

No. 17-546

In The
Supreme Court of the United States

—◆—
ASHBY COLEMAN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The Supreme Court Of Virginia**

—◆—
BRIEF IN OPPOSITION

—◆—
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QUESTION PRESENTED

Does *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), require an appellate court to conduct an independent review of the lewdness of a photograph when reviewing a sufficiency-of-the-evidence challenge to a child pornography conviction?

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ASHBY COLEMAN, PETITIONER,

v.

COMMONWEALTH OF VIRGINIA, RESPONDENT.

***ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA***

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. In early 2013, law enforcement officers with the Southern Virginia Internet Crimes Against Children Task Force (“ICAC”) opened an investigation targeting petitioner Ashby Coleman. Based on a tip from the National Center for Missing and Exploited Children, ICAC investigators suspected that Coleman was distributing child pornography on the internet. JA 98-103.¹ Specifically, Coleman had posted two pictures to his Pinterest account² in December 2012 and February

¹ All references to “JA” refer to the joint appendix filed in the Court of Appeals of Virginia.

² The Court of Appeals explained that, “Pinterest allows users to organize and share images, or ‘pins’ on virtual ‘pinboards’—akin to public online bulletin boards. Users can then browse the pinboards of other users and ‘re-pin’ any content therein. Users

2013 that investigators believed were child pornography. JA 98-100.

The first photograph (“Exhibit One”) depicted a close-up of male and juvenile-female genitalia. The Court of Appeals of Virginia described the photograph in detail:

Exhibit One is a black-and-white image depicting a visibly erect penis touching the labia of a disproportionately small vagina. The photo does not show either subject’s face or torso; however, several factors indicate that the female is a juvenile. The female depicted has no pubic hair, or any sign that her pubic hair was removed. In addition, the narrowness of her hips, the disparity between the size of her and the male’s genitalia, and other factors indicate that, at the time of the photo, she had not yet undergone puberty and was underage.

Pet. App. 6.

The second photograph (“Exhibit Two”) depicted three nude young women lying on their stomachs on a bed, facing away from the camera with their legs spread. The Court of Appeals described this photograph in detail as well:

Exhibit Two is a color image depicting three females lying in a bed, a sexually suggestive setting. Furthermore, they are positioned in a

can also post comments on pins of their own or pins of others.”
Pet. App. 1 n.1 (citation omitted).

manner that could reasonably be interpreted, and Coleman did in fact interpret, as sexually provocative or enticing. They are completely nude, facing away from the camera with their legs spread so their buttocks and labia are visible. Their limbs are overlapping. One of the girls has her head laying on top of her arms in a submissive posture. Finally, their genitalia are positioned at the center of the image.

Pet. App. 9.

Exhibit Two also contained a watermark that linked to a Russian website “run by a man named Grigori Galitsen.” JA 118. As one of the investigators testified, Galitsen was “involved in the founding of several websites depicting erotic photography of teenagers” and “is known for specializing in some barely legal as well as Lolita.” JA 119-20. “‘Lolita’ is a common reference to child pornography.” Pet. App. 7 n.2.

Having concluded based on their professional judgment that Exhibits One and Two constituted child pornography, investigators used an email address associated with the Pinterest account and an IP address to locate Coleman’s residence. JA 101-03, 108. When investigators visited the residence as part of their investigation, Coleman’s mother answered the door. JA 106. The officers informed her that they were there to determine “if she knew anything about” the suspected child pornography. JA 107. Coleman, who was seated on a nearby stairway, volunteered, “I think I’m the one you’re looking for.” *Id.*

Coleman admitted to the officers that the email address associated with the Pinterest account belonged to him. JA 108. And he also admitted to posting Exhibit One to Pinterest. JA 108-09. Although he did not recall posting Exhibit Two, he conceded that he was not aware of anyone else posting images to his Pinterest account. JA 143. Coleman was subsequently arrested. *See* JA 3, 6.

