No. 19-1435

In The

Supreme Court of the United States

LAURA TANNER,

Petitioner,

v.

STATE OF AMES,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF AMES

BRIEF FOR PETITIONER

The Justice Robert H. Jackson Memorial Team

MATTHEW ARONS
MAX BLOOM
TAYLOR CUSTER
DUSTIN FIRE
COLLEEN O'GORMAN
SAMUEL STRATTON

Counsel for Petitioner

MARCH 10, 2021, 7:30 PM
AMES COURTROOM
HARVARD LAW SCHOOL

Oral Argument

QUESTIONS PRESENTED

1. Whether the Ames Nonconsensual Pornography Act violates the First Amendment.

2. Whether the Fifth Amendment privilege against self-incrimination allows a defendant to refuse to disclose the password to her computer and phone when the government has a warrant to search those devices.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

Constitutional Provisions

OPINIONS BELOW

The opinion of the Supreme Court of Ames is reproduced at page 2 of the Joint Appendix. The Superior Court of Ames's denial of Tanner's motion to dismiss is reproduced at page 24 of the Joint Appendix. The Superior Court of Ames's grant of the State's motion to compel production is reproduced at page 26 of the Joint Appendix.

JURISDICTIONAL STATEMENT

The Supreme Court of Ames issued its decision on August 28, 2020. J.A. 16. The petition for writ of certiorari was granted on January 5, 2021. J.A. 1. This Court has appellate jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT PROVISIONS

This case involves the First and Fifth Amendments to the United States Constitution, as well as the Nonconsensual Pornography Act, Ames Crim. Stat. 545. All relevant provisions are reproduced in the Appendix.

STATEMENT OF THE CASE

This case concerns those guarantees secured by the Bill of Rights. Specifically, it concerns "[o]ur profound national commitment to the free exchange of ideas, as enshrined in the First Amendment." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989). And it concerns the Founders' judgment, embodied in the Self-Incrimination Clause of the Fifth Amendment, that "it were better for an occasional crime to go unpunished than that the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused." *Ullmann v. United States*, 350 U.S. 422, 427 (1956). In prosecuting Laura Tanner, the State of Ames breached both guarantees.

Statutory Background

The Nonconsensual Pornography Act ("NCPA"), Ames Crim. Stat. 545, is a sweeping restriction on sharing sexual images without the express consent of the subject. The statute's core provision states that:

> A person may not knowingly disclose an image of another, identifiable person whose intimate parts are exposed or who is engaged in a sexual act, if the person making the disclosure knows or should know that the person depicted reasonably expected that the image would remain private, and knows or should know that the person depicted did not consent to such disclosure.

Id. 545(c). On its face, the statute applies regardless of whether the recipient welcomed the image; regardless of whether the individual

actually knew that the person depicted expected or desired privacy; and, in most cases, regardless of the purpose or the scope of the disclosure.

The statute does, however, contain two relevant exceptions. First, the statute exempts disclosures of "[i]mages involving voluntary exposure in public and commercial settings." *Id.* 545(d)(1). Second, the statute exempts disclosures made "to advance the public interest," but only where they are "made to a small audience." *Id.* 545(d)(2). Violations of the statute are punishable by "up to 6 months in jail and/or a fine of $2000." *Id.* 545(f).

The statute's "purpose" is to prevent "harm to the [depicted] subjects, including but not limited to loss of professional opportunities and reputation, harassment and threats, and severe emotional distress." *Id.* 545(a)(3). The criminalized speech, the legislature asserted, is "of essentially no value to society." *Id.* 545(a)(2).

Facts of the Case

Late one evening, M.S., a team manager at Ames Robotics, Inc. (the "Company"), J.A. 18, decided to create a pornographic video of himself on his iPhone, J.A. 17. Nude, with his genitals exposed, M.S. expounded for ninety seconds on his desire to have sex with the viewer. J.A. 17. According to M.S., he believed he sent this video to his girlfriend. J.A. 17. Instead, the video surfaced later that evening on a website run by the Ames Robotics Employees' Association. J.A. 18. The website was accessible to anyone with an internet connection, permitted any user to

anonymously post messages, and stored no information about who posted or viewed the messages. J.A. 18.

The message accompanying the post suggested that the video may have been shared by one of M.S.'s 182 colleagues at the Company. *See* J.A. 4, 22. The poster expressed disgust at having received the shocking video "out of the blue" from a team manager she had "never really spent any time with," and the film's graphic content led her to believe that the team manager had been sending unwelcome sexual material to other junior female employees. J.A. 22. Troubled by a "corporate culture that allow[ed] blatant harassment like this to go unchecked," the poster stressed that "IT IS IMPERATIVE that our senior management take this seriously and DO SOMETHING. NOW." J.A. 22.

Early the next morning, M.S. responded to the anonymous post. J.A. 19. He claimed that, instead of sending the film to his girlfriend, Laura Taylor, J.A. 3, he had instead sent it to a colleague with a "very similar" name, J.A. 23. It was this colleague, he believed, who had authored the post, and he asked that it be taken down. J.A. 23. Later that day, the message and video were removed from the website. J.A. 20. The Company fired M.S. in the wake of these events. J.A. 20. Traumatized by the episode, he felt that the video's publication ruined not only his career but also his life. J.A. 20.

The State of Ames soon began to investigate Laura Tanner. Relying solely on M.S.'s testimony and a review of his iPhone, the State claimed that "it appear[ed] that the only [other] person . . . who had access to the video before it was posted was . . . Tanner." J.A. 20. In an interview with the police, Tanner expressed sympathy for M.S.'s situation and said that she "felt bad about everything that had happened to" him. J.A. 21. Still, Tanner never admitted to disclosing or even receiving the video when the police asked if she had posted it. J.A. 20. And after the State secured a search warrant for evidence on Tanner's computer and cell phone that she had posted the video, she refused to disclose the passwords to the devices. J.A. 21. Ames then charged Tanner with violating the NCPA. J.A. 21.

Proceedings Below

Tanner moved to dismiss the charge on the basis that the NCPA violates the First Amendment. J.A. 24. Reasoning that the speech prohibited by the statute was "of such low social value" that it was not protected by the First Amendment, the Ames Superior Court denied Tanner's motion. J.A. 24–25.

The State then moved to compel Tanner to "disclose her passwords" so that it could execute a warrant to search her computer and cell phone for "evidence that she posted, without the consent of the subject, a private, sexually explicit video to the Internet, in violation of the Nonconsensual Pornography Act." J.A. 26. Concluding that the

passwords fell under the foregone conclusion exception, the Superior Court granted the motion and compelled Tanner to "produce within 30 days the passwords to her computer and cellular phone." J.A. 27.

Facing a potential sentence of up to six months in jail and a fine of up to $2,000, Ames Crim. Stat. 545(f), Tanner entered into a conditional guilty plea under which she would not serve any jail time and would be subject to a fine of $500, J.A. 30. Tanner conditioned the plea on her right to appeal the Superior Court's order denying dismissal of the complaint as well as the order granting the State's motion to compel. J.A. 28. If either order were reversed—that is, if the complaint were dismissed on First Amendment grounds or if the State's motion to compel were denied on Fifth Amendment grounds—Tanner would be entitled to withdraw her guilty plea. J.A. 28. Should that happen, Tanner's admissions in the course of entering her guilty plea would "not be admissible against her." J.A. 28.

The Supreme Court of Ames affirmed the Superior Court's ruling as to Tanner's motion to dismiss. J.A. 16. While the court assumed without deciding that the speech prohibited by the NCPA was constitutionally protected and that strict scrutiny applied, J.A. 9–10, it nonetheless upheld the law, J.A. 13. The court acknowledged that the NCPA's "exclusions could have been broader," J.A. 11, and admitted that applying the statute to Tanner "might chill the victims of unwanted

sexual advances from coming forward," J.A. 12. But the court concluded that the NCPA fell within constitutional bounds to the extent that it "preserved [a victim's] right to call out suspected sexual harassment." J.A. 13.

