

WORKING THIS HARD: INTERNET USE AND FEDERAL NEXUS REQUIREMENT

Abstract: This Comment examines whether internet use alone is sufficient to establish that messages traveled across state lines for the purposes of federal criminal statutes containing a federal nexus requirement—a showing of connection between the matter and the federal government to bring the matter under the federal jurisdiction. The Comment focuses on the First Circuit’s decision in *United States v. O’Donovan* holding that the use of the internet alone is sufficient to meet the jurisdictional element. In doing so, the First Circuit reaffirmed its adherence to the so-called Per se Rule, followed by the Second, Third, and Fifth Circuits, and opposed by the Ninth and Tenth Circuits. This Comment argues that the most optimal resolution of the jurisdictional split is to create a rebuttable presumption that a message has travelled across state lines when there is evidence of internet use, shifting the burden on the defendant to produce credible evidence to the contrary.

INTRODUCTION

Over six billion individuals across the world are using the internet but the courts do not seem to agree on when an internet transmission crosses state lines.¹ In 2003, an article published in the *Boston College Law Review* was grappling with the internet and its immense impact on law among various other aspects of our lives.² More than two decades later, courts, lawmakers, and legal commentators appear even further confused as the internet exposes them to more colorful and unpleasant wrinkles in our legal system.³ One such wrin-

¹ See *Statistics*, INT’L TELECOMM. UNION, www.itu.int/en/ITU-D/Statistics/pages/stat/default.aspx [perma.cc/26HS-Q2SW] (estimating that approximately six billion people—74% of the world’s population—were using the internet as of 2025). Compare *United States v. MacEwan*, 445 F.3d 237, 253 (3d Cir. 2006) (holding that evidence of internet use alone is sufficient to establish that an internet transmission has travelled across state lines), with *United States v. Wright*, 625 F.3d 583, 594 (9th Cir. 2010) (requiring evidence that a transmission has actually moved between states to establish that it has crossed state lines).

² See Justin Hughes, *The Internet and the Persistence of Law*, 44 B.C. L. REV. 359, 360 (2003) (exploring the transformation of familiar legal concepts in light of convergence of law and internet); see also Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 430–31 (2002) (discussing boilerplate contracting, associated risk of companies exploiting consumers, and other contract law issues in the electronic age); David R. Johnson & David Post, *Law and Borders—the Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1368, 1370 (1996) (discussing the transformation of traditional concepts such as territorial boundaries and space by the advent of the internet).

³ See Elettra Bietti, *A Genealogy of Digital Platform Regulation*, 7 GEO. L. TECH. REV. 1, 59 (2023) (surveying recent major changes in regulators’ attitudes toward the tech industry); Daniel C.K. Chow, *Alibaba, Amazon, and Counterfeiting in the Age of the Internet*, 40 NW. J. INT’L L. & BUS. 157, 162 (2020) (discussing the proliferation of counterfeiting with the advent of Amazon, Alibaba,

kle that gave rise to an entrenched circuit split is the question, most recently addressed by the First Circuit Court of Appeals, of whether the use of the internet alone is sufficient to establish that a transmission has travelled across state lines.⁴ The answer determines whether a defendant may be prosecuted under federal criminal laws when sending or requesting transmission over the internet, even when there is no evidence that either the origin or the destination of said transmission was outside of a single state.⁵

Part I of this Comment provides an overview of the legal landscape surrounding the commerce clause and the federal nexus requirement at the heart of the jurisdictional split, as well as the factual and procedural history of *United States v. O'Donovan*.⁶ Part II describes the opposing positions of the jurisdictional split.⁷ Part III proposes a resolution of the split, balancing prosecutorial efficiency with defendants' due process rights.⁸

I. BACKGROUND

In 2025, in *United States v. O'Donovan*, the U.S. Court of Appeals for the First Circuit held that the use of the internet alone is sufficient to establish that messages traveled across state lines—a jurisdictional element required under the Wire Fraud Statute.⁹ Section A of this Part discusses the development of the interstate commerce jurisdictional element in federal criminal statutes.¹⁰ Section B

and other internet marketplaces); Gregory C. Cook & Andrew Ross D'Entremont, *No End in Sight? Navigating the "Vast Terrain" of Personal Jurisdiction in Social Media Cases After Ford*, 73 ALA. L. REV. 621, 622 (2022) (examining personal jurisdiction in cases involving social media users); Jack Goldsmith & Eugene Volokh, *State Regulation of Online Behavior: The Dormant Commerce Clause and Geolocation*, 101 TEX. L. REV. 1083, 1085 (2023) (describing state laws that attempt to regulate online transactions); Jacqueline Short, Comment, *Manifest Destiny? The Fourth Circuit's Inevitable Expansion of "Registers" Under the ACPA*, 66 B.C. L. REV. 2085, 2091 (2025) (discussing the circuit split over the interpretation of the word "registers" for the purposes of the Anti-Cybersquatting Protection Act).

⁴ See *United States v. O'Donovan*, 126 F.4th 17, 36 (1st Cir. 2025) (holding that evidence of internet use is sufficient to establish that a transmission has traveled across states lines); *infra* notes 25–36 and accompanying text.

⁵ See *O'Donovan*, 126 F.4th at 26, 36 (holding that a transmission has travelled across state lines even when both the sender and receiver of the transmission in question were physically in Massachusetts); *infra* notes 66–88 and accompanying text.

⁶ See *infra* notes 9–36 and accompanying text.

⁷ See *infra* notes 37–65 and accompanying text.

⁸ See *infra* notes 66–88 and accompanying text.

⁹ See 18 U.S.C. § 1343 (criminalizing the use of interstate wires to further a scheme to defraud a victim of money or property); *id.* § 1346 (expanding § 1343 to cover the intangible right to honest services); *United States v. O'Donovan*, 126 F.4th 17, 36 (1st Cir. 2025) (holding that the government has satisfied its burden of proving that a transmission has crossed state lines by offering evidence that the defendant has used the internet).

