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

REPLY BRIEF FOR PETITIONER

The Justice Robert H. Jackson Memorial Team

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Oral Argument

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I. THE NCPA VIOLATES THE FIRST AMENDMENT.

A. The NCPA criminalizes protected speech.

1. The speech criminalized by the NCPA is not obscene.

"State statutes designed to regulate obscene materials must be carefully limited." *Miller v. California*, 413 U.S. 15, 23–24 (1973). But Ames's analysis looks more like the "somewhat tortured history of the Court's [pre-1973] obscenity decisions" than the carefully limited *Miller* test. *Id.* at 20.

At the outset, the State fails to articulate how the nonconsensual disclosure of pornography is meaningfully different from other sexually explicit—but constitutionally protected—speech. *See* Resp't's Br. 11–12. Whole categories of film, literature, and Internet speech could be silenced if the government could criminalize any expression that is "in some sense erotic." Resp't's Br. 11–12 (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 579 (2002)). "Compared with the nudity available on thousands of other sites," Resp't's Br. 12, the nonconsensual disclosure of pornography is not particularly perverse, *see Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 324 (7th Cir. 1985) (holding that depictions of women "presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual" retain constitutional protection (quoting Indianapolis, Ind., Code § 16-3(q) (1984))).

Further, Ames mischaracterizes the criminalized speech as "patently offensive" by emphasizing the context of expression over its content. Resp't's Br. 12. It cannot be said that "'the setting in which the publications were presented' renders [the images] offensive" when nothing in the NCPA turns on whether an image's setting or presentation suggests that it was distributed nonconsensually. Resp't's Br. 12 (quoting *Ginzburg v. United States*, 383 U.S. 463, 465 (1966)). In the years since *Ginzburg*, this Court has held that an image will be found "patently offensive" only if it depicts "'hard core' sexual conduct." *Jenkins v. Georgia*, 418 U.S. 153, 160 (1974) (quoting *Miller*, 413 U.S. at 27). The NCPA bans mere nudity. Ames Crim. Stat. 545(c).

Finally, the NCPA bans some speech of serious value, and thus fails *Miller*'s third prong. *See Miller*, 413 U.S. at 24. The NCPA prohibits socially significant and sexually abusive speech alike. *See infra* Section I.D. The criminalized speech therefore is not obscene.

2. *The nonconsensual disclosure of pornography does not warrant a novel exception to the First Amendment.*

Ames misstates the law by suggesting that "[a] categorical exception is appropriate because 'the evil to be restricted so overwhelmingly outweighs the expressive interests . . . at stake.'" Resp't's Br. 17 (second alteration in original) (quoting *New York v. Ferber*, 458 U.S. 747, 763–64 (1982)). This Court has expressly rejected the argument that *Ferber* created a balancing test for recognizing new

exceptions to the First Amendment. *United States v. Stevens*, 559 U.S. 460, 471 (2010). Instead, this Court will recognize new categories of unprotected speech only if there is "a long (if heretofore unrecognized) tradition of proscription." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 792 (2011). No historical tradition exists here.

The State's account merely highlights speech covered by existing exceptions to the First Amendment. *See* Resp't's Br. 14–15. For instance, the "familiar letters" in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901), would fall within the intellectual property exception because the writer "possess[ed] the sole and exclusive copyright therein." *Id.* at 346. Likewise, the federal cyberstalking statute falls within the speech integral to criminal conduct exception because it is "directed toward courses of conduct, not speech." *United States v. Osinger*, 753 F.3d 939, 944 (9th Cir. 2014) (quoting *United States v. Petrovic*, 701 F.3d 849, 856 (8th Cir. 2012)).

Indeed, this Court's history of striking down prohibitions on publishing private information, *see, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001), shows that First Amendment concerns often limit "[t]he state's ability to enforce citizens' privacy rights," Resp't's Br. 13–14. Because history does not warrant a novel exception, the First Amendment protects the nonconsensual disclosure of pornography.

B. The NCPA is subject to strict scrutiny.

The State suggests that the NCPA should be subject to intermediate rather than strict scrutiny because "there is no realistic possibility that official suppression of ideas is afoot." Resp't's Br. 19 (quoting *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 189 (2007)). But the State "skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive . . . ." *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015).

