No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

ROBERT ANDREW RILEY – PETIITIONER

v.

UNITED STATES OF AMERICA – RESPONDENT

_____

PETITION FOR WRIT OF CERTIORARI

_____

FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

ED STAPLETON
Attorneys for Appellant
613 E. Saint Charles
Brownsville, Texas 78520
Telephone: (956) 504-0882

QUESTIONS PRESENTED

1. Because child pornography is not one of the federal crimes enumerated by the constitution, the trial court erred by failing to declare unconstitutional the statutes under which Mr. Riley was prosecuted. (The Fifth Circuit rejected this argument in *United States v. Cleveland*, 951 F. Supp. 1249 (E.D. La. 1997. We ask this Court to reconsider and reverse this ruling.)

2. Because a prosecution for child pornography is beyond the scope of the Commerce Clause, the trial court erred by failing to declare the statute unconstitutional. (The Fifth Circuit rejected this argument in *United States v. Kallestad,* 236 F.3d 225, 228 (5th Cir. 2000). We ask this Court to reconsider and reverse this ruling.)

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. Robert Andrew Riley, Defendant-Appellant.

2. United States of America, Plaintiff-Appellee.

3. Counsel for Plaintiff-Appellee:
Assistant United States Attorney Ana Cecilia Cano (in district court), and United States Attorney Jennifer B. Lowery, Carman Castillo Mitchell; and Assistant United States Attorneys Paula C. Offenhauser (on appeal).

4. Counsel for Defendant-Appellant:
Assistant Federal Public Defender Hector Garza (in district court), and Ed Stapleton (on appeal).

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

Cases

Statutes

Other Authorities

Constitutional Provisions

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to this petition and is unpublished.

The opinion of the United States District Court appears at Appendix B to this petition and is unpublished.

JUISDICTION

The date on which the United States Court of Appeals decided Mr. Riley's case was March 15, 2022.

A petition for rehearing was not urged.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves issues pursuant to 1st Amendment, 5th Amendment and 18 U.S.C. 2252A.

STATEMENTOF THE CASE

A. The offenses and plea.

Mr. Riley, a United States citizen, was charged by indictment on May 1, 2018, in Brownsville, Texas. Mr. Riley was charged with the following:

> **Count 1:** Receipt of Child Pornography, in violation of 18 U.S.C. §§ 2252A(a)(2)(B) and 2252A(b)(1),
>
> **Count 2**: Possession of Child Pornography, in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2252A(b)(2)
>
> **Count 3:** Distribution of Child Pornography, in violation OF 18 U.S.C. §§ 2252A(a)(2) and 2252A(b)(1)(3)

On May 10, 2018, Mr. Riley entered his plea of not guilty. On June 25, 2019, Mr. Riley entered a plea of guilty to Counts 1 and 2. On August 26, 2021, a sentencing hearing before the judge was held.

B. Statement of Facts

On January 18, 2018, Homeland Security agents traced a BitTorrent network to Mr. Riley's address on South Padre Island. A search warrant was executed and desktop computer, laptop computer, external drives, thumb drives, an SD and an iPhone along with used female undergarments that were mailed to Mr. Riley were seized. Mr. Riley was arrested and during questioning admitted that the agents would find photographs and videos of child pornography on his computer, external drives, thumb drive and iPhone. He stated he installed BitTorrent or a similar program to download child pornography. He stated that he was unaware that the

BitTorrent program shared child pornography, but he admitted that he would share child pornography on an online forum. He also put child pornography in his Dropbox account. He was held accountable for 479,903 images of child pornography, including bondage, sadism, and other depictions of violence. He facilitated access to child pornography so he could obtain more of it from the file sharing network. Except for paying for used panties, there is no evidence that any money was involved in his transactions. No evidence exists that he purchased or sold pornography. He was not in the business of child pornography but supported himself with employment at the Origins Recovery Center.

C. Sentencing

On August 26, 2021, Mr. Riley was sentenced to 168 months for counts 1 and 2.

D. Appeal

Mr. Riley timely filed his appeal to the United States Court of Appeals for the Fifth Circuit and affirmed the District Courts judgment.

REASONS FOR GRANTING THE PETITION

1. Because child pornography is not one of the federal crimes enumerated by the constitution, the trial court erred by failing to declare unconstitutional the statute under which Mr. Riley was prosecuted. (The Fifth Circuit rejected this argument in *United States v. Cleveland*, 951 F. Supp. 1249 (E.D. La. 1997. We ask this Court to reconsider and reverse this ruling.)

