No. 23-5383

In the Supreme Court of the United States

RAMHAM DUPRIEST,

PETITIONER,

v.

STATE OF NEW JERSEY,

RESPONDENT.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, on the specific facts of this case, the First Amendment requires proof of scienter as to the age of a child victim.

2. Whether, on the specific facts of this case, the Due Process Clause requires proof of scienter as to the age of a child victim.

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The opinion of the New Jersey Superior Court, Appellate Division, is unreported. Pet. App. 3-12.

JURISDICTION

The judgment of the Appellate Division was entered on April 24, 2023. Pet. App. 2. The New Jersey Supreme Court denied certification on June 27, 2023. *Id.*, at 1. Petitioner sought certiorari on August 8, 2023. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a), which the State disputes for the reasons below.

INTRODUCTION

Petitioner asks this Court to take up two constitutional claims that he never presented to New Jersey's intermediate appellate court, which therefore never addressed them in the unpublished ruling from which he seeks certiorari. Even aside from the vehicle problems, the unusual facts of this case implicate no split, and the underlying claims lack merit.

Petitioner, then a 21-year-old man, pursued a romantic relationship with a 14-year-old child—even after receiving a picture of the child in a penguin costume, and even after spending time alone with that child at the child's grandparents' house. Petitioner was convicted under New Jersey's child-endangerment statute for knowingly "engag[ing] in sexual conduct which would impair or debauch the morals of the child." N.J. Stat. Ann. § 2C:24-4 (a)(1). On appeal, he argued that state law required the State to prove particular scienter as to the child victim's age. But New Jersey precedent foreclosed that argument, so the state intermediate appellate court rejected his claim in its unpublished decision. Petitioner did not press any freestanding constitutional claims to that court.

Petitioner now urges this Court to consider whether his particular conviction violates the First Amendment and Due Process Clause, but his

petition must be denied for three independently sufficient reasons. *First*, Petitioner failed to present either question to New Jersey's intermediate appellate court, so that court never addressed them in the unpublished opinion on review. That vehicle problem alone is dispositive.

Second, leaving aside that the appellate court's decision could not split with any other court on claims it never had any occasion to address, Petitioner's case implicate no split. Petitioner claims generally that this Court's review is needed to consider whether the First Amendment or the Due Process Clause requires a *mens rea* as to the victim's age in a child-endangerment prosecution involving misconduct online. But that ignores significant details about the conduct that led to his conviction and from which he had ample opportunity to ascertain the victim's age, including (but not limited to) exchanges of photographs and an in-person meeting. And Petitioner identifies no divergence of opinion as to whether the First Amendment and/or the Due Process Clause requires a specific *mens rea* as to age in a case involving any knowing course of conduct remotely like this one. Petitioner essentially asks this Court to review his one conviction—that is, to review one intermediate court's unpublished decision.

Third, even if this Court were to take up these unusual facts in this posture, Petitioner's two claims lack merit. Neither the First Amendment nor the Due Process Clause requires a state to prove—as part of a child-endangerment prosecution—any particular *mens rea* as to a victim's age where a defendant knowingly engages in a course of conduct like this one, including the exchange of photographs and an in-person meeting—all of which gave defendant ample opportunity to ascertain the child's age.

This Court should deny the petition.

STATEMENT OF THE CASE

Petitioner, then 21 years old, met T.B., then 14, in January 2011, through an online videogame platform. Pet. App. 3. The platform allowed users not only to play with others from across the internet, but also to communicate with them. Petitioner initiated contact with T.B. *Ibid.*

At trial, testimony conflicted as to what ages T.B. and Petitioner initially represented. T.B. first stated, on direct examination, that he initially told Petitioner he was 16 years old and that Petitioner told him that he was 17 years old. See Pet. 3. After being shown his statement to the police, however, T.B. testified that he had told Petitioner he was 14

and that Petitioner had said he was 16. See *ibid.*[1] In addition to claiming a false age (whether 16 or 17), Petitioner told T.B. that he went to T.B.'s school. Pet. App. 3.

