

No. \_\_\_\_\_

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IN THE  
Supreme Court of the United States

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RAMHAM DUPRIEST,  
*Petitioner*

v.

STATE OF NEW JERSEY,  
*Respondent*

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

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JOSEPH E. KRAKORA, Esq.  
New Jersey Public Defender

PETER T. BLUM, Esq.\*  
New Jersey Assistant Deputy Public Defender

KEVIN S. FINCKENAUER, Esq.  
New Jersey Assistant Deputy Public Defender

Office of the NJ Public Defender  
31 Clinton St, 9th Floor  
P.O. Box 46003  
Newark, New Jersey 07101  
(973) 877-1200  
(973) 877-1239 (fax)  
peter.blum@opd.nj.gov

Attorney for Petitioner  
\**Counsel of Record*

## QUESTIONS PRESENTED

Mr. Dupriest met T.B. while playing an online video game primarily played by young adults. Their conversation and relationship continued after the game via online communications. T.B. stated numerous times, including at trial, that he had told Mr. Dupriest he was older than he actually was when they first started talking. Their conversation eventually became romantic, and Mr. Dupriest shared naked pictures of himself with T.B.

At the time Mr. Dupriest sent the pictures, their communication had been entirely online with no face-to-face interaction. Only later did Mr. Dupriest learn that T.B. was a minor. At trial, however, the jury was not instructed that the State was required to prove Mr. Dupriest knew the age of the victim. Additionally, Mr. Dupriest was disallowed from raising a defense to the charges that he thought T.B. was of age when he sent the pictures. Mr. Dupriest was subsequently convicted of endangering the welfare of the child and placed on the sex offender registry where he will likely remain for the rest of this life.

These facts present two significant questions for this Court to resolve:

- I. Does it violate First Amendment free speech protections to convict a person for conduct involving distributing obscene material to a minor without having a scienter requirement as to the age of the victim or permitting a mistake-of-age defense?
- II. Does it violate Fourteenth Amendment due process protections to convict a person for sending an explicit picture to a minor without having a scienter requirement as to the age of the victim or allowing a mistake-of-age defense when the entire interaction took place online with no in person, face-to-face communication?

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The petitioner, Mr. Ramham Dupriest, respectfully prays that a Writ of Certiorari issue to review the April 24, 2023, judgment and decision of the Superior Court of New Jersey, Appellate Division. That decision affirmed Mr. Dupriest's convictions and the trial court's refusal to allow him to present a mistake-of-age defense to the sending of an explicit picture to an individual he met and was interacting with online. The New Jersey Supreme Court declined to review the case.

**OPINIONS BELOW**

The April 24, 2023, opinion of the Superior Court of New Jersey, Appellate Division is unreported and attached as Appendix A.

**JURISDICTION**

The Supreme Court of New Jersey denied review on June 27, 2023. Appendix B. This petition for a writ of certiorari is filed within ninety days of the order. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

## **CONSTITUTIONAL PROVISIONS INVOLVED**

The First Amendment of the United States Constitution States in pertinent part:

Congress shall make no law . . . abridging the freedom of speech . . .

Section one of the Fourteenth Amendment to the United States Constitution states in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

## **STATEMENT OF THE MATTER INVOLVED**

This petition arises from the failure of the trial court to instruct the jury that the State must prove Petitioner knew the minor to whom he sent an explicit picture was underage, or to otherwise allow him to raise a mistake-of-age defense to a sex offense conviction for sending explicit pictures to a minor he met online.

Ramham Dupriest met T.B. in January of 2011 while playing Call of Duty, an online, multiplayer war video game that is primarily played by younger adults. T.B.'s version of events as to what was said during that initial conversation varied. T.B. told an investigator that he told Mr. Dupriest he was 18 years old. At trial, T.B. initially testified he told Mr. Dupriest that he was 16 years old,<sup>1</sup> and that Mr. Dupriest told him he was 17 years old. When the trial prosecutor confronted T.B. with an earlier statement he made to law enforcement, T.B. modified his testimony to say that he told Mr. Dupriest he was 14 years old, and Mr. Dupriest told him he was 16 years old. At the time, Mr. Dupriest was 21 years old while T.B. was 14 years old.