"We are all textualists now." Justice Elena Kagan

The federal pornography statutes are beyond the scope of federal authority because the crime of pornography is not one of the enumerated specific crimes over which the Constitution gives the federal government authority: counterfeiting, piracy, offenses against the law of nations, and treason. Pornography is a matter for the states to criminalize and punish.

The Constitution gave Congress authority over enumerated crimes: counterfeiting, piracy and felonies on the high seas, and treason. U.S. Const. art. I, § 8, cl. 6, 10; *id*. art. III, § 3, cl. 2. It is a fundamental principle of constitutional law that the federal courts are courts of limited jurisdiction, and that federal criminal jurisdiction is limited to cases arising under the United States Constitution or federal law. *See* U.S. Const. Art III, § 2. The Constitution specifically enumerates certain criminal activities. These enumerated crimes are counterfeiting, U.S. Const. Art I § 8, cl. 6; piracy on the high seas, U.S. Const. Art I § 8, cl. 10; treason, U.S. Const. Art III § 3, cl. 2; offenses against the law of nations, U.S. Const. Art III, cl. 6; and offenses supporting impeachment, U.S. Const. Art I § 3, cls. 6 and 7. *United States v. Cleveland*, 951 F. Supp. 1249, 1251 (E.D. La. 1997). In *Cleveland,* this court rejected an argument that gambling should not be a federal crime, because it was not a crime enumerated in the constitution.

Under the doctrine of *expressio unius est exclusio alterius*, (Expression of one thing is the exclusion of another), we argue that, by granting Congress the power to

punish these matters, the Framers intended to establish the whole of Congress's power to define crimes. As Chief Justice Marshall asked in *McCulloch v. Maryland*: "Whence arises the power to punish, in cases not prescribed by the constitution?" *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 416 (1819). He answered: "The power of punishment appertains to sovereignty, and may be exercised, whenever the sovereign has a right to act, as incidental to his constitutional powers." *Id*. At 418.

Expressio unius is an "interpretive canon" that instructs that when a legal instrument grants a power and specifies the mode of its implementation, interpreters should treat the specified mode as exclusive. The maxim reflects the commonsense idea that a lawmaker would not take pains to prescribe particular means of carrying out a power if other methods would do. *ARTICLE: THE PROTEAN TAKE CARE CLAUSE*, 164 U. Pa. L. Rev. 1835, 1859; See Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1243 (1995) (reasoning that the *expressio unius* canon provides an appropriate framework for construing "provisions of the Constitution that both create entities and describe the powers those entities may wield").

Cleveland failed to exclude other crimes based on this doctrine, but we ask this court to do so now. Both the Supreme Court and the Fifth Circuit have previously applied this canon in other contexts. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 168 (1993); *Melendez-Diaz*, 557 U.S.

305 , 319 (2009); *Cobb v. Delta Exports, Inc.,* 186 F.3d 675, 677 n.2 (5th Cir. 1999) (Smith, J.); *Drinkard v. Johnson*, 97 F.3d 751, 773 (5th Cir. 1996) (explaining that an instruction telling the jury what it may consider necessarily implies what the jury may not consider; discussing the maxim "*expressio unius est exclusio alterius"*);

No pleading or proof have been offered against Mr. Riley that he has violated any enumerated crimes or provisions of the Constitution. Put simply, much if not all of Art. I, § 8 (including portions of the Commerce Clause itself), would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce. An interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct. We urge the indictment failed to state a federal claim and that the charges against him should be dismissed.

2. Because a prosecution for child pornography is beyond the scope of the Commerce Clause, the trial court erred by failing to declare the statute unconstitutional. (The Fifth Circuit rejected this argument in *United States v. Kallestad*, 236 F.3d 225, 228 (5th Cir. 2000). We ask this Court to reconsider and reverse this ruling.)

The federal pornography statutes are not "necessary and proper for carrying into Execution" the enumerated power of the Commerce Clause.

Mr. Riley urges that is prosecution is an exercise of federal jurisdiction beyond that permitted by the Commerce Clause. The United States Constitution, Article 1, Section 8, Clause 3, provides: "To regulate Commerce with foreign Nations, and among the foreign States, and with the Indian Tribes." The power to regulate

interstate commerce was defined as also regulating interstate navigation in *Gibbons v. Ogden*, 22 U.S. (9Wheat.) (1824). Then, in *United States v. Lopez*, 514 U.S. 549 (1995) the Supreme Court held that under the Commerce clause a law was unconstitutional if the crime alleged does not have a substantial effect on interstate commerce.