T.B. and Petitioner communicated by email and text messages over the course of several weeks. See *ibid.* Petitioner emailed T.B. through two email addresses, including jdickmaster34@xxxxx.com. *Ibid.* At some point, T.B. revealed that he was gay. *Ibid.* One email from Petitioner to T.B., sent on January 28, 2011, at 3:02 a.m. reads:

> Text me when you wake up, okay. Love you, babe. It's not going to be this weekend that I'm going to come up. My sister said that she will bring me up one weekend that she don't have work but text me at [phone number]. Love you and night.

Id., at 3-4. Petitioner also used language such as "love you, sexy," in communicating with T.B. See Pet. 6.

Sometime during their email communications, T.B. and Petitioner also sent photographs of themselves to each other. On February 4, 2011, T.B. emailed Petitioner a photograph of himself dressed as a penguin for

[1] At the time of the underlying events, the endangering statute in New Jersey defined a "child" as any person under the age of 16. N.J. Stat. Ann. § 2C:24-4 (b)(1) (2001). In 2013, the statute was amended to cover anyone under the age of 18. See P.L. 2013, c. 51, § 13.

Halloween. Pet. App. 4. In response, Petitioner sent T.B. three photos of himself, one with his chest bared, one completely naked with his hand on his buttocks, and a third of his penis. *Ibid.*

Eventually, the two arranged to meet up in person. T.B. often spent weekends at his grandparents' house, and he invited Petitioner to visit him there on Friday, February 4, 2011. *Ibid.* When Petitioner came over around 6:00 p.m., T.B. introduced Petitioner as a friend from school. *Ibid.* Petitioner brought an overnight bag with him. *Ibid.* While Petitioner was in the bathroom, T.B. looked inside Petitioner's overnight bag and found clothes, deodorant, a toothbrush, and condoms. *Ibid.* Around 11:30 p.m., T.B.'s grandmother drove Petitioner to the train. *Id.*, at 5.

Petitioner returned early that Sunday (and perhaps Saturday morning as well). *Ibid.* & n.1. On Sunday morning, T.B.'s grandfather found Petitioner on their porch, prompting T.B.'s grandmother to drive Petitioner back to the train station. *Id.*, at 5. Later that morning, T.B.'s grandparents told T.B.'s mother about these events. *Ibid.* After talking with T.B., T.B.'s mother contacted the police, reporting the messages and photographs that Petitioner had sent to T.B. *Ibid.* The police determined that Petitioner was a 21-year-old man. *Ibid.*

Petitioner was charged with third-degree child endangerment, N.J. Stat. Ann. § 2C:24-4 (a), and distribution of materials obscene to children to a child, *id.* § 2C:34-3(b). Pet. App. 5. The obscenity charge was later dismissed, and a jury found Petitioner guilty of endangering the welfare of a child by "engag[ing] in sexual conduct which would impair or debauch the morals of the child," N.J. Stat. Ann. § 2C:24-4 (a). See Pet. App. 6, 8. Petitioner was sentenced to three years in prison. *Id.*, at 8-9.

Petitioner appealed his conviction and sentence to New Jersey's intermediate appellate court, known as the Appellate Division. Petitioner argued, as relevant here, that he should have been permitted to present a mistake-of-age defense under New Jersey statutory law. To support his argument, Petitioner relied on statutory text and principles of statutory construction. He claimed no freestanding right under the Due Process Clause, and at no point mentioned the First Amendment.[2] See Pet. 6-7.

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[2] At the beginning of the relevant section of his brief, Petitioner did refer to the Due Process Clause, the Compulsory Process Clause, and the Confrontation Clause as the potential sources of an underlying right to present a complete defense. But he made clear that any deprivation of his rights to due process and a fair trial stemmed from being denied the opportunity to raise a defense that (he argued) was provided *by state law*. He did not argue that the Due Process Clause itself required a particular scienter as to age.

The State argued, and the appellate court agreed, that New Jersey Supreme Court precedent foreclosed Petitioner's statutory arguments. See Pet. App. 11 (discussing *State v. Perez*, 832 A.2d 303, 312 (N.J. 2003)); Pet. 6 (noting the focus of the appeal was on state statutory issues). The court made clear that the endangerment statute was not a strict-liability offense, since the State must still "establish the appropriate mens rea for the sexual conduct component of the offense." Pet. App. 11 (citing *State v. Demarest*, 599 A.2d 937, 941 (N.J. Super. Ct. App. Div. 1991)).