¹⁰ See *infra* notes 13–17 and accompanying text.

provides a basic overview of the technology behind internet transmissions.¹¹ Section C examines the factual and procedural history of *O'Donovan*.¹²

A. The Federal Nexus Element in Federal Criminal Statutes

Congress has long used its Article I power to regulate interstate commerce as a jurisdictional hook to create new crimes that are otherwise not covered by federal jurisdiction.¹³ In essence, the legislature inserts the oft-used phrase “in interstate commerce,” or a version of it, into federal criminal statutes to bring the predicate crime within the federal domain.¹⁴

Since the 1910s, the U.S. Supreme Court has held that Congress may regulate the channels and instrumentalities of interstate commerce, persons or things in it, and activities that have a substantial relation to interstate commerce.¹⁵ Naturally, the advent of the internet created fertile ground for a circuit

¹¹ See *infra* notes 18–24 and accompanying text.

¹² See *infra* notes 25–36 and accompanying text.

¹³ See U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”); Caryn Devins, Roger Koppl, Stuart Kauffman & Teppo Felin, *Against Design*, 47 ARIZ. ST. L.J. 609, 635 (2015) (noting that although criminal law has traditionally been in the domain of states, the federal government has used it as a tool to expand federal criminal law); Richard W. Garnett & John P. Elwood, *Section 666, The Spending Power and Federalization of Criminal Law*, 25 THE CHAMPION 26, 26 (2001) (noting Congress’s reliance on the Commerce Clause to broaden federal criminal jurisdiction).

¹⁴ See 18 U.S.C. § 922(g) (preventing the unlawful possession by a prohibited person of a firearm or ammunition that had been shipped or transported in interstate or foreign commerce); *id.* § 922(j) (punishing possession of a stolen firearm that has been shipped or transported in interstate commerce); *id.* § 924(b) (bringing under federal jurisdiction transportation of firearms in interstate or foreign commerce with intent to commit a felony); *id.* § 1951 (addressing robbery or extortion affecting interstate or foreign commerce); *id.* § 1952 (disallowing travel in interstate or foreign commerce to promote unlawful activity); *id.* § 1341 (punishing mail fraud in interstate commerce); *id.* § 2261 (addressing travel in interstate commerce with the intent to commit an act of intimate partner violence or causing the travel of a victim of such act); *id.* § 2314 (criminalizing transportation of stolen goods in interstate or foreign commerce); *id.* § 2421 (addressing transportation of individuals for prostitution or other unlawful sexual activity in interstate or foreign commerce); *id.* § 2423(a) (punishing transportation of minors in interstate or foreign commerce for sexual activity); *id.* § 2315 (prohibiting receipt of stolen goods that have crossed a state or U.S. boundary).

¹⁵ 15A AM. JUR. 2D *Commerce* § 20 (2025); see, e.g., *United States v. Lopez*, 514 U.S. 549, 559 (1995) (finding that Congress has the power to regulate activities substantially affecting interstate commerce, not just interstate commerce itself); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255–56, (1964) (“[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.” (quoting *Caminetti v. United States*, 242 U.S. 470, 491 (1917))); *Hou. E. & W. Tex. Ry. Co. v. United States (Shreveport Rate Cases)*, 234 U.S. 342, 353 (1914) (holding that Congress has the power to regulate the instrumentalities of interstate commerce); *Ickes v. FAA*, 299 F.3d 260, 263 (3d Cir. 2002) (holding that airspace is channels of interstate commerce); *United States v. Ho*, 311 F.3d 589, 597 (5th Cir. 2002) (holding that telecommunications networks are channels of interstate commerce); *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334, 1347 (11th Cir. 2002) (designating national securities markets as channels of interstate commerce); *Gibbs v. Babbitt*, 214 F.3d 483, 490–91 (4th Cir. 2000) (holding that railways, waterways, and airspace are channels of interstate

split on the question of whether the use of the internet, standing alone, is sufficient to satisfy the federal nexus element, even when the evidence shows that the transmission was both sent from and received in the same state.¹⁶ Most case law underlying the jurisdictional split focuses on statutes related to child pornography that contain the same federal nexus requirement as the one found in the Wire Fraud Statute.¹⁷

B. Technology Behind Internet Transmissions

In order to reach its destination, an internet protocol (IP) packet, which is a short message or a segment of a larger message, hops through computers called routers that determine the most optimal route to the recipient.¹⁸ Those transmissions that pass only through in-state routers are considered to have followed a local path.¹⁹ In contrast, transmissions that have jumped through at least one out-of-state router are said to have followed a non-local path.²⁰ Two

commerce); *United States v. New Buffalo Amusement Corp.*, 600 F.2d 368, 391 n.4 (2d Cir. 1979) (categorizing highways as channels of interstate commerce); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 518 (1941) (holding that railroads, navigable waters, and airspace are channels of interstate commerce); *Escanaba & Lake Mich. Transp. Co. v. City of Chicago*, 107 U.S. 678, 682 (1883) (interpreting navigable waters to be channels of interstate commerce).

¹⁶ See *United States v. O'Donovan*, 126 F.4th 17, 34 (1st Cir. 2025) (recognizing the circuit split on the issue). Compare *United States v. Kieffer*, 681 F.3d 1143, 1153 (10th Cir. 2012) (holding that evidence of internet use alone is insufficient to establish that a web transmission travelled across state lines in interstate commerce), and *United States v. Wright*, 625 F.3d 583, 590–95 (9th Cir. 2010) (rejecting the argument that internet use satisfies interstate jurisdictional requirements), with *United States v. MacEwan*, 445 F.3d 237, 244 (3d Cir. 2006) (“[B]ecause of the very interstate nature of the Internet, once a user submits a connection request to a website server or an image is transmitted from the website server back to user, the data has traveled in interstate commerce.”), and *United States v. Runyan*, 290 F.3d 223, 239 (5th Cir. 2002) (holding that proof of internet usage is sufficient to find the interstate commerce element satisfied).

