No. 24-735

In the Supreme Court of the United States

RAYMOND LIDDY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to relief on his claim, raised for the first time in the court of appeals, that insufficient evidence supported the district court's finding that he violated a condition of his probation by transmitting threats in interstate commerce, in violation of 18 U.S.C. 875(c).

ADDITIONAL RELATED PROCEEDING

Supreme Court of the United States:

Liddy v. *United States*, No. 22-549 (Feb. 21, 2023)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is available at 2024 WL 3518327.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2024. A petition for rehearing was denied on October 30, 2024 (Pet. App. 4a-5a). The petition for a writ of certiorari was filed on January 8, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of possessing child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). Judgment 1. The district court sentenced petitioner to five years of probation. Judgment 2. The court of appeals

affirmed, 2022 WL 4533991, and this Court denied a petition for a writ of certiorari, 143 S. Ct. 781. The district court subsequently revoked petitioner's probation and ordered 24 months of imprisonment, to be followed by five years of supervised release. Am. Judgment 1-3. The court of appeals affirmed. Pet. App. 1a-3a.

1. In 2017, agents from the Federal Bureau of Investigation executed a search warrant at petitioner's residence, where they seized an external hard drive and two thumb drives. 2022 WL 4533991, at *1; D. Ct. Doc. 72, at 11 (Apr. 29, 2020). The agents found child pornography on each drive. 2022 WL 4533991, at *1. A federal grand jury in the Southern District of California indicted petitioner on one count of possessing child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). Indictment 1.

In 2020, following a bench trial, the district court found petitioner guilty and sentenced him to five years of probation. Judgment 1-2; 2022 WL 4533991, at *1. The probationary sentence was subject to several conditions, including the statutorily required condition that petitioner refrain from committing another federal, state, or local crime. Judgment 2; see 18 U.S.C. 3563(a)(1). The court of appeals affirmed, 2022 WL 4533991, and this Court denied a petition for a writ of certiorari, 143 S. Ct. 781.

2. In 2023, petitioner was assigned to a new probation officer. C.A. E.R. 50-55. On the evening of April 25, 2023, the officer called petitioner's home number to introduce herself. *Id.* at 52-53, 158. Petitioner picked up. *Id.* at 54. After the officer explained who she was, petitioner began screaming obscenities and threats. *Id.* at 17, 54-56, 205.

Among other things, petitioner shouted, "I will find you, bitch. I will fucking kill you." C.A. E.R. 56. Peti-

tioner passed the phone to his wife, who likewise called the officer obscene names and threatened to find and kill her. *Id.* at 17, 55-56, 205. Petitioner then got back on the phone and called the officer a "bitch, motherfucker." *Id.* at 17, 205. He also declared that she "was probably a 'n***** bitch.'" *Id.* at 17; see *id.* at 56, 205. The officer hung up. *Id.* at 55.

In the moments that followed, petitioner and his wife called back the probation officer several times. C.A. E.R. 17, 57, 205. During those calls, petitioner and his wife made additional threats, telling the officer, "we know where you are n***** and we will find and kill you." *Id.* at 17. Although the calls left the officer "shocked," *id.* at 59, she called petitioner again later that evening, hoping to "reset the conversation," *id.* at 60. Petitioner answered, and the "threats continued." *Id.* at 62. After he spoke about "pulling a gun" if the officer showed up at his house, the officer ended the call. *Ibid.*

3. Based on the threats that petitioner had made to his probation officer, the U.S. Probation Office filed a petition to revoke petitioner's probation. C.A. E.R. 16-24. The petition alleged that in making those threats, petitioner had committed other federal and state crimes, in violation of the conditions of his probation. *Id.* at 17. Specifically, the petition alleged that petitioner had threatened to injure the person of another, in violation of 18 U.S.C. 875(c); that he had threatened to kill a federal law enforcement officer, in violation of 18 U.S.C. 115(a)(1)(B); and that he had threatened to commit a crime that would result in death or great bodily injury to another person, in violation of Cal. Penal Code § 422. C.A. E.R. 17. The Probation Office later amended the petition to include additional allegations that petitioner had separately violated other conditions of his proba-

tion by traveling outside the district without permission and by using a computer-related device without prior approval. *Id.* at 26-27.