Regardless of what was said, Mr. Dupriest and T.B. got along and exchanged email information to continue to talk after the game. The two began an online communication in which they discussed being gay and shared other personal information. During that online communication, Mr. Dupriest sent T.B. pictures of

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<sup>1</sup> Under the endangering statute as it existed at the time of the alleged offenses, the victim would have had to be under the age of 16. N.J. Stat. Ann. § 2C:24-4 (eff. Dec. 28, 2001).

himself that included pictures of his penis and his buttocks. At no time prior to his sending the pictures was there any face-to-face interaction.

Eventually, the two decided to meet, and T.B. invited Mr. Dupriest to the house where he was staying with his grandparents on February 4, 2011. During their visit, Mr. Dupriest was transparent with T.B. about the fact that he was 21, and T.B. allowed Mr. Dupriest to stay. The two spent the next four hours together, but during that time no sexual contact of any kind occurred, nor did Mr. Dupriest attempt any sexual contact with T.B. While Mr. Dupriest was in the bathroom at one point during the night, T.B. decided to go through Mr. Dupriest's bag and found condoms. However, there was no testimony that Mr. Dupriest ever mentioned the condoms to T.B., nor showed them to T.B., nor that Mr. Dupriest even knew T.B. went through his bag. Eventually, Mr. Dupriest left that night and took the train home.

That next Sunday, around 6:30 a.m., T.B.'s grandparents found Mr. Dupriest on their front porch. Mr. Dupriest asked to be driven back to the train station and they did so. T.B.'s grandparents then told Mr. Dupriest's father about the visits, who in turn told T.B.'s mother. T.B.'s mother, suspecting something was wrong, called the police. After police were contacted, Mr. Dupriest emailed T.B., saying, "this is a time where you need to be honest with me about your age. I want to know why [your] dad [is] calling the cops on me because I need to protect myself from the law." T.B.'s mother eventually brought T.B. to the police station to make a statement and provided police with several emails and the pictures Mr. Dupriest had sent T.B., which she had obtained by going into T.B.'s account.

In June of 2011, Mr. Dupriest was indicted on one charge of distributing obscenity to a minor under N.J. Stat. Ann. § 2C:34-3(b)(1) and one charge of child endangering under N.J. Stat. Ann. § 2C:24-4(a)(1). The indictment did not specify what conduct Mr. Dupriest was alleged to have engaged in, but merely parroted the language of the statutes with a general timeframe of January 26 to February 26, 2011.

In a hearing the day before trial,<sup>2</sup> the trial judge stated that it was unsure from the indictment what exactly the State was alleging Mr. Dupriest did. The State argued it was seeking to prosecute Mr. Dupriest not only for the naked pictures sent to T.B., but also for the later visit to the house, as well as earlier communications where Mr. Dupriest used language like “love you” and “babe” in his messages to T.B. Additionally, the State also indicated it was dropping the obscenity charge to preclude Mr. Dupriest from raising a mistake-of-age defense provided in that statute and was proceeding to trial only with the endangering count.

The morning of trial, the defense moved to be able to present a mistake-of-age defense to the remaining endangering charge. Defense counsel noted that the obscenity statute specifically governing this conduct allows for a mistake-of-age defense and that there was no other sexual conduct alleged besides the exchange of the naked pictures. Defense counsel also expressed concern that: “If you have no face-

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<sup>2</sup> Mr. Dupriest initially pleaded guilty to a count of third-degree endangering, but ultimately had that plea vacated after a long and protracted appeals process. He eventually took his charges to trial in October of 2019.

to-face contact with someone, you speak to them over the internet alone, they lie to you about their age and then you are not allowed to present that as a defense? There are serious constitutional implications there.”

