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

JOINT APPENDIX

TABLE OF CONTENTS

SUPREME COURT OF THE UNITED STATES

ORDER LIST

Certiorari Granted

January 5, 2021

19-1435 Tanner v. Ames

The petition for a writ of certiorari is granted on the following two questions:

1. Whether the Ames Nonconsensual Pornography Act, Ames Crim. Stat. 545, 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.

SUPREME COURT OF AMES

STATE, *Appellee*, v. LAURA TANNER, *Appellant.*	Docket No. 18-75

CANNON, J., for a unanimous Court:

This case addresses two weighty questions under the federal Constitution, both of which require us to apply familiar constitutional principles to relatively new technology. The first question is whether the State of Ames's criminal statute outlawing nonconsensual pornography complies with the First Amendment. The second question is whether the Fifth Amendment's privilege against self-incrimination permits a defendant to refuse to disclose the passwords to her computer and phone. We rule for the State on both questions.

BACKGROUND

In 2016, the State of Ames enacted the Nonconsensual Pornography Act, codified at Ames Crim. Stat. 545, to address the growing problem of nonconsensual pornography, sometimes referred to as "revenge porn." The archetypical revenge porn case arises when, after a romantic relationship fails, a disappointed party seeks to hurt the other party by disseminating intimate photos or

videos produced during the relationship on the Internet. But in many ways, the term "revenge porn" is a misnomer, because the motivations for the disclosure of nonconsensual pornography are often not vengeful. Profiteers post such videos for money, and others do so for notoriety or their own dark amusement. Whatever the motivations, the disclosure of nonconsensual pornography can have serious personal and professional consequences for the victims, but it has been unclear whether existing tort doctrines provide any relief.

The State legislature sought to fill that potential gap in the common law by enacting the Nonconsensual Pornography Act, which makes it a misdemeanor to knowingly disclose any sexual image or video containing nudity, which was created with an expectation of privacy, without the subject's consent. The statute has numerous exceptions to allow, for example, limited disclosures to report unlawful conduct.

Ames is not alone in outlawing nonconsensual pornography. According to the Cyber Civil Rights Initiative, an advocacy organization that urges the adoption of legislation to prevent the disclosure of nonconsensual pornography, 46 other States and the District of Columbia have laws on the books addressing this subject. *See* Cyber Civil Rights Initiative, 46 States + DC + One Territory Now Have Revenge Porn Laws, https://www.cybercivilrights.org/revenge-porn-laws/. The terms of these statutes vary.

The facts of this case, which are drawn from the State's criminal complaint, do not resemble typical revenge porn. They began on October 10, 2018, when a man, initials M.S., sought to send his girlfriend, Laura Taylor, an intimate, sexually explicit video of himself. However, instead of sending the video to Laura Taylor, M.S. accidentally misdirected the video to defendant Laura Tanner—who was M.S.'s work colleague at Ames Robotics. M.S. was a manager at Ames Robotics; Tanner is a software engineer. She did not directly report to M.S., but knew who he was, and knew that he outranked her at the company.

Tanner did not respond directly to the message sending the video. Instead, Tanner posted the video, along with a message of her own, to a web forum for employees of Ames Robotics to discuss workplace issues. The message was not signed with Tanner's name, but was instead posted anonymously—which is standard practice for this forum. The message complained that the video was sexual harassment, and excoriated the corporate culture of Ames Robotics for allowing M.S. to work there in a managerial position. The post referred to M.S. as a "pig," and demanded an investigation and consequences. The forum website was accessible to all 183 employees of Ames Robotics—and indeed, it could be accessed from outside the company, too.

The following day, M.S. discovered that he had misdirected the video to Tanner, and apologized to her and the company. A few hours later, the original

message posted to the web forum, including the video, was taken down. But the consequences were already rolling. M.S. lost his job shortly thereafter. Before long, the video also made its way out of the employee forum. It is now accessible on offshore pornography websites on the Internet, and is unlikely ever to vanish completely.