2. A grand jury in Campbell County, Virginia indicted Coleman for two counts of distribution of child pornography, in violation of Virginia Code § 18.2-374.1:1(C). JA 1-2. “Child pornography” is statutorily defined as “sexually explicit visual material which utilizes or has as a subject an identifiable minor.” Va. Code Ann. § 18.2-374.1(A) (2014). Under the statute, the term “sexually explicit visual material” includes, among other things, visual representations of “a lewd exhibition of nudity,” “sexual excitement,” or “sexual conduct.” *Id.* “Sexual excitement” is defined as “the condition of human male or female genitals when in a state of sexual stimulation or arousal.” Va. Code Ann. § 18.2-390(4) (2014).

Coleman was tried by a jury in the Circuit Court for Campbell County. As the prosecutor remarked in her opening statement, there was no dispute that Coleman distributed Exhibit One and Exhibit Two, and the question for the jury was solely whether the images were sexually explicit in nature and whether they depicted children under the age of 18. JA 88-89.

At trial, Coleman testified that he had had an “issue with pornography for a long time.” JA 140. At around ages 11 to 13, he began looking for pornographic images of girls his “own age.” JA 141. He confessed that, while looking for such images, he had used the search term “kiddy porn.” JA 142. Despite these efforts, he maintained that he only ever obtained adult pornography. JA 144.

After Coleman turned 18, he went to Liberty University and lived in a dormitory. JA 131-33. He testified, however, that he quit after his first semester because he did not attend his classes regularly. *See* JA 148-49. Coleman acknowledged that “pornography did play a role” in his academic failure. JA 149. Coleman claimed that he had used pornography as a “distraction” from going to class. *Id.*

In December 2012, Coleman moved back home with his mother. JA 138. When her son moved back home, Ms. Coleman installed software on his computer that she thought would preclude his access to online pornography. JA 134. But she did not restrict his access to Pinterest because it “never occurred” to her that Pinterest would contain pornography. JA 135.

Coleman testified that he used his Pinterest account to view pornography because the security filters on his home computer and at Liberty University would not be “flag[ged]” by his use of Pinterest. JA 144. And he candidly confessed that he was “hiding” the pornography on his Pinterest account from both his mother and the university. JA 145. But he never made any

effort to make his account “private” and “knew that there was a possibility that other people might see [the pictures].” JA 145-46.

Coleman’s defense focused on whether the photographs depicted minors. JA 181-86. He did not argue to the judge or jury that the images were protected under the First Amendment to the U.S. Constitution or even that they were not lewd under Virginia law. See JA 14 (instructing the jury that a “lewd exhibition is defined as lascivious or indecent. It is subject matter that is designed for sexual indulgence or inciting to lust or sexual desire.”). The jury convicted him on both counts.

3. After he was convicted, Coleman retained new counsel and filed a motion to set aside the verdict. JA 23-42. In addition to renewing his earlier motion to strike based on his argument that Exhibit One and Exhibit Two did not depict minors, Coleman asked the trial court to rule as a matter of law that the photographs were not “lewd” and, therefore, were not “sexually explicit visual material” within the meaning of Virginia Code § 18.2-374.1(A). JA 25-31, 222-27. After hearing oral argument, the trial court denied the motion and sentenced Coleman to 10 years in prison, with four years suspended. JA 62-63.

Coleman petitioned the Court of Appeals of Virginia for review, JA 65, and the court agreed to review the seven issues Coleman raised on appeal. Order, *Coleman v. Commonwealth*, No. 0096-16-3 (Va. Ct. App. Apr. 15, 2016). As Coleman acknowledged, “[n]one of

the Assignments of Error allege[d] a violation of the First Amendment.” Reply Br. at 2, 8, *Coleman v. Commonwealth*, No. 0096-16-3 (Va. Ct. App. July 14, 2016) [hereinafter “Reply Br.”].

Coleman did, however, seek review with respect to whether the evidence was sufficient to classify Exhibit One and Exhibit Two as “lewd.” Opening Br. at 2, *Coleman v. Commonwealth*, No. 0096-16-3 (Va. Ct. App. May 25, 2016) (“The trial court erred in failing to rule as a matter of law that Exhibit 1 was not ‘child pornography’ within the meaning of Va. Code §18.2-374.1(A) in that it was not a ‘lewd’ depiction of nudity.”); *see also id.* at 3 (same assignment of error for Exhibit Two). Coleman asked the Court of Appeals to make its own determination based on the evidence presented at trial, and find, as a matter of law, that the photographs were not lewd under Virginia Code § 18.2-374.1. *Id.* at 9.

