No. 24-735

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

REPLY BRIEF

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PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION

1. There is an active and widening Circuit split concerning the proper interpretation of federal statutes containing the language "in interstate or foreign commerce." The issue dividing the courts of appeals is whether proof that the defendant used the Internet is alone sufficient to satisfy the jurisdictional "in interstate commerce" element, or must the government prove the subject online transmission actually crossed a state line.

In various statutory contexts—all of which use identical language—the First, Second, Third, and Fifth Circuits have held that the government satisfies the "in interstate commerce" element simply by showing Internet use. The Ninth and Tenth Circuits have determined that the government must prove the online communication actually crossed state lines.

This is a worthy issue of national importance based not only on the disparate treatment of criminal defendants depending on their locale, but also because the Court has not clarified what the government must prove to satisfy Congress's choice of jurisdictional terminology when the Internet is involved. It has not spoken on the essential distinctions between, for instance, a transmission "in interstate commerce" and a transmission made using an "instrumentality of interstate commerce." Nor has the Court clarified to what degree the government can rely on Internet use alone to show an act occurred "in interstate commerce." The Internet is used by hundreds of millions of Americans every day to conduct innumerable transactions. Clarity on this issue is essential to provide

guidance to the public and also to Congress in passing and amending statutes that touch on the Internet.

2. The government maintains that the issue presented is not worthy of review because there is no conflict within the courts of appeals. But there is. As the Seventh Circuit recently held, "[a] Circuit split has developed around this point." *United States v. Hass*, 37 F.4th 1256, 1264 (7th Cir. 2022). *Hass* explained:

> Statutes that contain language such as "in interstate commerce" require proof that state lines were 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. Finally, Congress sometimes exercises its broad power to regulate even local activities that have a substantial effect on interstate commerce." "Congress's choice of language in any given statute is thus critical. How it articulates the interstate-commerce element of a statute tells us what that statute will reach."
>
> *The question is how we are to apply these established principles to the Internet.* Haas argues that the phrase 'in interstate commerce' requires a showing that the relevant communication physically traveled from a server in one state to a server in another. The government argues that such a showing is not necessary. Given the inherently interstate

nature of the Internet, the government believes it needed to show only that the Internet was used.

[] The First, Second, Third, and Fifth Circuits have taken the position that the government asks us to adopt here, that is, that the government can satisfy the 'in interstate commerce' element of a statute simply by showing that the Internet was used. *See 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. 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).

The Ninth and Tenth Circuits, on the other hand, have sided with Haas: they hold that the government must prove that the online communication crossed state lines, not simply that it was made on the Internet. *See United States v. Wright*, 625 F.3d 583, 590-95 (9th Cir. 2010) (addressing 18 U.S.C. § 2252A(1), which at the time contained the language "in interstate . . . commerce" but has also been amended since then); [*United States v. Schaefer*, 501 F.3d [1197]

> at 1200-02 [(10th Cir. 2007)] (same but with respect to 18 U.S.C. §§ 2252(a)(2), (a)(4)(B))."

Id. at 1264-65 (emphasis added).

The government has chosen to ignore *Hass*, failing even to cite the decision. But *Hass* leaves no doubt; there is an ongoing split.

3. The government, therefore, tries to change the subject. It points out that "*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)." It further states, "[a]fter 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. 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.'" Pet. 9 (citations omitted).

What the government fails to mention, however, is that Congress did so by changing the statute, not by addressing the split. Instead of the more limited "in interstate commerce" language at issue here, Congress amended the jurisdictional element to the more expansive "*any means or facility* of interstate or foreign commerce . . . *in or affecting* interstate or foreign commerce." 18 U.S.C. § 2252(a)(2). This amendment did nothing to resolve the ongoing disagreement as to the proper interpretation of the "in interstate commerce" language that Congress continues to use in myriad other statutes, such as 18

U.S.C. 875(c), 18 U.S.C. § 659, 18 U.S.C. § 922(a)(1), and 16 U.S.C. § 470ee(c). Thus, the Circuit split noted in *Hass* is alive and well.

It is also growing thanks to the decision in this case. The court of appeals held that because the "calls at issue were 'made over the internet,' this was sufficient to support a finding that the calls traveled in interstate commerce." Pet. App. 2a. That conclusion, however, directly conflicts with *Wright* and *Schaefer* (not to mention the statute's plain language).

4. The government responds that "this case would be a poor vehicle for this Court's review." Opp. 10. But its arguments fall flat.