For this point of error to prevail, we must contend with *United States v. Kallestad,* 236 F.3d 225, 228 (5th Cir. 2000). Interpreting *United States v. Lopez*, 514 U.S. 549 (1995), Justices Higginbotham and Reynaldo Garza found:

1. There are three categories of activity Congress may regulate under the Commerce Clause.
2. The third category should be analyzed on (1) whether the statute regulates "economic activity," (2) whether the statute has a jurisdictional element that restricts its application to activities with an explicit connection with or effect on interstate commerce, (3) whether congressional findings support a judgment of substantial effect and (4) whether the act committed lessens that effect on interstate commerce.
3. It is economic activity, even if local. Mr. Kallestad did not intend to sell his porn, but neither did Mr. Filburn ever intend to sell his wheat. Since child pornography is traded in an interstate market, it meets the first Lopez factor. Morrison's rape and Lopez' gun in a school zone were different.
4. The child pornography statute has a jurisdictional hook—mailed, shipped, or transported or made out of materials that were.

5. Congress made findings about the size of the industry and harm to children—a growing predatory business.

6. A national problem may not involve a national market—homicide is a national problem, but local murder is not subject to federal regulation.

7. National supply and demand of a fungible good must allow reaching local possession, but Congress must have been rational in its finding.

In dissent Justice Jolly finds:

1. Simple non-commercial possession of self-generated child pornography does not substantially impact interstate commerce.

2. *United States v. Morrison* requires the intrastate activity to be some sort of economic endeavor and Mr. Kallestad was not engaged in an "economic endeavor."

3. The majority's application of this act to Mr. Kallestad embraced the logic the *Morrison* Court eschewed—a reach into local intrastate conduct should not be allowed incident to a congressional effort to regulate a national market.

4. The persuasiveness of *Wickard* is questionable after *Morrison* and *Lopez*—does homegrown wheat really compete with a national market? And will the national market in child pornography really become dulled by familiarity so that Mr. Kallestad's pictures will be demanded?

In the light of recent discussion of the Commerce Clause, we urge that Justice Jolly had the better argument.

The most recent examination by the Fifth Circuit of the Commerce Clause was on November 12, 2021. The Fifth Circuit held that the Commerce Clause did not allow an OSHA mandate that a person "receive a vaccine or undergo testing falls squarely within the States' police power." *BST Holdings, LLC. v. Occupational Safety & Health Admin.* Page 17 (5th Cir. 2021): "Indeed, the courts 'always have rejected readings of the Commerce Clause . . . that would permit Congress to exercise a police power.' *United States v. Lopez,* 514 U.S. 549, 584 (1995) (Thomas, J., concurring). In sum, the Mandate would far exceed current constitutional authority." *BST* at 17.

The Fifth Circuit in *BST* goes beyond the factors considering impact on interstate commerce upon which the *Kallestad* decision is based, and asks the question of whether the proposed federal exercise of power "falls squarely within the States' police power"? *BST* at 16. Yes. Texas has its own laws regulating child pornography. Texas Penal Code Section 43.23. As this court states, people often fail to do things that would be good for them of for society, these failures "can readily have a substantial effect on interstate commerce," but that does not justify this exercise of the police power. Under this police power analysis, regulation of child pornography, *even if it has an effect on interstate commerce*, exceeds constitutional authority.

This court's finding in *BST* follow the reasoning of Justice Thomas notes in his concurring opinion in *Lopez*: "Indeed, if a "substantial effects" test can be appended to the Commerce Clause, why not to every other power of the Federal Government? There is no reason for singling out the Commerce Clause for special treatment.

Accordingly, Congress could regulate all matters that "substantially affect" the Army and Navy, bankruptcies, tax collection, expenditures, and so on. In that case, the Clauses of § 8 all mutually overlap, something we can assume the Founding Fathers never intended. Our construction of the scope of congressional authority has the additional problem of coming close to turning the Tenth Amendment on its head. Our case law could be read to reserve to the United States all powers not expressly prohibited by the Constitution. Taken together, these fundamental textual problems should, at the very least, convince us that the "substantial effects" test should be reexamined." *Lopez* at 589.