The Supreme Court of Ames also affirmed the Superior Court's ruling regarding the State's motion to compel production. The court treated the motion at issue—compelling disclosure of the passwords—as equivalent to one compelling the surrender of physical evidence. *See* J.A. 13. The court conceded that such acts of production might have testimonial value, but asserted that, under *Fisher v. United States*, 425 U.S. 391 (1976), the foregone conclusion exception nonetheless might allow compelled production. J.A. 13–15. The court then applied the exception to the case at hand in a single paragraph, concluding that, "once the State has a valid warrant to search a computer or phone, the Fifth Amendment does not shield the passwords to those devices from disclosure because the password itself is not testimonial or incriminating." J.A. 16.

SUMMARY OF THE ARGUMENT

I. Ames sought to tackle a real problem with a bad statute. The state may legitimately seek to prevent the harms caused by the nonconsensual disclosure of pornography. But it cannot violate the First Amendment to do so.

The NCPA violates the First Amendment on its face. As an initial matter, the expression that the NCPA targets is undoubtedly protected by the Constitution. Nonconsensual disclosure of pornography does not fall within any existing exception to the First Amendment, nor does it justify a new one. Further, the NCPA is a content-based restriction on speech, and like all such laws, it must be evaluated under strict scrutiny. Neither appeals to the secondary effects doctrine nor to the private nature of sexual images justify a departure from this Court's most searching standard of review.

But the NCPA fails any level of heightened scrutiny. Though Ames certainly has a compelling interest in mind, the statute is not narrowly tailored to that laudable end. By limiting disclosures in the public interest to small audiences, conditioning liability on mere negligence, and defining core concepts imprecisely, Ames prohibits protected speech without advancing the statute's stated aims. Most obviously, the NCPA restrains victims from speaking out about sexual harassment.

Even if this Court were to carve out a novel exception to the First Amendment, the NCPA still would not pass constitutional muster. The statute may proscribe some harmful speech. But it also criminalizes or chills a substantial array of speech that lies at the core of the First Amendment.

II. Even if this Court does not hold that the statute violates the First Amendment, it should still hold that Ames cannot compel Tanner to disclose the passwords to the cell phone and computer. Such compulsion violates the Self-Incrimination Clause of the Fifth Amendment, and Tanner's conditional guilty plea is therefore void.

The Fifth Amendment protects the disclosure of the passwords to a personal cell phone and computer for two reasons. First, the disclosure of the passwords itself is explicitly testimonial, since it relates facts from Tanner's mind to the government. And as the disclosure here is also both compelled and incriminating, it therefore satisfies the three elements of the Self-Incrimination Clause. Thus, the Ames Supreme Court's reliance on the foregone conclusion exception in this situation was misplaced. That doctrine only applies to testimonial communications that are implicit in the act of producing evidence, not to testimonial communications that are explicit, such as the verbal conveyance of information.

Second, by disclosing the passwords, Tanner would effectively produce the decrypted contents of the cell phone and computer. Understood correctly, the Fifth Amendment bars the compelled production of private documents such as these. The text of the Self-Incrimination Clause, this Court's case law, and the policies underlying the Fifth Amendment all demand this conclusion. Therefore, this Court

should hold that the foregone conclusion exception does not apply to private documents.

Finally, even if Ames can compel the production of private documents, and even if the foregone conclusion exception applies, that exception is not met here. The foregone conclusion exception only allows the compelled production of evidence where the testimony implicit in the act of production is known with certainty. Here, by disclosing the passwords, Tanner communicates (1) the contents of the passwords, (2) that she knows the passwords to the devices, and (3) that the evidence sought exists, is possessed by her, and is authentic. Because none of these three pieces of information is in fact a foregone conclusion, the Self-Incrimination Clause protects the testimony implicit in disclosing the passwords. The order is therefore unconstitutional.

ARGUMENT

I. THE NCPA VIOLATES THE FIRST AMENDMENT.

The First Amendment guarantees that the government "shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. It "reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *United States v. Stevens*, 559 U.S. 460, 470 (2010). The NCPA impermissibly sought to revise that judgment. The statute targets speech that is presumptively protected and does not fall under any exception to the First Amendment. Because the NCPA is a content-based law, it should be evaluated under

strict scrutiny. But the statute cannot survive *any* level of heightened scrutiny because it is not narrowly tailored to the state's interest. And even if this Court were to create a novel category of unprotected speech, the NCPA's capacious reach sweeps up enough protected speech to render the statute impermissibly overbroad. It is therefore unconstitutional on its face as a violation of the First Amendment.

A. The NCPA criminalizes protected speech.

To avoid heightened scrutiny, the state must show that the First Amendment does not protect the speech criminalized by the NCPA. But Ames cannot make this showing. All speech is presumptively protected. What's more, the statute criminalizes speech at the heart of the First Amendment—speech on matters of public concern. Further, the targeted speech does not fall under any existing exception to the First Amendment, nor is crafting a novel exception justified.

1. The First Amendment presumptively protects the speech at issue.

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972). The Ames legislature may believe that the nonconsensual disclosure of pornography "is speech of essentially no value to society." Ames Crim. Stat. 545(a)(2). But this determination is of no significance. It is well-established that pornography is protected by the First

Amendment. *See, e.g.*, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985). And the Constitution broadly protects speech regardless of its social value or relevance to matters of public concern: "*Most* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from Government regulation." *Stevens*, 559 U.S. at 479–80 (quoting 18 U.S.C. § 48(b) (2006)).

Still more, this case makes clear that the speech the NCPA captures can be highly valuable insofar as it involves reporting sexual harassment. This Court has long held that speech concerning public affairs "occupies the 'highest rung of the hierarchy of First Amendment values.'" *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)). Here, the post explicitly discussed a public issue. The author linked receiving an explicit video from a manager to "a corporate culture that allow[ed] blatant harassment like this to go unchecked" and demanded action: "IT IS IMPERATIVE that our senior management take this seriously and DO SOMETHING. NOW." J.A. 22.

The author's post thus contributed to an obvious example of public discourse: the ongoing #MeToo movement. Not only has the movement transformed entire industries, but it has also left a clear mark on recent judicial opinions and draft legislation. *See* Elizabeth C.

Tippett, *The Legal Implications of the MeToo Movement*, 103 Minn. L. Rev. 230, 235–36 (2018). In this way, the #MeToo movement illustrates why free speech is "a fundamental principle of the American government": because "public discussion is a political duty." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled in part by Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

2. No exception to the First Amendment—historical or novel—applies here.

"[T]he First Amendment has 'permitted restrictions upon the content of speech in a few limited areas . . . .'" *Stevens*, 559 U.S. at 468 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992)). None of those narrowly cabined domains is implicated here.

The lower court made a passing reference to arguments that the disclosure of explicit images without the consent of the sender may be "akin to obscenity, defamation, fraud, incitement, criminal speech, and child pornography." J.A. 8. But "akin to" is not a constitutional standard. To exile explicit images from the First Amendment's ambit simply because they are "akin to" traditionally unprotected speech would invert this Court's long-standing view that categories of unprotected speech should be "well-defined and narrowly limited." *Stevens*, 559 U.S. at 468–69 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942)).

Further, there is no "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *Id.* at 472. This Court has made clear that it will recognize new categories of unprotected speech if and only if there is "persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 792 (2011). But no such long tradition exists here—the nonconsensual disclosure of pornography was not regulated in any jurisdiction until 2013. *See* Jonathan S. Sales & Jessica A. Magaldi, *Deconstructing the Statutory Landscape of "Revenge Porn": An Evaluation of the Elements That Make an Effective Nonconsensual Pornography Statute*, 57 Am. Crim. L. Rev. 1499, 1500 (2020).