The Court of Appeals rejected Coleman’s arguments and affirmed his convictions. With regards to Exhibit One, the Court of Appeals held that it “need not determine if the image is a ‘lewd exhibition of nudity,’ as it depicts sexual conduct and sexual excitement, and thus is sexually explicit visual material under the statute.” Pet. App. 8. With respect to Exhibit Two, the Court of Appeals held that the issue of lewdness was “inherently a fact dependent inquiry” and that “[v]iewed in the totality [the court] cannot say the jury erred in finding this to be a lewd display of nudity.” Pet. App. 9.

Coleman petitioned the Supreme Court of Virginia to review the Court of Appeals' decision. Coleman argued in part that the Court of Appeals erred in failing to conduct an independent, de novo review of the jury's verdict. Pet. for Appeal at 1, 5, *Coleman v. Commonwealth*, No. 170145 (Va. Jan. 26, 2017). Coleman asserted that the Court of Appeals and the trial court erred in failing to rule as a matter of law that the photographs were not "child pornography" within the meaning of Virginia Code § 18.2-374.1(A), in that the evidence was insufficient to demonstrate that the photographs were "lewd" depictions of nudity. *Id.* The Supreme Court of Virginia refused the petition for appeal. Pet. App. 17.

Coleman timely petitioned this Court for a writ of certiorari.



REASONS FOR DENYING THE PETITION

Coleman asks this Court to grant certiorari and decide a question about what type of review the First Amendment requires in a case where he *expressly disclaimed* below that he was raising a First Amendment defense. Because Coleman never made the constitutional argument he raises in his petition to the Virginia courts, this Court should deny review.

Even if Coleman had not waived his First Amendment challenge, this case is a particularly poor vehicle for addressing the question presented. First, Coleman's argument is that the Virginia courts erred by

not independently deciding whether Exhibit One and Exhibit Two were “lewd” within the meaning of Virginia Code § 18.2-374.1. But Coleman has forfeited any challenge about the lewdness of Exhibit One by not appealing the Court of Appeals’ decision not to address lewdness to the Supreme Court of Virginia. So, if the Court were to reach the First Amendment question, the only image for which the argument is properly presented is Exhibit Two.

Second, Coleman is wrong on the amount of review his claims received below; the Court of Appeals did not “simply defer[] to the jury[’s] verdict.” Pet. 17. Even though the Court of Appeals was not asked to decide whether Exhibit One and Exhibit Two were constitutionally protected speech under the First Amendment, the court nonetheless closely examined the images and concluded that both were child pornography under Virginia Code § 18.2-374.1(A). With respect to Exhibit One, the court determined that it did not need to reach the question of lewdness at all; the image depicted “sexual excitement,” which eliminated the need to consider lewdness. Pet. App. 8. And with respect to Exhibit Two, the court detailed the myriad ways the image was lewd and concluded that the jury did not “err[] in finding [it] to be a lewd display of nudity.” Pet. App. 9.

Moreover, although that level of review is more than sufficient, any error in this case would be harmless beyond a reasonable doubt. The evidence was more than sufficient to convict Coleman of distributing child pornography no matter what standard of review is applied. His distribution of two images depicting sexually

graphic underage genitalia is entitled to no First Amendment protection.

Lastly, even in the absence of the overwhelming vehicle problems, this case does not implicate a split of authority. The petition should be denied.

I. This case is a particularly poor vehicle to address the question presented.

A. Coleman did not raise a First Amendment defense below and cannot raise one for the first time in this Court.

Coleman never argued to the Virginia courts that his conviction violated the First Amendment because the images he had distributed using Pinterest were protected speech. In fact, Coleman expressly disavowed that he was challenging his convictions under the First Amendment on any ground. *See* Reply Br. at 2 (“None of the Assignments of Error allege[d] a violation of the First Amendment.”). Instead, Coleman challenged his convictions under State law based on the sufficiency of the evidence. His decision not to press a First Amendment argument in State court precludes this Court from reaching the First Amendment question presented for the first time.

