No. ____

IN THE SUPREME COURT OF THE UNITED STATES

SARAH MELISA COX, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

A panel of the Ninth Circuit Court of Appeals held that a one-to-one communication can satisfy the requirement in 18 U.S.C. § 2251(d)(1)(A) that it is illegal to give a "notice" to make, print or publish child pornography. *United States v. Sarah Melisa Cox*, 963 F.3d 915 (9th Cir. June 6, 2020). The court chose not to follow the decision by a panel in the Eleventh Circuit Court of Appeals in *United States v. Caniff*, 955 F.3d 1833 (11th Cir. April 9, 2020) (*Caniff II*) that giving notice required more than a one-to-one communication. The panel in *Caniff II* reversed its earlier decision that an exchange from one individual to another, was sufficient for conviction. *United States v. Caniff*, 916 F.3d 929 (11th Cir. 2019) (*Caniff I.*)

This case, therefore, presents the following question: whether a communication between just two individuals is sufficient contact to satisfy the requirement of giving notice to make, print or publish the distribution of child pornography.

PARTIES TO THE PROCEEDING

Petitioner is Sarah Melisa Cox, who was the appellant in the court of appeals. Respondent is the United States of America, which is the appellee in the court of appeals.

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DECISIONS BELOW

The opinions below are reported at *United States v. Sarah Melisa Cox*, 963 F.3d 915 (9th Cir. June 6, 2020) and *United States v. Caniff*, 955 F.3d 1833 (11th Cir. April 9, 2020) (*Caniff II*), which superseded *United States v. Caniff*, 916 F.3d 929 (11th Cir. 2019) (*Caniff I*).

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on June 26, 2020. A petition for rehearing was denied on September 9, 2020. (A-1) This petition is timely under Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

The relevant statutory provisions are 18 U.S.C. §2251(d)(1):

> (d)(1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering—
>
> > (A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct;

shall be punished as provided under subsection (e).

(2) The circumstances referred to in paragraph (1) is that —

(A) such person knows or has reason to know that such notice . . . will be transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer . . .

* * *

(e) Any individual who violates, or attempts or conspires to violate, this section shall be . . . imprisoned not less than 15 years nor more than 30 years . . .

STATEMENT OF THE CASE

1. Overview

From November 22 through December 28, 2015, two people exchanged dozens of highly salacious messages and attachments pertaining to and disclosing child pornography. They sent and received these messages through a Kik Messenger application, a mobile messaging service that can transmit and receive messages, photos and videos, among other materials. In one instance, the Defendant, Sarah Cox, known as

"JadeJeckel" in the messaging exchanges, sent a message to the other person, Richard Hennis, known as "funguy4u2use" ("Funguy"), referencing a Dropbox location containing twenty-four videos of child pornography. She followed this communication with the messages "Goodies for daddy" and "Now find mommy some?" Cox did not send the Dropbox location to anyone else and did not direct, request or otherwise indicate to Hennis that he should do the same. No one else participated in any of the scores of messages that preceded or followed these exchanges, and neither Cox nor Hennis forwarded any of the messages. Thus, her conviction for knowingly making, printing or publishing a notice or advertisement seeking to distribute a visual depiction of a minor engaging in a sexual explicit act was limited to a single exchange of child pornography between two persons without any request for distribution beyond their limited connection.

2. <u>The Charges and Evidence at Trial</u>

On July 18, 2017, the government obtained a superseding indictment, which included three counts charging Cox with receiving child pornography, one count of notice and advertising child pornography and one count of distributing child pornography. Count 4, the notice and

advertising charge, alleged violations occurring on or between December 3 and December 4, 2015. (CR 50; ER250.) At trial, the government dropped the advertisement component of the charge and proceeded on the notice provision only. It is the notice charge that forms the basis for this petition.

Thus, Count 4 alleged that Cox ". . . knowingly made, printed, published, or caused to be made, printed or published, a notice . . . seeking to receive, exchange, produce, display, distribute or reproduce a visual depiction the production of which involved the use of a minor engaging in sexually explicit conduct and which depiction was of such conduct and the defendant knew or had reason to know that such notice and advertisement would be transported using . . . or . . . affecting interstate commerce by any means including by computer . . ." 18 U.S.C. § 2251(d)(1)(A) and 2256.