Child pornography is the only new exception to the First Amendment that this Court has recognized in the past half-century. *See New York v. Ferber*, 458 U.S. 747, 764 (1982). And that was a "special case" because "[t]he market for child pornography was 'intrinsically related' to the underlying abuse, and was therefore 'an integral part of the production of such materials, an activity illegal throughout the Nation.'" *Stevens*, 559 U.S. at 471 (quoting *Ferber*, 458 U.S. at 759, 761). The new exception thus closely tracked a historic and traditional exception to the First Amendment: speech that constitutes "an integral part of conduct in violation of a valid criminal statute." *Ferber*, 458 U.S.

at 761–62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)). Following this carefully circumscribed reasoning, this Court has affirmed that *virtual* child pornography retains its constitutional protection because it "records no crime and creates no victims *by its production*." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250 (2002) (emphasis added).

But the nonconsensual disclosure of pornography does not similarly track any "historic and traditional categories . . . long familiar to the bar." *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (quoting *Stevens*, 559 U.S. at 468). For instance, unlike child pornography, the images at issue here are not "intrinsically related" to criminal sexual abuse to the extent that creating the pornography itself is not a crime. And the nonconsensual disclosure of pornography aligns no better with any other category of unprotected speech. For example, it cannot be closely tied to the First Amendment's limited obscenity exception. *See Brockett*, 472 U.S. at 501 (holding that pornography that "arouses normal sexual responses" retains "constitutional protection"). And a new category would also far exceed the bounds of the defamation exception, which only covers false statements and images. *See, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 n.6 (1974) (noting that truth is always a complete defense in a defamation suit).

B. The NCPA is subject to strict scrutiny.

"[T]he Constitution 'demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality.'" *Alvarez*, 567 U.S. at 716–17 (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004)). Such "[c]ontent-based laws are subject to strict scrutiny." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020). Because the NCPA discriminates based on the content of an image, it should be subject to the most searching judicial review. Neither the secondary effects doctrine nor the private nature of intimate images warrants lowering the bar.

1. The NCPA is a content-based restriction on speech.

A law is "obvious[ly]" content-based—and thus "presumptively unconstitutional"—if it "defin[es] regulated speech by particular subject matter." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). The NCPA does just that. Whether an image is covered by the statute turns on whether it depicts "intimate parts" or "sexual acts." Ames Crim. Stat. 545(b)(3), (b)(4). This kind of content-based law "restrict[s] expression because of its message, its ideas, its subject matter, or its content." *Mosley*, 408 U.S. at 95. This profound risk to First Amendment interests requires that "the government prove[] that [the law is] narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163.

2. The secondary effects doctrine does not justify intermediate scrutiny.

Drawing on this Court's "secondary effects" jurisprudence, some state courts have relied on the harms of nonconsensual disclosure of pornography to carve out an exception to the rule that facially content-based laws demand strict scrutiny. *See People v. Austin*, 155 N.E.3d 439, 457 (Ill. 2019). At the outset, this approach flatly contradicts this Court's holding in *Reed* that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." 576 U.S. at 165 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)).

But even if the secondary effects doctrine remains good law, it does not apply here because the NCPA targets primary effects—not secondary effects. The secondary effects doctrine applies where regulations are motivated by remote harms "unrelated to the content of the expression itself." *Texas v. Johnson*, 491 U.S. 397, 412 (1989). The scope of this doctrine has always been narrow. In fact, this Court has only ever applied it to strike down laws in one context: regulations of adult-oriented, brick-and-mortar businesses whose presence tended to increase local crime rates and depress property values. *See, e.g.*, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986). Notably, all of these cases

preceded *Reed*'s rule that strict scrutiny applies to *all* content-based discrimination.

Conversely, this Court has been clear that "[t]he emotive impact of speech on its audience is not a 'secondary effect.'" *Boos v. Barry*, 485 U.S. 312, 321 (1988) (opinion of O'Connor, J.). It is critical that the exception be read narrowly, as a broad view "would turn every First Amendment case into a secondary effects case, given that the government almost always can proffer a justification based on harm." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 486 (1996).

Here, however, the harm at issue is plainly caused by the content of the pornography and its effect on audience and subject alike. The State of Ames recognized this in its legislative findings, identifying the targeted harm as the "loss of professional opportunities and reputation, harassment and threats, and severe emotional distress." Ames Crim. Stat. 545(a)(3). These are quintessential primary effects: that the communicative content at issue might be hurtful or embarrassing, or that it might damage the career of the person at issue. These harms may be very real, but they cannot justify a relaxed standard of scrutiny.

3. The public/private distinction does not justify intermediate scrutiny.

As a general rule, all speech—regarding both matters of public discourse and matters of intimate concern—receives the same broad

constitutional protections. *See supra* Section I.A.1. But some lower courts have misapplied this Court's precedents and withheld rigorous judicial review for statutes like the NCPA simply because some nonconsensual disclosure of pornography falls outside the core of traditional "public" discourse. *See Austin*, 155 N.E.3d at 458 (applying intermediate scrutiny).

This overextended reading of this Court's precedents is a mistake. To illustrate, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), this Court upheld *civil* liability for *false* statements of fact "on matters of purely private concern"—such as serious inaccuracies in a credit report—on the grounds that such private speech warrants "less stringent" protection. *Id.* at 759, 760. But *Dun & Bradstreet* is distinguishable from this case twice over. First, while true but harmful speech—such as the video at issue here—has a long history of constitutional protection, there "is no constitutional value in false statements of fact" like those at issue in *Dun & Bradstreet*. *Id.* at 767 (White, J., concurring in the judgment) (quoting *Gertz*, 418 U.S. at 340). Therefore, it would be a mistake to extrapolate a broad "private speech" exception to strict scrutiny from *Dun & Bradstreet*'s narrow holding.

Second, this Court has never relied on a distinction between public and private speech to uphold a *criminal* law, like the one at issue here. *See* Cynthia L. Estlund, *Speech on Matters of Public Concern: The*

Perils of an Emerging First Amendment Category, 59 Geo. Wash. L. Rev. 1, 23 (1990). And for good reason—the threat of criminal sanctions makes close judicial review all the more important. While this Court zealously guards the First Amendment against *any* state overreach, criminal statutes regulating speech "must be scrutinized with particular care." *City of Houston v. Hill*, 482 U.S. 451, 459 (1987) (citing *Winters v. New York*, 333 U.S. 507, 515 (1948)).

Of course, the government can address the harms caused by the nonconsensual disclosure of pornography. But the laws it enacts to do so must pass strict scrutiny.

C. The NCPA fails both strict and intermediate scrutiny.

A content-based law is "presumptively unconstitutional" and fails strict scrutiny unless it is "narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163. And even a content-neutral law subject to intermediate scrutiny must still be narrowly tailored to achieve a substantial government interest. *See Ward v. Rock Against Racism*, 491 U.S. 781, 798–99 (1989). Ames's statute fails to meet either burden.

1. The NCPA fails strict scrutiny because it is not narrowly tailored to a compelling state interest.

Strict scrutiny demands that a statute reach precisely that speech which is necessary to advance the state's compelling interest. *See Brown*, 564 U.S. at 799. The compelling government interest that the NCPA purports to target is the "severe harm" resulting from "[t]he

nonconsensual disclosure of private sexual images and videos." Ames Crim. Stat. 545(a)(3). And the statute's public interest exception makes clear that this interest does *not* extend to insulating bad actors—such as those who send unwanted pornographic material to unconsenting recipients—from being held accountable. *See id.* 545(d)(2).

To be sure, the government's interest may be compelling. But "precision" is the "touchstone" when the government regulates speech. *NAACP v. Button*, 371 U.S. 415, 438 (1963). Here, Ames has missed the mark.

i. The NCPA is overinclusive.

