

No. \_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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TIMOTHY RYAN,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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On Petition for a Writ of *Certiorari*  
to the United States Court of Appeals  
for the Seventh Circuit

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**PETITION FOR A WRIT OF *CERTIORARI***

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## QUESTIONS PRESENTED

- I. Based either on a dictionary definition of “distributes” or the rule of lenity, should Mr. Ryan have been convicted of distributing images that a police officer downloaded from Mr. Ryan’s computer via a file sharing program?
- II. Since the evidence showed that the police---not Mr. Ryan---knew how file sharing software worked, should the Seventh Circuit have vacated Mr. Ryan’s conviction for knowingly distributing child pornography?

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IN THE  
SUPREME COURT OF THE UNITED STATES  
MAY TERM 2018

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TIMOTHY RYAN,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

---

**PETITION FOR WRIT OF *CERTIORARI* TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

---

Petitioner, TIMOTHY RYAN, respectfully prays that a writ of certiorari issue to review the published opinion of the United States Court of Appeals for the Seventh Circuit, issued on May 23, 2018, denying Mr. Ryan's criminal appeal.

## OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is published at 885 F.3d 449. (Pet. App. 1a-9a)

## JURISDICTION

The appellate court entered judgment on March 13, 2018. (Pet. App. 10a). Mr. Ryan moved for rehearing and the court denied the motion on May 10, 2018. (Pet. App. 7a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

## RULES INVOLVED

Congress has made it unlawful for a person to “knowingly receive[ ], or distribute[ ] any visual depiction ..., if the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and such visual depiction is of such conduct.” 18 U.S.C. § 2252(a)(2). Section § 2252(a)(2)’s term “distributes” is not defined in the statute. When a statutory term is undefined, a court must apply basic principles of statutory interpretation to determine that the term means. *See Smith v. United States*, 508 U.S. 223, 228 (1993). A basic principle of statutory construction is to “normally construe [a term] in accord with its ordinary or natural meaning.” *Id.* Indeed, courts must start with the assumption that “the legislative purpose is expressed by the ordinary meaning of the words used.” *Richards v. United States*, 369 U.S. 1, 9 (1962). Black’s

Law Dictionary, p. 487 (9th ed. 2009), defines “distribute” as: “[t]o apportion; to divide among several” and “[t]o deliver.”

Relevant to that, the rule of lenity ensures fair warning by “resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered”. *United States v. Lanier*, 520 U.S. 259, 266 (1997). By requiring ambiguities in criminal statutes to be resolved in a defendant’s favor, the rule of lenity ensures that no person is put at risk of criminal sanction unless Congress clearly and unmistakably defines the actions prohibited or required. *See United States v. Campos-Serrano*, 404 U.S. 293, 297 (1971); *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 984 (7th Cir. 1999).

The various Circuits have determined “the evidence is sufficient to support a conviction for distribution under 18 U.S.C. § 2252(a)(2) when it shows that the defendant maintained child pornography in a shared folder, knew that doing so would allow others to download it, and another person actually downloaded it.” *United States v. Budziak*, 697 F.3d 1105, 1109 (9th Cir. 2012) (citing *United States v. Chiaradio*, 684 F.3d 265, 281–82 (1st Cir. 2012); *United States v. Collins*, 642 F.3d 654, 656–57 (8th Cir. 2011); *United States v. Shaffer*, 472 F.3d 1219, 1223 (10th Cir. 2007). By implication, failure to prove those things requires an appellate court to vacate a defendant’s conviction.

## STATEMENT OF THE CASE

This petition seeks review of Circuit precedent which allows a defendant to be convicted of distributing child pornography when a defendant never actively transfers it, but, rather, child pornography is downloaded from a defendant's computer by police via a file sharing program. This Court should address this issue because the plain meaning of "distribute" requires a defendant to actively transfer images, not to just make images available. If the word "distribute" does not clearly have that meaning, it is at least an ambiguous term whose ambiguity commands application of the rule of lenity. Additionally, Mr. Ryan's distribution conviction wasn't supported by proof he knew how file sharing worked and it can't be squared with the rule of lenity.

