No. 23-5383

IN THE

Supreme Court of the United States

RAMHAM DUPRIEST,
Petitioner

v.

STATE OF NEW JERSEY,
Respondent

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

PAGE NOS.

TABLE OF AUTHORITIES

PAGE NOS.

CASES

TABLE OF AUTHORITIES

PAGE NOS.

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

REPLY BRIEF FOR THE PETITIONER

This Court should grant Mr. Dupriest's petition and close the door left open by cases such as *Ginsberg v. New York*, 390 U.S. 629 (1968), *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), and *Reno v. ACLU*, 521 U.S. 844 (1997). As demonstrated in Mr. Dupriest's petition, the pertinent issues arise with relative frequency, and the prevalence of online romantic interaction requires the law to protect adults who seek consensual relationships with other adults.

The State's primary argument against granting certification is that this Court lacks jurisdiction to hear the questions presented in Mr. Dupriest's petition because they were not adequately raised in the state courts. However, the mistake-of-age dispute was the focal point of Mr. Dupriest's case at every stage in the proceedings; the New Jersey courts had ample opportunity to address these issues; and the pertinent federal constitutional claims were invoked both in the Appellate Division and New Jersey Supreme Court to sufficiently meet the jurisdictional requirements of this Court. Moreover, the heavy public import of the issues involved—and the egregious injustice in the specific result here—further merit this Court's consideration of these issues.

Jurisdictional issues aside, Mr. Dupriest's case factually presents a perfect vehicle for the questions presented in the petition: he met T.B. online; T.B. misrepresented his age; the two continued to interact online in a romantic fashion; and Mr. Dupriest sent T.B. explicit pictures in the course of that online interaction. This is the exact circumstance that is likely to be replicated

elsewhere and that requires this Court's intervention to ensure a person is not criminally prosecuted for remote sexual communications with a minor that misrepresents his age online.

As to the substance of the New Jersey courts' erroneous decisions, the State has done nothing to offer reasonable grounds for affirmance. The State by and large draws irrelevant factual distinctions between this case and the cases relied on in Mr. Dupriest's petition. Elsewhere, the State argues that Mr. Dupriest reasonably should have known T.B.'s age, an argument that presupposes mistake of age is a pertinent issue, which the State simultaneously maintains is not the case.

The State's remaining argument against granting the petition is that Mr. Dupriest has not identified any court split on this issue. While there has been relative uniformity in federal and state courts decisions on this and similar issues, those courts were all working to interpret the blank space left by this Court's decisions in *Ginsberg*, *X-Citement Video*, and *Reno*. This Court should decide those issues itself in this case, not leave it for other jurisdictions to decide what this Court would do on an ad hoc basis and, in the meanwhile, get it egregiously wrong as in Mr. Dupriest's case.

Accordingly, for the reasons elaborated in his petition and below, Mr. Dupriest respectfully requests that this Court grant his petition for certiorari and reverse his conviction for endangering the welfare of a child.

I. There is nothing about the procedure of this case that precludes this Court's review of the arguments raised in Mr. Dupriest's petition.

The State's primary argument in response to Mr. Dupriest's petition is that the arguments raised here were not properly raised in the state courts, and thus, not preserved for this Court's review. To the contrary, nothing about the procedure of this case or the contours of the mistake-of-age issue (which at every stage in the proceedings has been the focal point of this case) preclude this Court's consideration of the questions presented in the petition.

As an initial matter, this Court's powers are sufficiently broad that it can and has decided issues in cases that were not squarely presented to the state courts or even this Court for review. *See, e.g., Terminiello v. Chicago*, 337 U.S. 1 (1949) (reversing disorderly conduct conviction due to instructional error never raised by the defendant); *Vachon v. New Hampshire*, 414 U.S. 478 (1974) (reversing conviction for contributing to the delinquency of a minor for lack of evidence when no federal constitutional claim on that issue was raised by defendant). Notably, those cases bear striking parallels to Mr. Dupriest's case. *See Terminiello*, 337 U.S. at 4-6 (discussing significant First Amendment concerns with defendant's conviction); *Vachon*, 414 U.S. at 479-80 (finding conviction for distributing obscene button to a minor violated Fourteenth Amendment due process rights). Thus, even if Mr. Dupriest had not presented the petition questions to the New Jersey courts, this Court could otherwise rule on them if it deemed them of significant enough importance.