The NCPA makes no attempt to narrow its scope to instances in which sharing an image or video would cause the harmful effects the statute claims to target. Consider, for example, an employee who repeatedly receives unwelcome pornographic videos from her boss. This statute prohibits the recipient from disclosing the images to a close friend for private reasons, such as support, sympathy, or advice. And the statute also reaches commonplace behavior that has little relationship with the severe harms at the heart of the statute. For example, an individual who receives private sexual images cannot show them to a friend or confidante unless such a disclosure advances the public interest. *See* Ames Crim. Stat. 545(b)(1) (defining disclosure as including any act allowing the images to "be seen by at least one other person"). While this sort of sharing may be undesirable or embarrassing,

it neither causes nor constitutes the "loss of professional opportunities and reputation, harassment and threats, and severe emotional distress" that the statute targets. *Id.* 545(a)(3).

Still more, while the NCPA is intended to prevent harassment, it also helps sexual harassers evade accountability. This is because the statute's cramped public interest exception limits disclosures to small audiences. That same employee who may not turn to a friend for advice will also face criminal sanctions if she posts the images to a blog or chat room. This is true even if she does so in order to highlight the pervasiveness of sexual misconduct. While such posts might advance the "public interest," the internet is the paradigmatic large audience that this statute walls off. *Id.* 545(d)(2). And even if her boss were a public figure, the media could not incorporate the actual images into its reporting on the incident.

The "small audience" requirement is especially pernicious because victims of sexual abuse often must broadcast their stories in order to pressure authorities to act. And if authorities fail to act, this statute leaves victims without any viable recourse. Unsurprisingly, analogous state statutes that exempt disclosures made in the public interest do not limit them to "small audiences." *See, e.g.*, 11 R.I. Gen. Laws § 11-64-3(b)(5) (2020) (exempting "[d]issemination of an image that constitutes a matter of public concern, such as a matter related to

a newsworthy event or related to a public figure"). The NCPA's dramatic constraints on individual expression are entirely unnecessary to serve the government's compelling interest, for the simple reason that the statute is not designed to protect Harvey Weinstein or Anthony Weiner.

ii. The NCPA is underinclusive.

Despite this statute's capacious reach, it nonetheless fails to safeguard many of the innocent parties it purports to protect. Indeed, the NCPA provides no protection for content voluntarily created in a public or commercial setting, Ames Crim. Stat. 545(d)(1), no matter how that content is used. But many of the severe harms caused by the nonconsensual sharing of pornographic images occur in these very contexts. For example, individuals who post commercial content on pay-per-view websites for small, controllable audiences are some of the most common targets of the harassment and threats that the statute purportedly seeks to prevent. *See* Gillian Friedman, *Jobless, Selling Nudes Online and Struggling*, N.Y. Times (Jan. 13, 2021), http://nyti.ms/2LlV4Hz (discussing widespread unauthorized propagation of private pornography and resultant "death and rape threats" against performers). Ames has failed to explain why this category of victims—a group whose harassment has been so severe as to trigger national media attention—is entirely excluded from protection.

iii. The NCPA is not the least restrictive means available.

Ames could have accomplished its goals by employing any number of less restrictive alternatives. *See United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000). The state could have examined other policy proposals that would have been less burdensome to First Amendment rights. Ames also could have written a more precise statute less likely to chill protected speech.

First, Ames could have regulated nonconsensual disclosure of pornography using less coercive measures than criminal sanctions. Most obviously, Ames could have created a civil cause of action. *See Reno v. ACLU*, 521 U.S. 844, 872 (1997) (finding that criminal sanctions "pose[] greater First Amendment concerns" than analogous civil penalties). For example, Ames could have authorized suits for damages or injunctive relief against distributors rather than subjecting them to "up to 6 months in jail and/or a fine of $2000." Ames Crim. Stat. 545(f). Alternatively, the state could have directly addressed the harms of nonconsensual disclosure of pornography by regulating conduct rather than speech. For instance, Ames could have prohibited businesses from firing employees on the basis of leaked pornographic images. Or Ames could have directly regulated the platforms that host and share nonconsensual content. *See* Survivors of Human Trafficking Fight Back Act of 2020, S.4983, 116th Cong. § 2 (2020).

Second, Ames could have written the statute more precisely. "[S]tandards of permissible statutory vagueness are strict in the area of free expression," and the text of the NCPA provides little guidance to the public. *Button*, 371 U.S. at 432. For example, the statute permits the nonconsensual disclosure of sexual images "to a small audience to advance the public interest." Ames Crim. Stat. 545(d)(2). Yet the statute does not clarify how "small" the audience must be, what constitutes the "public interest," or even whether the public interest exception is a subjective or objective test. Thus, a victim of sexual harassment "must guess" whether her decision to expose her abuser or her choice of forum would meet these statutory elements. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967). Facing such uncertainty, many individuals will choose simply to remain silent.

Ames could have mitigated these vagueness concerns by adding an "intent to harm or profit" provision to the statute. For example, Kentucky's nonconsensual pornography statute requires "intent to profit, or to harm, harass, intimidate, threaten, or coerce the person depicted." Ky. Rev. Stat. Ann. § 531.120(1)(a) (West 2021). Over two-thirds of state laws governing nonconsensual disclosure of pornography impose similar requirements. *See* Sales & Magaldi, *supra*, at 1520. Conditioning criminal liability on a speaker's intent rather than a jury's

post-hoc analysis of what advances the public interest would mitigate the vagueness of this statutory scheme.

What's more, the fact that liability under the NCPA hinges on negligence—rather than knowledge or recklessness—chills protected speech. Under the statute, a defendant is liable if she "should know" that the subject of the image expected it to remain private and that the subject did not consent to the disclosure. Ames Crim. Stat. 545(c). "[M]ens rea requirements . . . provide 'breathing room' for more valuable speech by reducing an honest speaker's fear that he may accidentally incur liability for speaking." *Alvarez*, 567 U.S. at 733 (Breyer, J., concurring in the judgment). Thus, this Court has consistently demanded more than mere negligence before criminalizing speech—even within categories of wholly unprotected expression. *See, e.g.*, *Osborne v. Ohio*, 495 U.S. 103, 115 (1990) (child pornography); *Virginia v. Black*, 538 U.S. 343, 359 (2003) (true threats). Stringent mens rea requirements are even more critical where, as here, strict scrutiny applies.

Yet the NCPA leaves no such breathing room for speech. The complex realities of modern, online relationships make it especially inappropriate to condition liability on negligence. For example, does an expectation of privacy require a "promise" or "express request" to keep an image confidential? *State v. VanBuren*, 214 A.3d 791, 823 (Vt. 2019)

(discussing these issues). Does it apply in any intimate relationship or only those of a "sufficiently intimate or confidential nature"? *Id.* The chilling effects of a negligence standard are even more acute for downstream distributors of an image, who may simply have to guess how an image was produced or acquired. The government owes citizens greater certainty when it seeks to criminalize protected expression.

2. The NCPA fails even intermediate scrutiny.

Even if this Court were to analyze the NCPA under the intermediate scrutiny standard reserved for content-neutral laws, the statute would fail the test. First, content-neutral laws must "leave open ample alternative channels for communication." *Ward*, 491 U.S. at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Second, such laws must be "narrowly tailored to serve a significant governmental interest." *Id.* (quoting *Clark*, 468 U.S. at 293). "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). The NCPA's broad prohibition on speech fails on both counts.

First, the statute prohibits virtually all nonconsensual disclosure of pornography, thereby allowing stories to be shared only in words rather than in pictures. This Court has consistently rejected states' attempts to limit speakers' choices as to how to express themselves. For

example, in *Texas v. Johnson*, 491 U.S. 397 (1989), this Court held that the state could not prohibit flag burning because "messages conveyed without use of the flag are not 'just as forcefu[l]' as those conveyed with it." *Id.* at 416 n.11 (quoting *id.* at 431 (Rehnquist, C.J., dissenting)).