Petitioner sought review from the New Jersey Supreme Court. In his petition, he argued for the first time that the U.S. Constitution guaranteed him a right not to have been convicted of endangering without proof of a scienter specifically as to the victim's age. See Pet. 7. He raised two such claims: one under the First Amendment, the other under the Due Process Clause. See *ibid.*

The New Jersey Supreme Court denied his petition. Pet. App. 1. Petitioner now seeks certiorari from this Court.

REASONS FOR DENYING THE PETITION

Neither the First Amendment nor the Due Process Clause question warrants review. Both have fatal vehicle problems, depriving this Court

of jurisdiction or, at the very least, making the petition a poor candidate for review. Further, the unusual facts of Petitioner's case do not implicate a split. And in any event, Petitioner's claims lack merit.

I. Because Petitioner Failed To Raise His Arguments Below, This Is A Poor Vehicle To Review Either Question.

The threshold problem is dispositive: Petitioner never presented his First Amendment or Due Process claims to the Appellate Division, and so that court had no reason to—and did not—pass on them.

This Court has "almost unfailingly refused to consider any federal-law challenge to a state court decision" that was not "addressed by or properly presented to the state court that rendered the decision [this Court has] been asked to review." *Howell v. Mississippi*, 543 U.S. 440, 443 (2003) (per curiam) (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam)). That approach stems from foundational principles of jurisdiction. After all, under 28 U.S.C. § 1257(a), this Court has the power to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had" only where the right asserted "is specially set up or claimed under the [U.S.] Constitution." A "long line of cases" therefore holds that the "failure to present [a] federal claim in state court is jurisdictional." *Howell*, 543 U.S. at 445; see also,

e.g., *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983); *Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969).

Here, however, Petitioner never "properly presented" the questions in his petition "to the state court that rendered the decision [this Court has] been asked to review." *Howell*, 543 U.S., at 443. Before the Appellate Division, Petitioner advanced only the argument that New Jersey law entitled him to present a mistake-of-age defense. See *supra* at 7-8. In contrast to his present petition, he did not argue that the First Amendment and/or the Due Process Clause entitled him to make that argument, which helps explain why the Appellate Division did not pass on that issue. In other words, the First Amendment and due process rights that Petitioner now assert were never "specially set up or claimed" to the only appellate court that rendered a merits decision in his case. 28 U.S.C. § 1257(a). And that suffices to preclude this Court's review. See also *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997) (dismissing writ as improvidently granted where the decision below "did not expressly address the question on which [the Court] granted certiorari" and where those petitioners had not "met their burden of showing that the issue was properly presented").

Although Petitioner may argue that he did mention either the First Amendment or the Due Process Clause at other points or to support other arguments, that does not impact this fatal vehicle defect. As to the First Amendment, it is of no moment that Petitioner added this argument (for the first time in this action) when he petitioned the New Jersey Supreme Court for discretionary certification. Because the Court ultimately denied certification—perhaps because the question had never been pressed to or passed on by the Appellate Division—the Appellate Division is still "the state court that rendered the decision" at issue, *Howell*, 543 U.S., at 443, and no state court ever weighed in on the merits on this claim. And while Petitioner did *mention* the Due Process Clause to the Appellate Division, he did so strictly to argue that it would violate his right to a fair trial (or present a complete defense) to deny him a mistake-of-age defense that he was entitled to under one of two *statutes*. See *supra* at 7 n.2; see also *Chicago, I. & L. R. Co. v. McGuire*, 196 U.S. 128, 131 (1905) (confirming that "a mere suggestion of a violation of a [f]ederal right, not the distinct presentation of a [f]ederal question," is insufficient). That is distinct from his present claim: that because Petitioner's interactions with T.B. began online (or, in his telling, was entirely online), due process *standing alone*

would entitle him to make such a defense. The Appellate Division therefore addressed only the former, not the latter.