The district court held an evidentiary hearing. C.A. E.R. 42-201. At the hearing, the government presented evidence that on April 25, the probation officer had called petitioner using her desk phone, and petitioner had answered on his home phone. *Id.* at 54, 73, 158. The government also presented evidence that the Probation Office uses a voice-over-IP system, which means that calls made from the probation officer's desk phone are transmitted over the Internet. *Id.* at 128.

At the conclusion of the hearing, the district court found that petitioner had violated the conditions of his probation. C.A. E.R. 196-200. The court explained that, in the context of revoking petitioner's probation, it was the government's burden to prove a violation "by a preponderance of the evidence, not beyond a reasonable doubt." *Id.* at 44. The court then observed that 18 U.S.C. 875(c) prohibits "transmit[ting], in interstate commerce, any communication containing any threat to injure the person of another." C.A. E.R. 197. After noting the lack of "any dispute that the use of a phone constitutes an interstate communication," *id.* at 196-197, the court found that petitioner had violated Section 875(c) when he threatened over the phone to kill his probation officer, *id.* at 197.

The district court revoked petitioner's probation based on that violation, "without reaching any of the other issues." C.A. E.R. 199; see *id.* at 199-200. The court then ordered 24 months of imprisonment, to be followed by five years of supervised release. Am. Judgment 2-3; see 18 U.S.C. 3565(a)(2); C.A. E.R. 271, 285.

4. The court of appeals affirmed in an unpublished decision. Pet. App. 1a-3a. The court rejected petitioner's contention—which he had made for the first time on appeal, Pet. C.A. Br. 21-28—that "there was insufficient evidence to revoke probation because the government did not establish that his statements constituted transmission of threats in interstate commerce." Pet. App. 2a. Relying on circuit precedent, the court observed that, "[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." *Ibid.* (quoting *United States* v. *Sutcliffe*, 505 F.3d 944, 953 (9th Cir. 2007)). The court therefore determined that "[t]he 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." *Ibid.*

5. On January 17, 2025, petitioner completed his term of imprisonment. See Bureau of Prisons, U.S. Dep't of Justice, *Find an Inmate*, www.bop.gov/inmateloc (No. 63272-298). He is currently serving his five-year term of supervised release.

ARGUMENT

Petitioner contends (Pet. 6-11) that the evidence was insufficient to support the district court's finding that he violated a condition of his probation by transmitting threats in interstate commerce, in violation of 18 U.S.C. 875(c). The court of appeals correctly denied relief, and its decision does not conflict with any decision of this Court or another court of appeals. In any event, this case would be a poor vehicle for this Court's review because petitioner failed to challenge the sufficiency of the evidence in the district court, because this case arises in the unusual posture of a revocation of probation, and because

further review would not be outcome-determinative. The petition for a writ of certiorari should therefore be denied.

1. Section 875(c) prohibits "transmit[ting] in interstate or foreign commerce any communication containing * * * any threat to injure the person of another." 18 U.S.C. 875(c). Petitioner contends that the phrase "'in interstate * * * commerce'" requires showing that the "transmission actually crossed state lines." Pet. i (quoting 18 U.S.C. 875(c)). And he asserts (Pet. 5) that the evidence in this case was insufficient to show that his threats crossed state lines.

In the district court, however, petitioner failed to challenge the sufficiency of the evidence to satisfy Section 875(c)'s interstate-commerce element. See C.A. E.R. 42-201. He likewise failed to argue that Section 875(c) required showing that his threats crossed state lines. See *id.* at 196 ("I am not going to make the legal argument."). Indeed, the court noted the lack of "any dispute that the use of a phone constitutes an interstate communication." *Id.* at 196-197.

Accordingly, petitioner forfeited his challenge to the sufficiency of the evidence, and any review would be subject to the plain-error standard. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 507 U.S. 725, 731-737 (1993). Thus, in order to obtain relief, petitioner would have to demonstrate (1) error; (2) that is clear or obvious; (3) that affected substantial rights; and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Olano*, 507 U.S. at 732-736. Petitioner cannot do so.