Just so here. The sharing of an explicit video that evidences abuse is often the most "forceful" way for victims to be heard. For instance, law enforcement only took action against former Congressman Anthony Weiner for his sexual misconduct when his fifteen-year-old victim disclosed the lewd photos he had sent her to the media. *See* Benjamin Weiser, *Anthony Weiner Gets 21 Months in Prison for Sexting with Teenager*, N.Y. Times (Sept. 25, 2017), http://nyti.ms/3trNP1Z. The government cannot dictate how victims tell their stories.

What's more, the NCPA is not narrowly tailored. "A complete ban" on a category of speech—like the statute at issue here—"can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). That is not the case here. The NCPA takes aim at sexual abuse and harassment, but it criminalizes much more—silencing victims of sexual harassment and punishing the gossip alongside the vengeful ex-lover. *See supra* Section I.C.1.i. Nor has Ames "shown that it considered different methods that other jurisdictions have found effective," *McCullen*, 573 U.S. at 494, such as broadening the public interest

exception beyond small audiences or amending the statute to require specific intent or actual knowledge. *See supra* Section I.C.1.

D. Even if the NCPA targets some unprotected speech, it is nonetheless overbroad.

Though the government may legitimately proscribe some unprotected speech, it must avoid banning or chilling "a substantial amount of protected speech" in the process. *Ashcroft*, 535 U.S. at 255. But Ames's statute does just that. By failing to tailor this law to a narrow subset of harmful speech, Ames sweeps indiscriminately across human expression. Thus, even if this Court were to set aside its long-standing opposition to creating new categories of unprotected speech, *but see supra* Section I.A.2, this law would still violate the First Amendment.

Like the statute this Court struck down in *United States v. Stevens*, 559 U.S. 460 (2010), the NCPA "create[s] a criminal prohibition of alarming breadth." *Id.* at 474. The *Stevens* Court found that, even if animal cruelty *were* a form of unprotected speech whose distribution the government could lawfully proscribe, the statute at issue violated the First Amendment because its broad language also prohibited the distribution of hunting videos and other protected speech. *Id.* at 474–76. Similarly, the NCPA's broad language does not only apply to instances of sexual abuse. As the Ames Supreme Court recognized, the statute "might chill the victims of unwanted sexual advances from coming

forward." J.A. 12. The statute also criminalizes showing a private sexual image to just one friend—even if only to seek advice or sympathy. *See supra* Section I.C.1.i. The statute might even prohibit reporting on war crimes: a newspaper could be held criminally liable for publishing the infamous photos of nude detainees at Abu Ghraib prison. *See* Thom Shanker, *Horrific Scenes from Abu Ghraib*, N.Y. Times (May 2, 2004), http://nyti.ms/3pVhq1y. Whatever novel category of unprotected speech Ames seeks to establish here, this speech plainly falls outside it.

Indeed, "the bizarre and disorienting circumstances that gave rise to this case" make clear that this statute's overbreadth is not merely hypothetical. J.A. 12. The person who posted M.S.'s explicit video reasonably thought that she was exposing sexual harassment and vindicating women's rights in the workplace. *See* J.A. 22. Surely, such speech lies at the heart of the First Amendment. *See supra* Section I.A.1. Yet it is for precisely this speech that Ames prosecutes Laura Tanner. *See* J.A. 21.

As it stands, the citizens of Ames must rely on prosecutorial discretion to prevent future distortions of this law. *See* J.A. 12–13 (finding it unimaginable that a prosecutor would bring charges against a woman for reporting intentional sexual harassment, "even though the statute would permit it"). But in the First Amendment context, the proper judicial response to such sloppy drafting is not to rely on

prosecutors to respect individuals' rights—it is to send the state back to the drawing board. This Court has recognized that the First Amendment "does not leave us at the mercy of *noblesse oblige*" and has consistently refused to uphold unconstitutional statutes "merely because the Government promised to use [them] responsibly." *Stevens*, 559 U.S. at 480. It should not abandon that tradition here.

***

The NCPA violates the protections guaranteed by the First Amendment. Because the prosecution of Laura Tanner was unconstitutional, this Court should reverse the decision below.

II. THE COMPULSION ORDER VIOLATES THE FIFTH AMENDMENT.

The Self-Incrimination Clause of the Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In ordering Tanner to disclose to the government the contents of the passwords to her phone and computer, Ames attempts to do just that.

The disclosure of the passwords easily meets the three requirements for a communication to receive Fifth Amendment protection: it is compelled, it is incriminating, and it is testimonial. These facts alone decide the case. But even if there were no explicit testimony, the order would still violate the Fifth Amendment. The order requires Tanner to produce incriminating private documents that the government may never constitutionally compel from a suspect. And even

if the government may compel the production of private documents in some cases, it may not do so here. By producing the decrypted phone and the computer, Tanner would implicitly communicate testimony that does not fall under the foregone conclusion exception. The compulsion order therefore violates the Fifth Amendment.

A. The compulsion order is unconstitutional because the Fifth Amendment prevents the compelled disclosure of self-incriminating testimony.

This is a simple case, and it can be decided by straightforward application of this Court's Fifth Amendment doctrine. "To qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating, and compelled." *Hiibel v. Sixth Jud. Dist. Ct.*, 542 U.S. 177, 189 (2004). The disclosure of the passwords here is plainly compelled, as the State's motion to compel production makes clear. *See* J.A. 26–27. It is also incriminating, since it would allow the police to access the cell phone and computer in Tanner's possession—thereby "furnish[ing] a link in the chain of evidence needed to prosecute" her. *See Hiibel*, 542 U.S. at 190 (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951)). The only question, then, is whether the disclosure of Tanner's passwords is testimonial—and that too is clearly true.

1. The disclosure of the passwords is explicit testimony.

"[T]o be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Doe v. United States*, 487 U.S. 201, 210 (1988) (*Doe II*).

Indeed, "[t]here are very few instances in which a verbal statement, either oral or written, will not convey information or assert facts," and "[t]he vast majority of verbal statements thus will be testimonial." *Id.* at 213.

That test is easily satisfied here. If Tanner discloses the passwords to the cell phone and computer, she "relate[s] a factual assertion" and "disclose[s] information"—namely, the contents of the passwords. *Id.* at 210. In compelling Tanner to "disclose the contents of [her] own mind," *Curcio v. United States*, 354 U.S. 118, 128 (1957), the order violates the Fifth Amendment in a straightforward way. In fact, this Court has repeatedly used a hypothetical almost identical to the fact pattern here to illustrate the nature of the testimonial prong: "telling an inquisitor the combination to a wall safe" is testimonial, but "being forced to surrender the key to a strongbox" is not. *United States v. Hubbell*, 530 U.S. 27, 43 (2000); *see also Doe II*, 487 U.S. at 210 n.9 (same analogy).

For this reason, "[c]ourts that have addressed the passcode issue have found that a passcode cannot be compelled under the Fifth Amendment, because the act of communicating the passcode is testimonial." *In re Search of a Residence in Oakland*, 354 F. Supp. 3d 1010, 1015 (N.D. Cal. 2019); *see also United States v. Kirschner*, 823 F. Supp. 2d 665, 669 (E.D. Mich. 2010) (same). Academics have come to the

same conclusion. *See* Laurent Sacharoff, *Unlocking the Fifth Amendment: Passwords and Encrypted Devices*, 87 Ford. L. Rev. 203, 224 (2018). Even those who believe that the government may compel decryption believe that revealing a password is unconstitutional. Professor Orin S. Kerr, for example, concedes that it "should be obvious" that revealing the combination to a wall safe is testimonial, since it is "a statement of a person's thoughts revealed to the government," but concludes that compelled decryption might be different, "because an act of decryption *does not reveal the password*." Orin S. Kerr, *Compelled Decryption and the Privilege Against Self-Incrimination*, 97 Tex. L. Rev. 767, 782 (2019) (emphasis added).

Since the compelled disclosure of the passwords is incriminating, compelled, and testimonial, the Fifth Amendment bars the order at issue here. That is enough to settle this case.

