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The Very Interstate Nature of the Internet? Establishing Uniform Requirements for Internet Transmissions Within Interstate and Foreign Commerce

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THE VERY INTERSTATE NATURE OF THE INTERNET? ESTABLISHING UNIFORM REQUIREMENTS FOR INTERNET TRANSMISSIONS WITHIN INTERSTATE AND FOREIGN COMMERCE

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I. INTRODUCTION

Approximately forty percent of Americans have been victims of online harassment.[1] In recent years, reports of mild and severe online harassment have increased dramatically.[2] Social media users have criticized internet

1. *See* Emily A. Vogels, *The State of Online Harassment*, PEW RSCH. CTR. (Jan. 13, 2021), https://www.pewresearch.org/Internet/2021/01/13/the-state-of-online-harassment (defining less severe forms of online harassment as name calling and embarrassment, and severe forms as sustained harassment, stalking, physical threats, and sexual harassment).

2. *See id.* (comparing severe harassment, which increased by 66 percent from 2014

platforms for not doing more to prohibit, crack down on, or eliminate harassment speech.[3] However, these platforms are under no legal mandate to ensure their platforms are free from harassment.[4] In fact, the Communications Decency Act provides immunity to internet service providers for content published on their platforms by third-party users.[5] Additionally, in *Twitter, Inc. v. Taamneh* and *Gonzalez v. Google, LLC*, the Supreme Court declined to extend liability to social media companies for the actions of third parties on their platforms.[6] Since there are few options for holding social media companies liable, the victims must seek recourse from the individual perpetrators of the speech.

Victims are not completely alone in pursuing liability against the perpretrators of harassing speech. The government also has an interest in holding people accountable when hateful or harassing speech becomes harmful.[7] Federal prosecution of individuals using threatening speech on the Internet is authorized in 18 U.S.C. § 875.[8] However, this statute does not encompass all Internet-based criminal activity.[9] For example, online

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to 2020, with overall online harassment, which, after rising seventeen percent from 2014 to 2017, stayed stagnant between 2017 and 2020).

3. *See id.* (reporting seventy-nine percent of Americans believe social media companies do only a fair or poor job addressing harassment and bullying on their platforms).

4. *See* David McCabe, *Supreme Court Poised to Reconsider Key Tenets of Online Speech*, N.Y. TIMES (Jan. 19, 2023), https://www.nytimes.com/2023/01/19/technology/supreme-court-online-free-speech-social-media.html (explaining social media platforms cannot be held legally responsible for their users' posts under 47 U.S.C. § 230).

5. *See* 47 U.S.C. § 230 (providing immunity from civil liability to interactive computer service providers, such as Google, Facebook, and X (formerly Twitter), for third-party content).

6. *See* Twitter, Inc. v. Taamneh, 598 U.S. 471, 504-05 (2023) (holding the nexus between Twitter and the perpetrators of a terrorist attack is too far removed to establish civil liability under 18 U.S.C. § 2333). *Cf.* Gonzalez v. Google LLC, 598 U.S. 617, 622 (2023) (remanding the case to the Ninth Circuit to consider the decision in *Taamneh* under 47 U.S.C. § 230).

7. *See, e.g.*, N.Y. Times v. Sullivan, 376 U.S. 254, 262-63 (1964); Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969); Virginia v. Black, 538 U.S. 343, 359-60 (2003) (establishing unprotected speech tests for actual malice, speech advocating illegal action, and true threat tests, respectively).

8. *See* 18 U.S.C. § 875 (criminalizing communications in transmissions in interstate commerce related to (a) ransom and reward for kidnapped persons, (b) extortion, (c) threat to kidnap or injure, and (d) threat to injure property or reputation).

9. *See id.* (limiting the scope of the statute to ransom, extortion, kidnap or injury, and property or reputation damage).

stalking is vested within 18 U.S.C. § 2261A.[10] 18 U.S.C. § 875's proffered federal nexus is the Internet as a channel and instrument of interstate or foreign commerce.[11] There is a circuit split on whether the use of the Internet is so intertwined with interstate commerce to establish the requisite federal nexus for interstate transmission.[12]

The First, Second, Third, and Fifth Circuits hold that internet use, by default, is sufficient interstate nexus.[13] Two circuits, the Ninth and Tenth Circuits, require the government to present direct evidence that the transmission crossed state or foreign lines.[14] One circuit, the Seventh Circuit, has not picked a side because the most recent case met the requirements of both tests.[15] Clarifying the circuit split would establish a uniform test for the government to present sufficient evidence that it has jurisdiction to prosecute perpetrators of threatening speech.[16] A uniform test would provide clear protections for victims and judicial efficiency through prosecutorial guidance and evidentiary requirements that would enhance

10. 18 U.S.C. § 2261A (prohibiting online stalking serves as an example of Internet-based federal criminal laws).

11. *See* 18 U.S.C. § 875 (using specific language for each subsection to cover communications transmitted through interstate commerce).

12. *Compare* United States v. Lewis, 554 F.3d 208, 215 (1st Cir. 2009) (analyzing 18 U.S.C. § 2252(a)(2)), United States v. Harris, 548 F. App'x 679, 682 (2d Cir. 2013) (interpreting 18 U.S.C. § 2252(a)(2)), United States v. MacEwan, 445 F.3d 237, 244 (3d Cir. 2006) (reviewing 18 U.S.C. § 2252A(a)(2)(B)), *and* United States v. Runyan, 290 F.3d 223, 239 (5th Cir. 2002) (discussing 18 U.S.C. §§ 2251, 2252A), *with* United States v. Wright, 625 F.3d 583, 594 (9th Cir. 2010) (considering 18 U.S.C. § 2252A(a)(1)), *and* United States v. Schaefer, 501 F.3d 1197, 1201 (10th Cir. 2007) (assessing 18 U.S.C. §§ 2252(a)(2)-(4)(B)), *and also with* United States v. Haas, 37 F.4th 1256, 1263-65 (7th Cir. 2022) (reviewing the requirements of 18 U.S.C. § 875(c)).

13. *See Lewis*, 554 F.3d at 215; *Harris*, 548 F. App'x at 682; *MacEwan*, 445 F.3d at 244; *Runyan*, 290 F.3d at 239 (holding transmission via the Internet was proof that content crossed state or foreign lines to constitute interstate communication).

14. *See Wright*, 625 F.3d at 594; *Schaefer*, 501 F.3d at 1201 (explaining direct evidence of interstate or foreign transmission is required to establish transmission through interstate commerce).

15. *See Haas*, 37 F.4th at 1263-65 (concluding the Seventh Circuit did not need to establish a standard because the government presented evidence of foreign transmission).

16. *See* Jonathan M. Cohen & Daniel S. Cohen, *Iron-ing out Circuit Splits: A Proposal for the Use of the Irons Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals*, 108 CAL. L. REV. 989, 993-97 (2020) (noting the forty-four percent increase in cases filed in federal circuit courts over 30 years, resulting in a greater number of circuit splits due to varied burdens or limitations applied across the U.S. based on geography in interpreting federal law).

convictions. Consistent application of the federal nexus language would provide greater certainty regarding the interpretation of any statutes containing the same federal nexus langauge.

This Comment argues that federal statutes, including the jurisdictional nexus of "transmission in interstate or foreign commerce," should require evidence that a transmission actually traveled through interstate commerce to establish the required federal nexus.[17] Part II of this article describes what threatening internet speech is, the development of the circuit split, and the statutory criteria at issue.[18] Part III analyzes each side of the split and examines when statutory language permits an assumption of interstate or foreign transmission.[19] Part III also proposes adopting a strict definition of "transmission in interstate and foreign commerce" for Internet-based speech and requiring evidence that the transmissions crossed state or national lines.[20] Part IV recommends that Congress amend the statutes in question to include unambiguous wording to utilize this test and to continue to amend as internet and social media use evolves.[21] Part V concludes and looks at future unresolved questions.[22]

II. BACKGROUND

A. Threatening Internet Speech: 18 U.S.C. § 875.

Federal authority to prosecute harmful interstate communications rests in 18 U.S.C. § 875.[23] There are four subsections of section 875, each with three components: (1) the specific activity defined in each subsection (the speech-based covered act(s)), (2) the federal nexus (transmitting the communication through interstate commerce), and (3) the fine or imprisonment requirements

17. *See infra* Part III (analyzing the circuit split and proposing a new test that requires the government to establish evidence of transmissions crossing state or foreign lines).

18. *See infra* Part II (explaining 18 U.S.C. § 875 and the cases that created the split on the Internet as a form of interstate commerce).

19. *See infra* Part III.A (comparing the sides of the circuit split against an application of plain meaning, the interstate commerce nexus test under *United States v. Lopez*, and similarly worded statutes using other methods of transmission).

20. *See infra* Part III.B (proposing a new test for Internet-based transmissions in interstate commerce that requires evidence of travel across state or foreign lines).

21. *See infra* Part IV (arguing Congress must use its Commerce Clause authority judiciously and review related statutes for plain meaning).

22. *See infra* Part V (concluding the current test is the most fitting for Internet-based transmissions).

23. *See* 18 U.S.C. § 875 (providing the standards for threats made in interstate and foreign commerce).

for each crime (the punishment element).[24] This Comment focuses on the first two components: the speech-based acts and the federal nexus. The statute's four subsections prohibit interstate communications of demand for ransom or reward, extortion with threats to kidnap or injure, threat to kidnap or injure, and extortion with threats to injure property or reputation.[25] Each of the four subsections incorporates the specific federal nexus language: "whoever transmits in interstate or foreign commerce any communication."[26] The following section deconstructs the meaning of threatening speech and the development of Congress's use of the Interstate Commerce Clause as the federal nexus.

1. Free Speech versus Threatening Speech and the Covered Communications Under 18 U.S.C. § 875.

The first component of 18 U.S.C. § 875 is the specific conduct covered.[27] The First Amendment protects freedom of speech, but that right is not absolute.[28] For example, in *Virginia v. Black*, the Supreme Court held that true threats are unprotected speech.[29] The Court defined true threats from the perspective of the speaker, analyzing whether they intend to convey serious expressions to commit an act of unlawful violence.[30] The Supreme Court in *Elonis v. United States* later clarified specifically for 18 U.S.C. § 875(c) that there must be evidence of the speaker's subjective intent to convey a threat.[31] The Court explained that the prosecution must prove the defendant intended to cause a threat, not merely that the communication was perceived as a threat.[32] *Counterman v. Colorado* expanded the holding in *Elonis* by requiring proof that the speaker had the subjective intent to make

24. *See id.* (establishing the components for each subsection).

25. *See generally* 18 U.S.C. § 875.

26. *See id.* (incorporating the same federal nexus "transmission in interstate or foreign commerce" into each subsection).

27. *See id.* (enumerating the types of threatening conduct covered within the statute).

28. *See* U.S. CONST. amend. I (prohibiting Congress from enacting laws abridging the freedom of speech).

29. *See* Virginia v. Black, 538 U.S. 343, 359 (2003) (establishing the state may ban true threat speech).

30. *See id.* (distinguishing advocacy for the use of force and law violation from advocacy that directly incites the use of force or lawless action).

31. *See* Elonis v. United States, 575 U.S. 723, 740 (2015) (adopting a "reasonable person" standard based on if a reasonable person would perceive the speech as threatening).