M.S. filed a complaint with the Ames police, stating that the only person he had sent the video to was defendant Tanner—and on that basis, asserted that Tanner must have been the person responsible for posting the video to the Ames Robotics forum. M.S. complained that as a result of the disclosure of the video, he had lost his job and was unable to find employment elsewhere, was receiving online harassment and threats, and was suffering severe emotional distress. M.S. claimed that his "life and career have been ruined" by the disclosure of the video.

The Ames police chose to investigate the case as a violation of the Nonconsensual Pornography Act. On the basis of M.S.'s complaint, the police interviewed Tanner. In the interview, Tanner said that now that she had heard M.S.'s side, she "felt bad about everything that had happened to [M.S.]." However, she did not admit receiving or disclosing the video. Instead, when asked directly whether she was the one who had posted the video, she responded, "I don't want to answer that."

The police decided to continue their investigation, and obtained a warrant to search Tanner's computer and cell phone for evidence that she had posted the video to the web forum. Upon attempting to execute the search, the police discovered that both devices are protected with passwords. By then, Tanner had obtained legal counsel. When asked to disclose the passwords to the computer and phone, Tanner refused, citing the Fifth Amendment privilege against self-incrimination.

Based on the evidence in its possession, the State filed a criminal complaint against Tanner for violation of the Nonconsensual Pornography Act in the Criminal Division of the Superior Court. Tanner moved to dismiss the complaint on the ground that the statute is unconstitutional, and the trial court denied the motion, holding that the First Amendment does not protect Tanner's speech at all. The State then filed a motion to compel Tanner to disclose her device passwords, which the trial court granted. After the trial court granted that motion, Tanner entered a conditional plea of guilty to a Class C misdemeanor, expressly reserving her right to appeal from both motion orders. She now brings that appeal. For the reasons explained below, we affirm.

ANALYSIS

We consider the two motions in the order they were addressed by the Superior Court.

I. Whether the Nonconsensual Pornography Act Is Constitutional.

The operative provision of the Nonconsensual Pornography Act provides 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.

Ames Crim. Stat. 545(c).

The statute excludes "[i]mages involving voluntary exposure in public or commercial settings." Ames Crim. Stat. 545(d)(1). It also excludes "[d]isclosures made to a small audience to advance the public interest, including but not limited to the reporting of unlawful conduct to competent authorities." *Id*. 545(d)(2). Here, however, neither exclusion applies. The images in this case did not involve a public or commercial setting, so the first exclusion does not apply. The second exclusion does not apply for two reasons. First, the disclosure was not made to a "small audience"; it was made to a publicly accessible website typically viewed by all Ames Robotics employees. Second, the disclosure was not to advance the public interest—even if Tanner reasonably believed at the time that it was.

Because there is no way to construe the statute so that it would not reach the facts alleged in the State's complaint, we now confront the constitutional question head-on. Tanner argues that the statute is unconstitutional under the First Amendment because it is overbroad, and not narrowly tailored to achieve the

State's legitimate purposes. The State makes two arguments in defense of the statute. It argues that the First Amendment simply does not apply to the nonconsensual disclosure of private sexual imagery, contending that this entire category of speech falls outside the scope of the Constitution. It argues second that even if the First Amendment does apply, the statute survives every level of constitutional scrutiny. The State urges us to apply intermediate scrutiny, but contends that the statute would survive even strict scrutiny.

These arguments raise pure questions of law that we review *de novo*. We ultimately conclude that the statute survives strict scrutiny. Accordingly, we assume, without deciding, that the First Amendment applies, and that strict scrutiny is the correct standard.

A. Whether the First Amendment Applies.

The Superior Court held that the First Amendment does not apply at all because the speech prohibited by the Nonconsensual Pornography Act is, like child pornography, not constitutionally protected at all. We are not entirely sold on that proposition, but we need not resolve it because we conclude that the statute survives even if the First Amendment does apply.

