trapped within the cruel trilemma of self-accusation, perjury, or contempt. Ethan H. Shagan, *The English Inquisition: Constitutional Conflict and Ecclesiastical Law in the 1590s*, 47 Hist. J. 541, 560–61 (2004) (emphasis original); 9 Thomas Fuller, *The Church History of Brittan*, 189–203 (1656) (discussing the articles put to Thomas Cartwright by the High Commission).

Many of the principles and purposes associated with the Fifth Amendment were first articulated as moral objections to inquisitorial procedure by Puritan ministers imprisoned for refusing to swear the oath *ex officio*. *A General Supplication made to the Parliament in Annno 1586. November*, *reprinted in* 2 *The Seconde Parte of a Register* 82 (Albert Peel ed., 1915). Thomas Cartwright and other jailed ministers argued that forcing a man to confess his private faults in order to convict him of a crime was "to put the conscience upon the racke and there to leave it." *Cartwrightiana* 33; 37 (Albert Peel & Leland H. Carlson, eds. 1951). Plainly discussing the oath's chilling effect upon rights of privacy, speech and association, the ministers also observed that "the husband shall not dare to [tell] his wife, the father his sonne nor the master his servant anie thinge which maye come in publick question." *Id.* at 38–39.

Other principles associated with the right against self-incrimination arose as the conflict over the oath *ex officio* became a wider conflict over individual liberty and constitutionally-limited government. Opposition increasingly came from lawyers who argued that the oath deprived individuals of the accusatorial, common law procedure guaranteed by

Magna Carta, *e.g.*, James Morice, *A Briefe Treatise of Oathes* (1598). One important objection centered on the Crown's use of the oath *ex officio* as little more than an excuse for fishing expeditions in contravention of the common law's protection of privacy by limitations on search and seizure. *Letter from Lord Burghley to John Whitgift in* Strype, 1 *Life and Acts of John Whitgift* 313 (1882) (describing the oath *ex officio* as a "device to seek for offenders, [rather] than to reform any.").

Edward Coke established the *nemo tenetur* maxim as an independent right in *Burrows, Cox, Dyton, and Other v. High-Commission Court* (1616) 81 Eng. Rep 42; 3 Bulstrode 48 (KB), which articulated the rule upon which all future self-incrimination cases are based: "[T]he reason why in such cases a man needs not to answer, is, because that no man ought to accuse himself." *Id*. From that time forward, the right against self-incrimination was the law of the land and was inseparable from the very idea of English liberty. *See, e.g.*, John Lilburne, *England's Birth-Right Justified Against All Arbitrary Usurpation, Whether Regall or Parliamentary* 5 (1642).

The right against self-incrimination has always prevented inquisitorial procedure from transforming books and papers into instruments of tyranny. English jurists recognized that the right would suffer an inquisitor to "sifte & ransacke by oath [their] most secret thoughtes and consciences," Morice, *A Briefe Treatise* at sig. A4r., no more than it would permit him to "enter into mens houses, break upp their chests and chambers…carry away what they list, and afterward pick matter to arrest and commit them, whereof there

is no other proofe," William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning: 602–1791* 114 (2009) (quoting Robert Beale, *A Collection Shewinge What Jurisdiction the Clergie Hathe Heretofore Lawfully Used and May Lawfullye Use in the Realme of Englande*). Thus, the right protected books and papers of all kinds, whether public, private, corporate or otherwise. *Rex v. Worsenham* (1701) 91 Eng. Rep. 1370; 1 Lord Raymond 705 (KB); *Regina v. Mead* (1704) 92 Eng. Rep. 119; 2 Lord Raymond 927 (KB); *Rex v. Cornelius* (1744) 93 Eng. Rep. 1133; 2 Strange 1210 (KB); *Rex v. Purnell* (1744) 95 Eng. Rep. 595; 1 Wilson 239 (KB); *Rex v. Heydon* (1762) 96 Eng. Rep. 195; 1 Blackstone 351 (KB).

