No. 24-

IN THE

Supreme Court of the United States

RAYMOND J. LIDDY,

Petitioner,

v.

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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QUESTIONS PRESENTED FOR REVIEW

This case raises a fundamental question that has split the Circuits regarding the intersection between the use of the Internet and federal criminal law. The question is whether statutes containing the language "in interstate or foreign commerce" merely require proof that the defendant used the Internet to complete the crime or must the prosecution prove the subject online transmission actually crossed state lines. *E.g.*, 18 U.S.C. § 875(c). The First, Second, Third, and Fifth Circuits take the position that the government satisfies the "in interstate commerce" element of a statute simply by showing Internet use. The Ninth and Tenth Circuits hold that the government must prove that the online communication crossed state lines.

RELATED CASES

United States v. Raymond J. Liddy, No. 19-cr-01685-CAB, U.S. District Court for the Southern District of California. Judgment entered September 2, 2020.

United States v. Raymond J. Liddy, No. 20-50238, U.S. Court of Appeals for the Ninth Circuit. Judgment entered September 28, 2022.

United States v. Raymond J. Liddy, No. 19-cr-01685-CAB, U.S. District Court for the Southern District of California. Judgment revoking parole entered November 20, 2023.

United States v. Raymond J. Liddy, No. 23-3654, U.S. Court of Appeals for the Ninth Circuit. Judgment entered July 7, 2024, rehearing denied October 30, 2024.

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Petitioner Raymond J. Liddy respectfully asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The court of appeals rejected petitioner's claim of insufficient evidence and affirmed the revocation of his probation. The decision is available at *United States v. Liddy*, 23-3654, 2024 U.S. App. LEXIS 18208 (9th Cir. 2024).[1]

JURISDICTION

On July 24, 2024, the Ninth Circuit filed its decision. On October 30, 2024, the Ninth Circuit denied a petition for rehearing en banc.[2] This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I.

The petitioner, Raymond J. Liddy, is a disabled combat veteran, who was diagnosed with posttraumatic stress disorder as a result of his service to the United States.

In 1986, Mr. Liddy enlisted in the United States Marine Corps and soon deployed to combat in Panama as a Rifle Platoon Commander in the expeditionary force

1. A copy of the decision is attached as Appendix A.

2. A copy of the order is attached as Appendix B.

of Operation Just Cause. 2-ER-222-24.[3] While there, he volunteered to disarm a dangerous explosive device and was nearly killed when it unexpectedly detonated. 2-ER-224. He instantly suffered burns over 14% of his body. 2-ER-224.

The trauma from his burns caused an inability to breath and required resuscitation. 2-ER-224-26. After emergency evacuation to a hospital, doctors put him in a medically induced coma. 2-ER-224-26. For two days physicians in Panama tried to stabilize Mr. Liddy, and once he was well enough, he was evacuated to Brooks Army Medical Center at Fort Sam Houston, Texas. 2-ER-224-26.

He spent months recovering in the burn unit, but his commitment to country did not waiver. 2-ER-224-26. He was again sent to combat, in Iraq, as part of Operation Desert Storm and later Operation Iraqi Freedom. Throughout his time in Iraq, Mr. Liddy served as a Marine Corps officer. 2-ER-226-27. He and his battalion were frequently shot at by small arms, sniper, and mortar fire. 2-ER-226-27. Tragically, they suffered numerous casualties. 2-ER-226-27.

Following his multiple combat tours, Mr. Liddy was diagnosed with posttraumatic stress disorder and deemed 50% disabled. 1-ER-19, 2-ER-226-27.

As Mr. Liddy approached mandatory Marine Corps retirement, he grew depressed and felt a loss of purpose.

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3. The Excerpt of Record ("ER") is on file with the Ninth Circuit Court of Appeals.

2-ER-227. This exacerbated the severe, combat-related PTSD he had experienced since Panama. 2-ER-227-28. He sought help and was prescribed Ambien for his inability to sleep. 2-ER-227-28. It did not fix the problem, so he began supplementing the drug with nightly drinking. 2-ER-227-28. Inebriated, depressed, and still unable to sleep, Mr. Liddy turned to the Internet. 2-ER-227-28.

He began frequenting adult chatrooms, where sexual topics were discussed, and users posted links to adult pornography. 2-ER-228. Occasionally, an image would reveal what appeared to be child pornography. 2-ER-228. Although Mr. Liddy ultimately deleted these images, he was eventually prosecuted for, and convicted of, possessing several images of child pornography found in unallocated computer space (i.e., in the deleted space on his computer). 2-ER-228, 254.