¹⁷ See 18 U.S.C. § 2251(a) (1994) (criminalizing using a child to produce pornography, with the jurisdictional element satisfied if the accused knows or has reason to know that “visual depiction” will be transported in interstate or foreign commerce.); *id.* § 2252(a)(2) (1994) (criminalizing transportation or receipt of child pornography in interstate or foreign commerce). In 2008, Congress amended these statutes to also cover acts “affecting interstate commerce.” See Catherine Beal, *The Very Interstate Nature of the Internet? Establishing Uniform Requirements for Internet Transmissions Within Interstate and Foreign Commerce*, 32 AM. U. J. GENDER SOC. POL’Y & L. 383, 405 (2024) (discussing the enlargement of child pornography statutes to cover acts that affect interstate commerce). The amendment was a direct response to *United States v. Schaefer* and was intended to broaden the scope of the statutes to cover intrastate activities. Beal, *supra*, at 405–06; *United States v. Schaefer*, 501 F.3d 1197, 1205 (10th Cir. 2007) (requiring that the government show actual movement of transmissions across state lines to satisfy the relevant element), *superseded by statute*, Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, 122 Stat. 4001 (2008).

¹⁸ See Abdullah Yasin Nur & Mehmet Engin Tozal, *Geography and Routing in the Internet*, 4 ACM TRANSACTIONS ON SPATIAL ALGORITHMS & SYS. 1, 2 (2018) (stating that IP packets usually follow the shortest geographical path).

¹⁹ Massimo Candela, Valerio Luconi & Alessio Vecchio, *A Worldwide Study on the Geographic Locality of Internet Routes*, 201 COMPUT. NETWORKS 1, 2 (2021).

²⁰ *Id.* at 4.

percent of internet transmissions in North America utilize non-local paths.²¹ A transmission may utilize a non-local path even when both the sender and the recipient are located in the same area.²²

Although it is possible to determine post-factum whether a particular transmission has travelled through an out-of-state router, these techniques will usually yield approximate results at best.²³ It would also require cooperation of Internet Service Providers (ISPs), which is not guaranteed as they may resist subpoenas because of corporate policy and privacy considerations.²⁴

C. Factual and Procedural History of O'Donovan

In 2020, Theory Wellness, a medical and recreational cannabis company, initiated the process of obtaining a host community agreement (HCA) with the city of Medford, Massachusetts, to satisfy a requirement to operate a marijuana establishment within the municipal limits of Medford.²⁵ The company retained

²¹ *Id.* at 12.

²² *See id.* at 4 (defining non-local paths as paths where at least one of the routers through which a transmission passes falls outside of the area in which both the source and destination are located).

²³ *See* David Chaikin, *Network Investigations of Cyber Attacks: The Limits of Digital Evidence*, 46 CRIME L. SOC. CHANGE 239, 246 (2006) (discussing the difficulties associated with obtaining internet-related evidence); Alagappan Ramanathan & Sangeetha Abdu Jyothi, *Leveraging Traceroute Inconsistencies to Improve IP Geolocation*, ARXIV (Jan. 25, 2025), arxiv.org/abs/2501.15064 [perma.cc/ZWY5-5WQP] (presenting GeoTrace, a new tool built to enhance the accuracy of IP geolocation through existing traceroute information); Fabien Viger et al., *Detection, Understanding, and Prevention of Traceroute Measurement Artifacts*, 52 COMPUT. NETWORKS 998, 999 (2008) (explaining how traceroute tools may sometimes yield inaccurate results). Traceroute is a digital tool that allows network operators to identify the routers through which packets travel. *See* Kelly C. Bourne, APPLICATION ADMINISTRATORS HANDBOOK: INSTALLING, UPDATING AND TROUBLESHOOTING SOFTWARE 310 (2014).

²⁴ *See* Brittany Brattain, *The Electronic Communications Privacy Act: Does the Act Let the Government Snoop Through Your Emails and Will It Continue?*, 17 N.C. J.L. & TECH. 185, 198, 199–200 (2016), <https://journals.law.unc.edu/ncjolt/articles/the-electronic-communications-privacy-act-does-the-act-let-the-government-snoop-through-your-emails-and-will-it-continue/> [https://perma.cc/E36H-J77V] (exploring privacy standards for ISPs under the Electronic Communications Privacy Act, detailing the difference between basic subscriber information available by subpoena and more sensitive content that requires probable cause and a warrant); Chaikin, *supra* note 23, at 245–46 (stating that, in the context of cyber-attacks, investigators must determine where cyber attackers are physically located, which could be anywhere in the world, and this process necessitates obtaining help from numerous internet providers and law enforcement authorities in different countries); Yan Fang, *Internet Technology Companies as Evidence Intermediaries*, 110 VA. L. REV. 1227, 1243 (2024) (showing that ISPs are resistant to subpoenas because of their intense privacy practices and trade secret laws).