Even if the rule were not jurisdictional, considerations of federalism and comity weigh heavily against review. After all, "in a federal system, it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge." *Cardinale*, 394 U.S., at 439; see also *Adams*, 520 U.S., at 90 (agreeing "'it would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider" (quoting *Webb v. Webb*, 451 U.S. 493, 500 (1981)). That concern is implicated here, where the Appellate Division addressed only Petitioner's state-law claim because that was what Petitioner argued. Petitioner therefore did not give that court "a fair opportunity to address the federal question that is sought to be presented here." *Adams*, 520 U.S. at 87 (quoting *Webb*, 451 U.S. at 493, 501). Nor has he identified any basis for that failure to present it earlier. Petitioner thus offers no basis to find that "even treating the [presentation] rule as purely prudential, the circumstances here justify [an] exception." *Howell*, 543 U.S., at 445-46 & n.3 (quoting *Adams*, 520 U.S., at 90).

Related practical concerns would also complicate this Court's review. After all, "[q]uestions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." *Cardinale*, 394 U.S. at 439. Indeed, here, key questions could have been further addressed if Petitioner had raised his new theories at the proper time. For instance, in pressing his First Amendment claim, Petitioner suggests to this Court that his conviction hinged upon his "speech"—distributing "an obscene image." *E.g.*, Pet. 10-11. But the State prosecuted him for a range of troubling interactions with T.B., of which sending nude photographs was just one component. See, *e.g.*, *supra* at 4-6. And, relevant to both claims, the appellate record as to what Petitioner knew or should have known about T.B.'s age is underdeveloped—which makes sense, given that these issues were not properly raised. The practical concerns only underscore the already-fatal vehicle problems here.

II. Certiorari Is Not Otherwise Warranted On Petitioner's First Amendment Question.

Beyond failing to raise the First Amendment issue below, Petitioner runs into two other fatal defects on his First Amendment claim: his fact-

specific claims implicate no conflict, and in any event, there is no error to correct in this particular scenario.

A. Petitioner Identifies No Split To Resolve.

This case implicates no alleged conflict among any circuits or state high courts. Initially, the Appellate Division could not have split with any other court on Petitioner's First Amendment question, given that it never addressed the issue in its unpublished opinion. But regardless, this case presents an uncommon fact pattern that does not implicate any split: it involves a course of conduct, including in-person interactions and an exchange of photographs, that gave Petitioner ample opportunity to ascertain T.B.'s age. Petitioner identifies no judicial decision holding that the First Amendment requires proof of scienter as to the child's age where a defendant knowingly engages in this significant a course of conduct.

Indeed, the specific cases on which Petitioner relies do not conflict with the judgment below (let alone the opinion below, which addressed only Petitioner's state-law argument), and instead are easily distinguishable. Take Petitioner's primary case, *State v. Weidner*, 611 N.W.2d 684 (Wis. 2000). *Weidner* reviewed an obscenity prosecution in the context of a defendant who had been charged with sending graphic

images to a 16-year-old girl through an internet chatroom. *Id.*, at 686. As Petitioner notes, that court did hold the statute's lack of protection for defendants who may not have known of the recipient's age was unconstitutional "in the context of the internet and other situations that do not involve face-to-face contact." *Id.*, at 686. But that court was clear in emphasizing that the core issue was the defendant's "ability to ascertain the age of the victim." *Id.*, at 690. (Indeed, the opinion was written in 2000—long before the advent of FaceTime.) So given "[t]he difficulty of age verification over the internet," at least where interactions lack "face-to-face interaction" and prevent the defendant from "ascertain[ing] reliably the age of the recipient," the court found a First Amendment requirement to allow a mistake-of-age defense specifically where the conduct was an "internet communication that does not involve face-to-face contact." *Id.*, at 686 n.3, 690-91.

That does not conflict with even the result in this case, let alone the opinion. Petitioner had ample opportunities to ascertain T.B.'s age—the touchstone *Weidner* identified. Far from a chatroom conversation in 2000, Petitioner and T.B. engaged in weeks of in-depth exchanges that offered Petitioner ample opportunity to consider T.B.'s age, including

when T.B. sent Petitioner the picture of himself in the penguin costume—an action that *preceded* Petitioner's decision to send T.B. nude photos. Pet. App. 3-4. And even after spending hours with T.B. at T.B.'s grandparent's house, Petitioner reappeared on T.B.'s front porch (with T.B. inside) the following Sunday morning. *Weidner* did not consider such a broader course of conduct, and how that court resolved a largely isolated exchange via an internet chatroom says little about how to resolve the conduct here.