“[T]his Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim ‘was either addressed or properly presented to the state court that rendered the decision we have been asked to review.’” *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (citation omitted).

Declining to entertain federal constitutional claims that have not been properly presented to a State's highest court "serves an important interest of comity," *Adams v. Robertson*, 520 U.S. 83, 90 (1997), and demonstrates a "'due regard for the appropriate relationship of this Court to state courts.'" *Illinois v. Gates*, 462 U.S. 213, 221 (1983) (citation omitted). "[I]t 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." *Adams*, 520 U.S. at 90 (citation omitted). Moreover, requiring petitioners to adequately present issues to State courts gives those courts the opportunity to reach a decision "that could obviate any challenges to state action in federal court." *Id.* Thus, where the petitioner did not give a State Supreme Court the opportunity to "pass on the question, [this Court] may not do so." *Gates*, 462 U.S. at 219.

This Court should not reach the question presented in light of Coleman's decision not to present his First Amendment argument to the Virginia courts. Just as in *Howell*, "Petitioner's brief in the State Supreme Court did not properly present his claim as one arising under federal law." 543 U.S. at 443. And that failure deprived the Virginia courts of the right to address a matter it "has an undeniable interest in" addressing: whether the First Amendment requires a specific type of appellate review in a child pornography case. *Adams*, 520 U.S. at 90. Because Coleman did not give the Virginia Supreme Court an opportunity to address his new First Amendment argument, the Court

should deny certiorari. Doing so “‘promote[s] respect . . . for the Court’s adjudicatory process [and] the stability of [the Court’s] decisions.’” *Gates*, 462 U.S. at 224 (quoting *Mapp v. Ohio*, 367 U.S. 643, 677 (1961) (Harlan, J., dissenting)).

B. Even if Coleman could raise a First Amendment challenge for the first time in this Court, his argument is meritless.

If Coleman had presented a First Amendment argument in this case, his claim would plainly fail on the merits. Neither Exhibit One nor Exhibit Two is entitled to any form of protection under the First Amendment.

Although Coleman’s petition is far from clear, the only First Amendment challenges he theoretically could have raised here involve whether the Virginia courts had to conduct an independent assessment of whether the individuals in the images were juveniles and whether the nudity presented in the images was lewd under Virginia Code § 18.2-374.1(A). *See* Pet. 8-9.³ Contrary to Coleman’s claim that the Court of Appeals “simply deferred to the jury,” Pet. 17, the court’s

³ By focusing his petition entirely on the question of lewdness, Coleman has abandoned his challenge to whether the Court of Appeals needed to conduct an independent review to decide whether Exhibit One and Exhibit Two depicted minors. For the sake of completeness, however, the Commonwealth will explain how the Court of Appeals independently reviewed the images both to determine the age of the persons shown and to decide if they were lewd.

analysis demonstrates that it conducted a thorough, independent review of the images.

1. Exhibit One plainly depicted a female child and it is irrelevant whether the image was lewd.

The Court of Appeals carefully detailed how Exhibit One obviously depicted a child and why the image constituted child pornography.

With respect to whether the photograph showed a minor, the court noted that “the jury was left to infer” the ages of the individuals depicted because there was “no evidence as to the identities of the individuals in the images.” Pet. App. 6. And viewing the evidence in the light most favorable to the Commonwealth—again, because Coleman had brought a sufficiency challenge, not a constitutional challenge⁴—the court listed the ways in which Exhibit One depicted a juvenile female: (1) “[t]he female depicted has no pubic hair, or any sign that her pubic hair was removed”; (2) “the narrowness of her hips”; (3) “the disparity between the size of her and the male’s genitalia”; and (4) “other factors indicate that, at the time of the photo, she had not yet undergone puberty and was underage.” *Id.* Thus, the

⁴ When reviewing the sufficiency of the evidence, a reviewing court in Virginia determines “‘after viewing the evidence in the light most favorable to the prosecution, [whether] *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *Hutton v. Commonwealth*, 791 S.E.2d 750, 752 (Va. Ct. App. 2016) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

court had little trouble concluding based on its independent review of the image that “the jury did not err in finding” that Exhibit One depicted a minor. Pet. App. 7.