32. *See id.* at 740-41 (requiring an element of "intent" to threaten).

threatening statements beyond § 875(c).[33] In *Counterman*, the Court provided further clarification that true threats must include some subjective understanding that the statements are threatening under a reckless standard analysis.[34] *Elonis* and *Counterman* require subjective analyses of defendants to establish whether the statements were threatening.

2. The Federal Nexus: Interstate and Foreign Commerce Under 18 U.S.C. § 875.

The second component of each subsection of 18 U.S.C. § 875 is the federal nexus justification.[35] The statute's federal nexus is Congress's constitutional authority to regulate interstate and foreign commerce.[36] Congress has the exclusive power to regulate interstate commerce.[37] In the twentieth century, the Court affirmed expanding deference to Congress to utilize broad sweeping federal nexus under the Commerce Clause.[38] In *United States v. Darby*, the Supreme Court broadened Congress's authority when it upheld the Fair Labor Standards Act to regulate employment conditions under the Commerce Clause.[39]

The Supreme Court strengthened Congress's Commerce Clause power even more the year after *Darby*, in *Wickard v. Filburn*, when the Court upheld Congress's regulation of wheat crop acreage allotments, limiting the

33. *See* Counterman v. Colorado, 600 U.S. 66, 81 (2023) (applying the *Elonis* standard to broader true threat criminal statute applications and finding specific intent to threaten is required for establishing unprotected threatening speech).

34. *See id.* at 82 (holding that utilizing a reckless standard to assess whether the speech is threatening is aligned with *mens rea* requirements).

35. *See* 18 U.S.C. § 875 (adopting the same interstate transmission federal nexus standard for each subsection of the statute).

36. *See* U.S. CONST. art. 1, § 8, cl. 3 (granting Congress the power to regulate commerce with foreign nations, among states, and tribes).

37. *See* Gibbons v. Ogden, 22 U.S. 1, 206 (1824) (establishing Congress's authority can be used to its fullest extent without limitations outside of the Constitution through the Commerce Clause).

38. *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941); Wickard v. Filburn, 317 U.S. 111 (1942); Katzenbach v. McClung, 397 U.S. 294 (1964) (affirming Congress's expanded use of commerce power to regulate seemingly intrastate activities).

39. *See Darby*, 312 U.S. at 109, 125-26 (affirming the sections of the Fair Labor Standards Act that prohibit goods in interstate commerce made by non-compliant companies regarding wage and hour requirements, signifying a newfound acknowledgment of the power vested in the Commerce Clause, thereby overturning Hammer v. Dagenhart, 247 U.S. 251 (1918) (establishing a standard that intrastate activities, such as child labor practices, were too far removed from the goods traveling through the channels of commerce)).

amount of wheat farmers could grow on their property.[40] Each of these cases expanded Congress's authority to regulate seemingly intrastate activities that had a conceivable connection to interstate commerce.[41]

However, in 1995, the Supreme Court restrained Congress's increasing application of the Commerce Clause in *United States v. Lopez*.[42] The Supreme Court clarified three parameters in which the Commerce Clause can be used.[43] Congress's authority to regulate the use of interstate commerce was limited to (1) channels of commerce, (2) instrumentalities of commerce, and (3) activities that substantially affect interstate commerce.[44] The substantial effects test was first articulated in *United States v. Morrison*; courts determine Congress's power to regulate activities that substantially affect interstate commerce if the activity meets the four-part test: (1) economic nature, (2) jurisdictional limits, (3) congressional findings regarding the activity's relationship with interstate commerce, and (4) the actual connection between activity and interstate commerce.[45] These four factors constitute the test to establish the broadest extent of Congressional power under the Commerce Clause.[46]

B. The Circuit Split Over Internet Use and Interstate Commerce.

The federal nexus transmission of material in interstate or foreign commerce is at the heart of the circuit split. The split concerns the interpretation and application of the federal nexus wording in several statutes that cover heinous crimes such as the sexual exploitation of minors and child

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40. *See Wickard*, 317 U.S. at 128-29 (expanding Congress's ability to use the interstate Commerce Clause to intrastate activities that could significantly impact interstate commerce).

41. *See, e.g.*, *Gibbons*, 22 U.S. at 196-97; *Darby*, 312 U.S. at 109, 125-26; *Wickard*, 317 U.S. at 128-29 (affirming and broadening Congress's ability to exercise its power to regulate commerce).

42. *See* United States v. Lopez, 514 U.S. 549, 567 (1995) (limiting the great deference given to Congress from 1937 until 1995 of connecting even minutiae effects and instead requiring a substantial effect analysis).

43. *See id.* at 558-59 (narrowing Congress's use of the Commerce Clause to channels, instrumentalities, and substantial effects).

44. *See id.* at 559 (defining the modern substantial effects test); *see also* Gonzales v. Raich, 545 U.S. 1, 17-18 (2005) (affirming the application of the *Lopez* substantial effects test by applying the components to intrastate, homegrown cannabis production).

45. *See* Norton v. Ashcroft, 298 F.3d 547, 555-56 (6th Cir. 2002) (synthesizing the findings in United States v. Morrison, 529 U.S. 598, 610-19 (2000), to enumerate clear components of the substantial effects test).

46. *See id.* (detailing the four-step analysis for the substantial effects test).

pornography.[47] In addition to 18 U.S.C. § 875, at least three other statutes, 18 U.S.C. §§ 2251, 2252, and 2252A, have a similar federal nexus of "transmission in interstate or foreign commerce."[48] Further, 18 U.S.C. §§ 2252 and 2252A include a requirement that the person knowingly transport or receive explicit content.[49] The purpose of this requirement is not related to the actual transmission, but rather the mental state of the person who is sending or receiving the material.[50] The knowing participation requirement is complemented by later sections of each statute that permit affirmative defenses that the defendant attempted to destroy and/or report the material.[51]

Although these issues are distinct from threatening speech, given the similar transmission statutory language, the federal nexus component of these laws is analyzed similarly. Congress enacted 18 U.S.C. §§ 2251, 2252, and 2252A using its Constitutional authority to regulate interstate and foreign commerce.[52] These statutes, at the time the cases in the circuit split were decided, prohibited transmission of these materials in interstate commerce.[53] In 2008, Congress amended §§ 2251, 2252, and 2252A to broaden the transmission jurisdictional power.[54] The phrase transmission "in interstate or foreign commerce" became "in or affecting interstate or foreign commerce."[55]

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47. *See* 18 U.S.C. §§ 2251, 2252, 2252A (2003) (utilizing the same federal nexus language for each section).

48. *See* 18 U.S.C. § 2251 (2003) (requiring transmission in interstate or foreign commerce to prosecute sexual exploitation of children offenses); 18 U.S.C. § 2252 (2003) (including the same transmission language for crimes related to certain activities relating to material involving the sexual exploitation of minors); 18 U.S.C. § 2252A (2003) (encompassing identical transmission language for certain activities relating to child pornography material).

49. *See* 18 U.S.C. §§ 2252(a)(1)-(2), 2252A(a)(1)-(3) (2003) (amending the covered acts to include a heightened knowledge component).

50. *See id.* (requiring the defendant is actively engaged in viewing the material and not acting swiftly to destroy or report the material).

51. *See* 18 U.S.C. §§ 2252(c)(2), 2252A(d)(1) (2003) (listing enumerated affirmative defenses including promptly and in good faith turning over the material to law enforcement).

52. *See* 18 U.S.C. §§ 2251, 2252, 2252A (2003); *see also* U.S. CONST. art. 1, § 8, cl. 3 (granting Congress interstate and foreign commerce power).

53. *See* 18 U.S.C. §§ 2251, 2252, 2252A (2003) (providing jurisdictional coverage for transmissions in interstate commerce).

54. *See* Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, § 103(b), 122 Stat. 4003 (2007) (amended 2008) (amending the statute to include substantial effects).

55. *See id.* (broadening the jurisdictional coverage).

While §§ 2251, 2252, and 2252A currently have a federal nexus justification different from 18 U.S.C. § 875, the circuit split has not been resolved for what constitutes interstate transmission for Internet use and what extends to statutes that still use the simplified language.[56] This Comment focuses on the interpretation of the statutory language limited to transmission in interstate or foreign commerce and does not question the validity of child pornography statutes.

This section briefly reviews the statutes that the circuits rely on, which include 18 U.S.C. § 875;[57] 18 U.S.C. § 2251;[58] 18 U.S.C. § 2252;[59] and 18 U.S.C. § 2252A.[60] Using the above-mentioned statutes, seven circuits are involved in the split of what constitutes transmission in interstate commerce.[61] Each of the seven circuits decided cases in which the defendant was charged with using the Internet in violation of the respective statutes.[62] The First, Second, Third, and Fifth Circuits hold that the use of the Internet alone is sufficient to establish the interstate commerce nexus.[63] The Ninth and Tenth Circuits hold that there must be evidence that the Internet communication at issue crossed state lines to have a federal nexus.[64] Lastly,

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56. *See* United States v. Haas, 37 F.4th 1256, 1265-66 (7th Cir. 2022) (summarizing the extent of the circuit split and applying the split to 18 U.S.C. § 875).

57. *See* 18 U.S.C. § 875 (encompassing unprotected interstate communications).

58. *See* 18 U.S.C. § 2251 (2003) (addressing sexual exploitation of children).

59. *See* 18 U.S.C. § 2252 (2003) (discussing certain activities relating to material involving the sexual exploitation of minors).

60. *See* 18 U.S.C. § 2252A (2003) (focusing on certain activities relating to material constituting or containing child pornography).

61. *Compare* United States v. Lewis, 554 F.3d 208, 209 (1st Cir. 2009), United States v. Harris, 548 F. App'x 679, 680 (2d Cir. 2013), United States v. MacEwan, 445 F.3d 237, 240 (3d Cir. 2006), *and* United States v. Runyan, 290 F.3d 223, 231 (5th Cir. 2002) (representing the side of the circuit split that does not require proof the transmission crossed state or foreign borders), *with* United States v. Wright, 625 F.3d 583, 588 (9th Cir. 2010), *and* United States v. Schaefer, 501 F.3d 1197, 1198 (10th Cir. 2007) (constituting the other side of the circuit split by requiring evidence of interstate or foreign transmission), *and Haas*, 37 F.4th at 1259 (declining to pick a side of the circuit split).

62. *See* Bernie Pazanowski, *Circuit Splits Reported in U.S. Law This Week-June 2022*, BLOOMBERG L. (July 5, 2022, 9:40 AM), https://www.bloomberglaw.com /product/blaw/bloomberglawnews/us-law-week/ (reporting on the extent of the circuit split over evidentiary standards for "transmission in interstate or foreign commerce").

63. *See Lewis*, 554 F.3d at 209; *Harris*, 548 F. App'x at 680; *MacEwan*, 445 F.3d at 237; *Runyan*, 290 F.3d at 239 (interpreting the transmission components to mean the use of the Internet establishes interstate transmission).