Ultimately, Mr. Dupriest was barred from raising any kind of mistake-of-age defense, and the State was allowed to present all available proofs, including the visits to the home and the condoms in the bag. In charging the jury on endangering in its final instructions, the trial court stated that the various conduct by Mr. Dupriest that could sustain an endangering conviction included: “sending nude photos of his body and/or representing himself to be 16 years old and attending the same school as [T.B.] and/or communicating with [T.B.] using language including love you, sexy, babe and/or appearing at the house where [T.B.] was staying.” The trial court did not instruct the jury that the State was required to show Mr. Dupriest knew T.B. was underage to sustain a conviction. The jury eventually convicted Mr. Dupriest of endangering, and he was sentenced to three years in prison and to parole supervision for life, in addition to having to register as a sex offender under New Jersey’s Megan’s Law.

On appeal, Mr. Dupriest raised as his primary argument that (A) the endangering statute should be construed as having a scienter requirement for the age of the victim when dealing with remote communications like the kind at issue here, and (B) that he should be entitled to raise a mistake-of-age defense regardless because the obscenity statute governing the conduct explicitly provided for one. The Superior Court of New Jersey, Appellate Division, in an unpublished decision rejected

these arguments in a single paragraph. The Appellate Division relied substantially on State v. Perez, 832 A.2d 303 (N.J. 2003), which stated: “[T]he child-endangerment statute requires only objective proof that the alleged victim was a child under the age of sixteen, not that the accused knew or reasonably should have known that fact.” *Id.* at 312.

Mr. Dupriest filed a petition for certification with the New Jersey Supreme Court, arguing, as he does here, that not having any scienter requirement as to the age of the victim violated First Amendment protections as applied to this case, and the foreclosure of any mistake-of-age defense otherwise violated Due Process protections because the initial exchange was entirely over the internet. The New Jersey Supreme Court denied the petition in a one-page order without any statement of reasons.

The focus of this petition is the trial court’s refusal to allow Mr. Dupriest to present a mistake-of-age defense or to require the State to prove he knew the age of the victim to secure a conviction. Several First Amendment obscenity decisions by this Court support the need of a scienter requirement for the age of the victim here, and every state court to address the First Amendment issues in this context has reached the conclusion advanced by Mr. Dupriest. Additionally, irrespective of the First Amendment issues, Due Process protections demand that defendants must be able to raise a mistake-of-age defense for sexual contact with a minor when the contact was entirely over the internet without any face-to-face interaction. Otherwise, any individual communicating with another online in a romantic fashion would be

exposed to an endangering conviction (and a lifetime on parole and on the sex offender registry) if the person misrepresents his age or holds himself out to be someone else.

Accordingly, Mr. Dupriest respectfully requests that this Court grant his petition to address these issues of overriding public import, reverse his conviction, and remand the matter for a new trial.

## REASONS FOR GRANTING THE WRIT

There are several significant constitutional concerns presented by convicting Mr. Dupriest of endangering under these facts without having any scienter requirement as to the age of the victim or allowing Mr. Dupriest to present a mistake-of-age defense to the sending of explicit photographs to an individual he met online:

1. Several cases by this Court have clearly suggested the need for scienter requirements for distributing obscenity, including offenses involving minors, so that such statutes do not violate First Amendment protections by significantly chilling protected communications between adults. Although this Court has never explicitly said that there must be a scienter requirement as to the age of the victim in a case like this, several state courts have interpreted the Court's clear suggestions exactly this way. The State in Mr. Dupriest's case circumvented these cases by prosecuting the exact same conduct under New Jersey's broad endangering statute, which carries much more severe penalties, rather than the applicable obscenity statute.

In the age of "sexting" and the frequent exchange of explicit pictures between people interacting romantically, this Court should clarify that an adult cannot be convicted of an offense for sharing explicit pictures with another person he reasonably believes to also be an adult so that lawful conduct many Americans engage in is not chilled.

2. Additionally, these facts present a critical question for contemporary society that has not been explicitly addressed by this Court, namely: whether it violates due process for a person to be criminally convicted for sharing an explicit

picture with a minor he met online when there was no in-person interaction prior to the sharing of the picture and the other person had misrepresented himself as being of age. A significant number of people today meet strangers online, often for the purpose of starting a romantic or sexual relationship. But in online communication, it is impossible to verify someone's age with any degree of certainty. Thus, if someone matches with a profile on an online dating application, the person generally trusts that the individual represented is in fact that person.