Even under the State's proposed standard, the NCPA would still be subject to strict scrutiny. Ames asserts that Tanner "cannot point to a single idea that the NCPA prevents her from expressing." Resp't's Br. 19. And Ames also attempts to distinguish *Reed* by claiming that the NCPA does not regulate speech on "matters of public concern." Resp't's Br. 20. But the NCPA *does* suppress the expression of ideas and impair public debate. As this case illustrates, the NCPA criminalizes victims of sexual harassment who share proof of their experiences.

C. The NCPA fails any level of heightened scrutiny.

Ames suggests that the NCPA protects "privacy rights." Resp't's Br. 23. But if this were so, the statute would be underinclusive. Most obviously, a nude image that "redact[s]" a subject's genitals—but not her face—may escape liability, even if distributing that image is still an

invasion of privacy. Resp't's Br. 16. Ames also suggests that individuals can share intimate images indiscriminately so long as they do not send them, but "showing" an intimate image is no less violative of privacy than "sending" it. Resp't's Br. 27.

Regardless of the State's underlying interest, the NCPA is not narrowly tailored. For one, Ames misreads the statute in suggesting that *all* "redacted images" escape the NCPA's ambit. Resp't's Br. 16. Simply blurring a subject's "intimate parts" will not eliminate liability if an image nonetheless depicts an "identifiable person . . . engaged in a sexual act." Ames Crim. Stat. 545(c).[1] What's more, the State's claim that the "small audience" requirement "prevent[s] excessive injury to subjects" is inconsistent with this Court's precedents. Resp't's Br. 26. This Court has repeatedly rejected similar arguments and held that the First Amendment protects "mass" disclosures of publicly significant personal information. *Fla. Star v. B.J.F.*, 491 U.S. 524, 540 (1989).

D. The NCPA is substantially overbroad.

The NCPA's unconstitutional applications are not "peripheral." Resp't's Br. 31. For example, forty-one percent of young women have received unsolicited nude images from men, *see October 2017 Survey*, YouGov, https://bit.ly/3pUJm4K (last visited Feb. 24, 2021), yet the

[1] Because the NCPA thus provides no viable alternative channels for sharing these images, it fails even intermediate scrutiny. *Contra* Resp't's Br. 22.

NCPA prevents this large class of victims from sharing proof of their experiences. Nor is the NCPA's sweep limited to speech concerning sexual harassment—it also restricts political speech. *See, e.g.*, Pet'r's Br. 30 (discussing Abu Ghraib photographs).

The State's attempts to narrow the statute on appeal are unavailing. For example, Ames asserts that a "reasonable person would understand" that the public interest exception permits reporting sexual harassment. Resp't's Br. 30. But this case shows otherwise. The Supreme Court of Ames found that sharing the video of M.S.—evidence of potential workplace harassment—did not "advance the public interest." J.A. 7. Similarly, Ames fails to explain its assertion that disclosures in search of emotional support are akin to disclosures for medical treatment and thus exempted by the statute. *See* Resp't's Br. 27. At best, Ames shows that the statute is ambiguous—but this Court considers "the ambiguous as well as the unambiguous scope" of a statute when addressing overbreadth. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.6 (1982).[2]

[2] Ames cites *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), for the proposition that "a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim." Resp't's. Br. 30 n.5 (quoting *Holder*, 561 U.S. at 20). But *Holder* also acknowledged that "[s]uch a plaintiff may have a valid overbreadth claim under the First Amendment." 561 U.S. at 20.

E. This Court should not sever the statute.

"Severability is of course a matter of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). If this Court determines that some applications of the statute are unconstitutional, the proper remedy is to reverse the judgment below and remand for further proceedings in state court. *See, e.g.*, *Zobel v. Williams*, 457 U.S. 55, 64 (1982) (remanding because it is "of course for the Alaska courts to pass on the severability clause of the statute").

Even if this Court were to reach the question of severability, it should reject the State's effort to rewrite the statute by creatively excising individual words. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S 320, 329–30 (2006). Last term, this Court reiterated that whether and how a statute may be severed should turn on "the text of the severability or nonseverability clause." *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2349 (2020). The NCPA's severability clause states that "*provisions* of [the NCPA] are severable." Ames Crim. Stat. 545(g) (emphasis added). But neither of the two-word phrases that the State suggests severing—"small audience" and "should know," Resp't's Br. 32—is itself a "provision." By specifying that "provisions"—rather than individual words—are severable, the legislature purposefully bounded judicial discretion. This Court should respect that decision.