Among other things, a jury convicted Mr. Ryan of distributing child pornography in violation of § 2252(a). (Pet. 1a-9a). Mr. Ryan appealed to the Seventh Circuit and argued that the conviction was infirm based on the statute's plain language, the rule of lenity, and the absence of proof that he knew how file sharing worked. (Pet. App. 1a-9a).

1. The Seventh Circuit affirmed. (Pet. 1a-9a). Mr. Ryan moved for rehearing, but the court denied the rehearing motion. (Pet. App. 10a).

### **REASONS FOR GRANTING THE WRIT**

This Court should grant *certiorari* to resolve whether a defendant can be convicted of knowing distribution of child pornography when a defendant never

transferred any contraband image and the government presents no evidence that the defendant knew his file sharing folder allows others to download images. This case presents an ideal vehicle for deciding the issue because the statute's language is being universally misinterpreted by federal courts and the facts of this case do not, in any event, support conviction because the evidence shows only the police officer---not Mr. Ryan---knew how file sharing worked.

**I. Based either on a dictionary definition of “distributes” or the rule of lenity, Mr. Ryan should not have been convicted of distributing images that a police officer downloaded from Mr. Ryan’s computer via a file sharing program.**

1. On appeal, Mr. Ryan argued that the plain meaning of the word “distribute[s]” in 18 U.S.C. § 2252 does not allow a defendant to be convicted based on images law enforcement downloaded from a defendant’s computer. He further argued that the conviction would be improper given the rule of lenity.

2. *Ryan* said that while the Seventh Circuit had not directly addressed § 2252(a)(2)’s meaning of “distribution”, one of its decisions involving a Guidelines enhancement, *United States v. Carani*, 492 F.3d 867, 876 (7th Cir. 2007), held that a defendant who “knowingly make[s] his child pornography available for others to access and download” by peer-to-peer sharing has distributed pornography for purposes of applying the knowing distribution enhancement of U.S.S.G. § 2G2.2(b)(3)(F). *Carani* relied on *Shaffer*, a Tenth Circuit case which analogized to gas station owners who allow drivers to “stop and fill their cars for

themselves” without the station owner actively participating in the sale. 492 F.3d at 876 (quoting *Shaffer*, 472 F.3d at 1223–24). *Ryan* concluded that “[t]here is no reason why this same definition should not apply when interpreting ‘distribute’ in the criminal statute”. 853 F.3d at 453.

3. Respectfully, since Guidelines enhancements are applied based on a preponderance of the evidence and allow for judicially determined facts as opposed to a criminal conviction which requires proof beyond a reasonable doubt and jury determined facts, *Ryan* should not have relied on *Carani*. Also, the gas station analogy from *Shaffer* is a poor one. Whereas a gas station owner sells patrons goods, a defendant who has a file sharing program on a computer may not even know the program allows another person to access the computer’s contents, much less actively provide those goods to anyone.

4. More critically, since § 2252(a)(2) does not define “distribute”, a court must apply basic principles of statutory interpretation to determine that the term means. See *Smith*, 508 U.S. at 228. A normal construction of “distribute” is to use a dictionary definition. *Id.*; *Richards*, 369 U.S. at 9. And “distribute” means “[t]o apportion; to divide among several” and “to deliver”. See Black’s Law Dictionary, p. 487; <http://www.merriamwebster.com/dictionary/distribute> (definition of “distribute” includes: “to divide among several or many” and “to give out or deliver especially to members of a group”).

5. Consonant with *Smith*, the word “distributes” (and its various iterations) must be given its ordinary, natural meaning. 508 U.S. at 228. By placing child pornography in a shared file folder, a defendant does not apportion, divide or deliver it to someone else. The contraband images are relocated to a folder that is simply accessible to others. So, images in a shared file folder are not distributed under § 2252(a)(2) when a defendant merely makes images accessible.