It cannot be that a person can then be convicted for engaging in romantic conversation or explicit picture sharing with the other person if it is a minor who set up a false profile or otherwise misrepresented his age. The purpose of such criminal statutes is to criminalize individuals seeking to engage in sexual contact with minors, not adults seeking other adults with no reasonable way to ascertain the age of the virtual person on the other end. Accordingly, this Court should accept this petition likewise to resolve this significant, outstanding due process question.

Below, the Petition addresses each of these three reasons in turn.

**I. Does it violate First Amendment free speech protections to convict a person for conduct involving distributing obscene material to a minor without having a scienter requirement as to the age of the victim or permitting a mistake-of-age defense?**

First, the failure to require the State prove Mr. Dupriest knew the age of the victim or to allow him to raise a mistake-of-age defense violated Mr. Dupriest's First Amendment free speech rights—among other constitutional protections—because, as

applied to these facts, it substantially chills and interferes with protected First Amendment conduct. *U.S. Const. amend. I, IV.*

Sending an obscene image to a minor is criminally prohibited in New Jersey under two statutes. The first is third-degree distributing obscenity to a minor under N.J. Stat. Ann. § 2C:34-3(b)(1). That statute provides for a mistake of age defense under certain circumstances, N.J. Stat. Ann. § 2C:34-3(e). The second statute criminalizing such conduct is the extremely broad child endangering offense under N.J. Stat. Ann. § 2C:24-4(a)(1), which makes it a third-degree offense for any person to “engage[] in sexual conduct which would impair or debauch the morals of the child . . . .” The New Jersey Appellate Division held that this statute had no scienter requirement as to the age of the victim.

The First Amendment and its relationship to the mens rea requirements for the criminalization of obscenity have been the subject of this Court’s analysis before. In the landmark decision *Smith v. California*, 361 U.S. 147 (1959), this Court tackled the issue of whether it was constitutionally permissible for the sale of obscene materials to be a strict liability offense; specifically, whether the prosecution could sustain a conviction without any scienter requirement as to the content of the obscene books. The *Smith* court noted that “the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence,” and that a scienter requirement may be necessary when a statute would “tend to work a substantial restriction” on otherwise protected activity. *Id.* at 150. Ultimately, this Court held that making the distribution of obscene materials a strict liability offense

would “impose a severe limitation on the public's access to constitutionally protected matter.” *Id.* at 153. However, the decision refrained from specifying further what mens rea is required for the offense, saying, “We need not and most definitely do not pass today on what sort of mental element is requisite to constitutionally permissible prosecution”. *Id* at 154. In short, this Court held that, though the states can pass obscenity laws, they must not be so overbroad as to violate the First Amendment and criminalize what would otherwise be lawful protected conduct. *Id* at 155. Despite the lack of a clear definition of what exact mental state should apply, it was nonetheless clear to the Court that some culpable mental state was required.

This Court had occasion to revisit obscenity later in *Ginsberg v. New York*, 390 U.S. 629 (1968). There, the defendant was prosecuted for the sale of obscene materials to a 16-year-old, a minor under New York law, and he challenged the statute as unconstitutionally vague. *Id.* at 631, 643-44. The statute had contained a knowing mens rea for the “character and content” of the materials distributed and provided for a reasonable mistake of age defense. *Id.* at 643-44. Relying on *Smith*, the *Ginsberg* Court upheld the statute on the grounds that it was sufficiently tailored to address knowingly wrongful conduct, although the Court did not expressly discuss the defense as to the age of the victim other than to say briefly that the mistake-of-age defense provided in the statute was adequate. *Id.* at 645. Nonetheless, *Ginsberg* reinforced that some sort of scienter or defense regarding the age of the recipient is a necessary component of a conviction for distributing obscene materials to a minor.