64. *See Wright*, 625 F.3d at 588; *Schaefer*, 501 F.3d at 1198 (interpreting the

the Seventh Circuit sits squarely between either side as the case involving internet communication that crossed state lines met both tests.[65]

1. The First, Second, Third, and Fifth Circuits.

The First, Second, Third, and Fifth Circuits hold that internet use alone is sufficient to establish transmission in interstate commerce to provide a federal nexus.[66] For example, in 2002, the Fifth Circuit, in *United States v. Runyan*, upheld Runyan's conviction of sexual exploitation of a child in violation of 18 U.S.C. § 2251 and distribution, receipt, and possession of child pornography in violation of 18 U.S.C. § 2252A.[67] The government presented evidence of CDs, ZIP disks, and floppy disks that all contained inappropriate material that could be accessed using a computer connected to the Internet.[68] The evidence under § 2251 included testimony from the child, who was exploited by Runyan, discussing Runyan's statements she overheard that he was going to sell the images of the victim over the Internet.[69]

For the charges under § 2252A, the government did not establish that the images traveled interstate, only that the images were connected to the Internet.[70] No evidence presented directly linked interstate transmission with the material.[71] The Fifth Circuit upheld the conviction by allowing circumstantial or indirect evidence could establish the "transmission in interstate commerce".[72] The Court held even a "WWW." web address on

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necessity for interstate transmission as requiring the government to furnish evidence that the transmissions indeed traversed state boundaries).

65. *See Haas*, 37 F.4th at 1265 (declining to pick a side of the circuit split because the specific evidence presented included undisputed facts that the transmission was sent to Russia, thus meeting the transmission in foreign commerce component).

66. *See Lewis*, 554 F.3d at 209; *Harris*, 548 F. App'x at 680; *MacEwan*, 445 F.3d at 237; *Runyan*, 290 F.3d at 239 (holding the transmission components were met by using a computer and Internet, because of the interstate nature of the Internet).

67. *See* United States v. Runyan, 290 F.3d 223, 231 (5th Cir. 2002) (observing the charges against Runyan under 18 U.S.C. §§ 2251 and 2252A (1998), which included identical transmission language to the 2003 versions of the statutes).

68. *See id.* at 232 (articulating the volume of evidence collected against Runyan).

69. *See id.* at 238-39 (fulfilling the component that Runyan intended to transport these images interstate).

70. *See id.* at 243 (acknowledging the government did not provide evidence of interstate transmission, just Internet use, for charges under 18 U.S.C. § 2252A (2003)).

71. *See id.* at 243 (contending that the Government must only prove the Internet was used to download the materials to establish the requisite federal nexus).

72. *Compare Runyan*, 290 F.3d at 239 (declaring the Fifth Circuit will follow the

the material could be sufficient to make an interstate commerce connection.[73]

The Third Circuit came to a similar conclusion in 2006 with *United States v. MacEwan*. The monumental decision in *United States v. MacEwan* is the foundation for this side of the circuit split: that use of the Internet is sufficient to establish interstate transmission. MacEwan was charged with three counts of receiving child pornography in violation of 18 U.S.C. § 2252A.[74] Police searched MacEwan's computer twice, yielding over 1,060 and 250 graphic images, respectively.[75] The government called Comcast's Network Abuse Department manager to testify generally how website connection requests go through the shortest path, based on the volume of internet traffic at the time of the request.[76]

Ultimately, a jury convicted MacEwan of receiving images transmitted in interstate or foreign commerce.[77] The Third Circuit upheld the conviction because the "very interstate nature of the Internet" meant that the server's connection to the Internet constantly established interstate transmission.[78] The court defined the phrase "very interstate nature of the Internet" to mean that once a user goes to a website or downloads an image, the data travels through a website server and the complex global data systems of interstate commerce.[79] This assessment remains the predominant definition the

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rule that the use of the Internet, alone, establishes interstate transmission), *with* United States v. Hilton, 257 F.3d 50, 54-55 (1st Cir. 2001) (holding Internet alone is sufficient to support evidence of Internet connection, thus interstate transmission under a previous version of 18 U.S.C. § 2252A (1998)).

73. *See Runyan*, 290 F.3d at 239 (deciding Internet use constructively establishes interstate transmission); *see also* United States v. Henriques, 234 F.3d 263, 266-67 (5th Cir. 2000) (supporting the notion that circumstantial evidence linking an image to the Internet, such as the presence of a website address embedded on the image, can be sufficient to establish interstate transmission).

74. *See* United States v. MacEwan, 445 F.3d 237, 240 (3d Cir. 2006) (defining the charges against MacEwan stemming from police seizing MacEwan's computer).

75. *See id.* (emphasizing the volume of evidence discovered on MacEwan's computer).

76. *See id.* at 240-41 (summarizing that the testimony of Comcast's manager did not include direct evidence of interstate transmission).

77. *See id.* at 242 (recounting MacEwan's conviction under 18 U.S.C. § 2252A (2003)).

78. *See id.* at 244 (declaring the Internet is interstate by default, so a connection to the Internet is synonymous with interstate transmission).

79. *See id.* at 244 (basing the phrase on the First Circuit's holding in United States v. Carroll, 105 F.3d 740, 742 (1st Cir. 1997), which held the use of the Internet is tantamount to transmissions crossing state lines).

government relies on in such cases.[80]

The First Circuit built upon *MacEwan* in *United States v. Lewis* in 2009. Lewis was charged with receipt of child pornography in violation of 18 U.S.C. § 2252.[81] Lewis downloaded inappropriate images on a computer at his work, which led to a forensic analysis of his computer at home.[82] The search uncovered ten child pornography videos on his home computer that Lewis admitted to downloading.[83] The forensic analysis determined Lewis likely downloaded videos from the internet platform LimeWire.[84]

The government did not provide direct evidence that the videos were downloaded using interstate transmission; instead, there was no evidence that Lewis traveled outside of Massachusetts—digitally—to obtain the videos.[85] The court conducted an extensive analysis of how LimeWire's file-sharing procedures operate.[86] The First Circuit held that § 2252 requires the government to establish actual interstate transmission of the images.[87] The court characterized the use of the Internet alone as sufficient to prove interstate transmission.[88] Therefore, the court determined that actual proof of interstate transmission was unnecessary because transmission over the

80. *Compare, e.g.,* United States v. Lewis, 554 F.3d 208, 215 (1st Cir. 2009) (supporting *MacEwan*'s assessment of the very interstate nature of the Internet by affirming the conviction without establishing interstate or foreign transmission), *and* United States v. Harris, 548 F. App'x 679, 682 (2d Cir. 2013) (reiterating *MacEwan*'s reference to the very interstate nature of the Internet), *with* United States v. Wright, 625 F.3d 583, 595 (9th Cir. 2010) (disagreeing with the quote in *MacEwan* as the government's justification for not providing specific evidence of transmission).

81. *See Lewis*, 554 F.3d at 209 (summarizing the charges against Lewis under 18 U.S.C. § 2252 (2003)).

82. *See id.* (observing Lewis was a United States Park Ranger and sent messages from the Salem Maritime National Historic Site).

83. See *id.* at 209 (recapping the evidence presented at trial).

84. *See id.* at 211 (citing Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 919-20 (2005) (clarifying LimeWire, as a peer-to-peer file-sharing Internet-based application, avoids central servers as the source of this assessment; but also noting that these types of applications still utilize dynamic routing methods)).

85. *See id.* at 209 (reviewing the government's expert witness said on cross-examination the transfer could have occurred entirely intrastate).

86. *See id.* at 209, 211 (analyzing the structure of LimeWire and how data is transmitted through its servers).

87. *See id.* at 212 (noting the undisputed evidence that the images came from the Internet but providing no proof of interstate transmission).

88. *See id.* at 215 (clarifying that when using the Internet, the interstate transmission component could be met by showing simply that the Internet was used).

Internet was tantamount to moving across state lines.[89] The court upheld Lewis's conviction.[90]

Last, in 2013, the Second Circuit, in *United States v. Harris*, took a comparable approach to *Lewis* concerning 18 U.S.C. § 2252.[91] Harris was charged with three counts of receiving child pornography and one count of possession of child pornography in violation of 18 U.S.C. § 2252.[92] Harris appealed his conviction because the government did not establish that the materials traveled across state lines.[93] The Second Circuit relied on its previous holdings in *United States v. Rowe* and *United States v. Anson,* which held that possession of material obtained from the Internet was sufficiently "in commerce."[94] The court cited the First, Third, and Fifth Circuits as additional evidence that the use of the Internet is synonymous with interstate transmission.[95] The court affirmed the conviction because Harris obtained the materials from the Internet, which was sufficient to find that the material traveled interstate.[96]

2. The Ninth and Tenth Circuits.

Unlike the above four circuits, the Ninth and Tenth Circuits required actual evidence of interstate transmission to meet the interstate transmission nexus.[97] These two circuits required actual proof of the Internet transmission

89. *See id.* at 209 (citing United States v. Carroll, 105 F.3d 740, 741 (1st Cir. 1997)) (explaining Internet use is synonymous with interstate transmission).

90. *See id.* (affirming Lewis's conviction because the use of the Internet, without establishing the route taken, was sufficient).

91. *See* United States v. Harris, 548 F. App'x 679, 682 (2d Cir. 2013) (suggesting use of the Internet alone suffices for the jurisdictional nexus of interstate commerce transmission).

92. *See id.* at 680 (describing the charges against Harris under 18 U.S.C. § 2252 (2003)).

93. *See id.* (summarizing the grounds of Harris's appeal).

94. *See id.* at 682 (citing United States v. Rowe, 414 F.3d 271, 279 (2d Cir. 2005) (holding that using the Internet involved transportation in interstate commerce under 18 U.S.C. § 3237(a)) and United States v. Anson, 304 F. App'x 1, 5 (2d Cir. 2008) (holding that obtaining images from the Internet is tantamount to interstate transmission under 18 U.S.C. § 2252(a)(2) (2003))).

95. *See id.* (agreeing with the First, Third, and Fifth Circuits' definition of Internet use being tantamount to interstate transmission; reiterating the Third Circuit's assessment in *MacEwan* that the very interstate nature of the Internet is perfectly logical).

96. *See id.* at 682 (holding proof of Internet use established interstate transmission without presenting proof of crossing state or foreign lines).

97. *See* United States v. Wright, 625 F.3d 583, 591 (9th Cir. 2010) (holding the plain

traveling in interstate or foreign commerce.[98] The Tenth Circuit, in the 2007 decision in *United States v. Schaefer*, reviewed the application of "transmission in interstate or foreign commerce" within 18 U.S.C. § 2252.[99] Schaefer was convicted of receiving and possessing child pornography in violation of 18 U.S.C. § 2252.[100] The charges stemmed from a tip by the Office of Immigration and Customs Enforcement ("ICE").[101] The tip resulted in a search of Schaefer's computer, revealing subscriptions to inappropriate websites, and an analysis of CDs and documents, revealing graphic images.[102] Schaefer admitted to seeking such images on the Internet but did not explain the transmission route.[103] The government did not present evidence that the transmissions traveled interstate.[104]

The Tenth Circuit conducted a plain meaning analysis of the statutory text.[105] The Tenth Circuit held that internet connection, without proof of interstate transmission, was insufficient to establish a federal nexus required in 18 U.S.C. § 2252.[106] The Tenth Circuit concluded that Congress intended to use statutory language that limited the breadth of the jurisdictional nexus by only including the "transmission in interstate or foreign commerce" language, which does not encompass substantial effects or facilities associated with interstate or foreign commerce.[107] The Tenth Circuit overturned Schaefer's conviction because the federal nexus of interstate

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meaning of the statute must be taken to require at least one method of interstate travel); *see also* United States v. Schaefer, 501 F.3d 1197, 1198 (10th Cir. 2007) (declaring specific evidence of transmission across state lines is required under the statute).

98. *See Wright*, 625 F.3d at 591; *Schaefer*, 501 F.3d at 1197-98 (holding evidence of interstate or foreign transmission is required under the statutes).

99. *See Schaefer*, 501 F.3d at 1197-98 (reviewing Schaefer's conviction under 18 U.S.C. § 2252 (2003)).