2. The foregone conclusion exception cannot strip the disclosure of its Fifth Amendment protection.

This case is governed, and can be resolved, by foundational Fifth Amendment principles. *See supra* Section II.A.1. The Supreme Court of Ames, however, relied on the foregone conclusion exception articulated in *Fisher v. United States*, 425 U.S. 391 (1976), to hold otherwise. J.A. 14. This was a mistake. But to understand where the state supreme court went wrong, one must first understand *Fisher*.

In that case, this Court devised three new principles of constitutional law. First, this Court reasoned that the production of evidence is not always intrinsically testimonial, and hence that it does not *necessarily* receive Fifth Amendment protection. *See Fisher*, 425 U.S. at 409–10. Second, this Court constructed the act of production doctrine, recognizing that the mere act of producing a document might incidentally communicate information, such as the existence of the papers or the suspect's belief that the papers were those described in the subpoena. *See id.* at 410. Therefore, many acts of production might still violate the Fifth Amendment. Third and finally, this Court carved out an exception to the act of production doctrine, permitting subpoenas so long as "[t]he existence and location of the papers are 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 papers." *Id.* at 411. It is this narrow exception that the Supreme Court of Ames misconstrued to hold that the compelled disclosure of the passwords does not violate the Fifth Amendment.

But the foregone conclusion exception cannot save the compulsion order here because the disclosure of Tanner's passwords is not merely an act of production with incidental testimonial value. Rather, the order compels two distinct testimonial communications from Tanner: (1) the explicitly testimonial disclosure of the passwords, and (2) the implicitly

testimonial production of the underlying documents on the cell phone and computer. The foregone conclusion exception could conceivably apply to the second communication because it is only implicitly testimonial. But it cannot apply to the first communication because it is explicitly testimonial in its own right.

As a preeminent authority on criminal procedure concludes, compelling the subpoenaed party to reveal a passcode "would require a testimonial communication standing apart from the act of production, and therefore make unavailable the foregone conclusion doctrine." 3 Wayne R. LaFave et al., Criminal Procedure § 8.13(a) (4th ed. 2017). For this reason, academics and courts alike consistently conclude that the disclosure of a password is straightforwardly protected by the Fifth Amendment. *See supra* Section II.A.1. And this Court has also implicitly adopted that interpretation by repeatedly insisting that the government may not compel a suspect to disclose the "combination to a wall safe." *See supra* Section II.A.1.

The text of *Fisher* supports this reading. There, this Court emphasized that the subpoenas at issue—seeking tax documents in a case investigating tax fraud—did not "compel oral testimony." *Fisher*, 425 U.S. at 409. Further, this Court suggested that the papers the government sought to produce "[could not] be said to contain compelled testimonial evidence," and that any communicative aspects would be

due to the act of production, "wholly aside from the contents of the papers produced." *Id.* at 409–10. Here, by contrast, the order does "compel" Tanner's "oral testimony"—the disclosure of the passwords. The testimonial communications are in no way "wholly aside" from the production demanded by the government; rather, the disclosure of the passwords is exactly what Ames seeks to compel. Whatever difficulties *Fisher* may present, this case can be—and hence should be—decided on much simpler grounds.

B. The compulsion order is unconstitutional because the Fifth Amendment also prevents the compelled production of self-incriminating private documents.

For the reasons given above, this case may be resolved on the basis of a simple Fifth Amendment principle: the government can never compel an individual to reveal incriminating testimony. *See supra* Section II.A. But the compelled disclosure of the passwords also violates the Fifth Amendment for a second reason. Properly understood, the Self-Incrimination Clause categorically bars the compelled production of private documents, such as the contents of a personal cell phone or computer.[1] Both the history of the Fifth Amendment and the precedents of this Court support this proposition. The foregone conclusion exception

[1] Because the compelled production at issue requires Tanner to disclose the actual content of the passwords, this Court need not evaluate the additional protection the Fifth Amendment affords private documents. However, this issue could become crucial if the government were to compel Tanner to unlock the devices without revealing their passwords.

therefore does not apply to private documents, and Ames may not compel the production of the passwords.

1. The history and original understanding of the Fifth Amendment support an absolute protection against the compelled production of private documents.

As Justices of this Court have repeatedly recognized, the history and original understanding of the Fifth Amendment bar the compelled disclosure of private documents. Indeed, "[a] substantial body of evidence suggests that the Fifth Amendment privilege protects against the compelled production not just of incriminating testimony, but of any incriminating evidence." *Hubbell*, 530 U.S. at 49 (Thomas, J., concurring). Concurring in the judgment in *Fisher*, Justice Brennan noted that both "[h]istory and principle teach that the privacy protected by the Fifth Amendment extends not just to the individual's immediate declarations, oral or written, but also to his testimonial materials in the form of books and papers." 425 U.S. at 418 (Brennan, J., concurring in the judgment). Over four decades later, Justice Gorsuch similarly observed that "there is substantial evidence that the privilege against self-incrimination was also originally understood to protect a person from being forced to turn over potentially incriminating evidence." *Carpenter v. United States*, 138 S. Ct. 2206, 2271 (2018) (Gorsuch, J., dissenting).

There is little dispute that, before the Constitution was ratified, the common law recognized that the protection against self-

incrimination extended to both compelled statements and the compelled production of physical documents in the possession of the defendant. *See, e.g.*, *King v. Purnell*, 96 Eng. Rep. 20, 23 (K.B. 1748) (explaining that a court may not "make a man produce evidence against himself, in a criminal prosecution"). As Lord Mansfield famously stated, in a criminal case a defendant "is never forced to produce any evidence; though he should hold it in his hands, in Court." *Roe v. Harvey*, 98 Eng. Rep. 302, 305 (K.B. 1769).

State constitutions at the time of the Founding all adopted this common law approach. Section 8 of the 1776 Virginia Declaration of Rights provided a model for all the states that constitutionalized the right against self-incrimination. *See* Leonard W. Levy, Origins of the Fifth Amendment: The Right Against Self-Incrimination 409 (1968). These states framed the right as a protection against government compulsion either "to give" or "to furnish" evidence. *See* Richard A. Nagareda, *Compulsion "To Be a Witness" and the Resurrection of* Boyd, 74 N.Y.U. L. Rev. 1575, 1606 nn.124–25 (1999) (collecting sources). Federal proposals also spoke in terms of individuals' right "not to be compelled to furnish evidence against themselves." Letters from the Federal Farmer, Letter VI (Dec. 25, 1787), *reprinted in* 2 The Complete Anti-Federalist 256, 262 (Herbert J. Storing, ed., 1981).

The Fifth Amendment's phrase "to be a witness" was an attempt to enshrine this historical right, not to alter it. "[H]istory shows that the language of the Clause was apparently chosen as a stylistic variation of more broadly worded state constitutional provisions." Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. Pitt. L. Rev. 27, 78 (1986). Contemporaneous dictionaries confirm that the term "witness" was defined as one who "gives" or "furnishes" evidence. *See* Nagareda, *supra*, at 1608–09 (collecting dictionary definitions). The meaning of this language was not controversial at the time; the Fifth Amendment raised "no attention, much less opposition, in Congress, the state legislatures that ratified the Bill of Rights, or anywhere else." *Hubbell*, 530 U.S. at 53 (Thomas, J., concurring).

2. The best reading of this Court's case law is that the compelled production of private documents violates the Fifth Amendment.

Prior to *Fisher*, the scope of the Self-Incrimination Clause reflected this historical understanding and prohibited both compelled oral testimony and the compelled production of private documents. The long-standing rule in American jurisprudence was that the "compulsory production of the private books and papers [of a defendant in a criminal case] is compelling him to be a witness against himself" in violation of the Fifth Amendment. *Boyd v. United States*, 116 U.S. 616, 634–35 (1886). Up to almost the very year that *Fisher* was decided, this rule was "often . . . reiterated without question." *Fisher*, 425 U.S. at 419

(Brennan, J., concurring in the judgment); *see, e.g.*, *Bellis v. United States*, 417 U.S. 85, 87 (1974) ("[T]he Fifth Amendment privilege against compulsory self-incrimination *protects an individual from compelled production of his personal papers* and effects as well as compelled oral testimony." (emphasis added)).