This Court has "identified three broad categories of activity that Congress may regulate under its commerce power." *United States* v. *Lopez*, 514 U.S. 549, 558

(1995). "First, Congress may regulate the use of the channels of interstate commerce." *Ibid.* Second, Congress may "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *Ibid.* And third, Congress may "regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *Id.* at 558-559 (citation omitted).

"Congress is aware of the 'distinction between legislation limited to activities "in commerce" and an assertion of its full Commerce Clause power so as to cover all activity substantially affecting interstate commerce.'" *Scarborough* v. *United States*, 431 U.S. 563, 571 (1977) (citation omitted). Thus, in prohibiting the transmission of threats "in interstate * * * commerce," Section 875(c) does not cover all activity substantially affecting interstate commerce—the third category above. 18 U.S.C. 875(c). But Congress's authority to protect the channels and instrumentalities of commerce can itself include the authority to regulate "intrastate activities." *Lopez*, 514 U.S. at 558; see *ibid.* ("[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses * * * is no longer open to question.") (citation and internal quotation marks omitted; brackets in original).

In this case, petitioner's threats were transmitted via phone and Internet. See p. 4, *supra*. "'Telephones,'" including "landlines and cellphones," have been considered "'instrumentalities of interstate commerce.'" *United States* v. *Stackhouse*, 105 F.4th 1193, 1199 (9th Cir.) (citation omitted), cert. denied, 145 S. Ct. 558 (2024). Likewise, the Internet can readily be described as "an instru-

mentality and channel of interstate commerce." *United States* v. *Sutcliffe*, 505 F.3d 944, 953 (9th Cir. 2007). Petitioner is therefore not entitled to relief simply because the target of his threats was in the same State (a fact that made the threats all the more credible and harmful).

In any event, even if Section 875(c) required proof of a transmission across state lines, such proof was provided here. C.A. E.R. 196-197. As the district court observed, the government bore the burden of proving a violation of a condition of petitioner's probation "by a preponderance of the evidence, not beyond a reasonable doubt." *Id.* at 44; see *United States* v. *Perkins*, 67 F.4th 583, 615 (4th Cir. 2023). "The Internet is an international network of interconnected computers." *Reno* v. *ACLU*, 521 U.S. 844, 849 (1997). And a rational factfinder could find that use of the Internet to transmit threats makes it more likely than not that the transmission crossed state lines. See *United States* v. *Lewis*, 554 F.3d 208, 214 (1st Cir.) (finding evidence that the defendant "used the Internet" sufficient to show "actual interstate transmission"), cert. denied, 556 U.S. 1276 (2009); *United States* v. *Carroll*, 105 F.3d 740, 742 (1st Cir.) ("Transmission of photographs by means of the Internet is tantamount to moving photographs across state lines."), cert. denied, 520 U.S. 1258 (1997); see also *Jackson* v. *Virginia*, 443 U.S. 307, 313 (1979) (sufficiency standard).

2. Contrary to petitioner's contention (Pet. 7-10), the court of appeals' decision in this case does not conflict with any decision of another court of appeals. The only other court of appeals to have addressed the meaning of Section 875(c)'s interstate-commerce requirement is the Third Circuit in *United States* v. *Elonis*, 730 F.3d 321 (2013), rev'd on other grounds, 575 U.S. 723 (2015). And the Third Circuit, in accord with the Ninth Circuit, de-

clined to set aside the defendant's convictions on a theory like the one petitioner advances here. *Id.* at 335.

Petitioner asserts (Pet. 9-10) that the decision below conflicts with the Tenth Circuit's decision in *United States* v. *Schaefer*, 501 F.3d 1197 (2007). But *Schaefer* involved the interpretation of two provisions of the child-pornography statute, 18 U.S.C. 2252(a)(2) and (4)(B), not the interpretation of Section 875(c). 501 F.3d at 1197. After the Tenth Circuit in *Schaefer* took the view that "an Internet transmission, standing alone," does not satisfy "the interstate commerce requirement" of the child-pornography statute, *id.* at 1200-1201, Congress superseded the decision by amending the statute to clarify that "[t]he transmission of child pornography using the Internet constitutes transportation in interstate commerce," Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, § 102(7), 122 Stat. 4002. And *Schaefer* concerned the sufficiency of the evidence to support a conviction, not—as here—the sufficiency of the evidence to support a revocation of probation. See 501 F.3d at 1205-1207. Because the latter requires only proof by a preponderance of the evidence, not beyond a reasonable doubt, *Schaefer* does not speak to the sufficiency of the evidence to revoke petitioner's probation here. See p. 8, *supra*.