100. *See id.* (summarizing the charges against Schaefer).

101. *See id.* at 1198 (explaining the nature of the tip from ICE).

102. *See id.* (assessing the evidence presented against Schaefer).

103. *See id.* at 1198-99 (restating Schaefer's admissions to authorities contrasted with the lack of evidence of interstate transmission at trial).

104. *See id.* at 1200-01 (observing the lack of evidence proving an interstate transmission path).

105. *See id.* (reversing the conviction based on the insufficiency of evidence presented).

106. *See id.* (holding the requirements of the statute required proof of transmission across state lines).

107. *See id.* at 1201-02 (distinguishing the specific language in 18 U.S.C. § 2252 (2003) from other types of language that include broadening terms such as "affecting" or "facility").

transmission was not met.[108]

The Ninth Circuit, in *United States v. Wright*, reviewed the conviction of Wright for transporting and possessing child pornography in violation of 18 U.S.C. § 2252A.[109] An undercover FBI agent discovered Wright's chatroom server used to exchange child pornography.[110] Wright used a client-to-client connection, like the LimeWire assessment the First Circuit did in *Lewis*, which circumvents a central server.[111] Both the undercover agent and Wright were based in Arizona.[112] Although both sides did not dispute that the transmissions did not cross state lines beyond Arizona, the district court convicted Wright under § 2252A.[113]

On appeal, the Ninth Circuit interpreted the plain meaning of the term "transmission" to require direct evidence of movement across state or foreign lines.[114] The Ninth Circuit explicitly disagreed with the Third and First Circuit's holdings in *MacEwan* and *Lewis*, respectively, by rejecting the argument that a defendant's mere connection to the Internet was sufficient to establish interstate transmission and support a conviction.[115] The Ninth Circuit decided this case in 2010, a few months after the Fifth Circuit's decision in *Lewis* and two years before the Second Circuit's decision in *Harris*. Here, the facts were clearer than in the previous cases because there was evidence that the transmission never crossed state lines.[116] The Ninth Circuit reasoned that even in non-digital transmissions, like mail or sea, there must be direct evidence of interstate transmission, and the Internet should be treated the same.[117]

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108. *See id.* at 1201, 1207 (overturning Schaefer's conviction because of the lack of evidence of interstate transmission).

109. *See Wright*, 625 F.3d at 588 (restating the charges against Wright).

110. *See id.* at 588-89 (summarizing the facts that led to the charges against Wright under 18 U.S.C. § 2252A (2003)).

111. *See id.* at 589 (enunciating the types of internet servers used by Wright).

112. *See id.* at 588 (noting the geographic location of the defendant and the agent was the same state).

113. *See id.* at 590, 595 (reviewing the conviction while assessing the sufficiency of evidence under the statute's plain meaning).

114. *See id.* at 591 (interpreting the text's plain meaning).

115. *See id.* at 595 (rejecting the First, Second, Third, and Fifth Circuit's holdings that Internet use is equivalent to interstate transmission).

116. *See id.* (underscoring the undisputed evidence that the materials did not leave Arizona).

117. *See id.* at 597-98 (equating the use of the Internet to more established methods of transmission).

3. The Seventh Circuit.

The Seventh Circuit, in 2022, declined to pick a side of the split because the facts of the case on point satisfy both tests because the transmissions used the Internet and crossed state lines.[118] In *United States v. Haas*, the Seventh Circuit conducted a plain error review of Haas' conviction under 18 U.S.C. § 875(c).[119] Haas posted death threats against UN Ambassador Nikki Hayley on her public Instagram profile and then visited a Russian-based social media site where he posted anti-Semitic content about the FBI Officer who investigated him for the Instagram comments.[120] Since Haas was in Illinois when he posted the threats on a Russia-based website without servers based in the United States, his posts crossed interstate and foreign lines.[121] The Seventh Circuit equated this to an interstate transmission, like going to a post office to mail a letter.[122] The appellate review was subject to plain error only, and the Seventh Circuit maintained neutrality by explaining that Haas did not raise these issues during the trial.[123] Although the court avoided picking a side due to the plain-error review, the Seventh Circuit indicated that the language "transmission in interstate commerce" required proof of interstate transmission and that Congress used limited language.[124] The court explained that because the transmissions traveled across state or foreign lines to reach a recipient in a different location or because the website platform's servers are located elsewhere, the evidence could be sufficient to establish transmission in interstate commerce.[125]

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118. *See* United States v. Haas, 37 F.4th 1256, 1264-65 (7th Cir. 2022) (discussing the circuit split while clarifying that the Seventh Circuit will not pick a side).

119. *See id.* at 1265 (considering the evidence against Haas under 18 U.S.C. § 875).

120. *See id.* at 1259-60 (clarifying the context behind the charges against Haas involved several posts on the Internet).

121. *See id.* at 1265 (detailing the international lines Haas's posts crossed when he posted to a Russian-based website).

122. *See id.* at 1266 (comparing Internet transmissions to shipping mail internationally to demonstrate these transmissions have capacity to transmit interstate, even if the shipper does not actively seek an interstate or foreign path).

123. *See id.* at 1264 (noting even though Haas was pro se at the appellate level, his failure to raise these issues at the trial court was less understandable because he was then-represented by counsel).

124. *See id.* at 1266 (comparing Haas, knowingly using a Russian platform, to someone mailing a letter across state lines as evidence that the transmission crossed state lines. Also contending that Haas facilitated an interstate transmission, just as one would use the Post Office, UPS, or FedEx to mail a letter).

125. *See id*. (explaining ways in which transmission could transcend to be in interstate commerce).

III. ANALYSIS

A. A Comparison of the First, Second, Third, and Fifth Circuits to the Ninth and Tenth Circuits and Seventh Circuit Shows That the Former Circuits Are Incorrectly Overly Broad.

1. The Plain Meaning of the Statutory Language Demonstrates That the Full Extent of Congress's Commerce Clause Power Does Not Apply.

There are several analytical frameworks courts can employ when interpreting the meaning of statutory text. This section examines four tools: plain meaning, subsequent congressional action, the substantial effects test, and similarly worded statutes. Courts should first look to the plain meaning of a statute when analyzing congressional intent.[126] The Supreme Court's seminal case *Tennessee Valley Authority v. Hill* emphasized that when the "plain intent of Congress" is seen in the text of the statute, courts should limit their interpretation to the statutory text.[127] Plain meaning analysis first involves reading the basic language of the statute without applying congressional intent or supplemental facts.[128] This is the first step in statutory analysis because it is widely accepted that the ordinary meaning of the words Congress uses is understood to reflect legislative intent most clearly.[129]

The First, Second, Third, and Fifth Circuits unjustifiably construed the definition of "transmission" in a way that is inconsistent with the plain meaning of the statute.[130] These four circuits presumed that all activity on the Internet was equivalent to transmissions in interstate commerce without

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126. *See* Robin Kundis Craig, *The Stevens/Scalia Principle and Why It Matters: Statutory Conversations and a Cultural Critical Critique of the Strict Plain Meaning Approach*, 79 TUL. L. REV. 955, 960 (2005) (asserting the plain meaning rule is hardly controversial and the logical first step in analysis).

127. *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184-85 (1978) (adopting a plain meaning analysis as the guiding tool to understand congressional intent).

128. *See* United States v. Nader, 542 F.3d 713, 717 (9th Cir. 2008) (emphasizing the first step to analyzing congressional intent must be through a plain meaning reading of the text and only if the plain meaning is ambiguous should other sources be considered).

129. *See Hill*, 437 U.S. at 184 (maintaining the plain meaning of the words Congress used established the boundaries of statutory interpretation).

130. *Compare* United States v. Lewis, 554 F.3d 208, 215 (1st Cir. 2009), *and* United States v. Harris, 548 F. App'x 679, 682 (2d Cir. 2013) (holding internet use is by default an interstate transmission), *with* United States v. Wright, 625 F.3d 583, 600-01 (9th Cir. 2010), *and* United States v. Schaefer, 501 F.3d 1197, 1201 (10th Cir. 2007) (requiring proof that the internet transmission crossed state lines).

evidence that the transmission left the state.[131] However, the four circuits do not see their interpretations as inconsistent with plain meaning analysis due to assessments of the Internet in the early 2000s.[132]

For instance, the Third Circuit's ruling in *MacEwan* serves as the quintessential Internet-as-interstate-commerce analysis for several of the more recent cases.[133] The frequently cited quote in *MacEwan*, "the very interstate nature of the Internet is enough [to establish interstate transmission]," establishes the foundational argument for this side of the circuit split.[134] *MacEwan* points out that the Internet is one of the more intertwined interstate transmission methods.[135] However, the court's conclusion gave the Internet special status under statutory language that is outside of the scope of the law.[136] The plain reading of the text rightfully creates the parameters for the first step of analysis. There must be a presumption that Congress chose the words intentionally; to interpret otherwise goes outside the bounds of a plain meaning analysis.[137]

The First and Second Circuits expanded upon *MacEwan*'s interpretive lead.[138] The Fifth Circuit, in *Runyan*, did not have *MacEwan* to rely on

131. *See Lewis*, 554 F.3d at 216; *Harris*, 548 F. App'x at 682 (finding that showing cross-state-lines transmission is unnecessary when the Internet is the transmission source because of the very interstate nature of the Internet).

132. *Compare* United States v. MacEwan, 445 F.3d 237, 244 (3d. Cir. 2006) (deciding the route of an internet transmission is not needed when establishing federal nexus and serving as a quintessential case for the Internet-is-interstate-transmission argument), *with Wright*, 625 F.3d at 591 (criticizing *MacEwan* as the source of the Government's belief there is no need to demonstrate crossing state lines because it is outside the plain meaning of the statute).

133. *See, e.g.*, *Lewis*, 554 F.3d at 215; *Harris*, 548 F. App'x at 682; *Wright*, 625 F.3d at 591; *Schaefer*, 501 F.3d at 1203-04 (attributing the assessment of the very interstate nature of the Internet to *MacEwan* 445 F.3d at 244).

134. *See MacEwan*, 445 F.3d at 244 (holding the Internet is an international network and therefore it is not necessary to distinguish precise transmission paths).

135. *See* Reno v. ACLU, 521 U.S. 844, 849-50 (1997) (observing the Internet is a network of interconnected computers that grew from 300 host computers to 9,400,000 between 1981 and 1996).

136. *See Wright*, 625 F.3d at 600 (articulating Congress's intent can vary from the plain meaning of the statute, but ultimately courts are bound to the plain meaning when such meaning is ordinarily logical).

137. *See* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (underscoring that the cardinal canon of judicial inquiry is a plain meaning analysis as there is a rightful presumption that legislatures legislate with the words they intend to use, and courts should go no further than a plain meaning analysis when statutes are unambiguous).

138. *See Lewis*, 554 F.3d at 215-16; *Harris*, 548 F. App'x at 682 (aligning

because that case came out four years after *Runyan*.[139] Alternatively, the Fifth Circuit relied on the cases that the Third Circuit used to establish its holding in *MacEwan*.[140] The Fifth Circuit agreed that internet use constitutes interstate transmission, which also went far outside of the plain meaning analysis.[141] By going outside of the plain meaning, the First, Second, Third, and Fifth Circuits established unnecessary ambiguity in the application of "transmission in interstate commerce." The circuit split can be succinctly summarized by the First, Second, Third, and Fifth Circuits, which interpret the law beyond its literal text, while the Ninth and Tenth Circuits' analysis aligns with the plain meaning of the text. Courts lack the authority to redefine legislative intent when Congress's intentions are evident.[142] If there is no evidence the sender and recipient are in different states, or without evidence servers in another state transmitted the digital material, there can be no transmission in interstate commerce.