Even once this Court began to stray from the common law belief that incriminating evidence could never be compelled, private documents retained absolute protection. For example, in holding that the government could compel production of "real or physical evidence," this Court stated that the Fifth Amendment privilege reaches "an accused's communications, whatever form they might take," including *"compliance with a subpoena to produce one's papers*." *Gilbert v. California*, 388 U.S. 263, 266 (1967) (emphasis added) (quoting *Schmerber v. California*, 384 U.S. 757, 763–64 (1966)). Similarly, in permitting the compelled production of a law firm's financial records from a partner, this Court reaffirmed that an individual's private documents could not be compelled. *See Bellis*, 417 U.S. at 87.

Fisher did not change this picture. The case concerned subpoenas directed not at the suspects' personal documents, but at workpapers that had been prepared by accountants and contained none of the suspects' own communications. *See Fisher*, 425 U.S. at 393–95, 409. In short, the documents at issue were the quintessential business and financial

records that have long been the subject of compelled production. *See, e.g.*, *Shapiro v. United States*, 335 U.S. 1, 33 (1948). And although this Court expressed skepticism about its historically absolute protection for private documents, *see Fisher*, 425 U.S. at 409, it avoided the question of "[w]hether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession [because] the papers demanded [there were] not his 'private papers,'" *id.* at 414.

Admittedly, some lower courts have expressed confusion as to whether the Fifth Amendment still protects against the compulsion of private documents. *See In re Steinberg*, 837 F.2d 527, 529–30 (1st Cir. 1988) (describing different approaches). Much of this confusion stems from *United States v. Doe*, 465 U.S. 605 (1984) (*Doe I*), where this Court held that the contents of the business records of a sole proprietor were not privileged. *Id.* at 612. But only Justice O'Connor, in a lone concurrence, took this holding to imply that the Fifth Amendment no longer prevented the compelled production of private documents. *See id.* at 618 (O'Connor, J., concurring). In contrast, the majority opinion emphasized that the documents were even more impersonal and commercial in nature than those in *Fisher*. *See id.* at 610 n.7 (majority opinion) (noting that the workpapers in *Fisher* "related to the taxpayers' individual personal returns," while the "documents sought here pertained to respondent's businesses"). In short, neither in *Doe I* nor

Fisher, nor in any case before or since, has a majority of this Court indicated that the government may compel the production of private documents.

3. The foregone conclusion exception cannot apply to private documents because the Fifth Amendment bars their compelled production.

This Court has never used *Fisher*'s foregone conclusion exception to justify the compelled production of private documents. *Fisher* itself only involved documents prepared by others for business purposes; that is, *not* private documents. Extending *Fisher* beyond its facts would reverse the historical protection for private documents by giving the government a way to compel their production. This would be a mistake for three reasons.

First, if applied to all acts of production, the foregone conclusion exception threatens to undermine the purpose of the Fifth Amendment. The Fifth Amendment "reflects many of our fundamental values and most noble aspirations" including "our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt" and "our sense of fair play which dictates 'a fair state-individual balance by requiring the government . . . , in its contest with the individual to shoulder the entire load.'" *Carter v. Kentucky*, 450 U.S. 288, 299 (1981) (alteration in original) (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964)). Accordingly, the privilege against self-incrimination "stands as a prohibition upon a particular *method of*

information gathering." Nagareda, *supra*, at 1598 (emphasis added). While the government can independently seize any evidence without violating the Fifth Amendment, it cannot demand help from the individual the evidence incriminates.

The foregone conclusion exception defeats this core purpose by making the privilege contingent on the strength of the government's case rather than the source of the government's information. Fifth Amendment protection "has never been restricted to testimony that is not cumulative." Alito, *supra*, at 49; *see also Fisher*, 425 U.S. at 429 (Brennan, J., concurring in the judgment) ("I know of no Fifth Amendment principle which makes the testimonial nature of evidence and, therefore, one's protection against incriminating himself, turn on the strength of the Government's case against him."). Only in the context of a Fourth Amendment reasonableness inquiry does a court consider the government's preexisting knowledge. *See* Michael S. Pardo, *Disentangling the Fourth Amendment and the Self-Incrimination Clause*, 90 Iowa L. Rev. 1857, 1888 (2005).

Second, extending the foregone conclusion exception to private documents threatens to undermine basic Fourth Amendment protections. If the government could compel the production of any document from a suspect directly, there would be no need to conduct a search. Instead, subpoenas would function as self-executing search

warrants. This would gut defendants' constitutional protections—at the federal level, for instance, "subpoenas can be issued by prosecutors without judicial review or approval, and grand jury subpoenas for documents need not satisfy the Fourth Amendment particularity and probable cause requirements that apply to search warrants." Lance Cole, *The Fifth Amendment and Compelled Production of Personal Documents After* United States v. Hubbell—*New Protection for Private Papers?*, 29 Am. J. Crim. L. 123, 128–29 (2002) (footnote omitted).

Finally, extending the foregone conclusion exception to private documents would be particularly problematic in the context of modern technology. As this Court noted in *Fisher*, the subpoena of a personal diary might pose "[s]pecial problems of privacy." 425 U.S. at 401 n.7 (citing *United States v. Bennett*, 409 F.2d 888, 897 (2d Cir. 1969) (Friendly, J.)). Such special problems of privacy are even more acute in the context of cell phones and computers, which may contain far more intimate and personal information than most diaries. This Court has frequently recognized that such devices raise heightened privacy concerns because they "differ in both a quantitative and a qualitative sense from other objects." *Riley v. California*, 573 U.S. 373, 393 (2014). Cell phones and computers not only store drastically more documents than any physical archive, but also store those documents in an easily searchable and downloadable way. For this reason, "[w]hen confronting

new concerns wrought by digital technology, this Court has been careful not to uncritically extend existing precedents." *Carpenter*, 138 S. Ct. at 2222. That principle also cautions against a broad application of the foregone conclusion exception to this novel context.

C. Even if the government may compel the production of some private documents, the foregone conclusion exception does not permit compelled disclosure here.

Even if the foregone conclusion exception were available here—which it is not, *see supra* Sections II.A.2, II.B.3—it still would pose too high a bar for the government to clear. Ames may only invoke the foregone conclusion exception where it already *knows* the information conveyed by the compelled act of production. By complying with the compulsion order, Tanner would communicate (1) the contents of the passwords; (2) her ability to decrypt the devices; and (3) that the evidence sought exists, is possessed by her, and is authentic. Ames has failed to show that it knows any of this—let alone all of it. The foregone conclusion exception therefore is not met, and the order violates the Fifth Amendment.

Fisher made clear that the foregone conclusion exception is satisfied only where testimony implicit in an act of production "adds little or nothing to the sum total of the Government's information." 425 U.S. at 411. Indeed, a "foregone conclusion" is "[a]n *inevitable* result; a *foreordained eventuality*." *Foregone Conclusion*, Black's Law Dictionary (11th ed. 2019) (emphasis added). Mere suspicion will

therefore not suffice. The government learns a great deal when an act confirms that what it previously only *supposed* was true is *in fact* true. Terms like foregone, foreordained, and inevitable simply leave no room for that much doubt in the first place.

But *what* exactly must the government know? It must know all the testimonial elements of the act of production at issue. *See Fisher*, 425 U.S. at 411. Otherwise, the act would reveal something that the government previously did not know and thus impermissibly add to "the sum total of the Government's information." *Id.* It is only when the government has proven it already knows the testimonial aspects of production before compelling the act that the question becomes one "not of testimony but of surrender." *Id.* (quoting *In re Harris*, 221 U.S. 274, 279 (1911)). Here, Ames compels Tanner to disclose the passwords to a phone and computer. J.A. 26. By compelling that act, the government forces Tanner to communicate at least three things—each of which must be a foregone conclusion to avoid violating the Fifth Amendment.