II. THE COMPULSION ORDER VIOLATES THE FIFTH AMENDMENT.

A. The passwords are incriminating.

Ames suggests that testimony is not incriminating under the Fifth Amendment if it bears only a but-for causal relationship to inculpatory evidence. Resp't's Br. 36–37. But that is not the law. Rather, this Court has made clear that the Fifth Amendment encompasses "*any disclosures* that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U.S. 441, 445 (1972) (emphasis added). This language clearly indicates that any causal relationship is enough. As even one of the State's principal sources notes, "*Kastigar* appears to have expanded the incrimination standard . . . to include *merely causal* connections between disclosures and evidence." Orin S. Kerr, *Decryption Originalism: The Lessons of* Burr, 134 Harv. L. Rev. 905, 957 (2021) (emphasis added).

Under this test, courts agree that the disclosure of a password is incriminating. *See, e.g.*, *United States v. Kirschner*, 823 F. Supp. 2d 665, 669 (E.D. Mich. 2010) ("[T]he government . . . is seeking testimony from the Defendant, requiring him to divulge through his mental processes his password[,] that will be used to incriminate him."); *United States v. Sanchez*, 334 F. Supp. 3d 1284, 1295 (N.D. Ga. 2018) (collecting cases). And academics and practitioners alike have emphasized that passwords

are testimonial, *see* Pet'r's Br. 32–34, a conclusion that would be entirely irrelevant if the passwords were not also incriminating.

Nor can Ames provide any case supporting its narrow reading of the causal rule. The lower court case cited by Ames, *see* Resp't's Br. 38–39, addressed a very different scenario: whether the government impermissibly relied on evidence that stemmed from prior immunized testimony, not whether testimony itself was privileged. *See United States v. Helmsley*, 941 F.2d 71, 80–81 (2d Cir. 1991).[3] By contrast, a broad causal standard makes sense here. Whenever a suspect's honest testimony will allow the use of evidence against her, she is put in the cruel trilemma of perjury, self-accusation, or contempt.

While purporting to describe the law today, Ames is in fact urging this Court to adopt Professor Orin S. Kerr's reading of *United States v. Burr*, 25 F. Cas. 38 (C.C.D. Va. 1807) (No. 14,692e), as the law. *See* Resp't's Br. 39–42. But *Burr* is only a second-best indication of how the Framers understood the Self-Incrimination Clause. Even Kerr notes that "[t]he sources available in 1791, taken alone, do not provide a clear

[3] When a court is determining whether to exclude evidence, it is natural to consider whether the causal link between the evidence and the testimony was attenuated, lest a "fortuitous" chain of causation, *Helmsley*, 941 F.2d at 82, prevent the government from introducing evidence that is otherwise unrelated to the immunized testimony. When considering whether the privilege extends to testimony in the first place, there are no such concerns, as the risk of incrimination must be "real and appreciable" for the privilege to apply. *Hiibel v. Sixth Jud. Dist. Ct.*, 542 U.S. 177, 190 (2004).

resolution of the correct standard to apply." Kerr, *supra*, at 952. Ambiguous history cannot justify setting aside a half-century of case law.

What's more, the facts of *Burr* differ in a key way. That court held that Aaron Burr's private secretary, Charles Willie, could be compelled to reveal his knowledge of the cipher to one of Burr's letters. *Burr*, 25 F. Cas. at 40. Since Willie was asked about Burr's letter, not his own, the court could resolve the issue on the grounds that Willie's present knowledge of the cipher simply would not be inculpatory. *See id.* Here, by contrast, Tanner's disclosure of the passwords would provide a "link in the chain of testimony" by giving the government access to the computer and phone. *Id. Burr*, then, simply indicates that Tanner's *friend* could be compelled to disclose the passwords, not that Tanner *herself* may be so compelled.

B. The passwords are testimonial.

Ames contends that "an action that communicates information incidental to the government's purpose in compelling the action" is not testimonial. Resp't's Br. 45. But the disclosure of the passwords is not merely an action; it is explicit, verbal testimony. And "[t]he vast majority of verbal statements" are testimonial, since they "convey information or assert facts." *Doe v. United States*, 487 U.S. 201, 213 (1988).

Ames cites three examples to suggest that the testimonial prong is much narrower than *Doe*'s language would indicate. *See* Resp't's Br.