On the other side of the circuit split, the Ninth and Tenth Circuits performed a plain meaning analysis.[143] Both circuits applied the plain language to the evidence presented.[144] In *United States v. Wright*, the Ninth Circuit explicitly rejected the conclusions in *MacEwan* and *Lewis* that internet use presumptively involves interstate transmission.[145] *Wright* also rejected the notion that the language "transmission in interstate commerce" is synonymous with the broadest-reaching elements of Congress's

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transmission analysis with *MacEwan*'s analysis by not requiring evidence of interstate travel).

139. *See* United States v. Runyan, 290 F.3d 223, 239 (5th Cir. 2002) (relying on United States v. Carroll, 105 F.3d 740, 742 (1st Cir. 1997) (using the language that Internet transmission is tantamount to interstate commerce)).

140. *See id.* (citing *Carroll*, 105 F.3d 740) (defining the "very interstate nature of the Internet," which the court also relied on in *MacEwan*).

141. *See Runyan*, 290 F.3d at 239 (siding with the First Circuit's ruling in *Carroll* that Internet use is always considered interstate transmission).

142. *See generally* U.S. CONST. art. 1 (vesting legislative power in the Legislative Branch, not the Judicial Branch).

143. *See* United States v. Wright, 625 F.3d 583, 591 (9th Cir. 2010) (stating *MacEwan* was the source of the Government's belief that there is no need to demonstrate crossing state lines); United States v. Schaefer, 501 F.3d 1197, 1201 (10th Cir. 2007) (maintaining interstate transmission is not assumed just because the Internet is used).

144. *See Wright*, 625 F.3d at 591; *Schaefer*, 501 F.3d at 1202 (discussing how the interpretation of 18 U.S.C. §§ 2252 and 2252A (2003), respectively, is limited to the plain terms analysis).

145. *See Wright*, 625 F.3d at 595 (rejecting the *MacEwan* and *Lewis* conclusions that the Internet is assumed to be an interstate transmission even without evidence).

commerce power.[146] The Ninth Circuit also compared the plain meaning of 18 U.S.C. § 2252A to statutes with broader federal nexus language, such as 18 U.S.C. § 1952, the Travel Act, to examine the effect of expansive federal nexus language.[147] The court accentuated the plain meaning by citing Webster's dictionary, a preferred source in interpreting the plain meaning while interpreting the statutory text.[148]

Similarly, the Tenth Circuit, in *Schaefer*, critically examined the plain meaning of "transmission in interstate commerce."[149] The court interpreted the phrase to require actual movement, such as out-of-state servers, senders, or recipients, through commerce, thus requiring specific evidence of interstate transmission.[150] Through this analysis, the Tenth Circuit cast doubt on whether Congress intended to cover intrastate activities, ultimately deciding Congress did not intend to cover intrastate transmissions.[151]

The Tenth Circuit came to its conclusion by utilizing a plain meaning analysis.[152] *Schaefer* equated internet transmission with other methods of transmission, such as shipping or mailing.[153] These statutes do not include a carve-out or enumerate special treatment for the Internet.[154] Roads have the ability to facilitate interstate travel, and mail can be sent interstate.[155] Just because a transmission method can facilitate interstate travel does not mean this specific statutory wording, "transmission in interstate or foreign

146. *See id.* (reiterating a transmission in interstate commerce is a narrow, but clear, exercise of Congress's power).

147. *See id.* at 594 (comparing 18 U.S.C. § 2252A (2003) with 18 U.S.C. § 1952's language "any facility in interstate or foreign commerce," comparing intent with the actual text used, and the plain analysis scope of the different modifiers).

148. *See id.* at 597 (finding the common dictionary definitions to supplement interpreting the plain meaning).

149. *See Schaefer*, 501 F.3d at 1201 (reviewing the plain meaning of the federal nexus component of 18 U.S.C. § 2252 (2003)).

150. *See id.* (affirming the federal nexus language requires evidence of the transmissions crossing state lines).

151. *See id.* (questioning Congress's intent to cover all crimes over the Internet when the jurisdictional language is narrow).

152. *See id.* (interpreting the plain language of 18 U.S.C. § 2252 (2003) and citing United States v. Hunt, 456 F.3d 1255, 1264-65 (10th Cir. 2006) (holding a statute requiring only movement in commerce signifies movement between states)).

153. *See id.* (declining to give special treatment to internet transmissions).

154. *See* United States v. Wright, 625 F.3d 583, 592 (9th Cir. 2010) (emphasizing the plain reading of "transmission in interstate commerce" must be applied equally).

155. *See id.* (acknowledging other transmission methods that can travel intrastate or interstate).

commerce," covers all transmissions.[156] This analysis underscores the need for a comprehensive test and resolution of the circuit split.

Lastly, the Seventh Circuit in *Haas* avoided an extensive analytical framework comparing the two sides of the circuit split.[157] There was clear evidence that the transmissions crossed foreign lines to enter a website server in Russia.[158] The Seventh Circuit remained skeptical of the circuit split.[159] The Seventh Circuit noted a plain meaning interpretation of the statute is not controversial or novel but called the Ninth and Tenth Circuits' test reductive.[160] Despite this assessment, the Seventh Circuit upheld Haas's conviction because the transmissions crossed international lines, affirming the Ninth and Tenth Circuits' test.[161]

2. Congress Amended the Federal Nexus in 2008 Demonstrating "Transmission in Interstate Commerce" Has a Limited Application of the Commerce Clause.

Another indication that the "transmission in interstate commerce" language is not as broad as the First, Second, Third, and Fifth Circuits contend is that Congress broadened the federal nexus to include intrastate activities in 2008.[162] Congress understands the "transmission in interstate or foreign commerce" verbiage does not cover purely intrastate transmissions, it only covers interstate movement.[163] In 2008, Congress passed the

156. *See id.* (comparing wire fraud statutes with similar federal nexus wording to 18 U.S.C. § 2252A (2003) and concluding those statutes require proof of transmissions crossing state lines).

157. *See* United States v. Haas, 37 F.4th 1256, 1265 (7th Cir. 2022) (rejecting a deep analysis because the nuances of the sides of the split were largely inapplicable due to the evidence of foreign transmission and plain error review).

158. *See id.* (avoiding picking a side due to plain error review).

159. *See id.* at 1264-65 (summarizing the two sides of the circuit split, briefly, while acknowledging the First, Second, Third, and Fifth Circuits are in the majority but not analyzing the strengths of the side, contrasted with a criticism of the Ninth and Tenth Circuits oversimplification of the Internet).

160. *See id.* at 1264-65 (discussing the significance of a plain meaning analysis).

161. *See id.* at 1265 (accepting the government presented enough evidence to show actual transmission and leaving both sides of the circuit split viable for potential ruling in future cases).

162. *See* Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, tit. I, § 103(b), 122 Stat. 4002, 4003 (2008) (codified as amended 18 U.S.C. §§ 2251, 2252, 2252A).

163. *See* United States v. Lewis, 554 F.3d 208, 214 (1st Cir. 2009) (referring to statements in the congressional record during the amendment debates to indicate

Effective Child Pornography Prosecution Act of 2007.[164] The legislation, *inter alia*, amended the language of 18 U.S.C. §§ 2251, 2252, and 2252A to change the phrase "transmissions in interstate commerce" to "transmissions in and affecting interstate commerce."[165]

The federal nexus language of 18 U.S.C. §§ 2251, 2252, and 2252A now encompasses broader transmission methods.[166] It should be noted that *Runyan*, *MacEwan*, and *Schaefer* were decided before the 2008 amendments.[167] *Lewis*, *Harris*, and *Wright* were decided after the 2008 amendment process, but because the charges were based on acts committed before 2008, they utilized pre-amended language.[168] The Seventh Circuit does not address the amendments because *Haas* involves 18 U.S.C. § 875, not 18 U.S.C. §§ 2251, 2252, or 2252A.[169]

During the 2007 floor debates on the Effective Child Pornography Prosecution Act, Congressman Conyers explained the legislation was a direct response to *United States v. Schaefer*.[170] Congressman Conyers accentuated the Tenth Circuit's rationale in *Schaefer* as ammunition to persuade more members of Congress to support the bill.[171] Congressman

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Congressional intent was inconsistent with the plain text interpretation of the pre-2008 statute).

164. *See* Effective Child Pornography Prosecution Act of 2007 § 103(b) (expanding the federal nexus of the statutes to include "affecting" interstate or foreign commerce).

165. *See id.* (clarifying the reach of the statute by broadening the federal nexus).

166. *See id.* (summarizing Congress's floor speeches about the 2008 amendments).

167. *Compare, e.g.*, United States v. Runyan*,* 290 F.3d 223, 231 (5th Cir. 2002), *and* United States v. MacEwan*,* 445 F.3d 237, 240 (3d Cir. 2006) (upholding convictions under the pre-2008 statutes without referencing the amendment process because these cases occurred six and two years, respectively, before Congress amended the language), *with* United States v. Schaefer, 501 F.3d 1197, 1197 (10th Cir. 2007) (affirming the pre-2008 statutory language requires evidence of interstate travel. The case was decided in 2007, so there was no mention of Congress' 2008 amendments).

168. *See Lewis*, 554 F.3d at 216 (referring to the 2008 Act's amendment process for the sake of completeness); United States v. Harris, 548 F. App'x 679, 682 (2d Cir. 2013) (rejecting Harris's argument that the newly amended statute indicates the pre-2008 language should be analyzed differently); United States v. Wright, 625 F.3d 583, 591 (9th Cir. 2010) (analyzing the 2008 amendments as evidence the Circuit should apply the pre-2008 statutory language under a more limited analysis).

169. *See generally* United States v. Haas, 37 F.4th 1256, 1260 (7th Cir. 2022) (charging Haas with violating 18 U.S.C. § 875(c)).

170. *See* 153 CONG. REC. H31044 (daily ed. Nov. 13, 2007) (summarizing statements of Rep. Conyers noting that if the statute included the language from the bill broadening it, then *Schaefer* would have been decided differently).

171. *See id.* (emphasizing Rep. Conyers' frustration with the outcome of *Schaefer*).

Conyers reiterated how Congress intended to use the full reach of its constitutional authority when prohibiting child pornography.[172] In light of the holding in *Schaefer*, Congressman Conyers led the effort to modernize the plain meaning to account for internet transmissions, realigning congressional intent with the plain meaning of the statute.[173] Several other representatives spoke about the need to update the wording because *Schaefer's* plain meaning analysis ran contrary to congressional intent.[174] Their statements highlighted a mismatch in the plain text analysis and how Congress wanted the statutes to be applied.[175]

The First Circuit referenced the aforementioned statements in the congressional record through its analysis of the statute.[176] Ultimately, the First Circuit kept this analysis narrow because it was bound to the pre-2008 language, consistent with the laws at the time Lewis committed the offenses.[177] Further, in *United States v. Harris*, the Second Circuit reconciled interpreting 18 U.S.C. § 2252 after the 2008 amendments.[178] The Second Circuit acknowledged the amendments but contended the amended language did not change its analysis, maintaining that the pre-amended language does not require actual proof of crossing state lines.[179] The Second Circuit cited *MacEwan's* contention about the very interstate nature of the

172. *See id.* (recording statements of Rep. Conyers supporting the expanded scope of the statute because even wholly localized conduct can impact interstate commerce).