With respect to “lewdness,” the court determined that it did not need to reach that issue to conclude that Exhibit One was a form of child pornography. Pet. App. 8. Instead of deciding the lewdness question, the court held that Exhibit One depicted “sexual excitement,” which is a separate category of “sexually explicit visual material” under Virginia Code § 18.2-374.1(A). Pet. App. 8. The court explained that, in Exhibit One, “the male is unmistakably visibly aroused while touching his genitals to the female’s.” *Id.* Because “sexually explicit visual material” under Virginia Code § 18.2-374.1(A) includes images depicting “the condition of human male or female genitals when in a state of sexual stimulation or arousal,” Va. Code. Ann. § 18.2-390(4), Exhibit One constitutes child pornography regardless of whether it is deemed lewd.

Coleman has waived any challenge to the Court of Appeals’ decision that Exhibit One depicted male genitalia in a state of sexual excitement for purposes of Virginia Code § 18.2-374.1(A). In his subsequent petition for appeal to the Supreme Court of Virginia, Coleman did not challenge that holding. Rule 5:17 of the Rules of Supreme Court of Virginia therefore dictates that the issue has been waived. *See* Va. Sup. Ct. R. 5:17(c) (“Only assignments of error assigned in the petition for appeal will be noticed by this Court.”).

2. Coleman admitted that Exhibit Two depicted at least one female child, and the image is plainly lewd.

As with Exhibit One, the Court of Appeals carefully detailed how Exhibit Two obviously showed a child and why the photograph was lewd under Virginia Code § 18.2-374.1.

With respect to whether Exhibit Two depicted a child, the court explained that “Coleman’s own arguments before the trial court undermine his claim that the image does not depict at least one minor.” Pet. App. 6-7. Indeed, in his motion to set aside the verdict, Coleman’s counsel “stated ‘it seems clear that one of the three girls would appear to be [an] actual minor[.]’” Pet. App. 7. Thus, the court concluded that Exhibit Two was a photograph of a minor because Coleman’s counsel admitted that it was.⁵

As for the lewdness of Exhibit Two, the Court of Appeals described in detail the sexually explicit nature of the photograph. “Exhibit Two is a color image depicting three females lying in a bed, a sexually suggestive setting.” Pet. App. 9. “One of the girls has her head laying on top of her arms in a submissive posture.” *Id.* Moreover, the three girls “are completely nude, facing away from the camera with their legs spread so their

⁵ Even if that were not the case, Exhibit Two also “contained a watermark referencing a website run by a man who . . . ‘is known for specializing in some barely legal as well as Lolita,’ and was ‘involved in the founding of several websites depicting erotica photography of teenagers.’ ‘Lolita’ is a common reference to child pornography.” Pet. App. 7 n.2.

buttocks and labia are visible. Their limbs are overlapping.” *Id.* The camera was “‘focused on [the girls’] genitalia,’” *id.* (quoting *Asa v. Commonwealth*, 441 S.E.2d 26, 29 (Va. Ct. App. 1994)), which “are positioned at the center of the image,” *id.*

Simply put, deciding whether Exhibit Two was lewd was not a close call. In viewing the facts about the image in their “totality,” the court correctly concluded that the jury did not err in finding the image to be a “lewd display of nudity.” *Id.*

3. Any error in this case is harmless beyond a reasonable doubt.

Ultimately—even if (1) Coleman had raised a First Amendment challenge, (2) the Court of Appeals had not independently reviewed Exhibit One and Exhibit Two and concluded that they constituted child pornography, and (3) a failure to conduct independent review was error—any error would be harmless beyond a reasonable doubt. *See Rose v. Clark*, 478 U.S. 570, 576-79 (1986).

The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant’s guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.

Id. at 577 (citation omitted) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)).

“Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.” *Id.* at 579. Defendants are entitled “to a fair trial, not a perfect one.” *Id.* (citation omitted).