Nor do Petitioner's other cases suggest he would have been entitled to prevail under their holdings either. In two, not only were defendants' communications with the victim more limited, but the statutes at issue also already included a *mens rea* as to the victim's age, meaning that any language about such an element being required was dicta. See *State v. Stone*, 137 S.W.3d 167, 173, 179-83 (Tex. App. 2004) (elements included "knowing the person is a minor," applied where defendant communicated over AOL Instant Messenger); *State v. Backlund*, 672 N.W.2d 431, 433-34, 438-42 (N.D. 2003) (law banned "communication[s] that … discusse[d] sexual acts" made to a person "believe[d] to be a minor," applied in a case

where defendant had sent only written messages in internet chatroom). Those opinions likewise have little bearing here.

Still other cited cases involve distinct First Amendment challenges—such as facial challenges to statutes targeting dissemination of harmful materials or solicitation of minors. See, *e.g.*, *United States v. Bailey*, 228 F.3d 637, 638-39 (6th Cir. 2000) (assessing overbreadth of online-child-solicitation law, and highlighting risk that lack of scienter would have for those who "post messages for all internet users, either adults or children, to seek out and read at their discretion"); *Commonwealth v. Jones*, 28 N.E.3d 391, 397 (Mass. 2015) (in overbreadth context, explaining that "[i]f scienter as to the recipient's age were not required, online booksellers … who could not reasonably identify the age of every person who visits their Web sites would be discouraged from disseminating material that is appropriate for adults"); see also *id.*, at 399 (no plain error on specific facts); *State v. Ebert*, 263 P.3d 918, 920-22 (N.M. Ct. App. 2011) (upholding online-child-solicitation law against overbreadth challenge, and noting "statute does not restrict adults from communicating about sex to children, nor does it restrict adults from soliciting sex from one another"). None of those cases held that proof of

scienter as to age is required where a single defendant is prosecuted for child endangering after an ongoing pattern of conduct in which he pursues a child with ample opportunity to learn the child's age.

The remaining cases are even less helpful to Petitioner: they do not reflect decisions by federal courts of appeals or high courts; likewise arise out of different contexts; and may even cut *against* Petitioner's theory on these facts. See *People v. Cervi*, 717 N.W.2d 356, 366-68 (Mich. Ct. App. 2006) (upholding solicitation-of-minors law on grounds that the statute did not "proscribe words alone," was tailored to protect children specifically, and targeted "specific conduct directed toward sexual abuse of children"); *United States v. Riccardi*, 258 F. Supp. 2d 1212, 1226 (D. Kan. 2003) (in context of a challenge to the federal online-solicitation-of-minors statute, finding constitutional concerns apply differently to a statute that applies only to minors and is not a regulation "of all indecent communications whether or not the communications targeted minors"). Petitioner cites no split that implicates the facts of his conduct, even if the question had been properly presented to and addressed by the Appellate Division.

B. This Conviction Does Not Violate The First Amendment.

Petitioner asks this Court to invalidate his conviction based on a case-specific theory that he never presented to the appellate court below. But even were this Court to engage in such a fact-bound review of such a vehicle, Petitioner's First Amendment claim lacks merit.

Petitioner was convicted under New Jersey's child-endangerment statute, which punishes someone "who engages in sexual conduct which would impair or debauch the morals of [a] child." N.J. Stat. Ann. § 2C:24-4a. New Jersey courts have determined that for a defendant to be convicted of this offense, the State must establish that (1) the victim was under the age of consent, *Perez*, 832 A.2d at 312, and (2) the defendant knowingly engaged in sexual conduct with the minor which would impair or debauch the morals of a child, *State v. Bryant*, 15 A.3d 865, 870-72 (N.J. Super. Ct. App. Div. 2011). Those elements can be violated in myriad ways, and thus require a careful analysis of the facts of the case.