It was not until the 1990s that this Court addressed in greater detail the extent to which an obscenity offense required a mens rea component. In *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), this Court dealt with the constitutionality of a statute criminalizing the sale of sexual materials depicting a minor and held that the “knowing” mens rea described in the statute applied to each element of the offense. *Id.* at 78. Reinforcing its prior rulings, the Court recognized “the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct.” *Id.* at 72. Discussing *Smith* and other cases, this Court held that, “A final canon of statutory construction . . . suggest that a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts. It is therefore incumbent upon us to read the statute to eliminate those doubts . . . .” *Id.* at 78.

Then again, in *Reno v. ACLU*, 521 U.S. 844 (1997), this Court addressed the constitutionality of a statute making it illegal to transmit “indecent” or “patently offensive” communications to minors over the internet. This Court ultimately held that the statute’s overbroadness “effectively suppresses a large amount of speech that adults have a constitutional right to receive and address to one another” because it was not reasonably tailored to criminalize situations where the actors actually intended to provide obscene content to minors. *Id.* at 874. In other words, the interest in protecting minors from sexually explicit material “does not justify an unnecessarily broad suppression of speech addressed to adults.” *Id.* at 875. This Court again made clear that statutes that substantially infringe on adults’ ability to engage in protected

communications with one another, and that are not narrowly tailored towards criminalize individuals who actually intend on doing harm, run afoul of First Amendment protections.

Although the above cases contain clear suggestions as to the Court's direction, to date, this Court has not explicitly addressed the question of whether there must be a mens rea requirement for the age of the victim to convict a defendant for conduct that involves distributing obscene images or communications to a minor. However, every state that has addressed this question has come out in favor of there being a firm scienter requirement relying on the cases just discussed. For instance, in *State v. Weidner*, 611 N.W.2d 684 (Wis. 2000), the Wisconsin Supreme Court dealt with the constitutionality of a conviction relating to a defendant who sent naked pictures of himself, along with other sexually explicit images, to someone he met in a chatroom that he later learned was a minor. *Id.* at 686. In addressing whether the State was required to prove knowledge of the age of the victim, that court stated that, "Because age represents the critical element separating illegal conduct from that which remains protected, to avert significant constitutional dilemmas some form of scienter must be implied in a statute imposing criminal liability based on age." *Id.* at 688 (citing *X-Citement Video, Inc.*, 513 U.S. at 69, 73). Of significant concern to the court was that a lack of face-to-face contact specifically provided no opportunity for being able to reliably ascertain someone's age. *Id.* at 690-92. Ultimately, the court held that there must be a knowing scienter requirement as to the age of the victim in situations

where there was no face-to-face contact to avoid chilling protected adult speech. *Id.* at 691.

Likewise, in *Commonwealth v. Jones*, 28 N.E.3d 391 (Mass. 2015), the Massachusetts Supreme Court dealt with the question of whether the state's dissemination-of-obscene-material-to-minors statute had a knowing scienter requirement as to the age of the victim. *Id.* at 393. Relying in part on *X-Citement Video, Inc.*, that court also concluded that to avoid overbreadth and preserve First Amendment protections, the State must prove in such prosecutions that the defendant knew the victim was underage. *Id.* at 397-98. Lastly, in *State v. Stone*, 137 S.W.3d 167 (Tex. App. 2004), a Texas Court of Appeals held that the state's distribution-of-obscene-material-to-minors statute comported with cases like *Ginsberg*, *Reno*, and *X-Citement Video Inc.* because there was a scienter requirement as to the age of the victim. *Id.* at 180-81.