“The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.” *New York v. Ferber*, 458 U.S. 747, 757 (1982). In *Ferber*, the Court recognized child pornography as “a category of material outside the protection of the First Amendment.” *Id.* at 763. Because of the “particular and more compelling interest in prosecuting those who promote the sexual exploitation of children,” the Court held that all child pornography—even that which is not obscene under the standard set forth in *Miller v. California*, 413 U.S. 15 (1973)—is not protected by the First Amendment.⁶ *Ferber*, 458 U.S. at 761.

Consequently, in a child pornography case, “[a] trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole.” *Id.* at 764. That

⁶ The difference between the standard articulated in *Ferber* and in *Miller* demonstrates why Coleman errs when he conflates obscenity cases and child pornography cases throughout his brief. The Commonwealth’s interest is profoundly different when prosecuting a person for distributing child pornography than for distributing obscene material.

lesser standard of review is justified by the fact that the Court “consider[s] it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work.” *Id.* at 762-63.

Here, Coleman hardly contests that the photographs he distributed on Pinterest depicted underage children in a sexually graphic manner. Other than noting in the facts section that he previously had disputed the age of the individuals, Pet. 7, Coleman focuses his petition on the question of lewdness. Coleman therefore has admitted to sharing two sexually graphic images of children’s genitalia on the internet.⁷ Consequently, there is no need to conduct an “‘independent examination’ of the allegedly unprotected material” in a case like this one. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 507-08 (1984) (quoting *Ferber*, 458 U.S. at 774 n.28). Under any level of review, Coleman’s conduct is not protected under the First Amendment.

⁷ Even if Coleman claims in reply that he has disputed that Exhibit One depicts a child, he has affirmatively admitted that at least one of the girls in Exhibit Two was a minor. Pet. App. 6-7.

II. This case does not implicate a split of authority warranting this Court’s review.

A. Although some federal courts disagree whether a lasciviousness determination is a factual or legal question, none of these cases creates a circuit split applicable to this case.

Even if this Court were willing to overlook the substantial vehicle problems with this case, Coleman is wrong that the lower courts are “badly split” on when to apply independent review in child pornography cases. Pet. 9. A close examination of the authorities that Coleman relies on shows only slight disagreement in the federal circuits on whether a lasciviousness determination under federal law is a factual finding, a legal conclusion, or a mixture of law and fact. None of these cases, however, supports Coleman’s sweeping argument that lower courts disagree about whether independent review is required of child pornography convictions when the defendant expressly raises a First Amendment challenge.

Coleman principally relies on a disagreement in the federal courts about what standard of review applies in deciding whether an image is a “lascivious exhibition of the genitals” under federal child pornography laws. *See* 18 U.S.C. § 2256(2)(A)(v). Coleman submits that four federal circuits have applied de novo review to such lasciviousness (i.e., lewdness)

determinations, whereas two others have reviewed that determination for “clear error.”⁸

The four federal cases that Coleman cites as applying de novo review are plainly distinguishable from this case. First, two of those cases applied de novo review because they were not reviewing the sufficiency of the evidence. *See United States v. Knox*, 32 F.3d 733, 744 (3d Cir. 1994) (“Because the meaning of the statutory phrase ‘lascivious exhibition’ . . . poses a pure question of law, our review is plenary.”); *United States v. Rayl*, 270 F.3d 709, 714 (8th Cir. 2001) (stating, in the context of an admissibility challenge that, “[o]f course, the question whether materials depict ‘lascivious exhibition of the genitals,’ an element of the crime, is for the finder of fact. . . . However, the meaning of ‘lascivious exhibition of the genitals’ is an issue of law.”). Because these cases were not deciding the sufficiency of the evidence, they cannot form part of a circuit split.