As the State made clear below, the sexual conduct charged below encompassed the full pattern of Petitioner's behavior—which amounted to a 21-year-old man pursuing a sexual relationship with a 14-year-old child. Once Petitioner established a rapport with T.B., T.B. confided to

Petitioner that he was gay. After T.B. sent Petitioner a picture of himself in a penguin costume, Petitioner responded by sending nude photographs of himself to T.B. Petitioner made plans to meet up with T.B., bringing an overnight bag with condoms when he went to meet T.B. at his grandparents' home. There, Petitioner stayed for hours, including spending time alone with T.B. in his room. After being driven to the train late that night by T.B.'s grandmother, Petitioner reappeared on T.B.'s grandparents' porch at least one of the next two mornings. See *supra* at 4-6. This was hardly a case about pure speech.

In prosecuting defendant under New Jersey's child-endangerment statute for engaging in this course of conduct, the State did not cross the First Amendment's lines. As a general matter, N.J. Stat. Ann. § 2C:24-4a requires a knowing *mens rea* with regard to the defendant's sexual conduct. *See Bryant*, 15 A.3d at 869-71. And while N.J. Stat. Ann. § 2C:24-4a does not require defendant to specifically know that the child was under the statutory age limit, *Perez*, 832 A.2d at 312, that does not violate the First Amendment, just like a statutory-rape law does not. Cf. *State v. Brienzo*, 671 N.W.2d 700, 708 (Wis. Ct. App. 2003) (distinguishing *Weidner* because the "child sexual assault statute

regulates conduct, not speech[,] … protect[ing] children from harmful sexual contact and not from speech or ideas").

Indeed, even assuming that some proof of scienter may be necessary in a purely online, text-only exchange in which a defendant had no opportunity to ascertain the child's age, cf. *Weidner*, 611 N.W.2d at 686, 690-91, that would still be inapposite. Petitioner had ample opportunity to ascertain T.B.'s age, because he received a picture of T.B., met T.B. in person, and communicated with T.B. extensively before and after both receipt of the picture and the in-person visit. And because Petitioner "confront[ed] the underage victim personally," he "may reasonably be required to ascertain that victim's age" and may be held liable for his failure to do so. See *United States v. X-Citement Video*, 513 U.S. 64, 72 n.2 (1994) (distinguishing strict liability in context of sex offenses such as rape and production of pornography from situations in which the child victim is "unavailable for questioning"); *United States v. Wilson*, 565 F.3d 1059, 1068-69 (8th Cir. 2009) (holding that the First Amendment does not require a mistake-of-age defense in prosecutions for the production of child pornography, and reasoning that "the First Amendment calculus is different depending on the proximity of the defendant to the victim").

Nor does *Counterman v. Colorado*, 143 S. Ct. 2106 (2023), bear on this analysis. Petitioner cites *Counterman* for the observation that "the First Amendment demands proof of a defendant's mindset to make out an obscenity case." Pet. Br. 16-17 (quoting 143 S. Ct. at 2115-16). But that sheds little light on how the First Amendment would apply to these facts. After all, Petitioner was prosecuted not for pure speech, but for his multi-week sexual pursuit of a 14-year-old, which included a mix of speech and conduct. See *Virginia v. Hicks*, 539 U.S. 113, 123-24 (2003) (describing the different First Amendment calculus for a course of conduct). And whereas *Counterman* discussed the need to consider chill in evaluating "true threats," 143 S. Ct. at 2114-19, it is hard to see how New Jersey's endangering statute, with its focus on sexual conduct, could chill much (if any) protected speech, especially as applied to these facts. See Pet. 17. That provides no basis for this Court's review either.

III. Certiorari Is Not Otherwise Warranted On Petitioner's Due Process Clause Question.

Petitioner's due process theory runs into the same fatal flaws: not only did Petitioner fail to raise this argument to the Appellate Division, but this argument implicates no conflict on these facts, and there is again no error in the decision below.

A. Petitioner Identifies No Split To Resolve.

Petitioner also fails to identify any conflict on the due process question. Initially, as noted, the Appellate Division could not split with any other court on Petitioner's due process question, since it never addressed the issue either. Moreover, Petitioner relies exclusively on two decisions from state intermediate appellate courts, and offers no decisions from state high courts or federal courts of appeals. But even taken on their terms, the two cases Petitioner cites to justify his position that he must "be entitled to raise a mistake-of-age defense … because his interaction with T.B. at the time he sent the photos was entirely over the internet with no face-to-face interaction," Pet. 18, do not actually conflict with the outcome of Petitioner's case.