We acknowledge that some commentators have made persuasive arguments that the disclosure of nonconsensual pornography is akin to obscenity, defamation, fraud, incitement, criminal speech, and child pornography, which receive no First

Amendment protection whatsoever. *See, e.g.*, Danielle Keats Citron, *Sexual Privacy*, 128 Yale L.J. 1870, 1936 (2019); Evan Ribot, *Revenge Porn and the First Amendment: Should Nonconsensual Distribution of Sexually Explicit Images Receive Constitutional Protection?*, 2019 U. Chi. Legal F. 521, 523 (2019); Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 Emory L.J. 661, 677 (2016); Alix Iris Cohen, *Nonconsensual Pornography and the First Amendment: A Case for A New Unprotected Category of Speech*, 70 U. Miami L. Rev. 300, 346 (2015).

The Supreme Court, however, has cautioned against adding new categories of entirely unprotected speech. See *United States v. Alvarez*, 567 U.S. 709, 717 (2012); *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 791 (2011); *United States v. Stevens*, 559 U.S. 460, 468-69 (2010). As a result, even courts that have upheld nonconsensual pornography statutes have generally concluded that the First Amendment applies. *See People v. Austin*, 155 N.E.3d 439, 455 (Ill. 2019), *cert. denied*, 2020 WL 5882221 (U.S. Oct. 5, 2020); *State v. VanBuren*, 214 A.3d 791, 807 (Vt. 2019).

We decline to take a view here—but we acknowledge that the Supreme Court may wish to clarify this point.

B. Whether the Nonconsensual Pornography Act Survives First Amendment Scrutiny.

We also bypass the inquiry about the appropriate level of constitutional scrutiny because we conclude that even under the most demanding standard of strict scrutiny, the Nonconsensual Pornography Act survives. To meet this test, the statute must be narrowly tailored to achieve compelling interests. *See, e.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015).

We conclude that the interests the statute seeks to achieve, which include protecting the sexual privacy of citizens, as well as preventing the harmful consequences that have been proven to arise from the disclosure and proliferation of nonconsensual pornography, qualify as compelling interests. The statute includes legislative findings identifying the social harms of nonconsensual pornography. *See* Ames Crim. Stat. 545(a). These harms are well documented in the literature, and the State is eminently justified in seeking to control them.

We also conclude that the statute is narrowly tailored to achieve its purposes. First, the statute identifies a discrete subset of information: images or videos showing certain defined forms of nudity or sexual acts. Second, the statute applies only if the person making the disclosure knows or should know that the image was reasonably expected to be kept private, and that the subject of the image did not consent. Third, the statute excludes certain disclosures, including disclosures to a small audience to advance the public interest. Ames Crim. Stat. 545(d)(2). While

the exclusions could have been broader (for example, they could have covered all disclosures intended to advance the public interest, regardless of audience size), we hold that the First Amendment does not require a broader exclusion.

We recognize that the statute does not include any specific intent requirement. For example, it does not apply only when the disclosure of the imagery is intended to harm the subject, or done for profit, or similar. Some courts have concluded that the lack of such a requirement is fatal to similar statutes. *See State v. Casillas*, 938 N.W.2d 74, 87 (Minn. Ct. App. 2019), *review granted* (Mar. 17, 2020); *Ex parte Jones*, 2018 WL 2228888, at *7 (Tex. App. May 16, 2018), *petition for discretionary review granted* (July 25, 2018). We disagree with that analysis, however, because the social harms resulting from the disclosure of nonconsensual pornography arise regardless of the motives of the original discloser. Accordingly, we conclude that it is permissible for the State to criminalize the disclosure without including a specific intent requirement. *See Austin*, 155 N.E.3d at 471 (upholding similar statute).