A similar principle has been applied in related contexts as well. In *United States v. Bailey*, 228 F.3d 637 (6th Cir. 2000), the Sixth Circuit addressed a defendant's conviction for violating a statute that criminalized persuading persons under the age of 18 to engage in criminal sexual acts. *Id.* at 638-39. In addressing the constitutionality of the statute, and relying on *Reno*, the Sixth Circuit noted that the statute was not overbroad because "it does not punish those who inadvertently speak with minors . . ." *Id.* at 639. *Bailey* has since been followed in other circuits and several states that consider the scienter requirement of the victim's age an essential part of upholding a child solicitation statute. See *State v. Backlund*, 672 N.W.2d 431,

442 (N.D. 2003) (upholding convictions of defendant who communicated with someone he believed was a minor because “the statute affects only those who willfully target a person believed to be a minor; it does not punish those who inadvertently speak with minors . . .”);<sup>3</sup> *People v. Cervi*, 717 N.W.2d 356, 368 (Mich. Ct. App. 2006) (convictions of defendant in relation to sexual communications with person in internet chatroom he believed was 14-year-old girl upheld because relevant statute “does not punish those who . . . inadvertently engage in e-mail conversation with minors.”); *State v. Ebert*, 263 P.3d 918, 922 (N.M. Ct. App. 2011) (child solicitation statute sound because “the ‘knowingly’ scienter requirement . . . ensures that communications are criminalized only when knowingly made to a child under the age of sixteen. Furthermore, the statute does not restrict adults from . . . soliciting sex from one another over the internet.”); *see also United States v. Riccardi*, 258 F. Supp. 2d 1212, 1226 (D. Kan. 2003) (child solicitation statute applied in telephonic communication case constitutionally sound because statute “targets only speech intending to persuade minors to engage in illegal sex acts.”).

Just this past term in *Counterman v. Colorado*, \_\_ U.S. \_\_, 143 S.Ct. 2106 (2023), this Court addressed this line of caselaw, noting that “the First Amendment demands proof of a defendant’s mindset to make out an obscenity case.” *Id.* at 2115-16. Although that case dealt with threatening comments, it is nonetheless clear that

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<sup>3</sup> Notably, North Dakota amended their child-solicitation-via-electronic-communication statute to avoid criminalizing situations “where minors misrepresent their age to adults engaged in Internet solicitation of sexual act.” *Backlund*, 672 N.W.2d at 434.

state criminal convictions which chill First Amendment speech continue to be a significant concern.

What the prosecution has done in this case is essentially try and circumvent the First Amendment issues by prosecuting the exact same conduct under the broad endangering statute of N.J. Stat. Ann. § 2C:24-4(a)(1), rather than the applicable obscenity statute of N.J. Stat. Ann. § 2C:34-3(b)(1). Indeed, the State explicitly dropped the obscenity charge to try and foreclose Mr. Dupriest from raising any mistake-of-age issue at the trial. By changing the statute for which Mr. Dupriest was primarily being prosecuted, the State attempted an end-run around his constitutional rights. But even if the endangering statute may not need this specific mens rea requirement when dealing with in-person conduct falling within its broad scope, it must apply to this situation where it deals with virtual conduct that is expressly protected between consenting adults and implicates First Amendment protections.

Today, the sharing of explicit photographs is extremely common, and as it relates to an interaction between consenting adults, is constitutionally protected. Although this Court's prior decisions all tend towards the conclusion advanced by Mr. Dupriest, the Appellate Division's decision makes clear that more clarification is necessary. This Court should grant certiorari to ensure that the many adults seeking lawful interactions with other adults are not chilled or criminalized by the overbroad application of sex offense statutes by explicitly holding that there must be a knowing scienter requirement as to the age of the victim for convictions dealing with distributing obscene images or sexual communications to a minor.

II. **This Court must hold that a person cannot be held criminally liable for sexual communications with a minor when the communication was entirely virtual, and the minor misrepresented himself as being older.**

Secondly, putting the First Amendment issue aside, Mr. Dupriest would otherwise be entitled to raise a mistake-of-age defense under due process protections because his interaction with T.B. at the time he sent the photos was entirely over the internet with no face-to-face interaction. U.S. Const. amend. XIV.

Today, interactions like the kind at issue here take place constantly; someone meets another person on an online forum, a chat room, a social media site, a dating app, or while playing online video games, and begins a communication with the person without actually meeting him face to face. During such communications, there is never a guarantee that a person is who he says he is, and indeed many times the person is pretending to be someone else, a misrepresentation often called “catfishing.”