The relevant exchanges and attachments between Hennis and Cox started on December 4, 2015 at 3:08 a.m. when Cox sent a message disclosing a Dropbox link to Hennis. The link contained several videos of child pornography. Portions of three of these videos were admitted into evidence. (*Id.*, p. 174, l. 12 to p. 178, l. 17; Tr. Exh. 18, MK 6458 at 79/89: Tr. Exhs. 4-6.) Accompanying the link were two messages: "Goodies for

daddy" and "Now find mommy some?" None of these exchanges were sent to or were intended to be exchanged with other individuals, groups, chat rooms or shared entities.

There were other exchanges between Cox and Hennis on December 3, 2015, starting at 6:12 p.m., also pertaining to a Dropbox link. Thus, Cox sent another link to Hennis and asked:

JadeJeckel: "Do you have one? I do, so you should set one up so you can keep all the goodies you find." (Tr. Exh. 18, MKs 6400, 6401 at p. 76/89 .)

Hennis: "you find." (Tr. Exh. 18, MK 6402 at p. 76/89.)

JadeJeckel: "I did ☺." (Tr. Exh. 18, MK 6404 at p. 76/89.)

Hennis: "I think after a Db account is so old, it doesn't allow the link to work. I've tried several times with others and it won't work. As vice versa." (Tr. Exh. 18, MK 6405 at p. 77/89.)

JadeJeckel: "Did the one I give you work? Worked good for me this morning." (Tr. Exh. 18, MK 6407 at p. 77/89.)

Hennis: "Yes." (Tr. Exh. 18, MK 6408 at p. 77/89.)

JadeJeckel: "Excellent ☺ I like having someone to share with." (Tr. Exh. 18, MK 6409 at p. 77/89.)

* * *

It is clear from other sets of messages and the government's extensive investigation that the intended use of these communications was between just Cox and Hennis. It is particularly evidenced by Cox's statement to Hennis: "Excellent ☺ I love having someone to share with." "Someone" in the context of this case was not more than one and sharing did not contemplate giving notice.

3. <u>Arguments on Appeal</u>

On appeal to the Ninth Circuit, the petitioner acknowledged that what constitutes "notice" for a violation of 18 U.S.C. § 2251(d)(1) typically is a factual matter left to the jury. (Ans. Br. at 31.) However, relying on the dissent in *Caniff I*, which at the time was the only appellate decision addressing a one-to-one exchange in the context of this case, Cox maintained that the one-to-one exchange on December 4, 2015, from her to Hennis could not have constituted "notice." In *Caniff,* the evidence disclosed that the defendant sent several text messages requesting

sexually explicit photos to an undercover agent posing as a 13-year old girl. No one else was involved in the exchanges. In basing its review on the several dictionary definitions of notice, the Eleventh Circuit held that an individually directed text message could constitute notice for the purpose of Section 2251(d)(1). *United States v. Caniff*, 916 F.3d 929, 936 (11th Cir. 2019). The dissent disagreed.

In conducting an exhaustive review of the definitions of "notice," the dissent gave four reasons why the extent - at best - of "notice's" reach could not definitively include one-to-one exchanges.

> – First, people simply would not use the term notice to include the event of one person sending a text message to another. (*Id.*, 941-42.)
>
> – Second, when viewed in juxtaposition to the common understanding of words describing prohibited actions, such as "make," "publish," or "print," the act of giving notice contemplates more than a one-on-one exchange. (*Id.*, 932-34.)
>
> – Third, when the term notice is viewed where it appears in Section 2251(d)(1), alongside of its companion advertisement, it takes on the concept of some form of public communication.
>
> – Fourth, the definition of notice in many dictionaries is comparable to the more public concept of advertisement. An example of "notice" according to Webster is "[a] written or printed sign ... communicating information or warning"—as in "to put a notice on a door," which conveys the idea that the public is informed. Similarly in the Oxford English Dictionary,

> notice could be "a displayed sign or placard giving news or information." Black's Dictionary as well defines notice as "[a] written or printed announcement." (*Id.*, 934-36.)

Thus, the answer to the coverage of "notice" is not so easily disposed of by consulting one's dictionary of choice. Consequently, the dissent would have reversed Caniff's conviction under the doctrine of lenity.

The government claimed that the message "goodies for daddy" sent from Cox just after she conveyed the link to Hennis elevated the notice from its lone recipient to others unknown. (Ans. Br. at 33.) However, Cox maintained just the opposite: that in her reference to "daddy" she continued to limit the exchange to only one person, Hennis. Indeed, just a few messages later she told Hennis that she "like[d] having someone to share with," indicating Hennis and no one else.