First, the government says this Court would have to review for plain error, and Mr. Liddy could not meet that burden. Opp. 10. This puts the cart before the horse. Whether the government or Mr. Liddy would ultimately prevail after full briefing and argument is not part of the certiorari analysis because the point is to resolve the issue and ensure nationwide consistency. The Ninth Circuit did not employ plain-error review, and any lingering doubts on that issue can be resolved on remand after this Court clarifies the standard.

Even assuming Federal Rule of Criminal Procedure 52(b)'s plain error standard applied, it is far from certain that Mr. Liddy would be unable to meet its requirements. Plain error can be based on the plain language of the statute. *See*, *e.g.*, *United States v. Jones*, 74 F.4th 1065, 1069 (10th Cir. 2023) ("we have made clear that an error can be plain when statutory language is sufficiently

clear"); *In re Sealed Case*, 573 F.3d 844, 851 (D.C. Cir. 2009) ("an error can be plain . . . because of the clarity of a statutory provision."); *United States v. Polouizzi*, 564 F.3d 142, 156 (2d Cir. 2009) (an error is plain when it violates "the plain language of the statute."). Here, section 875(c)'s statutory "in interstate commerce" language supports Mr. Liddy's argument that the government was required to prove the transmission actually crossed state lines—i.e., moved "interstate."

Second, the government says, "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." Opp. 11. This is incorrect. The legal issue presented is the proper construction of the statutory language "in interstate commerce." The fact that this case started as probation revocation has no impact on the answer to this pure question of statutory interpretation that has divided the Circuits.

Additionally, contrary to the government's claims, that the preponderance standard applies—as opposed to proof beyond a reasonable doubt—is irrelevant because there was *no evidence* before the district court showing that the calls between two California numbers here actually crossed state lines. While Rapunzel may be able to spin straw into gold, the government cannot transform no evidence into a preponderance. Indeed, "it is axiomatic that no evidence cannot constitute sufficient evidence[.]" *United States v. Trevino*, 720 F.2d 395, 398 (5th Cir. 1983).

Thus, whatever the burden of proof, no evidence that the calls crossed state lines cannot prove that they did so.

Third, the government says, "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." Opp. 11. This is both beside the point and wrong. As discussed, whether this Court ultimately affirms or reverses does not make the issue less worthy of review.

Nor is there any evidence that the same revocation and sentence would have resulted even without the Section 875(c) violation. On the contrary, the district court below specifically stated: "without reaching any of the other issues, I find him in violation of probation based on a violation of 18 U.S.C. Code 875." 1-ER-5. Because there are no findings as to the other alleged violations, if this Court reverses as to section 875(c), there would be nothing left to affirm. The case would have to be returned for further proceedings, at which time the government would decide whether to proceed with the remaining violations. If it did, the result is not a foregone conclusion.

As discussed in the briefing before the court of appeals, the other alleged violations required proof that Mr. Liddy acted with specific intent. The critical fact in the mens rea analysis is that Mr. Liddy thought he was talking to someone pretending to be his probation supervisor, but who was in fact an anonymous scammer trying to extort money from him. As the district court found, "in his mind, he thought [the caller] was trying to trick him" when she claimed she was his new probation

supervisor. 1-ER-3-4; also 2-ER-19, 45, 80, 193, 197-98, 203. Based on this finding, the district court might acquit on the remaining violations or simply find that they do not warrant revocation. 2-ER-44.[1]

Fourth, the government says, "petitioner has already completed his term of imprisonment. And he has not challenged the original child-pornography conviction to which his sentence relates." Opp. 11-12. This is a red herring. Mr. Liddy is still serving his term of supervised release. If this Court reverses, it would undo the revocation finding, which may leave him at unconditional liberty after remand. *See* 18 U.S.C. 2106. And even if it did not, the country would undoubtedly benefit from resolution of the larger issue.

For all these reasons, this case is a proper vehicle to answer a legal question of statutory interpretation impacting the nationwide prosecution of federal crimes committed over the Internet.

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1. To this end, it should be noted that Mr. Liddy has always maintained he did not threaten to kill anyone or use racist language. He admitted getting upset on the phone because he believed he was speaking to a scam caller who had used the publicly available information on the sex offender registry to try to take advantage of him (as had happened multiple times before). 1-ER-3-4, 2-ER-80. But he steadfastly denied making the alleged statements. He is a decorated Marine Corps Colonel, who served his country with honor and distinction. Those statements are entirely inconsistent with his character.

CONCLUSION

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

Respectfully submitted,

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