During sentencing, the district court explained, "[w]ith regard to the Court's understanding of Mr. Liddy's behavior here, I see a man in his 50s who got on the Internet for more acceptable adult viewing and went down a rabbit hole, and other people sent him material that he viewed and that he saved. And there is no evidence he was out searching for it. There is no search history that the government provided to show that he was looking for this material or sharing this material[.]" 2-ER-257-58. The court sentenced Mr. Liddy to five years of probation. 2-ER-265.

II.

Mr. Liddy began his probationary term in September 2020. 2-ER-16. He was required to register as a sex

offender, which meant his name, picture, home address in San Diego, and personal identifying information were publicly available on California's Megan's Law Website. 2-ER-144. To help navigate the issues resulting from his registration, Mr. Liddy hired an attorney who specialized in advising and representing sex offenders. 2-ER-140-41. She warned Mr. Liddy about the numerous scam calls he should expect from people claiming to be law enforcement officers and seeking money. 2-ER-142.

These warnings proved true. After his registration, Mr. Liddy was repeatedly targeted by scammers, who called claiming to be law enforcement officers. 2-ER-19, 45, 78, 80, 142-43, 152, 154. He reported these calls to his probation officer and defense counsel. 2-ER-111-12, 203.

On April 25, 2023, Mr. Liddy received a call after normal business hours on his home phone (a landline) in San Diego, California, from a woman with a Southern accent, claiming to be his new probation officer, Ms. Singleton. 2-ER-205. Mr. Liddy had not been told of any upcoming change in his supervision, and his currently assigned officer usually contacted him on his cell phone – not his home phone – so he believed he was dealing with another scammer. 2-ER-114; 2-ER-205. This triggered his PTSD, and Mr. Liddy's temper flared. 2-ER-205. He used offensive language and, according to Ms. Singleton, threatened to kill her. 2-ER-205.

Approximately two weeks after this incident, the Probation Department filed a petition with the district court alleging that Mr. Liddy violated the condition that he not commit another crime, by threatening to injure Ms. Singleton in violation of 18 U.S.C. § 875(c). 2-ER-17.

III.

The district court held an evidentiary hearing on the alleged violation. Ms. Singleton testified that she called Mr. Liddy's home in San Diego County from her office phone also in San Diego County. 2-ER-54. Another government witness testified that the Probation Department in San Diego uses AT&T with a voice-over-IP system (VOIP), which meant calls made from the office phones "are actually made over the Internet." 2-ER-128. The witness, however, did not suggest that those calls were routed through a server in another state or traveled across state lines. 2-ER-128. Nor was there any other evidence suggesting the online calls crossed state lines.

Following the hearing, the district court immediately ruled from the bench, based on "18 U.S.C. Code Section 875, interstate communications." 1-ER-2. Without addressing whether the call traveled across state lines, the court simply found that "the use of a phone constitutes an interstate communication." 1-ER-2-3. The court found a true threat, revoked Mr. Liddy's probation, and sentenced him to 24 months in custody with 5 years of supervised release. 1-ER-5; 2-ER-285.

IV.

On appeal, Mr. Liddy argued that the evidence was insufficient to find that he violated 18 U.S.C. § 875(c) because the government failed to establish that the subject call – from one California number to another – crossed state lines. This was not merely a theoretical issue, as AT&T has multiple data centers in California, including in San Diego, within close proximity of both the caller and the call recipient.

The court of appeals affirmed, concluding that the "testimony that the phone calls at issue were 'made over the Internet,' was sufficient to support a finding that the calls traveled in interstate commerce." APP:A at 2.

REASON FOR GRANTING THE PETITION

I.

The Court should grant this petition to resolve the Circuit split that has developed regarding the proof required when a statute prohibits a transmission "in interstate or foreign commerce."

II.

Congress often uses interstate and foreign commerce as the jurisdictional hook for its criminal law. But it does not always do so in the same way or using the same terminology. How it articulates the interstate-commerce element of a statute determines what that statute will reach and what the government must prove. Congress's choice of language in any given statute is critical: "Congress uses different modifiers to the word 'commerce' in the design and enactment of its statutes. The phrase 'affecting commerce' indicates Congress' intent to regulate to the outer limits of its authority under the Commerce Clause. . . . Unlike those phrases, however, the general words 'in commerce' . . . are understood to have a more limited reach." *Circuit City Stores, Inc.*, 532 U.S. 105, 115 (2001).

Typically, statutes that contain language such as "in interstate commerce" require proof that state lines were

actually crossed; by contrast, statutes with language such as "affecting commerce" or "any facility of interstate commerce" require proof only that the criminal activity involved an instrumentality or channel of interstate commerce. *See id.*; *United States v. Darby*, 37 F.3d 1059 (4th Cir. 1994); *United States v. Schaefer*, 501 F.3d 1197, 1201 (10th Cir. 2007); *United States v. Sutcliffe*, 505 F.3d 944, 953 (9th Cir. 2007).