State v. Moser, 884 N.W.2d 890 (Minn. Ct. App. 2016), does not bear on this dispute. That case involved a conviction under Minnesota's child-solicitation statute, Minn. Stat. § 609.352 (2014), which imposed strict liability and prohibited defendants from raising mistake-of-age defenses. *Moser*, 884 N.W.2d, at 895. *Moser* found that particular conviction to be constitutionally infirm specifically because the defendant had no face-to-face interaction (whether virtual or in-person) with an underage victim

who lied about her age. *Id.*, at 893-94. But it held strict liability could be permissible in other cases, "like the sexual assault of underage children and production of child pornography, where the defendant comes face to face with the victim and is therefore presumed to be able to ascertain the victim's age." *Id.*, at 899; *see also id.*, at 903 (distinguishing conduct that involves face-to-face contact from conduct that involved "solicitation … solely over the Internet" and where it is "extremely difficult to determine the age of the person solicited with any certainty"). As explained at length above, this case differs sharply: because Petitioner received a picture of T.B., could question T.B. about his age, and even met T.B. in person, it would not have been nearly so "difficult" for Petitioner "to determine the age of the [T.B.] with any certainty." See *id.*, at 903.[3]

[3] Moreover, the underlying crimes differ in kind. The *Moser* court was "especially concerned with the imposition of strict liability in this statute because of the inchoate nature of the crime of solicitation," under which acts "are criminal only because they are likely to lead to the commission of another offense." *Id.*, at 904; see also *ibid.* (finding that by removing a mistake-of-age defense in a crime that is already all about "preliminary behavior," the "constitutional boundary of due process has been crossed"). Not so here. New Jersey law punished Petitioner for engaging in a course conduct that endangered T.B., see *supra* at 19-20—conduct that is, itself, criminal. Thus, Petitioner's offense involves harmful primary conduct—especially where Petitioner had ample opportunity to determine the child victim's age, such that "it does not offend due process to charge … with knowledge of the victim's age" here. See *Moser*, 884 N.W.2d, at 903.

Petitioner's only other case—another intermediate state appellate court—undercuts his theory. See *Fleming v. State*, 376 S.W.3d 854 (Tex. App. 2012), *aff'd*, 455 S.W.3d 577 (Tex. Crim. App. 2014). The defendant was convicted of aggravated sexual assault of a child, but relied on some of the cases cited above to argue against the strict-liability provisions of Texas's sexual-assault-of-a-minor statute. *Fleming*, 376 S.W.3d, at 860. The court rejected that argument because he met the victim in person, noting that "*X-Citement Video* involves situations in which people usually would not confront the performer depicted in the material," whereas this defendant "personally confronted the underage victim and could have learned her true age." *Id.* (citing *X-Citement Video*, 513 U.S. at 71-83). Thus, the appellate court reasoned, "*X-Citement Video* is distinguishable from this case." 376 S.W.3d at 860. So too here.

B. This Conviction Does Not Violate Due Process.

Though the Appellate Division never had an opportunity to address the theory, Petitioner's due-process challenge to his conviction again falls short. It is clear that Petitioner knew that T.B. was far younger, had spoken with T.B. at length about serious personal topics, and even saw a photograph of T.B. wearing a penguin costume before he sent the nude

photographs and arranged an in-person visit, to which he brought an overnight bag with condoms. Petitioner had opportunities to "ascertain" the victim's age, which is what due process requires here. See *X-Citement Video*, 513 U.S. at 72 n.2.

Consequently, this case is far removed from the parade of horribles that Petitioner poses. Compare Pet. 20 (erroneously suggesting that "the Appellate Division's rationale" imperils "[d]ating apps" because anyone "seeking adult relationships" would be at legal risk). Petitioner was both presented with a wealth of information and the opportunity to glean that T.B. was, in fact, a minor. The unusual facts of this case are therefore far removed from the hypothetical of a well-meaning adult who is genuinely fooled by a "catfishing minor," Pet. 20, in a much more limited exchange. Even aside from the dispositive vehicle problem and lack of a split, Petitioner's due process theory is unavailing.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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