We also are uneasy about treating Tanner as a criminal. If we put ourselves in Tanner's shoes, we can see a very reasonable explanation for why she acted as she did. When she received the unwanted, sexually explicit video, Tanner had reason to think that she was being sexually harassed by a manager at her company. When she posted the video to the employee web forum, she may reasonably have

believed that she was engaged in socially beneficial speech on a matter of public concern by calling out unlawful sexual harassment and warning her colleagues about risk to them. She may have believed that reporting the matter through appropriate channels would have been ineffective. She may have also believed that if she failed to include the video, others would not believe her anonymous accusations against a manager. She may not have believed that the message was intended to be kept private. And of course, if she was shocked and appalled by receiving the video—as a reasonable person might well be—she may not have been thinking clearly as she posted the video. Any number of reasonable people could have acted exactly as Tanner did in the bizarre and disorienting circumstances that gave rise to this case.

We are quite reluctant to condone a criminal prosecution that might chill the victims of unwanted sexual advances from coming forward. And we are disturbed that a statute enacted to deter and prevent cyberbullying is now being used to prosecute somebody who perhaps reasonably believed that she was the victim of cyberbullying, and was merely trying to defend herself by imploring senior management at her company to take appropriate action. Were we making the prosecutorial decisions around here, we very well might not have brought this case. Indeed, had Tanner's initial assessment of the video been accurate (*i.e.*, M.S. had actually been harassing her), we cannot imagine a prosecutor who would have

thought it appropriate to bring charges against her—even though the statute would permit it.

Despite our concern, we ultimately conclude that the statute survives. The statute preserved Tanner's right to call out suspected sexual harassment without disclosing the damaging video, and the legislature was permitted to draw the line where it did. Although Tanner's behavior was, in our view, at least arguably reasonable, we do not think the First Amendment requires the legislature to condone it.

For the foregoing reasons, we hold that the Nonconsensual Pornography Act does not violate the First Amendment.

II. Whether the Fifth Amendment Permits the State to Compel the Production of Tanner's Computer Password.

The State moved to compel the production of Tanner's computer password, and Tanner refused on the ground that producing the password would violate the Fifth Amendment privilege against self-incrimination. The trial court granted the State's motion, and we affirm.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. For a communication to violate the Fifth Amendment, it must be "testimonial." *See Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 189 (2004). "[I]n order to 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).

In general, the surrender of physical evidence is not testimonial, except to the extent that the act of handing over the evidence itself implies a fact. For example, if the government says to a defendant, "Hand over the murder weapon," and the defendant produces a gun, this production would imply that: (1) the defendant knew that a murder occurred; (2) the defendant knew that the murder weapon was a gun; (3) the defendant knew which gun was used to commit the murder; and (4) the defendant had possession of that gun, so as to enable compliance with the government's demand. That would be self-incriminating, and so the Fifth Amendment protects the defendant from having to comply.

However, some facts are so obvious and clear that their implied disclosure is not testimonial. In *Fisher v. United States*, 425 U.S. 391, 411 (1976), the Supreme Court held that when a taxpayer was compelled to produce certain papers prepared by an accountant, the surrender of the papers was not testimonial because "[t]he existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers." Courts have described this reasoning as the "foregone conclusion" exception to the privilege against incrimination. It applies when, even though the act of production may convey some incriminating

knowledge apart from the items being produced, the knowledge conveyed is a foregone conclusion, or already obvious to the Government.

Applying the foregone conclusion exception to the context of computer and phone passwords, courts have reached varying results. In a recent case, the Supreme Court of New Jersey held that "although the act of producing the passcodes is presumptively protected by the Fifth Amendment, its testimonial value and constitutional protection may be overcome if the passcodes' existence, possession, and authentication are foregone conclusions." *State v. Andrews*, 234 A.3d 1254, 1274 (N.J. 2020). The court had no trouble concluding that the conditions for the foregone conclusion exception were true on the record before it: The existence of the passwords was confirmed by the fact that the phones at issue were password protected; the possession of the passwords was confirmed by the fact that the phones were seized from the defendant; and the authentication of the passwords was confirmed when the passwords, in fact, unlocked the phones. *See id.* at 1275.