²⁵ *United States v. O'Donovan*, 126 F.4th 17, 24–25 (1st Cir. 2025); *see also* MASS. GEN. LAWS ch. 94G, § 3(d)(1) (2024) (“A marijuana establishment or a medical marijuana treatment center seeking a new license or renewal of a license to operate or continue to operate in a municipality that permits such operation shall negotiate and execute a host community agreement with that host community setting forth the conditions to have a marijuana establishment or medical marijuana treatment center located within the host community, which shall include, but not be limited to, all stipulations of responsibilities between the host community and the marijuana establishment or medical marijuana treatment center.”); 935 MASS. CODE REGS. 500.002 (2024) (defining a Marijuana Establishment

an attorney, Sean O'Donovan, to aid in its application process.²⁶ Attorney O'Donovan happened to be acquainted with the brother of Medford's Chief of Police, who sat on the five-member Cannabis Advisory Committee tasked with reviewing HCA applications.²⁷

Attorney O'Donovan contacted the Chief's brother for the purpose of bribing him and/or the Chief to facilitate the HCA application process.²⁸ Upon learning of the scheme, the Chief notified the Federal Bureau of Investigation (FBI), who started an investigation into the matter, with the Chief's brother agreeing to aid in the investigation.²⁹ Per the FBI's guidance, the brother led attorney O'Donovan to believe that the Chief was inclined to accept the bribe.³⁰ The application process continued as normal for almost a year, during which time attorney O'Donovan and the Chief's brother communicated and met several times.³¹ Soon after Attorney O'Donovan paid the Chief's brother a portion of the promised money, the Committee separately issued the rankings and Theory Wellness obtained an HCA with Medford.³²

(ME) as a "Marijuana Cultivator (Indoor or Outdoor), Craft Marijuana Cooperative, Marijuana Product Manufacturer, Marijuana Microbusiness, Independent Testing Laboratory, Standards Laboratory, Marijuana Retailer, Marijuana Transporter, Delivery Licensee, Marijuana Research Facility Licensee . . . , Social Consumption Establishment . . . or any other type of licensed Marijuana-related business, except a Medical Marijuana Treatment Center"); THEORY WELLNESS, theorywellness.org/ [perma.cc/UMY8-978K] (describing the business of Theory Wellness, an East Coast recreational and medical cannabis company whose operations include the full cycle of production from cultivation to retail).

²⁶ *O'Donovan*, 126 F.4th at 25; see also 935 MASS. CODE REGS. 500.180 (showing the process of obtaining an HCA).

²⁷ *O'Donovan*, 126 F.4th at 24–25. In 2020, the city of Medford, Massachusetts, passed an ordinance permitting the operation of up to three recreational marijuana-sales businesses within the city and established a five-member Cannabis Advisory Committee, the purpose of which was to review applications by companies seeking to operate such businesses within the municipal limits. Medford, Mass., Code of Ordinances § 14-541 (2025) (establishing the Cannabis Advisory Committee and allocating three slots for MEs within Medford); *O'Donovan*, 126 F.4th at 24.

²⁸ *O'Donovan*, 126 F.4th at 25.

²⁹ *Id.* Although the Chief was aware of the ongoing investigation, the FBI intentionally withheld the identity of the company whose representative was attempting to bribe him to avoid hampering the overall operations of the Committee. *Id.* at 25 n.3. Theory Wellness was also allegedly unaware of O'Donovan's illicit pursuits. *Id.* at 28.

³⁰ See *id.* at 27 (discussing how O'Donovan, relying on the statements of the Chief's brother, decided to proceed with the bribe).

³¹ See *id.* at 27–28 (outlining the context and content of the subsequent meetings and conversations between O'Donovan and the Chief's brother).

³² *Id.* at 28–29. Theory Wellness subsequently successfully opened the facility, becoming the first employee-owned marijuana establishment in Massachusetts. Melissa Schiller, *Theory Wellness Opens Boston's First Employee-Owned Dispensary in Medford*, CANNABIS BUS. TIMES (Jan. 18, 2024), www.cannabisbusinesstimes.com/us-states/massachusetts/news/15687024/theory-wellness-opens-bostons-first-employee-owned-dispensary-in-medford [perma.cc/3PWB-P2KP]. It also established the world's first marijuana beverage facility alongside its Medford facility. *Id.* By the spring of 2026, Theory Wellness had established dispensaries in Vermont, Massachusetts, Maine, Ohio, and New Jersey, and

Notably, at one point after the initial engagement with the Chief's brother and before the City of Medford approved the HCA, the now Defendant, O'Donovan, sent the CEO of Theory Wellness an iMessage, saying that he was "[w]orking this thing hard just so you know my friend."³³ At the time of the transmission, both men were located in Massachusetts.³⁴

Subsequently, a grand jury charged the Defendant with honest-services wire fraud and with federal programs bribery.³⁵ The First Circuit held that the use of the internet was sufficient to satisfy the federal nexus, but because the testimony introduced by the government to establish the internet use was inadmissible, the court vacated the conviction.³⁶

II. JURISDICTIONAL SPLIT

Courts agree that when the record shows a message originating in State A reaches a recipient in State B by way of the internet, that message has travelled across state lines.³⁷ The problem arises when there is no evidence that the transmission has, at any time, actually travelled out of state.³⁸ The U.S. Courts of Appeals for the First, Second, Third, and Fifth Circuits have held that use of the internet alone is sufficient to constitute interstate travel (hereinafter the *Per se Rule*).³⁹ The Courts of Appeals for the Ninth and Tenth Circuits, on the oth-

its products are available in other New York dispensaries. See *THEORY WELLNESS*, *supra* note 25 (listing the locations of the company's dispensaries and markets).

³³ See *O'Donovan*, 126 F.4th at 29 (discussing O'Donovan's sending of the iMessage transmission). iMessage is a secure messaging service offered by Apple and accessible through iPhones, MacBooks, iPads, and other Apple devices. *About iMessage*, APPLE SUPPORT, support.apple.com/guide/iphone/about-imessage-iph4e9799206/ios [perma.cc/EMW7-R4UV].