Petitioner also contends (Pet. 8-9) that the Ninth Circuit's decision in this case conflicts with its prior decisions in *United States* v. *Sutcliffe*, *supra*, and *United States* v. *Wright*, 625 F.3d 583 (2010). But any such internal inconsistency would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Nor does such an intracircuit conflict exist. *Sutcliffe* upheld a conviction where evidence showed that the defendant's threats had crossed

state lines, but did not hold that similar proof is invariably required. See 505 F.3d at 953. To the contrary, *Sutcliffe* recognized that "the Internet is an instrumentality and channel of interstate commerce"—a recognition on which the decision below affirmatively relies. Pet. App. 2a (quoting *Sutcliffe*, 505 F.3d at 953). *Wright*, in turn, was similar to *Schaefer*, in that it concerned the since-amended child-pornography laws, and did not involve the distinct context of probation revocation. 625 F.3d at 588, 591 n.5, 598-601. And while it was "undisputed" in *Wright* that the images at issue "never crossed state lines," the decision expressly left open the possibility that "a defendant's use of the Internet may serve as a proxy for satisfying the interstate commerce requirement." *Id.* at 595.

3. At all events, this case would be a poor vehicle for this Court's review.

First, petitioner failed to challenge the sufficiency of the evidence to satisfy Section 875(c)'s interstate-commerce requirement in the district court. See p. 6, *supra*. The Ninth Circuit did not review his challenge for only plain error, possibly because circuit precedent "suggests that *de novo* review may still apply." Gov't C.A. Br. 15 n.1 (citing *United States* v. *Atkinson*, 990 F.2d 501, 503 (9th Cir. 1993) (en banc)). But this Court is not bound by circuit precedent, and under Federal Rule of Criminal Procedure 52(b), plain error is the applicable standard. For the reasons explained above, see pp. 6-8, *supra*, petitioner cannot show that any error was "plain"—*i.e.*, "clear" or "obvious," *Olano*, 507 U.S. at 734; see *United States* v. *Haas*, 37 F.4th 1256, 1265 (7th Cir. 2022) (finding, in a case involving a conviction under Section 875(c), that the district court "would not

have 'plainly' erred if it had concluded that the government needed to show only that the Internet was used").

Second, this case arises in the unusual posture of a revocation of probation. Accordingly, this case presents only the narrow issue of whether the evidence was sufficient to support the district court's finding that the government had proven Section 875(c)'s interstate-commerce element by a preponderance of the evidence. See p. 8, *supra*. Petitioner has not challenged that evidentiary standard; he has not cited any other case in which a court has addressed whether evidence was sufficient to satisfy Section 875(c)'s interstate-commerce element under a preponderance standard; and further review would not necessarily produce a decision that applied beyond that narrow context.

Third, this Court's review would not be outcome-determinative because the same revocation and sentence would have resulted even without the Section 875(c) violation. The Probation Office alleged that petitioner had violated the conditions of his probation by committing two other crimes: threatening to kill a federal law enforcement officer, in violation of 18 U.S.C. 115(a)(1)(B); and threatening to commit a crime that would result in death or great bodily injury to another person, in violation of Cal. Penal Code § 422. C.A. E.R. 17. Although the district court did not address those other allegations, petitioner's threats likewise satisfied the elements of those other crimes, which do not include any interstate-commerce element. See Gov't C.A. Br. 26-29. Thus, regardless of this Court's review, the outcome would be the same.

Finally, petitioner has already completed his term of imprisonment. See p. 5, *supra*. And he has not challenged

the original child-pornography conviction to which his sentence relates.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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