On the other hand, the Supreme Court of Pennsylvania recently held that "the foregone conclusion gloss on a Fifth Amendment analysis constitutes an extremely limited exception to the Fifth Amendment privilege against self-incrimination," which the Supreme Court has only ever applied in the context of compulsion of business and financial records. *Commonwealth v. Davis*, 220 A.3d 534, 549 (Pa.

2019), *cert. denied*, 2020 WL 5882240 (U.S. Oct. 5, 2020). Reasoning that "it would be a significant expansion of the foregone conclusion rationale to apply it to a defendant's compelled oral or written testimony," the court concluded that "to apply the foregone conclusion rationale in these circumstances would allow the exception to swallow the constitutional privilege." *Ibid*. Accordingly, the court held that "the compulsion of a password to a computer cannot fit within [the foregone conclusion] exception." *Id*. at 551.

Having considered the authorities, we agree with the Supreme Court of New Jersey. In our view, 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.

For the foregoing reasons, we affirm the trial court's decision to grant the motion to compel.

CONCLUSION

For the foregoing reasons, the trial court's motion rulings are AFFIRMED. Because Tanner's guilty plea was subject to revocation only upon a successful appeal from one or both motion orders, the guilty plea is now final and the judgment in this case is likewise final.

FILED: AUGUST 28, 2020

AMES SUPERIOR COURT, CRIMINAL DIVISION

STATE OF AMES, *Plaintiff*, v. LAURA TANNER, *Defendant.*	Docket No. _____

COMPLAINT FOR VIOLATION OF CRIMINAL LAWS

I, Erik Nygren, on behalf of the State of Ames, hereby bring this Complaint against defendant Laura Tanner, a resident of the State of Ames, for violation of Ames Crim. Stat. 545(c). This complaint is based on the following facts:

1. On October 10, 2018, at approximately 10:05 PM, an adult male with initials M.S.—who is the complaining witness in this case—used his iPhone to send a sexually explicit home-made video of himself to defendant Laura Tanner.

2. The video was approximately ninety seconds long. In the video, M.S. is nude, his genitals are visible, and he narrates his desire to have sexual intercourse with the recipient in an apparent attempt at seduction.

3. M.S. avers that he believed he was sending the video to his girlfriend, Laura Taylor, who had no objection to receiving such videos. But due to a typographical error in the addressee information, M.S. accidentally and unknowingly sent the video to defendant Laura Tanner instead. Subsequent investigation has confirmed

that Laura Taylor was M.S.'s girlfriend at the time, and that she did not object to receiving sexually explicit videos from M.S.

4. M.S. was employed by Ames Robotics, Inc., as a team manager. Defendant Tanner is also employed at Ames Robotics, as a software engineer. In the corporate hierarchy, M.S. outranked Tanner. Ames Robotics is a company that designs and manufactures robot drones, which are used as toys and delivery vehicles. Ames Robotics has 183 employees, all of whom work at a single facility in Ames.

5. At approximately 10:25 PM on October 10, 2018, a message containing the sexually explicit video of M.S. appeared on a website run by the Ames Robotics Employees' Association. The website has a message board where employees of Ames Robotics can discuss workplace issues. The site allows any user to create a conversation thread by posting a message, and other users can respond with messages of their own in that thread. Messages are anonymous, although users can reveal their names in the body of the messages if they wish. The site does not store information about people who post to the site or view messages, other than the messages they post.

6. The site is not password-protected or otherwise private; any person with access to the Internet can view the site's content. Although individual posts do not appear in the search results produced by Internet search engines, people can navigate their web browser to the site's front page, where they can browse through

all of the posts, or they can type in the URL of a specific post and access that post directly. Consistent with this, when a user attempts to post any information, a reminder appears, saying "PLEASE REMEMBER THAT THIS WEBSITE IS NOT PRIVATE OR SECURE. DO NOT POST SENSITIVE COMPANY INFORMATION, INFORMATION ABOUT CONFIDENTIAL WORK PROJECTS, OR OTHER INFORMATION THAT SHOULD BE KEPT SECRET. FOR ALL SUCH COMMUNICATIONS, PLEASE USE THE COMPANY INTRANET ONLY. YOUR ROBOT OVERLORDS THANK YOU FOR YOUR CONSIDERATION."