BST, by the Fifth Circuit, is consistent with the manner in which the Supreme Court in more recent cases has been interpreting the Commerce Clause:

> Indeed, it seems possible that much of Title 18, among other parts of the U. S. Code, is premised on the Court's incorrect interpretation of the Commerce Clause and is thus an incursion into the States' general criminal jurisdiction and an imposition on the People's liberty.

Gamble v. United States, 139 S. Ct. 1960, 1980 n.1 (2019)

Beyond the trends interpreting the Commerce Clause in the Fifth Circuit and the Supreme Court, some sister circuits have already applied a more limiting scope to the Commerce Clause:

The Sixth, Ninth, and Eleventh Circuits all struck down the federal Child Pornography Statutes as applied to the cases before their courts. *United States v. Corp,* 236 F.3d 325 (6th Cir. 2001); *United States v. McCoy,* 323 F.3d 1114 (9th Cir. 2003); *United States v. Maxwell,* 386 F.3d 1042 (11th Cir. 2004) and *United States v.*

Smith, 402 F.3d 1303 (11th Cir. 2005). However, this "as applied" basis is inappropriate in Commerce Clause litigation. *Gonzales v. Raich*, 545 U.S. 1 (2005).

Cases to Distinguish:

We bring this court's attention to *United States v. Williams,* 553 U.S. 285 (2008) and suggest our argument is not answered by the *Williams* case. In this case the Supreme Court affirmed the constitutionality of solicitation of child pornography when the defendant objected that the statute was overbroad under the First Amendment and impermissibly vague under the Due Process Clause of the Fifth Amendment. However, the theories advanced here are different: the statute being beyond any enumerated powers of Congress, including the Commerce Clause and the Supreme Court in *Williams* did not address these arguments. The 5th Circuit addressed similar First Amendment issues of morphed images in child pornography in *United States v. Mecham,* 950 F.3d 257 (5th Cir. 2020), but again, without considering these enumerated crimes and Commerce Clause arguments.

The Fifth Circuit considered by *per curium* decision an appeal on November 18, 2021, in *United States v. Hawkins*, *unpublished* (5th Cir. 2021). Mr. Hawkins filed a challenge to the factual basis to support a guilty plea. Because the factual basis was foreclosed, this court granted a summary affirmance. This, however, is not the nature of Mr. Riley's appeal.

What about *Stare Decisis*?

Deciding this case, as we have requested would not, it appears to this writer, require this Court to reverse any precedent of U.S. Supreme Court. Perhaps it

requires an acknowledgement that *Wickard v. Filburn,* 317 U.S. 111 (1942) cannot survive the reasoning of *United States v. Lopez.* However, it may require this Court to reject the previous 5th Circuit decisions of *United States v. Cleveland*, and *United States v. Kallestad.* We ask that the court apply the roadmap provided by Justice Kavanaugh for consideration of *stare decisis* when considering Constitutional issues:

> The doctrine of stare decisis does not mean, of course, that the Court should never overrule erroneous precedents. All Justices now on this Court agree that it is sometimes appropriate for the Court to overrule erroneous decisions. Indeed, in just the last few Terms, every current Member of this Court has voted to overrule multiple constitutional precedents. See, e.g., *Knick v. Township of Scott*, 588 U. S.___ (2019); *Franchise Tax Bd. of Cal. v. Hyatt, 587* U. S. ___ (2019); *Janus v. State, County and Municipal Employees*, 585 U. S. ___ (2018); *Hurst v. Florida*, 577 U. S. ___ (2016); *Obergefell v. Hodges*, 576 U. S. 644 (2015); *Johnson v. United States*, 576 U. S. 591 (2015); *Alleyne v. United States*, 570 U. S. 99 (2013); see also *Baude*, Precedent and Discretion, 2020 S. Ct. Rev. 1, 4 (forthcoming) ("Nobody on the Court believes in absolute stare decisis").