The original understanding of the right against self-incrimination was just as straightforward as it appears. "[I]n a criminal or penal cause, the defendant is never forced to produce any evidence, though he should hold it in his hands in court." *Roe dem. Haldane v. Harvey* (1769) 98 Eng. Rep. 302, 305; 4 Burrow 2484, 2489 (KB). The right's ability to protect individual liberty, constitutionalism, and accusatorial procedure is owed to its straightforwardness. If it were otherwise, the right against self-incrimination could not have played a key role in so many of the landmark cases in the Anglo-American canon. *E.g.*, *Entick v. Carrington* (1765) 19 State Trials 1029, 1073 ("[O]ur law has provided no paper-search in these cases to help forward the convictions….It is very certain, that the law obligeth no man to accuse himself….if suspicion at large should be a ground of search…whose house would be safe?").

The framers of the federal Constitution were zealous advocates of the right against self-incrimination. *E.g.*, Benjamin Franklin, *Observations on the Proceedings Against Mr. Hemphill* (1735) (criticizing the compelled production of books and papers as "contrary to the common Rights of Mankind, no Man being obliged to furnish Matter of Accusation against himself."). After the right was included in the constitutions and declarations of rights of the nascent states, *e.g.*, Va. Declaration of Rights § 8 (1776), James Madison placed the right against self-incrimination into the Fifth Amendment with the words "[n]o person…shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Although Madison's phrasing was unique, "'to be a witness' is 'to give evidence.'" Richard Nagareda, *Compulsion "to Be a witness" and the Resurrection of* Boyd, 74 N.Y.U. L. Rev. 1575, 1603 (1999); *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892); 1 Annals of Cong. 782 (1789) (statement of Rep. Lawrence) (referring to Madison's draft of the Fifth Amendment as "that part where a person shall not be compelled to give evidence against himself."); *Trial of Titus Oates* (1685) 10 State Trials 1079, 1100 ("[I]f a man will come without a subpoena, and give evidence in a case, that is no objection to his testimony."); *Trial of Nathanael Reading* (1679) 7 State Trials 259, 297 ("[I]f a man stands so in court that he cannot be received to give Evidence, he is no lawful witness.").

After independence, American self-incrimination doctrine remained unchanged from its long-standing common law traditions. Among the earliest examples is *United States v. Burr (In re. Willie)*, 25 F. Cas. 38

(C.C. Va. 1807), *a case on compelled decryption*. In that case, the government compelled Willie, Aaron Burr's secretary, to answer questions about an encrypted letter Burr had allegedly written. Willie refused to comply on the basis of his right against self-incrimination. *Id.* The court, in an opinion Chief Justice Marshall riding circuit, held that the right against self-incrimination "would most obviously be infringed" if Willie were forced to divulge his prior knowledge of the letter, its unencrypted contents, or the cipher used to encrypt it. *Id.* at 40.

From the outset, this Court has held that the Fifth Amendment right against self-incrimination has the same meaning and straightforward application as it did at common law. *Brown v. Walker*, 161 U.S. 591, 596–97 (1896); Washington, *Obsta Principiis* § II-A. This Court has long considered it "no longer open to question" that the Fifth Amendment's text is fundamentally a prohibition on *compulsion*, meaning a government action which creates a mental state of hope or fear in the mind of the accused. *Bram*, 168 U.S. at 543; 547–48. Accordingly, a witness cannot be compelled "to make disclosures or to give testimony which will tend to criminate him" nor "to produce the evidence to prove himself guilty of the crime about which he might be called to testify." *Counselman*, 142 U.S. at 567; *Gouled v. United States*, 255 U.S. 298, 306 (1921); *Ballman v. Fagin*, 200 U.S. 186, 195 (1906).

To ensure that this understanding would endure, this Court held the Fifth Amendment's text to be a "generic" statement intended to synthesize all of the principles associated with the right "in their full efficacy…free from the possibilities of…change,"

Bram, 168 U.S. at 543; 548, and necessarily includes the construction and limitations that applied to the right at common law, *Brown*, 161 U.S. 591 (1896). This Court's precedent holds that the amendment must be construed "liberally" and according to the maxim *obsta principiis*, which holds that a right cannot be construed in a way which permits end-runs around the principles it was established to protect. *Boyd v. United States*, 116 U.S. 616, 635 (1886); *Counselman*, 142 U.S. at 562.