The government also pointed to the dictionary definitions of "notice" (Ans. Br. at 33), but as noted above, the dictionary is not dispositive, and the government recognized as much. (Ans. Br. at 34, quoting *United States v. Peterson*, 2015 WL 13657215, *6 (C.D. Cal. 2015)) ("the related but independent term 'notice' is not primarily defined, even in dictionaries, by reference to the audience.") The court in *Peterson* did state that whether a communication amounts to "advertising" must be determined in context.

(*Id.*, *7.) The same contextual application should apply to notice. Here, the contextual setting is simply Cox referring Hennis to a link. The making, printing or publishing of visual depictions of minors engaging in sexually explicit conduct has a far broader reach, seemingly designed to present a more expansive spectrum of communication than from one individual to another.

Cases cited by the government as to the meaning of "notice" did not hold that a one-to-one exchange was sufficient. For example, in *United States v. Gries*, 877 F.3d 255, 260 (7th Cir. 2017), the Seventh Circuit viewed Section 2251(d)(1) in the context of exchanges in a chat room. *Gries* determined that "notice" was not limited to the dissemination to the general public; it also considered that the number of participants was relevant. (*Id.*, at 260, citing *United States v. Grovo*, 826 F.3d 1207, 1218-19 (9th Cir. 2016) ["notice" occurred where posts among a closed community of 40 to 45 individuals on an internet message board occurred]; *United States v. Franklin*, 785 F.3d 1365, 1369-70 (10th Cir. 2015) ["notice" consisted of sharing files in a closed, online network of "friends"], *United States v. Staples*, 2019 WL 1354144 (M.D.Pa 2019) ["notice" occurred in video chatroom].)

4. The Ninth Circuit Panel's Decision

Nonetheless, the Ninth Circuit Panel held that a one-to-one communication could satisfy the "notice" requirement of Section 2251(d)(1)(A), rejecting Cox's argument that the "notice" component of the statute was too vague to apply to her single message to Hennis. The Panel relied on the following factual basis for its decision:

> On November 22, 2015, Defendant Cox and Hennis reinitiated their Kik conversation. Cox and Hennis quickly resumed discussing their child sexual interest. Minutes after reconnecting in November 2015, Cox asked Hennis to send her his "nastiest favorite" "naughty" videos. In response, Hennis sent Cox eleven separate child photography files.
>
> For the next several weeks, Defendant Cox and Hennis continued to discuss their child sexual interest. Central to the charge for making a notice offering child pornography, on December 4, 2015, Defendant Cox used Kik to send Hennis two Dropbox links, calling them "[g]oodies for daddy." One of the Dropbox accounts contained child pornography videos. On December 23, 2015, Hennis sent Cox three child pornography

images. Hennis and Cox ended their text conversation on January 18, 2016. (Dkt. 54-1, pp. 4-5.)

The Panel based its decision on what it termed the "plain language" of "notice" in Section 2251(d)(1)(A), its positioning with other terms in the statute, and Congress' broad-based intention to legislate against child pornography. Yet, its own analysis of the coverage of notice underscores the very flaws in its conclusion that notice covers a single person to a single person exchange.

a. Dictionary Definitions of "Notice"

The Panel determined that because "notice" was not defined in the statute, it should be viewed in its ordinary meaning, which required applying dictionary definitions. However, in consulting various dictionaries the Panel concluded that there were several definitions of "notice" offering little guidance as to the extent of its coverage when applied to the acts of "mak[ing]," "print[ing]" or "publish[ing]." For example, one edition of *Merriam-Webster.com* gave four different definitions, none of which "implicate audience size." (Dkt. 54-1, pp. 9-10.)

Thus, the average person on the street would find no guidance in a published collection of words and their meaning.

b. Relevant Case Authority

The Panel also referred to decisions in two other circuits, which it stated "have reached similar conclusions" concerning whether Section 2251(d)(1)(A) excludes communications to groups having a limited number." It determined that "[i]n view of these dictionary definitions, the ordinary meaning of 'notice' does not exclude one-to-one communications." (*Id.*, p. 10, n. 16, referring to *United States v. Gries*, 877 F.3d 255, 260 (7th Cir. 2017) and *United States v. Franklin*, 785 F.3d 1365, 1368 (10th Cir. 2015)). Both of these decisions, however, concluded only that "notice" does not require a public dissemination; disclosure to intended groups is sufficient. Neither opinion dealt with the question here: whether notice included one-to-one communication.