First, Tanner is forced to communicate the passwords to the devices. Because this statement is explicitly testimonial, the foregone conclusion exception cannot and should not be applied. *See supra* Section II.A.2. Applying the foregone conclusion exception beyond the boundaries of *implied* testimony would threaten to destroy this long-assumed protection. Suppose, for example, that the government watches

a man murder someone. He is the murderer; it is a foregone conclusion. Under the foregone conclusion exception, the government could compel him to confess. Of course, if this were the rule, the Fifth Amendment would be only a parchment barrier against self-incrimination.

But even if somehow evaluated as implicit testimony, the passwords clearly are not a foregone conclusion. The government did not know the content of the passwords; if it did, the government would not need Tanner to disclose them. The very existence of this case demonstrates that part of the testimony intertwined with the compelled act is not yet known to the government. This testimony therefore does not lose its Fifth Amendment protection.

Second, Tanner is forced to communicate that she can decrypt both devices. *See* Kerr, *supra*, at 779 (2019) ("[T]he act of entering in the password and unlocking the device . . . amounts to an assertion that the person knows the password."). While the devices are clearly in Tanner's possession, the government has not proven that she can decrypt them. She has never admitted as much. J.A. 21; *but cf. United States v. Spencer*, No. 17-00259, 2018 WL 1964588, at *3 (N.D. Cal. Apr. 26, 2018) (finding no Fifth Amendment violation where the defendant admitted to purchasing and encrypting a hard drive matching the description of the one at issue). And the State provides no witnesses who can confirm Tanner knows the passwords to these devices. *But cf. United States v.*

Apple MacPro Comput., 851 F.3d 238, 242, 248 (3d Cir. 2017) (finding no Fifth Amendment violation where defendant's sister saw him using the encrypted hard drives). The facts here might lead one to *suspect* that Tanner knows the passwords. But suspicion falls far short of a foregone conclusion.

Third, Tanner is forced to communicate that the evidence "revealed by decryption exist[s], [is] possessed by [her], and [is] authentic." Sacharoff, *supra*, at 236 (footnote omitted). While here the government sought to compel production of the passwords to the devices, rather than the evidence the devices allegedly contain, "a forensic expert cannot tell whether an encrypted disk originally contained any data or was blank." *Id.* at 249 n.287. Compelling the production of passwords to digital devices is technologically and practically equivalent to compelling the production of the physical version of the files that those devices contain.

The prevailing test among the lower courts to evaluate whether existence, possession, and authenticity are a foregone conclusion has two requirements. *See United States v. Greenfield*, 831 F.3d 106, 116 (2d Cir. 2016). First, "the Government must *know* and not merely *infer*, that the sought documents exist, that they are under the control of defendant, and that they are authentic." *Id.* Second, as to the *specific* documents at issue, the government must establish its knowledge with

reasonable particularity—that is, it "need not demonstrate perfect knowledge of each specific responsive document." *Id.* To meet this test here, the government would need (1) to know that evidence of Tanner's guilt existed on the devices and (2) to describe each piece of evidence with reasonable particularity. But it cannot do either.

To begin, the government does not know that the particular documents exist. Here, the government wants to search "for evidence that [Tanner] posted, without the consent of the subject, a private, sexually explicit video to the Internet." J.A. 26. But the State has only shown that it *suspects* that such evidence exists—not that it *knows* it. That is precisely why it needs to search the devices. The best the State can assert is that "*it appears* that [Tanner was] the only person . . . who had access to the video before it was posted." J.A. 20 (emphasis added). But appearances are not obvious, foreordained, or inevitable. They are a hunch, not a foregone conclusion.

Moreover, the government is incapable of identifying any documents with reasonable particularity; the search warrant does not even establish the *existence* of any documents. It does not specify whether the "evidence" sought refers to a video, metadata suggesting Tanner posted the video to the internet forum, or something else. As this Court made clear in *Hubbell*, the foregone conclusion exception cannot apply where the government has not shown that it had "any prior

knowledge of either the existence or the whereabouts" of the documents that will be produced. 530 U.S. at 45. This is surely the case here, as Ames has not even identified the specific documents it seeks.

The application of the foregone conclusion exception here relies on three distinct pieces of implicit testimony: the contents of the passwords; Tanner's ability to decrypt the devices; and that the evidence sought exists, is possessed by her, and is authentic. Having failed to demonstrate that even one of these pieces of testimony is a foregone conclusion, the government cannot use the exception to circumvent the Fifth Amendment.

***

Compelled disclosure of the passwords is enough to violate the Fifth Amendment because it compels explicit testimony. But even if it were appropriate to apply the act of production doctrine and the foregone conclusion exception—which it is not—the analysis would ultimately lead to the same conclusion: the compulsion order violates the Fifth Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Ames should be reversed.

February 5, 2021 Respectfully submitted,

The Justice Robert H. Jackson Memorial Team

/s
Matthew Arons

/s
Max Bloom

/s
Taylor Custer

/s
Dustin Fire

/s
Colleen O'Gorman

/s
Samuel Stratton

APPENDIX

U.S. Const. amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Nonconsensual Pornography Act, Ames Crim. Stat. 545, provides:

> (a) Legislative findings and purpose.
>
> (1) The disclosure of private sexual images and videos without the consent of the subjects of those images and videos is a major social problem requiring immediate legislative response.
>
> (2) Freedom of speech is a prized value, but the nonconsensual disclosure of private sexual images and videos constitutes an egregious breach of privacy, and is speech of essentially no value to society.
>
> (3) The nonconsensual disclosure of private sexual images and videos often results in severe harm to the subjects, including but not limited to loss of professional opportunities and reputation, harassment and threats, and severe emotional distress.

(4) These harms are likely to occur regardless of the knowledge, intentions, or motivations of the person who discloses a private sexual image or video.

(5) Once images and videos are disclosed—and especially once they make their way to the Internet—they are likely to proliferate beyond control, and to remain in the public domain indefinitely, where they will continue to cause harm. Thus, it is imperative to deter and prevent the nonconsensual disclosure of private sexual images and videos before it occurs.

(6) Existing legal remedies are inadequate to deter and prevent the nonconsensual disclosure of private sexual images and videos.

(b) Definitions. For the purposes of this Section:

(1) "Disclose" includes transferring, publishing, distributing, or reproducing an image so that it may be seen by at least one other person;

(2) "Image" includes a photograph, film, videotape, recording, digital, or other reproduction;

(3) "Intimate parts" means the naked genitals, pubic area, anus, or female post-pubescent nipple of the person;

(4) "Sexual act" includes but is not limited to masturbation; genital, anal, or oral sex; sexual penetration with objects; or the transfer or transmission of semen upon any part of the depicted person's body.

(c) A person may not knowingly disclose an image of another, identifiable person whose intimate parts are exposed or who is engaged in a sexual act, if the person making the disclosure knows or should know that the person depicted reasonably expected that the image would remain private, and knows or should know that the person depicted did not consent to such disclosure.

(d) The following activities are exempt from the provisions of this Section:

(1) Images involving voluntary exposure in public or commercial settings;

(2) Disclosures made to a small audience to advance the public interest, including but not limited to the reporting of unlawful conduct to competent authorities, or the lawful and common practices of law enforcement, criminal reporting, legal proceedings, or medical treatment.

(e) Nothing in this Section shall be construed to impose liability upon the following entities solely as a result of content or information provided by another person:

(1) an interactive computer service, as defined in 47 U.S.C. 230(f)(2);

(2) a telecommunications network or broadband provider.

(f) Sentence. Disclosure of images in violation of this statute is a Class C misdemeanor punishable by up to 6 months in jail and/or a fine of $2000.

(g) Severability. The provisions of this statute are severable. If any is deemed to be unconstitutional or otherwise contrary to law, the intent of the legislature is that the remainder of the statute remain in effect.