45–46. But each of these cases involved the critical distinction between providing physical evidence and oral testimony. In *Fisher v. United States*, 425 U.S. 391 (1976), this Court noted that a subpoena for documents "does not compel oral testimony." *Id.* at 409. In *Gilbert v. California*, 388 U.S. 263 (1967), it noted that a handwriting sample was merely an "identifying physical characteristic" and contained no "communicative matter." *Id.* at 267. And in *United States v. Wade*, 388 U.S. 218 (1967), it noted that a voice exemplar compelled the accused "to exhibit his physical characteristics" and not "to disclose any knowledge he might have." *Id.* at 222.

C. The compelled production of self-incriminating private documents is appropriately before this Court.

The Fifth Amendment bar on compelling the production of private documents falls squarely within the bounds of the question presented. Virtually no one has any "real interest in . . . passwords themselves." Resp't's Br. 47. They are "merely a means to get to [a] computer's contents." *Commonwealth v. Davis*, 220 A.3d 534, 551 n.9 (Pa. 2019). In effect, "entering [a] password to unlock [a] device is analogous to the physical act of handing over documents." *Seo v. State*, 148 N.E.3d 952, 957 (Ind. 2020); *see also* Pet'r's Br. 49. Rather than refute this analogy, however, the State instead simply argues that it is beyond this Court's

reach. Resp't's Br. 51–53.[4] But that mistakenly assumes there is a difference between producing a password and producing the files it decrypts.

Encryption technology itself makes clear that there is no difference. "To someone without the password . . . an encrypted file on an unencrypted device is just gibberish." Kerr, *supra*, at 958. Even "a forensic expert cannot tell whether an encrypted disk originally contained any data or was [just] blank." Laurent Sacharoff, *Unlocking the Fifth Amendment: Passwords and Encrypted Devices*, 87 Ford. L. Rev. 203, 249 n.287 (2018). Entering the password "translates the encrypted version to the decrypted version." *Id.* at 233. It does not simply pull down a barrier to existing evidence. Rather, it calls back into existence evidence that was previously dismantled and intermixed with other random bits. Producing a password is thus the same as producing the files it decrypts.[5] *See Produce*, Black's Law Dictionary (11th ed. 2019) (defining produce as "to bring into existence" or "to create").

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[4] Ames does so by defining document production as "locating and surrendering documents in compliance with a subpoena." Resp't's Br. 52. That is unpersuasive for two reasons. First, complying with a subpoena is not necessary to produce documents. Second, entering a password *does* locate and surrender documents because it translates random data into intelligible files.

[5] Ames's foregone conclusion analysis is thus incomplete; it fails to show that Ames already knows that the files sought on the devices exist, are possessed by Tanner, and are authentic. *But see* Resp't's Br. 48–50.

Despite this, Ames assumes that there is a difference because, while it lacks the passwords, it "has the evidence." Resp't's Br. 53. But "[w]hen the government says it already *has* the documents, and it merely needs to decode them, it uses a misleading analogy." Sacharoff, *supra*, at 249 n.287. It does not have them; it has random bits. One need not be a programmer to see that random bits are not intelligible files. Since compelling Tanner to produce the passwords is no different than compelling her to produce the private documents they encrypt, it is barred under the Fifth Amendment.

D. Prohibiting the compelled disclosure of passwords does not render the contents of devices inaccessible.

Compelled disclosure of passwords is not the only way to access the contents of digital devices. For example, the government may compel the testimony of a friend or family member who knows the password. *See* Orin S. Kerr & Bruce Schneier, *Encryption Workarounds*, 106 Geo. L.J. 989, 1001 (2018). And just as "it is generally practicable to open a safe using force," Rsp't's Br. 48, the government may "break[] into" digital devices without a password such as by "exploit[ing] a flaw in the encryption scheme," Kerr & Schneier, *supra*, at 1005. Devices that are not accessible through these existing methods can also be made accessible through congressional intervention. *See, e.g.*, Lawful Access to Encrypted Data Act, S. 4051, 116th Cong. (2020). Prohibiting

compelled disclosure is far from an "impenetrable shield to criminals." Resp't's Br. 43.

As Ames notes, "[i]n our judicial system, the public has a right to every man's evidence." Resp't's Br. 33 (quoting *Trump v. Vance*, 140 S. Ct. 2412, 2420 (2020)). But this general maxim has limits that apply here: "'the public . . . has a right to every man's evidence,' *except for those persons protected by a constitutional, common-law, or statutory privilege*." *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (alteration in original) (emphasis added) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)). Ames may search these devices, but the Fifth Amendment protects Tanner from being forced to assist that process.

CONCLUSION

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

February 26, 2021 Respectfully submitted,

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