6. If Congress’s use of the word “distributes” in § 2252(a)(2) covers something less than giving out child pornography---like making contraband images accessible to others via a shared file folder---then the statute fails to clearly define the prohibited conduct and the rule of lenity applies. *See Campos-Serrano*, 404 U.S. at 297. Because applying the rule of lenity requires that any ambiguity in the word “distributes” be resolved in Mr. Ryan’s favor, the officer’s downloading of images from the shared file folder is not conduct clearly covered by § 2252(a)(2)’s distribution prohibition. *See Lanier*, 520 U.S. at 266.

7. Furthermore, Mr. Ryan’s proposed construction of the word gives effect to the venerable rule that a statute’s “legislative purpose is expressed by the ordinary meaning of the words used.” *Richards*, 369 U.S. at 9. If Congress wants to punish those who make contraband materials available to other, it can do so by providing the necessary verbiage. Also, reading the word “distributes”

in the proposed manner is consistent with § 2252's statutory context. Congress wants people who distribute child pornography to be punished more severely than people who just possess it. That fact is evident from the 5 to 20 year imprisonment range for a § 2252(a)(2) conviction versus the zero to 10 year range for a § 2252(b)(2) possession conviction. Actively sending contraband is more culpable conduct than possessing contraband. And Mr. Ryan never actively sent anyone contraband. Material downloaded on his computer went by default into a shared file folder where police found it and downloaded it.

8. To deem Mr. Ryan a child pornography distributor is contrary to § 2252's statutory context. It expands culpability beyond what the statute's graduated penalty structure intended. That further supports Mr. Ryan's position. *See, generally, Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 234 (2008); *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). Moreover, adopting Mr. Ryan's position in no way prevents the Government from seeking long sentences for appropriately convicted child pornography offenders. After all, Mr. Ryan's 18 U.S.C. § 2252(a)(2) receipt conviction (Count 2) carries the same 5 to 20 year prison range as his distribution conviction. *See* § 2251(b)(1).

**II. Since the evidence showed that the police---not Mr. Ryan---knew how file sharing software worked, the Seventh Circuit should have vacated Mr. Ryan's conviction for knowingly distributing child pornography.**

9. As stated above, “the evidence is sufficient to support a conviction for distribution under 18 U.S.C. § 2252(a)(2) when it shows that the defendant maintained child pornography in a shared folder, knew that doing so would allow others to download it, and another person actually downloaded it.” *Budziak*, 697 F.3d at 1109.

10. Mr. Ryan’s appellate brief relied on *Budziak* to vacate his conviction because the evidence did not show he maintained child pornography in a shared folder knowing that others could download it. Without mentioning *Budziak*, *Ryan* determined that the Government proved Mr. Ryan knowingly distributed child pornography because the programs on his computer:

. . . downloaded files to a shared folder from which other users could download the files. The government’s expert witness explained to the jury how these programs work and explained the programs running on the computer that allowed the user to block certain people from accessing the shared files. The government also presented evidence of Ryan’s sophisticated understanding of computers and software. Based on this evidence, a reasonable jury could find beyond a reasonable doubt that Ryan knew the files were accessible to others. *See United States v. Stevenson*, 680 F.3d 854, 857 (7th Cir. 2012) (“Only if the record is devoid of evidence from which a reasonable jury could find guilt beyond a reasonable doubt can [the defendant’s] conviction be over-turned.”); *see also United States v. Davis*, 859 F.3d 429, 434 (7th Cir. 2017) (“It is well established that a jury’s verdict may rest solely upon circumstantial evidence.” (quoting *United States v. Robinson*, 177 F.3d 643, 648 (7th Cir. 1999))).

885 F.3d at 453.

11. Rather than requiring evidence of a defendant's knowledge be the proof to satisfy § 2252(a)(2)'s "knowingly" element, *Ryan* lets stand a conviction based on a prosecution witness's understanding of a computer's filing sharing program. Since the Government never established facts that Mr. Ryan knew downloaded images went into the shared file folder, the Government did not meet its burden under § 2252(a)(2). *See Budziak*, 697 F.3d at 1109. By allowing Mr. Ryan's distribution conviction to stand despite the lack of necessary proof, *Ryan* creates a Circuit split between it and the *Budziak* line of cases.

## CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be granted.

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