That line of cases aside, the pertinent issues were adequately presented throughout the state court proceedings to allow for this Court's review. First, as the State acknowledges, the arguments presented here were presented exactly this way in Mr. Dupriest's petition to the New Jersey Supreme Court. That alone should be dispositive as to the federal questions being adequately presented to the state courts. *See Hemphill v. New York*, 595 U.S. 140, 160-69 (2022) (Thomas, J., dissenting) (in dissenting from acceptance of jurisdiction, focusing inquiry on whether the federal claim was presented to state's highest court). Notably, the State has not pointed to any New Jersey court rule or New Jersey case that would indicate these issues could not have been addressed by the New Jersey Supreme Court for failure to adequately raise the issues beforehand, nor did the State argue waiver or lack of preservation in response to these arguments being presented in the New Jersey Supreme Court petition.

Indeed, there was no legal bar to the state supreme court's consideration of these issues; if the New Jersey Supreme Court wanted to address them itself, it could have, and it decided not to. The State suggests that "perhaps" that court denied certification "because the question had never been pressed to or passed on by the Appellate Division." Resp. Br. 11. But again, the State cites no New Jersey law in support of such a conclusion because there was no bar to the New Jersey Supreme Court's consideration of these issues. Nor does the denial of a petition suggest such a conclusion because it does not express any view on the merits of the case. *Kutcher v. Hous. Auth. of Newark*, 119 A.2d 1, 3 (N.J. 1955).

Secondly, the federal character of Mr. Dupriest's mistake-of-age question was adequately presented to the Appellate Division. In the appellate brief, Mr. Dupriest explicitly cited to the Fourteenth Amendment, quoted cases by this Court expounding on the rights to due process and a complete defense, and argued that the trial court's error on the mistake-of-age issue violated those principles. That sufficiently puts the preservation of the Fourteenth Amendment due process claim beyond dispute. *See Hemphill*, 595 U.S. at 148-49 (passing reference to violations of Sixth Amendment and *Crawford v. Washington*, 541 U.S. 36 (2004) were sufficient to preserve federal issue).

The only issue to which there is reasoned room for dispute would be whether the failure to cite to the First Amendment in the Appellate Division precludes jurisdiction on the corresponding question posed in Mr. Dupriest's petition. Under these circumstances, however, it cannot. As an initial matter, it should be noted that the First Amendment is not the operable amendment in this case, even with respect to question number one in Mr. Dupriest's petition. The case here implicates First Amendment protections, but because it is a state law case, the First Amendment is not directly applicable; rather, it is the Fourteenth Amendment—the amendment cited consistently by Mr. Dupriest—that functions to invoke this Court's jurisdiction.[1] *Grosjean v. Am. Press Co.*, 297 U.S. 233, 243 (1936) ("While [the First Amendment free speech clause] is not a restraint upon

[1] In this respect, please note that there is a typo on page 11 of Mr. Dupriest's petition and the cite to *U.S. Const.* amend IV (the Fourth Amendment) should be *U.S. Const.* amend. XIV (the Fourteenth Amendment).

the powers of the states, the states are precluded from abridging the freedom of speech or of the press by force of the due process clause of the Fourteenth Amendment."). In other words, while the questions in the petition are broken down into a First Amendment speech part and a Fourteenth Amendment due process part for ease of understanding, they are both technically speaking Fourteenth Amendment due process issues. Thus, Mr. Dupriest's clear invocation of those rights in the Appellate Division with respect to the mistake-of-age issue should be considered adequate invocation of this court's jurisdiction on these questions.