³⁴ See *O'Donovan*, 126 F.4th at 26 (finding that the CEO was located at his home in Boxford, Massachusetts, when he received the iMessage from Attorney O'Donovan, who was also in Massachusetts). The court notes that the two men never discussed the contents of the message. *Id.*

³⁵ *Id.* at 2918 U.S.C. § 1343 (criminalizing the use of interstate wires to further a scheme or artifice to defraud a victim of money or property); *id.* § 1346 (expanding § 1343 to the intangible right to honest services); *id.* § 666 (criminalizing bribery concerning programs receiving federal funds).

³⁶ *O'Donovan*, 126 F.4th, at 37–38.

³⁷ See *United States v. Kimler*, 335 F.3d 1132, 1135 (10th Cir. 2003) (finding actual interstate travel when defendant sent threatening messages that travelled through internet servers located in different states).

³⁸ Compare *United States v. MacEwan*, 445 F.3d 237, 253 (3d Cir. 2006) (holding that evidence of internet use is sufficient to meet the interstate commerce element of § 2252A), with *United States v. Wright*, 625 F.3d 583, 594 (9th Cir. 2010) (holding that transmission of the relevant material in interstate commerce requires a showing that such transmission has actually crossed state lines).

³⁹ See *United States v. Harris*, 548 F. App'x 679, 682 (2d Cir. 2013) (holding that use of the internet is sufficient to show interstate travel); *United States v. Lewis*, 554 F.3d 208, 215 (1st Cir. 2009) (same); *MacEwan*, 445 F.3d at 253 (same); *United States v. Runyan*, 290 F.3d 223, 239 (5th Cir. 2002) (same).

er hand, require proof that the transmission actually crossed state lines.⁴⁰ Section A of this Part describes the position of the First, Second, Third, and Fifth Circuits.⁴¹ Section B describes the position of the Ninth and Tenth Circuits.⁴²

A. First, Second, Third, and Fifth Circuits

The First, Second, Third, and Fifth Circuits adopt the position that proof the defendant used the internet to send or receive a transmission is sufficient to show interstate activity.⁴³

In 1997, in *United States v. Carroll*, the First Circuit addressed whether there was sufficient evidence to convict the defendant of dissemination of child pornography.⁴⁴ The government presented evidence that the defendant planned to use the photographs he took of a minor for an online dating service.⁴⁵ The court equated the transmission of photographs online with moving them across state borders, and, by extension, in interstate commerce.⁴⁶

In 2002, in *United States v. Runyan*, the Fifth Circuit heard a case factually similar to *Carroll*, where the defendant was charged with distribution and receipt of child pornography across state lines.⁴⁷ There, the court held that circumstantial evidence the images came from the internet could sufficiently enable a rational jury to find that those images were transmitted in interstate commerce for the purposes of § 2252A.⁴⁸

⁴⁰ See *Wright*, 625 F.3d at 594 (requiring proof that the transmission actually moved between states to establish the federal nexus element); *United States v. Schaefer*, 501 F.3d 1197, 1201 (10th Cir. 2007), *overruled by* *United States v. Sturm*, 672 F.3d 891 (10th Cir. 2012) (en banc) (same).

⁴¹ See *infra* notes 43–55 and accompanying text.

⁴² See *infra* notes 56–65 and accompanying text.

⁴³ See *infra* notes 44–55 and accompanying text; see, e.g., *United States v. Carroll*, 105 F.3d 740, 742 (1st Cir. 1997) (establishing the *Per se* Rule for the First Circuit).

⁴⁴ *Carroll*, 105 F.3d at 742; see 18 U.S.C. § 2251(a) (criminalizing dissemination of child pornography).

⁴⁵ See *Carroll*, 105 F.3d at 742 (discussing the victim's testimony that she overheard the defendant's plans to scan the images and share them on the internet).

⁴⁶ See *id.* (holding that internet use was “tantamount to moving photographs across state lines and thus constitute[d] transportation in interstate commerce”). The court based its conclusion on two cases outside of the First Circuit that said nothing about whether the use of the internet alone is sufficient to constitute crossing of state lines but were instead concerned with whether the applicable statutes with a similar federal nexus element generally applied to electronic communications. See *United States v. Thomas*, 74 F.3d 701, 709 (6th Cir. 1996) (holding that electronic transmission of GIF files was within the scope of the relevant statute with a similar federal nexus); *United States v. Maxwell*, 42 M.J. 568, 580 (A.F. Ct. Crim. App. 1995) (holding that computer transmissions may be “included within the terms ‘transporting obscene material in interstate or foreign commerce’”).

⁴⁷ *United States v. Runyan*, 290 F.3d 223, 239 (5th Cir. 2002) (acknowledging the similarities between the facts at issue and *Carroll*). Like in *Carroll*, Runyan's wife discovered pornographic images on his computer when searching through his belongings after their divorce, leading to an investigation by law enforcement. *Id.* at 231–32; *Carroll*, 105 F.3d at 742.

⁴⁸ *Runyan*, 290 F.3d at 242–43 (affirming convictions for the receipt and possession of child pornography).

In 2006, in *United States v. MacEwan*, the Third Circuit went a step further by holding that the internet is actually a channel or instrumentality of interstate commerce.⁴⁹ In doing so, the court attempted to summarize the positions of the parties, trying to explain the workings of internet transmissions.⁵⁰ It nevertheless abandoned that reasoning, instead quoting the *Carroll* court that transmission of images on the internet is tantamount to crossing of state lines.⁵¹ The Third Circuit also introduced the now often cited proposition that the internet has an inherently interstate nature, without any further explanation.⁵²

In 2009, in *United States v. Lewis*, the First Circuit held that actual transmission across state lines is, indeed, a necessary element.⁵³ There, the defendant faced charges of violating a child pornography statute with a similar jurisdictional element.⁵⁴ The court, nevertheless, held that the prosecution had satisfied that element with evidence that the defendant used the internet—qualifying but upholding the *Per se* Rule.⁵⁵

⁴⁹ 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)) (holding that the internet is an instrumentality of interstate commerce).