> Historically, moreover, some of the Court's most notable and consequential decisions have entailed overruling precedent. See, e.g., *Obergefell v. Hodges*, 576 U. S. 644 (2015); *Citizens United v. Federal Election Comm'n*, 558 U. S. 310 (2010); *Montejo v. Louisiana*, 556 U. S. 778 (2009); *Crawford v. Washington*, 541 U. S. 36 (2004); *Lawrence v. Texas*, 539 U. S. 558 (2003); *Ring v. Arizona*, 536 U. S. 584 (2002); *Agostini v. Felton*, 521 U. S. 203 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U. S. 44 (1996); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833 (1992);1 *Payne v. Tennessee*, 501 U. S. 808 (1991); *Batson v. Kentucky*, 476 U. S. 79 (1986); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985); *Illinois v. Gates*, 462 U. S. 213 (1983); *United States v. Scott*, 437 U. S. 82 (1978); *Craig v. Boren*, 429 U. S. 190 (1976); *Taylor v. Louisiana*, 419 U. S. 522 (1975); *Brandenburg v. Ohio*, 395 U. S. 444 (1969) (per curiam); *Katz v. United States*, 389 U. S. 347 (1967); *Miranda v. Arizona*, 384 U. S. 436 (1966); *Malloy v.*

> *Hogan*, 378 U. S. 1 (1964); *Wesberry v. Sanders*, 376 U. S. 1 (1964); *Gideon v. Wainwright*, 372 U. S. 335 (1963); *Baker v. Carr*, 369 U. S. 186 (1962); *Mapp v. Ohio*, 367 U. S. 643 (1961); *Brown v. Board of Education*, 347 U. S. 483 (1954); *Smith v. Allwright*, 321 U. S. 649 (1944); West Virginia Bd. of Ed. v. Barnette, 319 U. S. 624 (1943); *United States v. Darby*, 312 U. S. 100 (1941); *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938); *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1937).
>
> The lengthy and extraordinary list of landmark cases that overruled precedent includes the single most important and greatest decision in this Court's history, *Brown v. Board of Education*, which repudiated the separate but equal doctrine of Plessy v. Ferguson, 163 U. S. 537 (1896). As those many examples demonstrate, the doctrine of stare decisis does not dictate, and no one seriously maintains, that the Court should never overrule erroneous precedent. As the Court has often stated and repeats today, stare decisis is not an "inexorable command." E.g., ante, at 20.

Ramos v. Louisiana, 590 U.S. ____ (2020), concurring opinion, Kavanaugh, J.

Justice Kavanaugh then provides a "methodology or roadmap" for a manner to apply stare decisis principles in a consistent manner: 1. Is the prior decision grievously or egregiously wrong? 2. Has the prior decision caused significant negative jurisprudential or real-world consequences? 3. Would overruling the prior decision unduly upset reliance interests?

Justice Kavanaugh applies this roadmap in reversing the decision that previously allowed a criminal conviction not based on a unanimous verdict.

The jurisprudential and real-world results of federalizing criminal law are widely deplored. Among the negative consequences of federalizing criminal law are overloading of the Federal courts with cases lacking in any direct Federal interest or

involvement, undermining the dual system of government (including double jeopardy issues). Federal legislation affects the entire nation, is cumbersome to change and remains on the books long after it loses its original value. Legislative efficiency is undermined as federal legislative jurisdiction expands. Increased federalization of criminal law propagates the illusion that Federal law is more effecting in resolving problems than State law, State law and federal law duplicate the law and result in conflicts of criminal case processing. *See, for example*, R J Miner *Consequences of Federalizing Criminal Law* NCJ Number 116913 Journal Criminal Justice Volume: 4 Issue: 1 Dated: (Spring 1989) Pages: 16-19,39-41 (1989).

Further:

> When it was enacted in 1790, the federal criminal code included just 30 crimes, but by the 1980s, the number had exploded to more than 3,000. The number of crimes in federal law and regulations today is unknown. The Department of Justice has failed many times to catalog this list, but studies estimate that there are 5,000 statutes and 300,000 regulations that carry federal criminal penalties. In the session ending in 2019, Congress introduced 154 bills that would have added new criminal penalties to the federal code. Charles Koch Institute, The Criminalization of Everything, https://charleskochinstitute.org/stories/the-criminalization-of-everything/ August 14, 2019.

CONCLUSION

We urge that federal child pornography criminal statutes should examined under a textualist view of these statutes under which Mr. Riley is being prosecuted. We ask this Court to find these statutes unconstitutional because they are beyond

any enumerated powers of Congress or the scope of the Commerce Clause and Mr. Riley case be reversed.

Respectfully submitted,

/s/ Ed Stapleton

ED STAPLETON
Texas State Bar Number 19058400

So. District No. 1501
613 E. Saint Charles
Brownsville, Texas 78520
Telephone: (956) 504-0882
Fax: (956) 504-0814