Jurisdiction of the first question is additionally appropriate because the two questions raised in Mr. Dupriest's petition to this Court are so intimately related that it would be unreasonable to address one and not the other. *See Illinois v. Gates*, 462 U.S. 213, 219-20 (1983) ("if the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued." (quoting *Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899))); *see also Hemphill*, 595 U.S. at 149 ("'Once a federal claim is properly presented, a party can make any argument in support of that claim.'" (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992))).

In short, this Court has no legal, jurisdictional bar to consideration of the arguments in Mr. Dupriest's petition. However, it is also worth noting that more policy-based considerations also weigh heavily in favor of this Court's review. To that end, it bears briefly going through the progression of this issue in the New Jersey courts in greater detail: At the trial level, on the eve of trial, the State dismissed the obscenity charge containing an explicit mistake-of-age defense and made a motion in limine to preclude any mistake-of-age issue by the defense on the remaining endangering charge. In response, defense counsel filed an opposition brief citing to *State v. Moser*, 884 N.W.2d 890 (Minn. Ct. App. 2016) (a due process case discussed at length in Mr. Dupriest's petition to this Court) and *State v. Backlund*, 672 N.W.2d 431 (N.D. 2004) (a First Amendment case also cited in Mr. Dupriest's petition that discusses *Reno*). At the oral argument on the morning of the first day of trial, defense counsel discussed the reasoning of *Moser* and noted "serious constitutional implications" are presented by not allowing Mr. Dupriest to raise a mistake-of-age issue for a remote interaction where the minor misrepresented his age.

In briefing before the Appellate Division, Mr. Dupriest's primary argument was that the refusal to allow a mistake-of-age defense was erroneous when dealing with a remote interaction that involved distributing an obscene image, in violation of the due process protections of the Fourteenth Amendment. While the briefing followed mostly a statutory-interpretation argument, when the case was reassigned, new counsel uploaded a letter alerting the appellate panel to

Moser, and the extended oral argument on the issue largely followed the reasoning presented in that case.

Finally, as acknowledged by both parties, Mr. Dupriest raised the issues with the New Jersey Supreme Court exactly as he raises them here, and there was no bar to that court's consideration of those issues when it declined review.

Put simply, this case is not at all comparable to cases like *Howell v. Mississippi*, 543 U.S. 440, 443-45 (2005) (no jurisdiction where defendant made no reference to the protections of federal law before its petition to this Court) or *Adams v. Robertson*, 520 U.S. 83, 87-89 (1997) (same). Comity is no issue because at every stage the New Jersey courts were made sufficiently aware of the pertinent issues; nor is there any failure on Mr. Dupriest's part to comply with state law preservation requirements. *See Adams*, 520 U.S. at 87-90 (discussing comity issues and state law preservation requirements with respect to jurisdictional issue).

Finally, the issues presented here are of paramount importance both to our society generally and Mr. Dupriest personally such that this Court's consideration is warranted. According to one Pew Research Center study, 72% of American adults use some kind of social media, and that number goes up to 84% with respect to adults under 30. Pew Research Center, *Social Media Use in 2021* (Apr. 7, 2021). According to another Pew study, roughly one-third of American adults have used online dating applications, going up to roughly one-half of

adults under 30.[2] Pew Research Center, *10 facts about Americans and online dating in 2019* (Feb. 6, 2020). Given the extreme prevalence of online interpersonal interaction with strangers, including for romantic and sexual relationships, this Court must make clear that a person cannot be criminally convicted for sexual or romantic interactions with a minor who utilizes such platforms and misrepresents his or her age.

With respect to Mr. Dupriest personally, he advocated heavily for this issue to be correctly decided at every stage of his proceedings, and at every stage the New Jersey courts reached the wrong decision. The consequence of those errors is that he will remain on parole supervision and on the sex offender registry for the rest of his life for a conviction where the State was not required to prove a disputed essential element of the offense. Such considerations strongly weigh in favor of this Court's intervention.