7. The message posted at 10:25 PM on October 10, 2018 was posted anonymously. In addition to commentary, the message identified M.S. by name and title, and included the video of M.S., such that if a user would click on or touch a thumbnail image of the first frame of the video, the entire video would play. The body of the message is included as Exhibit 1 to this Complaint, with M.S.'s name redacted.

8. More than thirty responses were posted to the message on the night of October 10, 2018 and the early morning of October 11, 2018.

9. At 8:45 AM on October 11, 2018, M.S. posted on the Ames Robotics Employees' Association website, stating that he had misdirected the video,

apologizing, and requesting that the video be taken down. His message to the website is included as Exhibit 2 to this Complaint.

10. Later that day (by 2 PM), the original message containing the video was taken down from the Ames Robotics Employees' Association forum website. However, by that time, the video had already been reproduced elsewhere on the Internet, including on at least two pornography websites hosted offshore. It is not known how the video made its way to these websites.

11. The disclosure of the video has resulted in harm to M.S. Specifically, M.S. lost his job and has found it difficult to obtain new employment. He also has received harassing and threatening communications. He further reports that he has been seeing a psychologist for help with trauma associated with these events. He claims that his life and career have been ruined by the disclosure of the video.

12. Based on a review of M.S.'s iPhone, and an interview with M.S., it appears that the only person, other than M.S., who had access to the video before it was posted to the Ames Robotics Employees' Association website was defendant Laura Tanner.

13. In a consensual interview, defendant Tanner did not answer when asked whether she was the one who had posted the video to the Ames Robotics Employees' Association website. Instead, she said, "I don't want to answer that."

She did say, however, that she "felt bad about everything that had happened to [M.S.]."

14. Tanner later refused to disclose the passwords to her computer and cell phone, despite the issuance of a valid warrant to search those devices for evidence that she posted the video.

15. Based on the State's investigation, the State has concluded that it is more likely than not that defendant Laura Tanner knowingly disclosed an image of another, identifiable person whose intimate parts were exposed, with knowledge that the person depicted reasonably expected that the image would remain private, and with knowledge that the person depicted did not consent to such disclosure, in violation of the Ames Nonconsensual Pornography Act, Ames Crim. Stat. 545(c). This offense is a Class C misdemeanor.

s/Eric Nygren

Deputy State Attorney
180 Holmes Place
Ames City, Ames

Sworn and subscribed before Judge Marlene Stevens on February 1, 2019.

EXHIBIT 1

From: Anon19768

Subject: DISGUSTING PIGS IN MANAGEMENT AT A.R.! TOTALLY OUTRAGEOUS CONDUCT ON VIDEO!

Posted: Oct. 10, 2018, 10:25:05 PM

I am hyperventilating as I write this. I was home, minding my business, when out of the blue I get a video message from [REDACTED], a Team Manager for Toy Product Development. I thought, this is weird, because I have never really spent any time with [REDACTED]. We have passed each other in the hallway, and said the occasional hello, but he had never sent me anything before, never talked about anything, never worked on a project together, etc.

I opened the video and my jaw dropped. He is there, naked, saying "I have a special message for you," and talking in a breathy voice about all the things he wants to do to me in bed.

THIS IS NOT OK! A MANAGER CANNOT SEXT AN EMPLOYEE OUT OF THE BLUE! I was so disgusted. I was disgusted at [REDACTED]. And I was disgusted to work at a place that has a corporate culture that allows blatant harassment like this to go unchecked. Given how random this is, I cannot imagine that I'm the first person this has happened to. How many other women have had to put up with behavior like this?