173. *See id.* (underscoring the need for amending the statutory language to ensure the statute had the broadest possible application).

174. *See id.* (recounting statements of Reps. Goodlatte, Carney, and Biggert signaling support of Rep. Conyers' statements).

175. *See id.* (accentuating Congressional outrage at child exploitation and pornography and emphasizing the need to strengthen statutes to prosecute these crimes).

176. *See* United States v. Lewis, 554 F.3d 209, 216 (1st Cir. 2009) (noting that although the new language cannot apply retroactively to Lewis, the Congressional statements led by Congressman Conyers show the statute's intent was affirmed by the amendments).

177. *See id.* at 216 (observing the amendments occurred after Lewis's conduct, making it inapplicable in the case against Lewis).

178. *See* United States v. Harris, 548 F. App'x 679, 682 (2d Cir. 2013) (acknowledging the updated language and reiterating previous Second Circuit cases have also not required evidence of interstate or foreign transmission over the Internet).

179. *See* United States v. Rowe, 414 F.3d 271, 279 (2d Cir. 2005) (affirming a conviction under 18 U.S.C. § 3237 for publishing an advertisement to trade child pornography as transmitting in interstate commerce because the Internet was used); United States v. Anson, 304 F. App'x 1, 5 (2d Cir. 2008) (upholding a conviction under 18 U.S.C. § 2252 (2003) because the use of the Internet is sufficient to establish "in commerce").

Internet to justify treating the pre-2008 language broadly.[180]

On the other side of the split, the Ninth Circuit considered the 2008 amendment history as evidence of what "transmission in interstate or foreign commerce" should mean.[181] *Wright* conducted a comprehensive analysis of the amendment's history to emphasize how Congress had several opportunities to amend the federal nexus language but did not.[182] Overall, given the broad reach of Congress's commerce power and the flexibility Congress can use under either part of or the entire power, the words Congress uses matter.[183]

The standards changed over time; if Congress thought the phrase "transmission in interstate commerce" reached instrumentalities at all times, there would have been no need for the 2008 amendments.[184] The Supreme Court held that Congress's words reflect the scope of the statute's impact, and the phrase "affecting commerce" indicates the intent to reach the full extent of its regulatory ability.[185] Ultimately, "transmission in interstate or foreign commerce" indicates that Congress utilized a more limited form of its Commerce Clause power.[186]

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180. *See Harris*, 548 F. App'x at 682 (adopting *MacEwan's* analysis by saying it makes perfect sense).

181. *See* United States v. Wright, 625 F.3d 583, 598-99 (9th Cir. 2010) (characterizing Congress's debates in 2008 as evidence that the plain meaning of "transmission in interstate commerce" is less broad thus covering fewer activities).

182. *See id.* at 599 (scrutinizing the previous amendments Congress made to 18 U.S.C. § 2252A between the 1970s and 1990s that changed the sentencing guidelines and acts covered under the statute but did not amend the transmission language).

183. *Compare* Circuit City Stores v. Adams, 532 U.S. 105, 115-16 (2001) (determining Congress's intent to regulate under the Commerce Clause power can be scaled up or down based on verbiage), *with* Gonzalez v. Raich, 545 U.S. 1, 30 (2005) (affirming Congress's broad use of the Commerce Clause in 21 U.S.C. § 801(3)-(6) when criminalizing intrastate, homegrown cannabis, as a legitimate federal regulation because of the impacts these intrastate activities could have on the national marijuana market).

184. *See Circuit City Stores*, 532 U.S. at 115-16 (reiterating Congress's word choice for interstate commerce indicates the scope of the jurisdictional coverage).

185. *See id.* (embracing that Congress's intent to regulate under the Commerce Clause can be scaled up or down based on verbiage).

186. *See id.* at 117 (indicating that the specific wording of federal nexus determines the scope courts should analyze within).

3. The Substantial Effects Test Does Not Apply to "Transmission in Interstate or Foreign Commerce" Language Because the Language Limits Jurisdiction Only to Channels and Instrumentalities.

The plain meaning of the statute does not broaden the jurisdictional scope, and Congress's 2008 amendment process emphasizes the plain meaning. Turning to the *Lopez* test and when the substantial effects test can be utilized, this test shows that the substantial effects test can only be used when two criteria are met: (1) the statute is written expansively and (2) the channels and instrumentalities Commerce Clause analyses fail.[187] Therefore, the "transmission in interstate or foreign commerce" language acts as a limitation that prevents the substantial effects test from being utilized.[188]

The Supreme Court's analysis of the breadth of the Commerce Clause and the extent of Congress's powers is best represented in *United States v. Lopez*.[189] While the Court affirmed that Congress can regulate and protect instrumentalities of interstate commerce, even when those instrumentalities occur exclusively intrastate, the Court did not declare that Congress's power is presumptively utilized.[190] Congress has the right to explicitly use this power, Courts cannot assume every statute has broadened reach.

The substantial effects test need not be applied to the statutory language "transmission in interstate commerce" because Congress limited the statutory scope to only apply to the first two areas of the Commerce Clause power: channels and instrumentalities.[191] The Internet is uniquely

187. *See* United States v. Lopez, 514 U.S. 549, 558-59 (1995) (elaborating on the three areas Congress can legislate using the Commerce Clause, (1) channels of commerce, (2) instrumentalities, and (3) substantial effects).

188. *See* United States v. Schaefer, 501 F.3d 1197, 1201-02 (10th Cir. 2007) (explaining Congress can limit the breadth of the Commerce Clause power by using limited wording).

189. *See Lopez*, 514 U.S. at 558-59 (defining the substantial effects test); *see also* Grant S. Nelson & Robert J. Punshaw Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 4-5 (1999) (summarizing the factors identified in *Lopez* and the substantial effects test requirements).

190. *Compare Lopez*, 514 U.S. at 558 (reaffirming that purely intrastate activities can be reached by Congress), *with* Houston E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342, 353 (1914) (emphasizing Congress' paramount power lies in regulating instrumentalities of intrastate commerce).

191. *See* United States v. MacEwan, 445 F.3d 237, 245 (3d Cir. 2006) (citing United States v. Hornaday, 392 F.3d 1306, 1311 (11th Cir. 2004)) (confirming the Internet is an instrumentality and affirming that Congress can regulate the Internet as an instrumentality).

considered both a channel and instrumentality of interstate commerce.[192] Therefore, the first two stages of the Commerce Clause analysis can apply.[193] Even though something can be a channel or instrument for interstate commerce transmission, it does not mean all statutes that utilize a portion of the Commerce Clause as the federal nexus also implicate every aspect of the Commerce Clause.[194]

The First, Second, Third, and Fifth Circuits incorrectly assumed that Congress fully exercises its Commerce Clause power for statutes that use the verbiage "transmitted in interstate commerce."[195] While Congress has the authority to regulate instrumentalities (including intrastate activities), there is no assumption that every statute automatically encompasses this provision.[196] The courts have not weighed in to suggest that Congress can implicitly exercise its powers when the statutory text does not indicate such. In fact, the Tenth Circuit operated under the assumption that Congress intentionally refrained from fully expanding its authority by employing the narrower transmission language, acting with purpose under the Commerce Clause.[197] Further, there is no dispute that Congress can regulate instrumentalities of interstate commerce, even when the activity is purely intrastate, but that ability must first be exercised through Congressional enactment of a statute.[198]

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192. *See* United States v. Sutcliffe, 505 F.3d 944, 953 (9th Cir. 2007) (holding the Internet is the method by which transactions occur, like channels like roads and waterways, which are methods of transmission, and the means to engage in commerce, like instrumentalities, like trucks or boats).

193. *See MacEwan*, 445 F.3d at 245 (explaining the third level of analysis is only appropriate when the first two are exhausted).

194. *See* United States v. Am. Bldg. Maint. Indus., 422 U.S. 271, 280 (1975) (acknowledging that Congress is acutely aware of the scope of the Commerce Clause power and the impact language has with establishing the breadth of the statute).

195. *See generally* United States v. Lewis, 554 F.3d 208, 209 (1st Cir. 2009); United States v. Harris, 548 F. App'x 679, 680 (2d Cir. 2013); *MacEwan*, 445 F.3d at 241; United States v. Runyan, 290 F.3d 223, 239 (5th Cir. 2002) (expanding Congress's Commerce Clause power by expanding the federal nexus to include transmissions affecting interstate or foreign commerce).

196. *See, e.g.,* United States v. Capoccia, 503 F.3d 103, 113 (2d Cir. 2007) (declining to affirm a conviction under 18 U.S.C. § 1343, which requires "transmission in interstate or foreign commerce," for wire fraud because the government did not present evidence that the transmission crossed state lines).

197. *See* United States v. Schaefer, 501 F.3d 1197, 1202 (10th Cir. 2007) (interpreting Congress's decision to use limited language as a purposeful decision to limit coverage).

198. *See* United States v. Lopez, 514 U.S. 549, 558 (1995) (upholding the long-standing acceptance of regulating instrumentalities).

4. The First, Second, Third, and Fifth Circuits Adopt The Plain Meaning of "Transmission in Interstate or Foreign Commerce" When the Transmission Method Is Not the Internet.

The final component to consider is how the First, Second, Third, and Fifth Circuits apply "transmission in interstate commerce" to non-Internet mediums of transmission. A brief analysis shows that these circuits require evidence of interstate or foreign transmission when non-Internet methods are the medium of transmission, such as telephones and wires.[199] For instance, the First Circuit, when applying 18 U.S.C. § 1343, which prohibits fraud by wire, radio, or television, has consistently held there must be evidence that transmissions crossed state lines to meet the "transmission in interstate commerce" component.[200]

In *United States v. Tum* and *United States v. Akoto*, the First Circuit made clear that statutes with the phrase "transmission in interstate commerce" required actual evidence of movement between states.[201] Both of these cases required a literal crossing of state lines for wire fraud and were decided four and fourteen years after *United States v. Lewis*, respectively.[202] The First Circuit does not reconcile where in the statute this unequal treatment is justified by holding internet transmission is presumptively interstate in certain contexts.[203]

The Second Circuit, in *United States v. Capoccia,* also utilized a different analysis of "transmission in interstate commerce" for non-internet

199. *See* Smith v. Ayres, 845 F.2d 1360, 1361 (5th Cir. 1988); United States v. Ruiz, No. 21-40723, 2022 U.S. App. LEXIS 9381, at *2 (5th Cir. Apr. 7, 2022) (treating non-Internet transmissions under the plain meaning analysis).

200. *See* United States v. Tum, 707 F.3d 68, 74 (1st Cir. 2013) (affirming Tum's conviction under 18 U.S.C. § 1343, in part, because there was sufficient evidence that the wire communications traveled across state lines); *see also* United States v. Akoto, 61 F.4th 36, 42-43 (1st Cir. 2023) (upholding the use of jury instructions from the district court that defined "interstate wire communication" to include a telephone communication that crossed state lines under 18 U.S.C. § 1343).

201. *See Tum*, 707 F.3d at 72-74; *Akoto*, 61 F.4th at 42-43 (applying a plain meaning analysis to "transmission in interstate commerce" when the transmission method is wires and phones, requiring the government to present evidence that the transmissions crossed state lines).