Second, the Tenth Circuit, in *United States v. Helton*, 302 F.App’x 842, 846 (10th Cir. 2008), did apply de novo review when reviewing whether an image was a lascivious exhibition of genitals. But in doing so, the court described the question as a mixed question of law

⁸ The term “[c]lear error” is a term of art derived from . . . the Federal Rules of Civil Procedure.” *Ornelas v. United States*, 517 U.S. 690, 694 n.3 (1996). “In Virginia, [the jury’s resolution of] questions of fact [is] binding on appeal unless ‘plainly wrong.’” *McGee v. Commonwealth*, 487 S.E.2d 259, 261 n.1 (Va. Ct. App. 1997) (citing *Quantum Dev. Co. v. Luckett*, 409 S.E.2d 121, 122 (Va. 1991); *Naulty v. Commonwealth*, 346 S.E.2d 540, 542 (Va. Ct. App. 1986)).

and fact. *Id.* The court in *Helton* therefore did not engage in independent de novo review as contemplated by *Bose*. Instead, like the Court of Appeals in this case, *Helton* concluded that the trier of fact did not err as a matter of law. *Id.* at 849.

Lastly, Coleman cites *United States v. Amirault*, 173 F.3d 28 (1st Cir. 1999), which is the only published federal circuit court decision to have applied de novo review to review a trial court’s lasciviousness determination. *Id.* at 33. *Amirault* is distinguishable from Coleman’s case procedurally because it was not a sufficiency of the evidence case, but rather a First Amendment challenge to the appropriate sentence enhancement after a guilty plea. *Id.* at 30. In addition, as a factual matter, the image at issue in *Amirault* was worlds apart from the sexually explicit photographs of children that Coleman posted on the internet.

In *Amirault*, the photograph depicted a partially nude teenage girl “standing or kneeling in a hole on a beach.” *Id.* Because “the district court helped define the limits of the largely unprotected category of child pornography,” the First Circuit applied de novo review “to ensure that the First Amendment had not been improperly infringed.” *Id.* at 33. Put differently, *Amirault* was a case at the margins of what constitutes child pornography, arguably depicting mere nudity; here, by contrast, there is no doubt that Exhibit One and Exhibit Two were child pornography.

In any event, *Amirault* is an outlier. The other federal circuit courts to have expressly addressed the

issue have reviewed whether an image constitutes a lascivious exhibition of genitals under the clear error standard. *See, e.g., United States v. Steen*, 634 F.3d 822, 826 (5th Cir. 2011) (“[W]e likewise apply the clear error standard to the jury’s conviction so far as it indicates a factual finding that the image was a lascivious exhibition of the genitals.”); *United States v. Schuster*, 706 F.3d 800, 806 (7th Cir. 2013) (“Whether an image depicts a ‘lascivious exhibition of the genitals’ is an intensely fact-bound question” that is reviewed for clear error); *United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987) (noting that “[t]he question of whether the pictures fall within the statutory definition is a question of fact as to which we must uphold the district court’s findings unless clearly erroneous”). These courts have properly recognized that “[w]hether the item to be judged is lewd, lascivious, or obscene is a determination that lay persons can and should make.” *United States v. Arvin*, 900 F.2d 1385, 1390 (9th Cir. 1990); *see also United States v. Frabizio*, 459 F.3d 80, 85 & n.8 (1st Cir. 2006) (stating that “whether a given depiction is lascivious is a question of fact for the jury” and “expert testimony is not required on the subject”).

Put simply, there is not an entrenched circuit split about whether independent, de novo review is required in every case to assess the sufficiency of the evidence supporting a lewdness or lasciviousness finding for child pornography. Indeed, in cases where a defendant failed to argue that images were protected under the First Amendment, courts did not feel compelled to engage in de novo review and to consider the First

Amendment issue sua sponte. *See Steen*, 634 F.3d at 825; *United States v. Overton*, 573 F.3d 679, 687-88 (9th Cir. 2009).

B. The State-court decisions cited by Coleman are largely irrelevant to the question presented.

Coleman acknowledges that “very few states’ courts of last resort seem to have discussed the issue specifically.” Pet. 14. That concession demonstrates that there is no split of authority among the State and federal courts. *See* Rule 10(b). Coleman nonetheless goes to great lengths to manufacture a split among State courts, but his attempt fails.