The video is below and it speaks for itself. IT IS IMPERATIVE that our senior management take this seriously and DO SOMETHING. NOW.

[VIDEO THUMBNAIL AND LINK REDACTED]

EXHIBIT 2

From: Anon19800

Subject: Apology re: DISGUSTING PIGS IN MANAGEMENT AT A.R.! TOTALLY OUTRAGEOUS CONDUCT ON VIDEO!

Posted: Oct. 11, 2018, 8:45:09 AM

I am the person in the video posted to this forum last night. I want to explain what happened and apologize, and also ask that the video be taken down as soon as possible.

Late last night, I tried to send a flirtatious video to my longtime girlfriend, who does not work at the company. Unfortunately, my girlfriend's name is very similar to one of our valued colleagues, and due to a typo, I accidentally misdirected the video to our colleague, who I believe authored the post that started this thread. This was a mistake. I would never, ever send an explicit video to anybody who didn't want to receive it, and I would stand up for any employee who received such an unwanted advance. Sexual harassment has no place at our business, whatsoever.

I feel terrible about what happened, and sincerely apologize. I can imagine how angry and betrayed our colleague felt upon receiving the video. I should obviously have been far more careful, and I have no good excuse for causing that pain. For now, all I can do is apologize from the bottom of my heart for the mix-up, and assure you and everybody else reading that it wasn't intentional.

I also ask that you please take the video down immediately. Just as that video had no place in your inbox, it certainly has no place on the systems of all of our colleagues, or anybody else on the Internet who might get their hands on it if it stays up. Only the site admins and the original poster can take down the video, and I'm asking one of you to please do that right now, before this spreads or goes viral or anything else like that.

Very sincerely,

[REDACTED]

AMES SUPERIOR COURT, CRIMINAL DIVISION

STATE OF AMES, *Plaintiff*, v. LAURA TANNER, *Defendant.*	Docket No. 18-cr-753

ORDER DENYING MOTION TO DISMISS CRIMINAL COMPLAINT

Defendant Laura Tanner moves to dismiss the criminal complaint against her on the ground that the underlying statute, the Ames Nonconsensual Pornography Act, Ames Crim. Stat. 545, violates the First Amendment to the Constitution of the United States. This Court denies the motion.

Defendant Tanner is accused of violating the Nonconsensual Pornography Act by posting a sexually explicit video of a work colleague to a website principally used by other colleagues. Although not relevant to the elements of the offense, the State alleges that the posting of the video caused significant harm to its subject.

Tanner argues that the statute violates the First Amendment because it punishes protected speech on the basis of its content. This Court concludes, however, that the speech prohibited by the statute is not protected by the First Amendment in the first place. Instead, the nonconsensual disclosure of private

sexual images is of such low social value that it falls outside the zone of First Amendment protection—just like child pornography. *See New York v. Ferber*, 458 U.S. 747, 764 (1982). That is true, in part, because the statute specifically carves out situations in which the disclosure of this information might actually have social value, leaving behind only valueless disclosures. *See* Ames Crim. Stat. 545(d).

Because Tanner's constitutional challenge fails at the threshold, her motion to dismiss must be DENIED.

s/Judge Mariah F. Williams

Superior Court, Criminal Division

DATED: MAY 1, 2019

AMES SUPERIOR COURT, CRIMINAL DIVISION

STATE OF AMES, *Plaintiff*, v. LAURA TANNER, *Defendant.*	Docket No. 18-cr-753

ORDER GRANTING STATE'S MOTION TO COMPEL PRODUCTION

On February 27, 2019, this Court granted the State's application for a warrant to search defendant Laura Tanner's computer and cellular phone for evidence that she posted, without the consent of the subject, a private, sexually explicit video to the Internet, in violation of the Ames Nonconsensual Pornography Act. The data on the computer and phone are password protected, and the only person who knows the password is the defendant. The State has moved to compel the defendant to disclose her passwords so that it can execute its search. The State's motion is granted.