B. The return of inquisitorial procedure and the cruel trilemma.

This Court has continued to recognize that impermissible compulsion occurs when a person is subjected to the cruel trilemma because a state of hope or fear is necessarily created in his mind when confronted with a choice between self-accusation, perjury or contempt. *Pennsylvania v. Muniz*, 496 U.S. 582; 596–97 (1990) ("[A] suspect is 'compelled…to be a witness against himself' at least whenever he must face the modern-day analog of the historic trilemma.").

However, as in the decision below, the compelled decryption cases reveal that *Fisher* and communications theory necessarily subject witnesses to this same cruel trilemma. Under *Fisher*, compelled self-incrimination can be acceptable in many circumstances, including where the government already knew the "testimonial communications" that would be communicated by a witness's compliance. *Fisher*, 429 U.S. at 411. But even if the government knew the witness to be guilty to a literal certainty, the witness has still been subjected to the cruel trilemma

and still compelled to incriminate himself for that reason.

Because the issue of compelled decryption has been assessed through the lens of *Fisher* and communications theory, the cases are replete with statements which rest "on the ground that compelling a suspect to submit to or engage in conduct the sole purpose of which is to supply evidence against himself nonetheless does not compel him to be a witness against himself." *Gilbert v. California*, 388 U.S. 263, 278 (1967) (Black, J., concurring in part). The trial court order which gave rise to the *Seo* case, for example, held that "[t]he act of unlocking the phone does not rise to the level of testimonial self-incrimination that is protected by the Fifth Amendment." *Seo v. State*, 109 N.E.3d 418, 422 (2018). However, this conclusion is incompatible with the centuries-old of understanding of the Fifth Amendment. A person compelled to decrypt some data has been forced to choose between incriminating himself by *complying* with the order and decrypting the incriminating evidence, *perjuring* himself by falsely stating an inability to comply, or finding himself held in *contempt* for the failure or refusal to comply. This is the definition of the cruel trilemma, and a result that strikes at the core of why we have the right against self-incrimination in the first place.

By imposing the cruel trilemma, the compelled decryption cases have also undermined the accusatorial protections that the right against self-incrimination was created to protect centuries ago. *Tehan v. United States ex rel. Schott*, 382 U.S. 406, 415 (1966) ("The basic purpose[] that lie[s] behind the

privilege…[is] preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution shoulder the entire load."). Under the guise of *Fisher*, courts have permitted the government to force a person to prosecute himself on the state's behalf. When a person is compelled to decrypt some data, he is forced to transform evidence which does *not* incriminate him into a form that *does*. This is "the antipode of the original understanding of the Fifth Amendment." *Pollard*, 287 So.3d at 664.

C. The diminution of privacy, speech and association

As this Court recognized in *Riley*, digital devices are so essential to participation in modern political, economic, and social life that access to an individual's cell phone "would typically expose to the government far more than the most exhaustive search of a house." *Riley v. California*, 573 U.S. 373, 396 (2014); *Carpenter v. United States*, 138 S. Ct. 2206 (2018). When a person is compelled to decrypt his digital devices, he is not only forced to expose the "sum of [his] private life," *Riley*, 573 U.S at 394, to the eyes of the state, but much of the lives of his family, friends, and associates as well.

The fact that digital devices contain so much information has made them of tremendous interest to law enforcement in almost every investigation. However, as this Court recognized unequivocally, "[p]rivacy comes at a cost." *Id*. at 401. The right against self-incrimination is not subject to being "balanced" against the interests or needs of law enforcement because the Fifth Amendment is itself

the declaration of the appropriate balance between citizen and state. *Hoffman v. United States*, 341 U.S. 479, 489–90 (1951); *New Jersey v. Portash*, 440 U.S. 450, 459 (1979) ("Balancing, therefore, is not simply unnecessary. It is impermissible.").

Compelling a person to decrypt a digital device, as in the decision below, is not merely inconsistent with this Court's approach, it is a symptom of the tremendous uncertainty and indeterminacy that *Fisher* has produced, as questions of access to digital devices have become commonplace. Indeed, this confusion is precisely the reason that Respondent sought a writ of certiorari on this identical issue in *Br. of Amici Curiae States of Utah et al.* at 1, *Commonwealth of Pennsylvania v. Davis*, No. 19-1254 (U.S. May 26, 2020).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari to resolve splits among the courts and to clarify the application of *Fisher* to compelled decryption.

Respectfully submitted,

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