II. This case is factually a perfect vehicle for resolving the issues presented and the decisions of the lower courts were clearly legally incorrect.

The jurisdictional issue aside, there can be little dispute that Mr. Dupriest's case factually presents a perfect vehicle to decide the questions presented in his petition. Mr. Dupriest met T.B. online, T.B. misrepresented his age, the two began a romantic interaction entirely online, and Mr. Dupriest sent explicit pictures to T.B. during that interaction without having met him face to

[2] Although Mr. Dupriest and T.B. met while they were playing an online video game, it bears mentioning that T.B. testified at trial that he also had false profiles on adult dating websites during this time.

face. This is the exact scenario that is at risk of occurring again and again (and indeed, as cases cited in Mr. Dupriest's petition make clear, has occurred). Likewise, it is those circumstances that require a mens rea as to the victim's age.

In contending that this case is factually a poor context for resolving these issues, and in additionally arguing that there was no error in the state court decisions, the State alternatively misstates the applicable facts and misunderstands the law. First, the State makes much ado about the fact that Mr. Dupriest and T.B. met in person after he had sent the pictures. It should go without saying that this has nothing to do with whether it was criminal conduct to have sent the pictures at the point in which the two had never met in person and only interacted online. It is true that the trial court did instruct the jury that conduct other than the sending of the explicit pictures could constitute a basis for the endangering conviction. But even assuming any of those acts could constitute "sexual conduct" within the meaning of N.J. Stat. Ann. § 2C:24-4(a)(1), the trial court explicitly instructed the jury that it could convict Mr. Dupriest of endangering based on the sending of the explicit pictures alone, and there is nothing in the verdict sheet that specifies on what conduct it was convicting Mr. Dupriest of endangering. Thus, he must have at least been permitted to raise a mistake-of-age defense to the sending of explicit images as a basis for endangering the welfare of a child.

Secondly, the State also relies substantially on the Appellate Division's misstatement that Mr. Dupriest sent the explicit photographs as a form of

"responding" to T.B. having sent a picture of himself in a penguin costume. For several reasons, the State's focus on this issue is a red herring. Initially, there is nothing in the record to support that Mr. Dupriest's explicit pictures were sent after T.B. sent his costumed picture. That sequence of events was never established at trial or any of the hearings; the screenshots of the explicit pictures do not contain a date, and T.B. only testified at trial that the explicit pictures were sent before they met on February 4, 2011.

Regardless, the State's assertion that this is somehow an adequate substitute for an in-person meeting lacks merit. The whole point of why online remote communications demand a higher degree of scrutiny with respect to these convictions is that there is no way to verify any information received online. If one receives a picture of a person, or of a driver's license, or of any other such thing, there is no guarantee that it is of the person who sent it. Likewise, photos and documents can otherwise be easily faked or altered, as can video footage. Even with a live video interaction such as FaceTime or Zoom, certain filters can distort a person's look or modify a voice. Put simply, there is nothing that can be determined from interacting with someone online that is a close substitute to meeting someone in person in terms of verifying who the person actually is. *See State v. Weidner*, 611 N.W.2d 684, 691 (Wis. 2000) ("sending documents via internet or mail does not obviate the uncertainty as to whether the documentation corresponds to the recipient's personal data. The lack of face-to-face interaction, which impairs the ability to ascertain reliably the age of the

recipient, effectively serves to chill speech."). The strict-liability exception to traditional mens rea requirements with respect to sexual conduct involving minors is only permissible where the perpetrator and the victim meet in person, face to face; that is why a video rendering of an underage person engaged in sexually explicit activity was not sufficient for strict liability and required a mens rea component as to the age of the performer in *X-Citement Video, Inc.*, 513 U.S. at 72 n.2.