202. *Compare Tum*, 707 F.3d at 72-74, *and Akoto*, 61 F.4th at 42-43 (requiring evidence of interstate transmission in 2013 and 2023 respectively), *with* United States v. Lewis, 554 F.3d 208, 209 (1st Cir. 2009) (declining to require evidence of interstate transmission).

203. *See Lewis*, 554 F.3d at 215 (citing *Carroll* and *MacEwan* to establish the presumption that all Internet use is interstate).

transmissions.[204] The court reversed the conviction because the government failed to establish that the transmission of bank funds crossed state lines, a requirement of the plain "transmission in interstate commerce" language of the statute.[205] The court did not accept the possible presumption of interstate travel between the defendant's bank and his business, which could have resulted in state lines being crossed.[206] The court held that the defendants established no direct evidence to demonstrate interstate transmissions, just circumstantial inferences.[207] However, six years after this decision, the Second Circuit in *Harris* held that internet transmissions could constructively establish interstate transmission.[208]

Similarly, the Third Circuit, in *Stanley v. IBEW*, affirmed the dismissal of wire fraud allegations under 18 U.S.C. § 1343 due, in part, to the lack of interstate transmission evidence.[209] The Third Circuit decided this case the same year as *MacEwan*, but despite having the same federal nexus language, the decisions are vastly different.[210] In *Stanley v. IBEW*, the court maintained that phone call evidence did not establish the actual crossing of state lines, failing to meet the interstate transmission requirement under the "transmission in interstate commerce" language.[211] Phone calls could establish interstate or foreign transmission, but when a phone call originates in the same state, the call is made to, without direct evidence of some sort of

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204. *See* United States v. Capoccia, 503 F.3d 103, 113 (2d Cir. 2007) (questioning the government's assertion that interstate transmission is presumed when there was no evidence presented on the origination of the bank's wire transfer).

205. *See id.* (questioning the sufficiency of evidence under 18 U.S.C. § 2314 when the bank could have made the transfer from its New York location, and be intrastate, or the New Jersey location, and thus be interstate).

206. *See id.* (denying the presumption of interstate transmission between bank wires).

207. *See id.* at 114 (assessing the potential paths the transmissions could have taken which could have resulted in a purely intrastate transmission).

208. *See* United States v. Harris, 548 F. App'x 679, 682 (2d Cir. 2013) (permitting the presumption of interstate transmission when using the Internet).

209. *See* Stanley v. IBEW, 207 F. App'x 185, 188 (3d Cir. 2006) (evaluating the lack of evidence to establish interstate transmission of fraud using a telephone under 18 U.S.C. § 1343, which requires transmissions travel through interstate or foreign commerce).

210. *Compare Stanley*, 207 F. App'x at 189 (requiring interstate phone transmission evidence), *with* United States v. MacEwan, 445 F.3d 237, 245 (3d Cir. 2006) (declining to require interstate Internet transmission evidence under the same statutory wording as in *Stanley*).

211. *See Stanley*, 207 F. App'x at 188 (insisting the federal nexus "transmission in interstate commerce" requires actual evidence of interstate transmission).

interstate or foreign line transmission, interstate transmission is not met.[212] It is difficult to reconcile the Third Circuit's momentous holding in *MacEwan* that the Internet is "very interstate," thus not requiring actual evidence, contrasted with the court's holding in *Stanley*.[213] The Third Circuit contended that phone transmissions require evidence of interstate or foreign movement, despite phone use could presumably involve interstate transmission.[214] The Third Circuit does not extend the same level of evidence for internet transmission.[215]

The Fifth Circuit, in *Smith v. Ayres*, held purely intrastate communications were beyond the scope of statutes that include the phrase "transmission in interstate commerce."[216] However, a mere fourteen years later, in *United States v. Runyan*, the Fifth Circuit changed its interpretation of the statute when applied to the Internet.[217] The Fifth Circuit has inconsistently required evidence for statutes using "transmission in interstate commerce" language, with a stricter standard for non-internet-based transmissions.[218] The Fifth Circuit again used this inconsistent requirement as recently as 2022, when the court upheld that the wire fraud statute, 18 U.S.C. § 1343, requires actual evidence of interstate transmission because the statute has "transmission in interstate commerce" language.[219]

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212. *See id.* (holding a phone call made intrastate does not meet the statutory requirements of establishing interstate or foreign transmission under the statute).

213. *Compare id.* at 188-89 (articulating that the mail and wire fraud claim is "doomed" because it lacks evidence of interstate transmission) *with MacEwan*, 445 F.3d at 245 (deciding direct evidence of interstate Internet transmission is not needed for a valid claim).

214. *See Stanley*, 207 F. App'x at 188-89 (reiterating that mail and wire fraud statutes require evidence of interstate use).

215. *See MacEwan*, 445 F.3d at 245 (granting presumptive interstate transmission status for Internet use).

216. *See* Smith v. Ayres, 845 F.2d 1360, 1366 (5th Cir. 1988) (emphasizing the Fifth Circuit has consistently held the phrase "transmission in interstate commerce" to require evidence of crossing state lines).

217. *See* United States v. Runyan, 290 F.3d 223, 239 (5th Cir. 2002) (evaluating Runyan's Internet activity without evidence of transmission path).

218. *See* United States v. Ruiz, No. 21-40723, 2022 U.S. App. LEXIS 9381, at *2-3 (5th Cir. Apr. 7, 2022) (emphasizing the Fifth Circuit has a well-established precedent requiring proof of interstate transmission under 18 U.S.C. § 1343).

219. *See id.* (affirming evidence of interstate transmission is required, absent admission from the defendant).

B. The Proposed Test: The Government Must Present Evidence Showing That the Internet Transmission Crossed State or International Lines When the Statute's Federal Nexus is "Transmission in Interstate or Foreign Commerce."

1. All Statutes that Contain "Transmission in Interstate or Foreign Commerce" Require the Government to Present Evidence of Interstate or International Transmission.

For the reasons mentioned above, the First, Second, Third, and Fifth Circuits' application of "transmission in interstate or foreign commerce" is implausible. A uniform test should be adopted across all circuits that is consistent with the text of the statute to resolve ambiguity and reduce confusion. The test should be: When applying statutes that use the federal nexus requirement of "transmission in interstate or foreign commerce," courts must require actual evidence that the transmission crossed state lines. The government must present evidence that the transmission crossed state or international lines.[220] This test would apply to all statutory interpretations when Congress has limited its Commerce Clause power to only transmissions in interstate commerce.[221]

Statutes that only include "transmission in interstate or foreign commerce" language do not warrant a carve-out or special treatment for internet or other transmissions.[222] Unless such treatment is subsequently added to the statutes, courts should not give the Internet special status for different interpretation compared to phone, mail, or wire when the statute does not permit it; doing so is inconsistent with plain meaning analysis.[223] This new

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220. *See* United States v. Wright, 625 F.3d 583, 588 (9th Cir. 2010) (disallowing a conviction when the evidence directly contradicts actual interstate transmission); United States v. Schaefer, 501 F.3d 1197, 1198 (10th Cir. 2007) (requiring evidence showing the transmission(s) crossed state lines).

221. *Compare* 18 U.S.C. § 875 (using the phrase "transmits in interstate or foreign commerce), 18 U.S.C. § 2314 (including the phrase "transports, transmits, or transfers in interstate or foreign commerce"), *and* 18 U.S.C. § 1343 (adopting the language "transmits or causes to be transmitted . . . in interstate or foreign commerce"), *with* 18 U.S.C. § 1952 (adding the qualifier "or any facility in interstate commerce" to expand jurisdictional scope), *and* 18 U.S.C. §§ 2251, 2252, 2252A (2003) (expanding federal nexus by adopting the facility qualifier along with "affecting interstate or foreign commerce" to exude Congress's broadest reach).

222. *See generally* 18 U.S.C. §§ 875, 1343, 2314 (including only the transmission in interstate or foreign commerce requirement, without reference to any special treatment based on transmission method).

223. *See* discussion *supra* Part III.A.1 (analyzing the merits of adopting a plain

rule is supported by a plain meaning analysis as it is a literal and straightforward interpretation of the phrase "transmission in interstate commerce."[224] Although the Internet is admittedly a different medium of movement compared to the aforementioned methods of transmission, it is similar enough that the statutes are compatible as applied to Internet-based crimes.[225]

Further, the proposed test is consistent with what Congress intended by using the limited scope language.[226] Even though the aftermath of *Schaefer* resulted in significant congressional backlash, Congress understood that the Tenth Circuit's interpretation was consistent with the text.[227] As Congress made the decision to take swift action to override what it considered *Schaefer's* precedent for future cases under 18 U.S.C. §§ 2251, 2252, 2252A (2003), Congress declined to make such corrections across the board for all statutes with "transmission in interstate or foreign commerce" language.[228]

Additionally, the proposed rule is consistent with interpreting the Commerce Clause as a federal nexus considering the *Lopez* test.[229] The test interprets the text under the first two prongs from *Lopez*: channels and instrumentalities of interstate commerce. As *Lopez* explained, the substantial effects test is only used when the first two thresholds, channels and instrumentalities, are not met and only applied when Congress permits the application of the substantial effects test.[230] This rule is also consistent

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meaning analysis of the statute).

224. *See* discussion *supra* Part III.A.1 (emphasizing the weight courts give to plain meaning analysis and the interpretation of the statute under that analytical framework).

225. *See* United States v. Wright, 625 F.3d 583, 588 (9th Cir. 2010); United States v. Schaefer, 501 F.3d 1197, 1197-98 (10th Cir. 2007) (applying 18 U.S.C. § 2252A (2003) to Internet-based crimes and requiring transmission evidence).

226. *See* discussion *supra* Part III.A.2 (interpreting Congress's 2008 enactment of amended language as a stark awareness of the limits of the language "transmitted in interstate commerce" and the subsequent inaction to amend all statutes with such language).

227. *See* 153 CONG. REC. H31044 (daily ed. Nov. 13, 2007) (statements of Reps. Conyers, Goodlatte, Carney, and Biggert criticizing *Schaefer* for reversing the conviction, not for misconstruing the statutory text, and urging swift passage of the bill).

228. *See id.* (enacting statutory amendments months after the *Schaefer* decision, in response to *Schaefer*).

229. *See* United States v. Lopez, 514 U.S. 549, 559 (1995) (summarizing the framework to regulate interstate commerce).

230. *See id.* (analyzing the Gun Free School Zones Act in order of each test, leaving substantial effects analysis third as a final opportunity for valid use of Congress's Commerce Clause power); *see also* Norton v. Ashcroft, 298 F.3d 547, 555-56 (6th Cir.

with how the First, Second, Third, and Fifth Circuits apply the same federal nexus language to non-Internet media, where the circuits require actual proof that the transmissions crossed state or foreign lines.[231] By requiring direct evidence of the transmissions crossing state or foreign lines, this test promotes a uniform interpretation of the "transmission in interstate commerce" statutory text.[232]

2. The Application of This Test Reflects the Prevalence of the Internet in Daily Life and Requires the Government to Provide Affirmative Evidence That is Accessible.

MacEwan raised concerns regarding difficulty tracking the exact route taken by an Internet user's website connection.[233] One of the government's witnesses in *MacEwan* voiced serious concerns about internet providers' ability to produce sufficient data to establish interstate transmission.[234] These concerns are worth addressing, although they can be thoroughly dismissed.