III.

When the Internet is involved, however, the circuit courts do not agree on what the government must prove to establish the jurisdictional element of "in interstate commerce." Thus, "[a] Circuit split has developed around this point." *United States v. Hass*, 37 F.4th 1256, 1264 (7th Cir. 2022).

The First, Second, Third, and Fifth Circuits hold that the government can satisfy the "in interstate commerce" element of a statute simply by showing that the defendant used the Internet to complete the crime:

- *United States v. Lewis*, 554 F.3d 208, 214-15 (1st Cir. 2009) (addressing 18 U.S.C. § 2252(a)(2), which at the time contained the language "in interstate . . . commerce" but has since been amended to say "in or affecting . . . commerce" and "any means or facility of . . . commerce");

- *United States v. Harris*, 548 F. App'x 679, 682 (2d Cir. 2013) (same);

- *United States v. Elonis*, 730 F.3d 321, 335 (3d Cir. 2013) (interpreting 18 U.S.C. § 875(c) and holding "submitting data on the Internet necessarily means the data travels in interstate commerce");

- *United States v. MacEwan*, 445 F.3d 237, 243 (3d Cir. 2006) (same but with respect to 18 U.S.C. § 2252A(a)(2)(B));

- *United States v. Runyan*, 290 F.3d 223, 239 (5th Cir. 2002) (same but with respect to 18 U.S.C. § 2251).[4]

The Ninth and Tenth Circuits, on the other hand, hold that the government must prove that the online communication actually crossed state lines, not merely that it was made using the Internet:

- *Sutcliffe*, 505 F.3d at 953 (Ninth Circuit addressing 18 U.S.C. § 874(c) and holding the "evidence supports the conclusion that Defendant electronically sent threats and social security numbers to internet servers located *across state lines*.") (emphasis in original);[5]

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4. Additionally, although not definitely resolving the question, the Seventh Circuit has noted that requiring "proof that a communication traveled from a server in one state to a server in another," is "dubious" and "fails to take full account of the realities of the Internet and its functioning." *Hass*, 37 F.4th at 1265 (7th Cir. 2022).

5. The court of appeals in this case cited *Sutcliffe*, *see* APP:A, but did not apply its requirement that the government prove the calls made over the Internet crossed states lines. *See Sutcliffe*, 505 F.3d at 953. However, because the decision here was a nonprecedential, unpublished memorandum, its failure to apply controlling Circuit precedent does not lessen the significance of the split.

- *United States v. Wright*, 625 F.3d 583, 590-95 (9th Cir. 2010) ("To the extent the government [] argues that use of the Internet, standing alone, satisfies section 2252A(a)(1)'s jurisdictional requirement, we reject that contention on these facts");

- *Schaefer*, 501 F.3d at 1200-02 (same but with respect to 18 U.S.C. §§ 2252(a)(2), (a)(4)(B) and holding "we decline to assume that Internet use automatically equates with a movement across state lines. With respect to such interstate movement, the government must introduce sufficient evidence to satisfy its burden of proof.");

This split is exemplified by the Tenth Circuit's discussion in *Schaefer*. The court there "respectfully disagree[d]" with "the Third Circuit's decision in *MacEwan*," explaining "[t]he *MacEwan* approach runs counter to the plain terms of § 2252(a)." *Schaefer*, 501 F.3d at 1204. The *Schaefer* court noted that under *MacEwan*, to establish the jurisdictional element, "the government need only prove that the defendant used the Internet in relation to the offense." *Id.* at 1205.

The *Schaefer* court accused the Third Circuit of "overlook[ing] the limiting jurisdictional language that Congress employed, i.e., the 'in commerce' language. In effect, it recast the jurisdictional requirement of the child-pornography statute into one that could be satisfied by use of an 'interstate facility,' and determined that the Internet was such a facility." *Id.*

The Tenth Circuit, therefore, declined to follow the Third Circuit and instead held: "[O]ur review concludes that under the plain terms of § 2252(a), and our

precedent, there is no 'Internet exception' to the statute's jurisdictional requirements. Simply stated, we decline to assume that Internet use automatically equates with a movement across state lines." *Id.*

IV.

As *Schaefer* demonstrates, the subject Circuit split is longstanding. And it implicates at least seven of the courts of appeals (including, as noted above, the Seventh Circuit). This deep divide alone is reason to grant certiorari. *See* Supreme Court Rule 10(a). But there is more.