Thus, case authority for other circuits is not dispositive and offers no guidance for this matter.

c. Notice Modified by Surrounding Terms

The Panel also examined how terms surrounding "notice" impacted its coverage. For example, the word "any," which preceded "notice," could

be read expansively, covering any type communication, including one-to-one. Moreover, the language of Section 2251(d)(1)(A) did not specifically limit giving "notice" to the public or a large group of individuals. On the other hand, to "publish" or "print" a notice did connote a public dissemination (*Id.*, p. 12), but to "make" notice was "quite clearly not limited to public dissemination and can include one-to-one communications that are fairly characterized as 'notices.'" (*Id.*, pp. 11-12.) The Panel did not, however, explain just how "making" notice can "clearly" include one-to-one contacts.

As noted, the three-judge panel in *Caniff* did not find the reliance on terms surrounding "notice" to be at all helpful.

d. Statutory Structure: Object & Policy

The Panel also addressed whether excluding one-to-one communication would frustrate Congress' purpose in regulating child pornography. The Panel noted that the expansive nature of laws covering child pornography in general dictated that "notice" should be broadly construed, to include an exchange between two individuals. (*Id.*, p. 13.)

This conclusion fails to consider the extensive coverage by Congress of other acts between two individuals involving child pornography, such as

transporting, shipping, receiving, distributing or even the possession of such materials. *See,* 18 U.S.C. §§ 2252(a)(1), (a)(2) and (a)(4)(B).

e. The Impact of the Eleventh Circuit Opinion in *Caniff II*

The Panel did not directly address Cox's argument that "notice" is unconstitutionally vague, since it concluded that there was sufficient evidence for a conviction. However, it did consider the decision by the Eleventh Circuit in *Caniff II*. In distinguishing *Caniff II* from *Cox*, the Panel recited the following evidence and reached the following conclusion:

> [T]he 32-year old defendant engaged in a text-message conversation with an FBI agent who posed as a 13-year-old girl for sexually explicit pictures of herself. For this conduct, the defendant was charged and convicted of 'mak[ing]' a 'notice' '*seeking*' to '*receive*' child pornography in violation of § 2251(d)(1)(A). (In contrast, Defendant Cox was charged with 'mak[ing]' a 'notice' 'offering' to 'display, distribute, or reproduce' child pornography)" (italics supplied in the original). (*Id.*, pp. 14-16.)

The Panel did not explain why making notice has broader coverage to include one-to-one communication when it is sent than when received.

In applying the rules of statutory interpretation, the Eleventh Circuit had "serious doubts" whether the charged conduct in that case applied. (*Caniff II*, 955 F.3d at 1189.) In resolving the confusion over whether a one-to-one exchange applied, the court determined that the rule of *lenity* should govern. Here, the Panel did not address the rule of lenity.

5. The Petition for Rehearing *En Banc*

In her petition for rehearing *en banc*, Cox argued that there was no distinguishable difference in the facts between her case and *Caniff*. The *Caniff II* court posed the issue this way: "The more difficult question, we think – and the question to which our lion's share of our analysis is devoted – is whether the ordinary meaning of 'notice' can fairly be understood to encompass private, person-to-person text messages." (*Caniff II*, at 1188.) It determined that due to the confusion in the meaning and application of relevant terms a one-to-one exchange did not constitute notice for the purpose of Section 2251(d)(1)(A).

a. The Dictionary Is No Help

Like the Panel here, *Caniff II* started its analysis by consulting the dictionary. The court found that some definitions were broad enough to cover one-to-one exchanges. On the other hand, it came across four others, found in such sources as *Webster's Second New International* (1944), *Webster's Third New International* (1993), *New Oxford American Dictionary* (3d ed. 2010) and *Black's Law Dictionary* (10th ed. 2009), which provided that notice referred only to public communications. (*Id.*, at 1188-89.) The court concluded that definitions showed only that either coverage is plausible.

b. Statutory Construction Is Not Conclusive

Just as the Panel did here, *Caniff II* also turned to the statute's other provisions in examining the context of "mak[ing]", "print[ing]", or "publish[ing]" any notice seeking or offering child pornography. There were two reasons why the court concluded that " . . . we are reluctant to read the term 'make[]' – and with it the phrase 'make[] . . . any notice' – for all it might possibly be worth." First, the phrase "make any notice" did not ordinarily in its usual sense convey to the average person that a one-to-one communication was covered. Second, the words "print" and "publish,"

which follow immediately after "make," "clearly contemplate only public communication" [underscoring in the original] and thus also limit the coverage of "making" a notice to a public exchange. (*Id.*, at 1189-90.)