Since 2006, when the Third Circuit decided *MacEwan*, the Internet has changed dramatically, and the ambiguities have been largely resolved; for example, there are more resources and skills to understand internet transmissions.[235] Further, the end of 2006 was when Twitter (now X) and Facebook launched, subsequently leading to the explosion of social media.[236]

2002) (emphasizing that the substantial effects test comes third in Commerce Clause analysis based on *Lopez* and United States v. Morrison, 529 U.S. 598 (2000)).

231. *See* discussion *supra* Part III.A.4 (articulating the First, Second, Third, and Fifth Circuits' inconsistent application of the language "transmission in interstate commerce" depending on whether the Internet is the transmission method).

232. *Compare supra* Part II.B.1 (detailing how the First, Second, Third, and Fifth Circuits' interpretation is unworkable as they do not require proof of transmission when the acts are on the Internet), *with supra* Part III.A.4 (identifying several other statutes where the circuits require proof of transmissions crossing state lines using the same federal nexus language).

233. *See* United States v. MacEwan, 445 F.3d 237, 241 (3d Cir. 2006) (summarizing the Comcast manager's testimony raising concerns about the ability to track previously completed transmissions).

234. *See id.* (casting doubts on available technology in 2004 to monitor previous Internet transmission).

235. *See* Lazaro Gamio, *How Data Travels Across the Internet*, WASH. POST (May 31, 2015), https://www.washingtonpost.com/graphics/national/security-of-the-internet/bgp/ (laying out how a user's email moves through a network, long-haul-provider, follows Border Gateway Protocol, and then enters the recipient's ISP before being delivered).

236. *See* Seth Fiegerman, *How 2006 Changed the Internet*, CNN BUS. (July 19, 2018,

The development in technology should indicate the dramatic evolution of the social landscape and the changes in the legal playing field for internet-based crimes.[237]

The proposed test requires the government to provide evidence of interstate or foreign transmission, which could result in the government providing information about the transmission path. The evidence could include (1) the speaker and the recipient were located in different states or countries at the time of the transmission, (2) the server is outside of the state or country of the origination of the post, or (3) the Internet service providers and social media companies have to provide information about user transmissions.[238] This evidentiary standard is consistent with the evidence accepted by the Seventh Circuit in *Haas*, where the government sufficiently established that Haas used a website based in Russia, constituting foreign transmissions.[239]

This test would apply regardless of the defendant's intent for her internet transmissions to travel in interstate or foreign commerce. This test is objective: Either the transmissions stayed within the state they originated in, even if through the Internet, or they traveled to a different state or country.[240] The plain meaning of "transmission in interstate or foreign commerce" requires objectivity.[241] Defendants are not required to have any sort of actual

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1:05 PM), https://money.cnn.com/2018/07/19/technology/news-feeds-history/index.html (explaining that 2006 was a pivotal year for technology and Internet development because of the creation of social media platforms such as Twitter (now X) and Facebook and the launch of the Apple iPhone).

237. *See* Marisol Cruz Cain & Greta L. Goodwin, *The U.S. Is Less Prepared to Fight Cybercrime Than It Could Be*, U.S. GOV'T ACCOUNTABILITY OFF. (Aug. 23, 2023), https://www.gao.gov/blog/u.s.-less-prepared-fight-cybercrime-it-could-be#:~:text=Cybercrime%20generally%20includes%20criminal%20activities,like%20illegal%20drugs%20or%20weapons (highlighting the cost, impact, and damage cybercrimes cause to the United States and the gaps in mitigation).

238. *See* United States v. Wright, 625 F.3d 583, 600-01 (9th Cir. 2010) (requiring the government to establish actual interstate transmission); United States v. Schaefer, 501 F.3d 1197, 1201 (10th Cir. 2007) (overturning the conviction because there was no evidence of interstate transmission).

239. *See* United States v. Haas, 37 F.4th 1256, 1265 (7th Cir. 2022) (finding sufficient evidence of interstate transmission because the defendant posted content on a website based in Russia, without servers in the United States, which established transmission in foreign commerce).

240. *See id.* (considering conflicts between Haas' intended recipient of the death threats and the third-party group in California that viewed the posts).

241. *See* discussion *supra* Part III.A.1 (showing plain meaning analysis for "transmission in interstate commerce" requires proof Internet transmission crossed state

or constructive knowledge of the transmission path.[242] For example, courts have declined to consider the user's intended transmission path and instead rely solely on the actual path taken when establishing interstate transmission.[243]

Therefore, even when the defendant may have no intent to transmit through interstate or foreign commerce, she must accept the consequences if that is how her transmissions are routed.[244] Although not all transmissions cross state or national lines, it is undeniable that the Internet, just like wire transfers and phones, has the capacity to serve as an interconnected international network.[245]

IV. POLICY RECOMMENDATION

Threats of violence and online harassment have no place in our society.[246] This circuit split represents an uneven application of the requirements to establish "transmission in interstate or foreign commerce" that most significantly impacts Internet-based crime as an unequal application of justice.[247] Congress has two options for action to resolve the split. First, Congress could clarify that the definition of "transmission in interstate or foreign commerce" is not an exercise of Congress's full Commerce Clause

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lines).

242. *Compare* 18 U.S.C. § 875, *with* 18 U.S.C. § 2252 (2003) (representing two statutes with different federal nexus invocations of Congress's Commerce Clause power where § 875 includes "transmission in interstate or foreign commerce" whereas § 2252 uses "transmission in *or affecting* interstate or foreign commerce" (emphasis added)).

243. *See* United States v. Davila, 592 F.2d 1261, 1263-64 (5th Cir. 1979) (clarifying that regardless of an individual's intrastate intent, the actual route can cross state lines and be considered sufficient to prosecute under a statute only with the federal nexus language "transmission in interstate or foreign commerce," under 18 U.S.C. § 1343, prohibiting interstate wire services to commit fraud).

244. *See id.* (upholding the conviction because the interstate transmission objectively occurred when the wire was routed from Texas, to Virginia, then back to Texas).

245. *See* Reno v. ACLU, 521 U.S. 844, 850-53 (1997) (contending the Internet is an international network); *see also* United States v. MacEwan, 445 F.3d 237, 244 (3d Cir. 2006) (declaring the Internet is uniquely interstate).

246. *See* Counterman v. Colorado, 600 U.S. 66, 69 (2023) (asserting true threats of violence are not protected speech).

247. *See* discussion *supra* Part III.A.4 (criticizing the disparate evidentiary standards under "transmission in interstate or foreign commerce" based on the transmission medium); *see also* United States v. Wright, 625 F.3d 583, 591 (9th Cir. 2010) (lambasting the Government's contention that they do not need to present direct evidence of interstate Internet transmission because of the holding in United States v. MacEwan, 445 F.3d 237, 244 (3d Cir. 2006)).

power, aligning with the Ninth and Tenth Circuits.[248] Alternatively, Congress could amend the language to represent a full exercise of the Commerce Clause power by including "affecting commerce," reflecting how the First, Second, Third, and Fifth Circuits apply the limited language.[249]

Congress has the authority, and has previously exercised its ability, to amend statutory language such as broadening or narrowing its power under the Commerce Clause.[250] For certain criminal statutes, the decision to expand the federal nexus makes perfect sense to ensure that the statute is applied as Congress intended.[251] This assessment was critical for Congress after *Schaefer* to broaden child pornography and exploitation statutes.[252]

One indication that Congress may not want to broaden the jurisdiction of all statutes with "transmission in interstate or foreign commerce" language is that Congress has not done so yet. Congress was so shocked by the decision in *Schaefer* that it introduced a bill the same year and passed just one year later, effectively preventing future crimes like those committed in *Schaefer* from happening again.[253] The bill passed unanimously in the House and Senate, demonstrating there was political momentum to expand the federal nexus to include broad internet usage for transmission-related statutes, but that was not done.[254] However, the 2008 amendments to fully cover federal prosecution for child exploitation and pornography demonstrate the need for Congress to be especially considerate of the language it uses for a federal nexus, especially when it comes to interstate

248. *See* discussion *supra* Part III.A.1 (affirming that the plain meaning of the statute requires evidence that the transmissions crossed state lines, like the holdings of the Ninth and Tenth Circuits).

249. *See* discussion *supra* Part III.A.2 (explaining the amendment process for child exploitation and pornography statutes).

250. *See* discussion *supra* Part III.A.2 (discussing the breadth of Congress's authority to regulate as it intends under interstate commerce).

251. *See generally* Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, tit. I, § 103(b), 122 Stat. 4002, 4003 (2008) (codified as amended 18 U.S.C. §§ 2251, 2252, 2252A) (reacting to the decision in *Schaefer* to expand the federal nexus of the child exploitation and pornography statutes).

252. *See id.* (expanding the federal nexus for child exploitation and pornography statutes to broaden the volume of acts covered).

253. *See* 18 U.S.C. § 875; 153 CONG. REC. H31044 (daily ed. Nov. 13, 2007) (recording of Rep. Conyers' dislike of *Schaefer*).

254. *See* Effective Child Pornography Prosecution Act of 2007, H.R. 4120, 110th Cong. (2008), www.congress.gov/bill/ 110th-congress/house-bill/4120 (reporting the roll call vote in the House was a 418 to 0 vote and the Senate passed the bill by Unanimous Consent).

commerce jurisdiction.[255]

V. CONCLUSION

Threatening and harassing speech is prevalent and well-established on the Internet.[256] When looking at the plain meaning of "transmission in interstate or foreign commerce," it is apparent that the First, Second, Third, and Fifth Circuits misapply the nexus to Internet-based crimes.[257] The Ninth and Tenth Circuits more accurately apply a plain meaning analysis.[258] The Seventh Circuit, in adopting neither side, incorrectly undermines the merits of the Ninth and Tenth Circuits analysis.[259]

Courts and Congress must ensure the statutes targeting internet harassment are clear. Congress has a responsibility to clarify the statutory text to ensure the intent of Congress can equally apply across all circuits. Until the circuit split is resolved, either by full adoption of the plain-meaning analysis or congressional action, prosecution across the United States is subjected to different evidentiary requirements, which weakens the effect of the statute. The Internet is not going away anytime soon.[260] So, by establishing a uniform test, there will be a consistent application of the law across the country.[261] This test will enable prosecutors to hold threatening speakers accountable and ensure that their convictions are upheld by utilizing a straightforward, nationally adopted application of "transmission in interstate commerce."

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255. *See* 153 CONG. REC. H31044 (daily ed. Nov. 13, 2007) (recording the statements of Reps. Conyers, Goodlatte, Carney, and Biggert noting "transmission in interstate commerce's" narrowed scope).

256. *See* Vogels, *supra* note 1, at 2 (explaining the growth of online harassment and threatening speech in recent years and suggesting that Internet-based harassment will stay).

257. *See* discussion *supra* Part III.A.1-3 (detailing how the First, Second, Third, and Fifth Circuits misapply the limited jurisdictional language to cover a broader range of Internet-based acts).

258. *See* discussion *supra* Part III.A.1-2 (demonstrating the Ninth and Tenth Circuit's interpretation of "transmission in interstate or foreign commerce).

259. *See* discussion *supra* Part III.A.1 (criticizing the Ninth and Tenth Circuits' "reductive" test while relying on actual evidence of foreign transmission).

260. *See* Reno v. ACLU, 521 U.S. 844, 849-50 (1997) (noting the growth of the Internet in the late 20th Century).

261. *See* discussion *supra* part III.B.1 (establishing a uniform test to require proof of interstate or foreign transmission for all transmissions that fall under statutes using "transmission in interstate or foreign commerce" language).