*See, e.g., Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579 (S.D.N.Y. 2018) (addressing plaintiff’s suit about person engaging in “catfishing” by setting up explicit dating profile asserting to be plaintiff). In short, many people begin talking to one another online, including, and perhaps even especially, for the purpose of starting romantic and sexual relationships, without meeting the other person or having any way to know who the other person actually is.

In recognition of this problem, courts have held that, where a person engages in exclusively virtual sexual contact with someone who is underage without any face-to-face interaction, that person cannot be held criminally liable for the sexual

communications with the minor if the minor misrepresented himself as being older without violating due process protections. In *State v. Moser*, 884 N.W.2d 890 (Minn. Ct. App. 2016), the defendant was charged with child solicitation after engaging in sexual communication with a teenage girl over Facebook who lied about her age. *Id.* at 894. Moser appealed, arguing he should have been entitled to raise mistake of age because their communication was entirely over the internet. *Id.* The Minnesota Court of Appeals agreed, finding that, where the communication was entirely online, a defendant must be able to raise a mistake of age defense so as not to “violate due process” by infringing on the “fundamental rights to liberty, to a fair trial, and to present a complete defense.” *Id.* at 904-06. To hold otherwise would “include[] within [the statute’s] ambit adults who have no desire to have sexual contact with children but instead believe that the person who they are soliciting over the Internet is another adult.” *Id.* at 904. The court expressed additional concern that, “Where solicitation occurs solely over the Internet, . . . it is extremely difficult to determine the age of the person solicited with any certainty.” *Id.* at 903.

In line with *Moser’s* reasoning, other authorities have noted concerns over convictions dealing with a minor victim where there was no face-to-face contact between the defendant and the minor. *See Fleming v. State*, 376 S.W.3d 854, 860 (Tex. App. 2012) (noting due process concerns arising in situations where there was no opportunity to see the alleged victim for sex offenses relating to underage victim); Michelle S. Simon, *The Prosecution and Defense of Sex Crimes* § 2.01 (2022) (“A rare circumstance, but one that is conceivable with the proliferation of online contact, is

the charge of attempted statutory rape when an adult contacts someone and takes substantial steps toward having intercourse with that person without any indication of his/her age and it turns out that the contacted individual is a minor. In that situation there may be a Due Process claim that strict liability as to age prohibits conviction . . .”).

Notably, *X-Citement Video, Inc., Reno* and *Weidner*, although decided on First Amendment grounds, were also substantially concerned with the inability to accurately verify age over the internet. *See X-Citement Video*, 513 U.S. at 72 n.2 (“The opportunity for reasonable mistake as to age increases significantly once the victim is reduced to a visual depiction, unavailable for questioning by the distributor . . .”); *Reno*, 521 U.S. at 876 (“The [District] Court found no effective way to determine the age of a user who is accessing material through e-mail, mail exploders, newsgroups, or chat rooms.”); *Weidner*, 611 N.W.2d at 690 (“The internet provides no effective means to gauge the identity and age of persons who access material through use of this continuously evolving technology.”).

Indeed, *Moser* reached the only rational conclusion because a contrary body of law is incompatible with modern society. Dating apps could not exist because, if the person on the other end happened to be underage, even if every representation by the person was that he was an adult, the Appellate Division’s rationale would expose any individual who communicated with the catfishing minor to a lifetime on the sex offender registry, even though the person was seeking adult relationships and believed he was talking to an adult.

Mr. Dupriest submits that the proliferation of virtual sexual communications in contemporary society makes these issues of supreme public import. Accordingly, he respectfully requests that this Court grant certiorari.

## **CONCLUSION**

For the reasons set forth above, the Court should grant certiorari to review the decision of the Superior Court of New Jersey, Appellate Division.

Respectfully submitted,

JOSEPH E. KRAKORA, Esq.  
New Jersey Public Defender  
Attorney for the Petitioner



PETER T. BLUM, Esq.  
New Jersey Assistant Deputy Public Defender

KEVIN S. FINCKENAUER, Esq.  
New Jersey Assistant Deputy Public Defender

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