Moreover, noted the court, applying the rule of statutory construction that words grouped together should be given a similar meaning would require that notice be limited to public coverage as is clearly contemplated by the neighboring term "advertisement." The court concluded, however, that this tenet of construction may be of limited application where there are less than three similarly situated terms, which is the case here. (*Id.*, 1190-91, citations omitted.)

c. Sufficiency of the Evidence Is Not the Issue

The concurring judge in *Caniff II* (who had dissented in *Caniff I*) decided in the previous case that as a matter of law that Section 2251(d)(1) did not cover one-on-one communications: "The unfortunate bottom line for me is this: No ordinary speaker of American English would describe a person-to-person text message – whether requesting milk from the grocery or, far more disgustingly, pornographic images from a teenager – as the 'mak[ing]' of a 'notice.' And the context in which those terms are used in § 2251(d)(1) – surrounded as they are by words like 'print[ ],' 'publish[ ],'

and 'advertisement' – confirms that the proscription on 'mak[ing]' a 'notice' does not reach Caniff's conduct." Rather, he perceived the majority opinion as a "purposive" decision – not textual. (*Caniff I* at 946.)

d. Congressional Coverage of Pornography Is Broad

Like the majority in *Caniff I*, the Panel here appeared to have been headed towards a goal-directed outcome: extend the coverage of Section 2251(d)(1) to Cox's message to Hennis in order to combat child pornography. *Caniff II* addressed this very concern, noting that 18 U.S.C. § 2252A(a)(2), which prohibits the knowing receipt of any child pornography sent through interstate commerce by any means including a computer, is punishable by a term of 5 to 40 years. (*Id.*, p. 1192.) A similarly stiff penalty applies to the sending of child pornography under similar circumstances. *See*, 18 U.S.C. § 2252A(a)(1).

e. The Rule of Lenity Applies

Caniff II could not "neatly resolve" the scope of notice by resorting to the dictionary or statutory construction methods. Thus, "[t]o resolve this seemingly intractable ambiguity, therefore, we turn to a traditional interpretive tiebreaker: the rule of lenity," which applies when after "the applicable semantic and contextual canons of interpretation" have been

considered and thus 'seiz[ed] everything from which aid can be derived' *Ocasio v. United States*, ___ U.S. ___, 136 S. Ct. 1423, 1434 n. 8, 194 L.Ed.2d 520 (2016) (internal quotation marks omitted), there is still "meaningful doubt" about the application of a criminal statute to a defendant's conduct, the doubt should be resolved in the defendant's favor. (*Id.*, p. 1191.) (*See also*, *United States v. Nosal*, 676 F.3d 854, 863 (9th Cir. 2012)) ("The rule of lenity requires 'penal laws to be construed strictly' [citation omitted] '[w]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'") (citation omitted.) The Eleventh Circuit applied the rule to Caniff's conduct and overturned his conviction on the charge of making notice to receive child pornography.

The Appellant maintained that the resolution of the issue is that not only as a matter of due process would a one-to-one exchange not constitute sufficient "notice," but given the lack of certainty that arises from using definitions of words and phrases and statutory construction principles the rule of lenity must apply.

Nonetheless, the Ninth Circuit rejected the Appellant's petition for rehearing *en banc*. The *Caniff II* opinion is, therefore, in direct conflict with the Panel's decision.

REASONS FOR GRANTING REVIEW

Clearly, there are diametrically different holdings in two Circuits on the same issue: whether the "notice" provision in 18 U.S.C. § 2251(d)(1)(A) encompasses one-to-one communication. Thus, there is a conflict between Circuits as to the extent of communication for a conviction based on notice. This Court grants certiorari to resolve differences of opinion among the Circuit Courts of Appeal. *Moskal v. United States*, 498 U.S. 103, 106 (1990).