As this Court has described, "[t]oday we use the Internet to do most everything." *Carpenter v. United States*, 585 U.S. 296, 387 (2018). Indeed, the Internet's pervasiveness in both everyday life and criminal undertakings cannot be overstated.[6] This Court, however, has not yet clarified what the government must prove to satisfy Congress's choice of jurisdictional terminology when the Internet is involved.

The Court has not spoken on the important distinctions between, for instance, a transmission "in

6. According to the FBI's 2023 Internet Crime Report, its Internet Crime Complaint Center "received a record number of complaints from the American public: 880,418 complaints were registered, with potential losses exceeding $12.5 billion. This is a nearly 10% increase in complaints received, and it represents a 22% increase in losses suffered, compared to 2022. As impressive as these figures appear, we know they are conservative regarding cybercrime in 2023." Available at https://www.ic3.gov/AnnualReport/Reports/2023_IC3Report.pdf (2023) (last accessed December 10, 2024).

interstate commerce" and a transmission made using an "instrumentality of interstate commerce." This language must mean different things and thus carry different proof requirements. *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment"). Nor has the Court clarified to what degree the government can rely on Internet use alone to show an act occurred "in interstate commerce."

In short, when it comes to Internet use, the law remains unsettled. That is problematic for many reasons, not least of all because allowing the Internet alone to suffice to exercise federal police powers creates a scenario in which, in the modern age, there will be few limits on federal criminal jurisdiction. For that reason, the split of authority on the important federal question presented here is worthy of review.

V.

This case also presents an excellent vehicle for resolving the split. First, the issue was briefed extensively to the court of appeals. The parties directly addressed whether the government had satisfied the jurisdictional element of 18 U.S.C. § 875(c) to show a transmission "in interstate commerce" when the only evidence was general Internet use, not that the call actually crossed a state line.

Second, this case presents a helpful permutation because the use of the Internet was entirely on the government's side – not Mr. Liddy's. As described above, the federal probation officer used a VOIP phone system

in California to call Mr. Liddy's traditional (non-Internet) landline also in California. Thus, not only was there no evidence the call crossed state lines, but to the extent Internet use alone is enough for jurisdictional purposes, the government (via the probation officer) created its own jurisdiction.

This factual scenario is beneficial because it allows the Court to answer the jurisdictional question in a manner that applies regardless of how the Internet transmission began – with a private citizen or a government agent. And that general applicability increases this case's value as a vehicle for resolving a matter of national significance.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Counsel for Petitioner

Dated: January 8, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JULY 24, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-3654

D.C. No. 3:19-cr-01685-CAB -1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RAYMOND LIDDY,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of California
Cathy Ann Bencivengo, District Judge, Presiding

Submitted July 16, 2024*

Before: SCHROEDER, VANDYKE, and KOH, Circuit Judges.

MEMORANDUM**

* The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appendix A

Raymond Liddy appeals from the district court's judgment revoking probation and imposing a 24-month sentence. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Liddy contends that there was insufficient evidence to revoke probation because the government did not establish that his statements constituted transmission of threats in interstate commerce, in violation of 18 U.S.C. § 875(c). In evaluating a challenge to the sufficiency of the evidence to support a revocation, we view the evidence in the light most favorable to the government and ask whether any rational trier of fact could have found the essential elements of a violation by a preponderance of the evidence. *See United States v. King*, 608 F.3d 1122, 1129 (9th Cir. 2010); *see also United States v. Hall*, 419 F.3d 980, 985 n.4 (9th Cir. 2005) (probation and supervised release revocation hearings are analyzed in the same manner). The evidence presented at the revocation hearing, including testimony that the phone calls at issue were "made over the internet," was sufficient to support a finding that the calls traveled in interstate commerce. *See United States v. Sutcliffe*, 505 F.3d 944, 953 (9th Cir. 2007) ("[A]s both the means to engage in commerce and the method by which transactions occur, the Internet is an instrumentality and channel of interstate commerce." (cleaned up)). Moreover, regardless of Liddy's belief as to the identity of the other participant on the calls, the evidence was sufficient to support a finding that Liddy intended to communicate a threat. *See United States v. Ehmer*, 87 F.4th 1073, 1120 (9th Cir. 2023). Accordingly,

the district court did not abuse its discretion by revoking probation. *See United States v. Daly*, 839 F.2d 598, 599 (9th Cir. 1988).

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED OCTOBER 30, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-3654
D.C. No. 3:19-cr-01685-CAB -1
Southern District of California,
San Diego

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RAYMOND LIDDY,

Defendant-Appellant.

Filed October 30, 2024

ORDER

Before: SCHROEDER, VANDYKE, and KOH, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on

whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Liddy's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 23) are denied.