Moreover, while the focus of this petition is largely on the unique problems posed by remote communications, caselaw is clear that conduct involving distributing obscene material to a minor requires some mens rea component as to the victim's age whether there was in-person communication or not. That is why in *Commonwealth v. Jones*, the Massachusetts Supreme Court held that, in order to comport with cases like *X-Citement Video*, its distribution of obscene material to a minor statute must have a mens rea for the victim's age, even though it was a case dealing with an uncle who showed pornography to his nephew during a prolonged period of in-person sexual abuse. 28 N.E.3d 391, 397-98 (Mass. 2015); *see also* N.J. Stat. Ann. § 2C:34-3(e)(1) (permitting mistake-of-age defense for distributing obscene material to minor even when the interaction was in person).

Lastly, the State otherwise strains to argue that this case is substantially factually distinct from other cases dealing with like issues and dwells heavily on the idea that Mr. Dupriest had "ample opportunity to ascertain the victim's age."

Resp. Br. 3, 4, 14, 15, 18. Even if this latter assertion were somehow true, this argument presupposes that we are at a stage where the reasonableness of mistake of age is a live issue. Whether Mr. Dupriest should have reasonably known T.B. was a minor or not is something for a jury to decide at trial, not for the State to summarily declare in a brief to this Court after successfully ensuring the issue would not be developed at the trial. Additionally, there is no meaningful factual distinction pointed to by the State that would warrant departing from the principles espoused in the cases relied on by Mr. Dupriest.

In short, this case is a perfect vehicle for addressing the issues of paramount importance presented in Mr. Dupriest's petition, and the State has produced no plausible arguments for upholding the erroneous decisions of the New Jersey courts.

III. As this issue and related issues are being addressed in a significant number of jurisdictions, this Court should not allow states to figure out what this Court's *Ginsberg*/*X-Citement Video*/*Reno* line of cases means on an ad hoc basis while it waits for more courts to get it wrong.

Lastly, the State also repeatedly asserts that Mr. Dupriest has not identified any court split that warrants the intervention of this Court. This is partly true in that it seems every published decision to address this issue or a similar issue has reached the conclusion that, when dealing with remote sexual or romantic communications to a minor, there must be a mens rea requirement as to the age of the victim. That is, every published decision related to this issue suggests the State's position here is wrong. The State, unable to produce a single

case supporting the New Jersey courts' erroneous decisions or its current erroneous position, tries to get around this by drawing irrelevant factual distinctions. But, as noted above, those fail to hold water.

In any event, the relative uniformity with which courts have settled against the State's position here should not preclude this Court from undertaking review. Although this Court's prior decisions in *Ginsberg*, *X-Citement Video*, and *Reno* all tend towards the conclusion advanced by Mr. Dupriest and reached by numerous state courts, this case would be another necessary step forward in that direction to fill a remaining void left by that line of cases. New Jersey's decisions on this issue demonstrate that a gap in this Court's jurisprudence exists that permits states to get this issue egregiously wrong with catastrophic results. There is no reason to wait for several more cases to get it wrong—and several more defendants to be severely and unfairly punished—before this issue is deemed worthy of review. *Cf. Nike, Inc. v. Kasky*, 539 U.S. 654, 667 (2003) (Breyer, J., dissenting from dismissal of interlocutory writ as improvidently granted) ("delay [in deciding the First Amendment issues presented] itself may inhibit the exercise of constitutionally protected rights of free speech without making the issue significantly easier to decide later on."). In other words, the legal blank space should not exist for the State to be making the arguments it makes here, and there is no reason to wait for more harm before filling it when it is clear it is a recurring issue.

Again, this is an issue that is discussed frequently and, given the preeminence of online romantic interaction, likely to occur again. It is imperative that this Court give guidance on the meaning of *Ginsberg*, *X-Citement Video*, *Reno* in this context. To the extent that the New Jersey courts in Mr. Dupriest's case unambiguously violated that caselaw, it is respectfully requested that, if this Court does not accept this petition on the merits, it should be summarily reversed and remanded for conflicting with this Court's prior decisions.

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,

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