⁵⁰ See *id.* at 244 (recounting the testimony of the government's expert witness about the pathfinding protocols and how the workings of the latter make it virtually impossible to determine the exact path taken by a connection request).

⁵¹ See *id.* at 245 (basing its holding on *Carroll* instead of further pursuing the implications of earlier expert testimony that explained the workings of internet transmission); *Carroll*, 105 F.3d at 742 (holding that internet transfers fall within interstate commerce).

⁵² See *MacEwan*, 445 F.3d at 244 (stating that the very interstate character of the internet necessitates the conclusion that the data has traveled in interstate commerce once a user transmits or receives an image from a website).

⁵³ *United States v. Lewis*, 554 F.3d 208, 213 (1st Cir. 2009). The court rejected the government's argument that (1) the jurisdictional element should only require transmission or shipment in the stream or flow of commerce instead of actual crossing of a state or national border, and (2) even if crossing of border is required, jurisdictional element in the digital medium should be relaxed. *Id.* at 212.

⁵⁴ *Id.* at 209; see 18 U.S.C. § 2252(a)(2) (criminalizing knowingly receiving child pornography using any means or facility of interstate or foreign commerce).

⁵⁵ *Lewis*, 554 F.3d at 214. The *Lewis* court based its conclusion on *Carroll* and *United States v. Hilton*, a case that also followed *Carroll*. See *id.* at 215 (citing *United States v. Hilton*, 257 F.3d 50, 54 (1st Cir. 2001)) (holding that proof of transmission of pornography over the internet satisfies the interstate commerce element of § 2252); *Carroll*, 105 F.3d at 742 (offering a prior example of the *Per se* Rule for the First Circuit). The First Circuit took note of the defendant's contention that the cases grounding *Carroll* did not stand for the proposition that evidence of internet use alone satisfied the federal nexus, but nevertheless refused to overturn its binding conclusion in *Carroll*. See *Lewis*, 554 F.3d at 216 (holding that even if the cited precedent does not stand for the *Per se* Rule, *Carroll*'s ruling is still binding); *Carroll*, 105 F.3d at 742 (providing precedent for *Lewis*). The court also amended its reasoning by citing to *Runyan* and *MacEwan*. See *Lewis*, 554 F.3d at 215 (stating it is "not alone" in its holding); *MacEwan*, 445 F.3d at 244 (providing a Third Circuit example of a similar holding); *United States v. Runyan*, 290 F.3d 223, 242–43 (5th Cir. 2002) (providing a Fifth Circuit example of a similar holding). In 2013, in *United States v. Harris*, the Second Circuit largely followed the reasoning in *Carroll* and *MacEwan* and adopted the *Per se* Rule. See *United States v. Harris*, 548 F. App'x

B. Ninth and Tenth Circuits

The Ninth and Tenth Circuits differ in their interpretation of interstate commerce and have held that use of the internet alone is not enough to satisfy the element of interstate commerce under § 2252.⁵⁶ These circuits have distinguished between the statutes referring to acts in interstate commerce and those referring to acts affecting interstate commerce or facilities thereof.⁵⁷

In 2007, in *United States v. Schaefer*, the Tenth Circuit held that, when there was no evidence the transmission originated in one state and was received in another, evidence of internet use alone was not enough to establish that the message had travelled across state lines.⁵⁸

In 2010, in *United States v. Wright*, the Ninth Circuit agreed with the Third Circuit's classification of the internet as an instrumentality of interstate commerce.⁵⁹ The transmission in *Wright*, however, was proven to be confined to one state.⁶⁰ Thus, the Ninth Circuit diverged from the Third Circuit, drawing a distinction between statutes that required an act in interstate commerce and statutes punishing acts affecting or using a facility of interstate commerce.⁶¹ There, the defendant was charged with violating a statute punishing acts in—as opposed to merely affecting—interstate commerce.⁶² The Ninth

679, 682 (2d Cir. 2013) (citing *MacEwan*, 445 F.3d at 244) (holding that the government has satisfied its burden of proof for the § 2252 requirement that the relevant transmission travelled in interstate commerce); *Carroll*, 105 F.3d at 742 (providing support for the *Harris* court's analysis on internet usage). The court concluded the relevant section about the sufficiency of evidence by deferring to the *MacEwan* court's abstract qualification of the internet as something inherently interstate, by virtue whereof establishing connection with the internet warrants the conclusion that requested or initiated transmission had travelled in interstate commerce. See *Harris*, 548 F. App'x at 682 (justifying the conclusion by referring to the reasoning of the *MacEwan* court); *Carroll*, 105 F.3d at 742 (supporting the *Harris* court's holding).

⁵⁶ See *United States v. Schaefer*, 501 F.3d 1197, 1205 (10th Cir. 2007), *superseded by statute*, Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, 122 Stat. 4001 (2008) (noting that *MacEwan* overlooked the difference between statutes criminalizing acts "in commerce" and those punishing the use of "any facility of interstate or foreign commerce"); *MacEwan*, 445 F.3d at 244 (providing the *Per se* Rule holding at the heart of *Schaefer*'s analysis).

⁵⁷ See *infra* notes 58–65 and accompanying text.

⁵⁸ See *Schaefer*, 501 F.3d at 1201 (holding that because the government failed to prove the server locations of the websites that defendant used as well as those of his ISP, there was insufficient evidence to support defendant's conviction for the otherwise intrastate transmission).

⁵⁹ See *United States v. Wright*, 625 F.3d 583, 593 (9th Cir. 2010) (citing *United States v. Sutcliffe*, 505 F.3d 944, 953 (9th Cir. 2007)) (holding the internet to be an instrumentality of interstate commerce).

⁶⁰ See *id.* at 595 (noting that it was undisputed that the relevant images did not cross state lines).