The vast majority of State cases cited by Coleman are not child pornography cases, but rather adult obscenity cases or cases in which adults have furnished minors with obscene material. *See, e.g., State v. Grainage*, 918 P.2d 1073, 1077 (Ariz. Ct. App. 1996); *State v. Canal*, 773 N.W.2d 528, 529 (Iowa 2009); *State v. Harold*, 593 N.W.2d 299, 307 (Neb. 1999). In fact, two of the cases relied upon by Coleman are obscenity cases that predate *Ferber* and *Bose*. *See Gotlieb v. State*, 406 A.2d 270 (Del. 1979); *Court v. State*, 217 N.W.2d 676 (Wis. 1974). These cases plainly do not conflict with the Virginia courts’ decision in this case, which involves exclusively child pornography. Decisions involving obscenity cannot be relied on to demonstrate a split of authority about child pornography, which is subject to

entirely different First Amendment considerations. *See Ferber*, 458 U.S. at 761-64.⁹

The child pornography cases on which Coleman does rely do not demonstrate a divide in how courts are applying the independent-review doctrine. A close examination of these authorities demonstrates little, if any, disagreement among the States about how to review child pornography convictions on appeal.

Coleman suggests that New Mexico does not independently review child pornography cases on appeal. Pet. 15. To reach that conclusion, however, he misconstrues *State v. Myers*, 207 P.3d 1105 (N.M. 2009). Although the court did not independently review the defendant's conviction in that case, the court plainly explained why it did not undertake that review. Like Coleman, the defendant in *Myers* “[did] not claim that the images [were] protected by the First Amendment of the federal constitution.” *Id.* at 1115. In the absence of a First Amendment challenge, the New Mexico court applied a traditional sufficiency-of-the-evidence

⁹ Coleman contends that Alabama does not apply the independent-review doctrine in child pornography cases. Pet. 15. But both of the decisions Coleman cites—*Lanham v. State*, 888 So. 2d 1283 (Ala. Crim. App. 2004), and *McFadden v. State*, 67 So. 3d 169 (Ala. Crim. App. 2010)—are not from the State's highest court and cannot form the basis for a split of authority under Rule 10. Moreover, *Lanham* addresses obscenity, which is not required for child pornography. *See* 888 So. 2d at 1287. And *McFadden* did apply de novo review when a defendant argued that his “collages or montages” of child pornography were protected under the First Amendment. 67 So. 3d at 179.

standard of review, *id.* at 1115-17, which is the same approach taken by the Virginia courts in this case.

Commonwealth v. Rex, 11 N.E.3d 1060 (Mass. 2014), is not inconsistent with the review undertaken by New Mexico and Virginia. In *Rex*, the prosecution appealed after the defendant successfully moved to dismiss the indictments on the basis that the images were protected under the First Amendment. 11 N.E.3d at 1063. *Rex* applied de novo review to ensure that the First Amendment had not been infringed. *Id.* at 1066-67. The decision therefore highlights the critical fact in this case: Coleman did not move to dismiss the indictments on First Amendment grounds, even though he could have made such a motion under Virginia law. See Va. Code Ann. § 19.2-266.2(D) (2015) (a motion to dismiss an indictment as unconstitutional may be raised before trial). When a defendant fails to raise a First Amendment defense, courts are not required to undertake independent appellate review of an ordinary sufficiency-of-the-evidence challenge.¹⁰

* * *

In sum, Coleman has not identified any split of authority that is applicable in this case, where he failed

¹⁰ *State v. Whited*, 506 S.W.3d 416 (Tenn. 2016), also is entirely consistent with the Virginia courts' decision in this case. In *Whited*, the defendant presented a legal argument about whether "the depictions in the videos are legally insufficient to support a finding that the minors were engaged in a 'lascivious exhibition' within the meaning of the Tennessee statute." *Id.* at 427. The court applied de novo review to that legal question, but viewed "the evidence in a light most favorable to the verdict." *Id.*

to raise a First Amendment challenge to his conviction for distributing child pornography. Although there is some disagreement in the federal courts about when independent appellate review is required, this case does not implicate that limited split of authority. Given “the absence of a pronounced conflict,” this Court “should not rush to answer a novel question.” *Spears v. United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting from summary reversal).



CONCLUSION

The petition for a writ of certiorari should be denied.

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