The Ninth Circuit attempted to distinguish the fact pattern in *Cox* from that in *Caniff II*, but there is no meaningful difference in the fundamental events in the two cases. In *Cox*, on December 4, 2015, the Defendant sent a Dropbox link to Hennis disclosing where he could find and view several videos of child pornography. She followed that up in the very next exchange with Hennis with "Goodies for daddy?" The difference between her actions and Caniff's is that she sent a link to videos of child pornography, whereas Caniff requested photographs of the same. The

similarities, however, are compelling. In both cases, there were just two individuals involved. In both cases, a messaging system was used. In neither case was there any mention of sharing any of the materials with others. In neither case was there a group chat link or message board that others could access.

That the charge in Cox was making a notice to display, distribute or reproduce child pornography as opposed to making a notice seeking to receive it does not explain how confusion over the dictionaries' multiple definitions and the lack of guidance from the rules of statutory construction make it any more likely that a lay person could comprehend whether a one-to-one exchange constituted giving notice of the distribution of child pornography.

Where there is doubt as to what conduct Congress intended to prohibit, the rule of lenity applies, so that criminal statutes must be closely, strictly construed, thereby resolving an ambiguously worded statute to apply only to conduct clearly covered by its terms. *United States v. Lanier*, 520 U.S. 259, 266 (1997) ("First, the vagueness doctrine bars enforcement of 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily

guess at its meaning and differ as to its application.' [citations omitted]. Second, as a sort of 'junior version of the vagueness doctrine,' [citation omitted] the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered [further citation omitted]. Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute [citations omitted], due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope [citations omitted].") *See also, United States v. Santos*, 553 U.S. 507, 514 (2008) ("Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. [citations omitted] This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.") There

is doubt here as to what "notice" covers, which is to be resolved in favor of the petitioner.

This is not to argue that the notice provision should be stricken from the statute, leaving advertisement as the only conduct to be condemned by making, publishing or printing seeking to receive or distribute child pornography. Giving notice certainly covers by any concept of the word dissemination to a group, as seemingly addressed if not actually decided by cases such as *Grovo*, *Gries*, *Franklin* and *Staples.* Reducing the coverage of a particular type of activity without eliminating the activity altogether is an outcome recognized and adopted by the Court. *Skilling v. United States*, 561 U.S. 358, 408-09 (2010) (where the Court ruled that in order to preserve the scope of the mail fraud statute, conduct required by the "honest services" form of activity engrafted onto it by *McNalley v. United States*, 487 U.S. 350 (1987), was too vague a criterion to be criminalized; instead, the statute would still cover bribery and kickbacks, just as it had before *McNalley*.)

Finally, the observation offered by the Panel that Congress intended to have robust enforcement of laws addressing child pornography is no reason to read coverage into a vague statute when applied to conduct not

clearly covered. *Santos*, 553 U S. at 514 (" . . . the Government contends that the interpretation should nonetheless be rejected because it fails to give the federal money-laundering statute its proper scope and because it hinders effective enforcement of the law. Neither contention overcomes the rule of lenity.")

CONCLUSION

The Petitioner respectfully submits that the split in Circuits over the issue of just what "notice" covers is critical when it comes to a one-to-one exchange. This is not to blunt the aggressive enforcement of child pornography laws. It is, however, to question the wholesale application of the term "notice" to a place where no one could say for sure whether it applies: that is, to a one-to-one exchange as a prosecutable act under Section 2251(d)(1)(A).

Respectfully submitted,

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December 15, 2020

CERTIFICATE OF SERVICE

I, David Eisenberg, hereby certify that all parties required to be served with the Petition for a Writ of Certiorari, Appendix to Petition for a Writ of Certiorari, and Motion for Leave to Proceed *In Forma Pauperis* filed herewith have been served as follows:

In accordance with Supreme Court Rule 12.2 and this Court's Orders dated March 19, 2020, and April 15, 2020, I caused a single paper copy of each document to be sent via Federal Express priority overnight delivery service to Clerk, Supreme Court of the United States, 1 First Street, NE, Washington, D.C., 20543, on December 15, 2020; and

On the same date, with Respondents' consent, I served electronic copies of these documents on Assistant United States Attorney Krissa Lanham, krissa.lanham@usdoj.gov; and

On the same date, with Assistant Solicitor General Christopher Michel's consent, I served electronic copies of these documents upon the Solicitor General of the United States, supremectbriefs@usdoj.gov.

/s/David Eisenberg
David Eisenberg