⁶¹ See *id.* at 599 (noting that Congress chose to not include the phrase "affecting commerce" and instead opted for "in interstate . . . commerce" in passing § 2252).

⁶² See *id.* at 600 (underscoring the distinction between acts in interstate commerce and acts affecting interstate commerce or the facilities thereof).

Circuit held against the *Per se* Rule and required proof that the communication actually crossed state lines.⁶³

In 2012, in *United States v. Kieffer*, the Tenth Circuit upheld *Schaefer*'s proposition that internet use alone is insufficient to establish interstate transmission.⁶⁴ The court clarified that, although *Schaefer* was superseded and overruled on other grounds, its proposition against the *Per se* Rule still stood.⁶⁵

III. CREATING A REBUTTABLE PRESUMPTION OF INTERSTATE TRAVEL

The distinction between controlling acts that are in interstate commerce versus acts that substantially affect interstate commerce is well recognized by the U.S. Supreme Court.⁶⁶ Thus, if Congress intended to exercise its power to the fullest, it could elect to include the appropriate language, as it did, for example, in child pornography statutes.⁶⁷

There seems to be no articulable justification for the *Per se* Rule.⁶⁸ In 1997, in *United States v. Carroll*, the First Circuit Court of Appeals' initial declaration on parity between use of the internet and interstate commerce was supported by no explanation or justification other than two non-binding cases concerned with something else entirely—whether the relevant statutes applied to electronic transmissions.⁶⁹ In 2002, in *United States v. Runyan*, that same

⁶³ See *id.* at 600–01 (finding no interstate transmission and reversing the conviction on the relevant count).

⁶⁴ See *United States v. Kieffer*, 681 F.3d 1143, 1155 (10th Cir. 2012) (upholding the narrow proposition of *Schaefer* that internet use alone is not enough to prove interstate transmission); *United States v. Schaefer*, 501 F.3d 1197, 1205 (10th Cir. 2007), *superseded by statute*, Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, 122 Stat. 4001 (2008) (holding before *Kieffer* that internet usage alone is not sufficient). *Kieffer*, being the only case among those mentioned in this section dealing with the Wire Fraud Statute (in fact the only one not dealing with the child pornography statutes), is perhaps factually the closest case to *O'Donovan*, although the holdings of the two cases are completely opposite. Compare *Kieffer*, 681 F.3d at 1155 (finding that internet use alone is insufficient to constitute interstate travel), with *United States v. O'Donovan*, 126 F.4th 17, 36 (1st Cir. 2025) (holding that transmission of iMessages over the internet was sufficient to satisfy the interstate commerce element).

⁶⁵ See *Kieffer*, 681 F.3d at 1155 (justifying upholding *Schaefer*'s relevant proposition by reference to in-jurisdiction case law standing for the same interpretation); *Schaefer*, 501 F.3d at 1205.

⁶⁶ See *Scarborough v. United States*, 431 U.S. 563, 571 (1977) (“Congress is aware of the ‘distinction between legislation limited to activities ‘in commerce’ and an assertion of its full Commerce Clause power so as to cover all activity substantially affecting interstate commerce.’”).

⁶⁷ See Effective Child Pornography Prosecution Act of 2007 § 103(b) (amending 18 U.S.C. §§ 2251 and 2252 to also cover acts affecting interstate commerce).

⁶⁸ See *infra* notes 69–74 and accompanying text.

⁶⁹ See *United States v. Carroll*, 105 F.3d 740, 742 (1st Cir. 1997) (holding that transmission of photographs by means of the internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce); see also *United States v. Thomas*, 74 F.3d 701, 706–07 (6th Cir. 1996) (holding that electronic transmission of GIF files was within the scope of the relevant statute with a similar federal nexus); *United States v. Maxwell*, 42 M.J. 568, 580 (A.F. Ct. Crim. App. 1995) (holding that computer transmissions are to be “included within the terms ‘transporting obscene material in interstate or foreign commerce’”). Even more, the Sixth Circuit, although deciding *Thomas*, has not conclusively taken sides in the split. See *Beal*, *supra* note 17, at 390–93 (sum-

reasoning rolled into the Fifth Circuit Court of Appeals predominantly by virtue of the factual similarities between the two cases.⁷⁰ The Third Circuit Court of Appeals was the first to attempt to provide a substantial justification for the rule through the reasoning that the internet is an instrumentality and channel of interstate commerce.⁷¹ Yet the court's reasoning degenerated into abstract statements justifying its position with the proposition that the internet has some inherent interstate nature and is intertwined with interstate commerce.⁷² Finally, when the First Circuit again faced the issue in *Lewis*, it was bound by *Carroll*, whereas two more circuits were already squarely aligned with it.⁷³ Thus, the court was understandably reluctant to overrule *Carroll*, and the Per se Rule survived.⁷⁴

It is obvious that requiring the government to prove beyond a reasonable doubt in every case that a transmission crossed state lines would spike the cost and complexity of litigation.⁷⁵ But the solution of the First, Second, Third, and Fifth Circuits to deem that all internet communication is interstate by default is comparably problematic, as some transmissions will inevitably remain within the state.⁷⁶

marizing the positions of the circuits regarding the Per se Rule). *But see* United States v. Mellies, 329 Fed. App'x. 592, 605 (6th Cir. 2009) (ruling on a case where the transmission actually crossed state lines).

⁷⁰ See United States v. Runyan, 290 F.3d 223, 239 (5th Cir. 2002) (adopting the *Carroll* rule verbatim); *Carroll*, 105 F.3d at 742 (providing the rule adopted in *Runyan*).

⁷¹ See United States v. MacEwan, 445 F.3d 237, 245 (3d Cir. 2006) (stating that it is difficult to discern whether the internet is a channel or an instrumentality of commerce and opting to refer to the internet as both a channel and an instrumentality).