Defendant argues that the Fifth Amendment's privilege against self-incrimination precludes the State from compelling her to reveal her passwords. The privilege applies when a defendant is compelled to provide testimony that is incriminating. When the State seeks information that is a "foregone conclusion" in light of what it already knows, the privilege is not implicated because, in that

circumstance, "[t]he question is not of testimony but of surrender." *Fisher v. United States*, 425 U.S. 391, 411 (1976).

Here, the State seeks surrender of the passwords so that it can carry out its valid search warrant. I conclude that those passwords fall within the foregone conclusion exception because their existence is known to the State, the fact that the defendant possesses them is known to the State, and they are self-authenticating. *See State v. Stahl*, 206 So. 3d 124, 136 (Fla. Dist. Ct. App. 2016); *Matter of Search of a Residence in Aptos, California 95003*, 2018 WL 1400401, at *5 (N.D. Cal. Mar. 20, 2018). Their disclosure is no more testimonial than the surrender of financial documents in the defendant's possession, as in *Fisher*.

Because the surrender of the passwords is not testimonial in nature under the foregone conclusion exception, the defendant's response to the State's motion fails, and the State's motion to compel is GRANTED. The defendant shall produce within 30 days the passwords to her computer and cellular phone.

s/Judge Mariah F. Williams

Superior Court, Criminal Division

DATED: JULY 31, 2019

AMES SUPERIOR COURT, CRIMINAL DIVISION

STATE OF AMES, *Plaintiff*, v. LAURA TANNER, *Defendant.*	Docket No. 18-cr-753

ORDER ACCEPTING CONDITIONAL GUILTY PLEA

Defendant Laura Tanner and counsel for the State appeared in open Court on August 9, 2019 for the purpose of changing defendant's plea from not guilty to a conditional plea of guilty. A colloquy was conducted and the Court is satisfied that the defendant's plea was changed with knowledge of the facts agreed to and the consequences of pleading guilty, and that the plea of guilty was made voluntarily, with the advice of counsel.

Defendant has expressly conditioned the plea on her right to appeal from the order denying dismissal of the complaint, dated May 1, 2019, and the order granting the State's motion to compel, dated July 31, 2019. Notwithstanding the appeal of guilty, defendant is entitled to appeal from these orders, and if either order is reversed on appeal, to withdraw her plea of guilty. In that circumstance, the parties shall revert to the status quo before the plea change, and defendant's admissions in the course of changing her plea shall not be admissible against her.

Pursuant to this plea of guilty, defendant is hereby found to have violated Ames Crim. Stat. 545, by knowingly disclosing an image of another, identifiable person whose intimate parts were exposed, knowing that the person depicted reasonably expected that the image would remain private, and knowing that the person depicted did not consent to such disclosure.

Defendant is sentenced to pay a fine of $500, with such sentence suspended pending appeals. Judgment will be entered concurrently.

s/Judge Mariah F. Williams

Superior Court, Criminal Division

DATED: AUGUST 19, 2019

AMES SUPERIOR COURT, CRIMINAL DIVISION

STATE OF AMES, *Plaintiff*, v. LAURA TANNER, *Defendant.*	Docket No. 18-cr-753

JUDGMENT IN A CRIMINAL CASE

Defendant Laura Tanner has pleaded guilty to one count of violating Ames Crim. Stat. 545(c), a Class C misdemeanor carrying a maximum penalty of months in jail and/or a fine of $2000. This plea may be withdrawn upon appellate reversal of the motion orders dated May 1, 2019, and July 31, 2019.

Defendant is sentenced to a fine of $500, suspended until the appellate process is complete.

s/Helen Larsen

Clerk of the Court

DATED: AUGUST 19, 2019

NONCONSENSUAL PORNOGRAPHY ACT
AMES CRIM. STAT 545

(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.