⁷² See *id.* at 244–45 (failing to explain how mere request for or initiation of a transmission over the internet—an instrumentality of interstate commerce—satisfies specifically the requirement that such transmission travel in interstate commerce, as opposed to merely affecting interstate commerce); see also United States v. Schaefer, 501 F.3d 1197, 1204–05 (10th Cir. 2007), *superseded by statute*, Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, 122 Stat. 4001 (2008) (pointing out that the Third Circuit's reasoning ignored the distinction between statutes punishing acts in interstate commerce and acts merely affecting facilities of interstate commerce).

⁷³ See United States v. Lewis, 554 F.3d 208, 215–16 (1st Cir. 2009) (stating that the court is bound by its decision in *Carroll* and that the Third and Fifth Circuits have likewise decided to follow the Per se Rule); *Carroll*, 105 F.3d at 742 (holding to the Per se Rule in its conclusions).

⁷⁴ See *Lewis*, 554 F.3d at 215–16 (holding that the government has proven actual interstate travel through presenting evidence of internet use).

⁷⁵ See *Chaikin*, *supra* note 23, at 246 (analyzing the complexity of requesting information from ISPs, a necessary requirement to track internet communications); Antonio E. Bernardo, Eric Talley & Ivo Welch, *A Theory of Legal Presumptions*, 16 J.L. ECON. & ORG. 1, 1–2 (2000) (analyzing how presumptions are designed to mediate between costly litigation and the need for efficient judicial outcomes); Francis H. Bohlen, *The Effect of Rebuttable Presumptions of Law upon the Burden of Proof*, 74 U. PA. L. REV. 307, 313–14 (1920) (concluding that careful use of rebuttable presumptions can minimize wasted judicial time and costly litigation).

⁷⁶ See United States v. O'Donovan, 126 F.4th 17, 26 (1st Cir. 2025) (stating that both parties were in the same state at the time of transmission); United States v. Wright, 625 F.3d 583, 595 (9th Cir. 2010) (showing a transmission that remains within one state); United States v. Sutcliffe, 505 F.3d 944,

Therefore, this Comment recommends that the U.S. Supreme Court resolve the split by creating a rebuttable presumption of interstate travel whenever a defendant has used the internet.⁷⁷ Consequently, the burden will be on the defendant to produce credible evidence that the transmission in question passed solely through local routers on its way to the recipient.⁷⁸ If satisfied, the burden will then shift to the government to prove the contrary beyond a reasonable doubt.⁷⁹

Rebuttable presumptions are a well-established tool in both criminal and civil law, and are implemented when requiring affirmative proof of an element in every single case would increase litigation costs without providing a proportional benefit as to the accuracy of outcomes.⁸⁰ In 2007, in *United States v. Schaefer*, the Tenth Circuit Court of Appeals, one of the two opponents of the Per se Rule, admitted that most internet transmissions will inevitably cross state lines.⁸¹ In light of that, requiring affirmative proof of the interstate movement pursues nothing but unnecessary precision.⁸² A rebuttable presumption will serve as a hedge for identifying the minority of cases where the transmission remained wholly within a state without spiking litigation costs in

953 (9th Cir. 2007) (concluding that the internet constitutes an instrumentality of interstate commerce).

⁷⁷ See 31A C.J.S. *Evidence* § 201 (2025) (defining rebuttable presumptions as types of evidence that stand and take evidentiary effect when there is no evidence purported to the contrary); *infra* notes 78–88 and accompanying text.

⁷⁸ See 29 AM. JUR. 2D *Evidence* § 266 (explaining a rebuttable presumption for the delivery of a physical communication to its planned recipient).

⁷⁹ See *id.* (discussing the shifting framework for rebuttable presumption); *Reasonable Doubt*, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining reasonable doubt and the “[b]eyond a reasonable doubt” standard). Reasonable doubt is the doubt that prevents a fact-finder from being fully convinced that something is the case; for example, that the defendant is guilty. *Id.* Stated differently, a reasonable doubt is the state of mind in which the juror, after considering all presented evidence, does not “feel an abiding conviction, to a moral certainty, of the truth of the charge.” See *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 320 (1850) (outlining the concept of reasonable doubt). “Beyond a reasonable doubt” is the standard the fact-finder in a criminal case must use. *Reasonable Doubt, supra*; see U.S. CONST. amend. XIV, § 1 (requiring “due process of law” before any State may deprive a person of certain entitlements, such as liberty); *In re Winship*, 397 U.S. 358, 365 (1970) (holding that the “beyond a reasonable doubt” standard is prescribed by the Due Process Clause). Some courts have defined proof beyond a reasonable doubt to be such proof that would preclude any reasonable hypothesis other than the one supporting that the element of a crime has been met. See, e.g., *State v. Rivera*, 810 A.2d 824, 830–31 (Conn. App. Ct. 2002) (providing a stricter definition of the reasonable doubt standard).

⁸⁰ See Bohlen, *supra* note 75, at 314 (discussing the utility of rebuttable presumptions in conserving judicial time and resources); Bernardo et al., *supra* note 75, at 2–3 (analyzing how rebuttable presumptions aim to preserve judicial efficiency while also reducing litigation costs).

⁸¹ See *United States v. Schaefer*, 501 F.3d 1197, 1201 (10th Cir. 2007), *superseded by statute*, Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, 122 Stat. 4001 (2008) (stating that it is likelier than not that an internet transmission crosses state lines).

⁸² See Bohlen, *supra* note 75, at 314 (emphasizing the importance of promoting judicial expediency). But see *Schaefer*, 501 F.3d at 1201 (proceeding to require that the government affirmatively establishes beyond a reasonable doubt that the internet transmission has crossed state lines).

pursuit of unnecessary precision.⁸³ Thus, the First, Second, Third, and Fifth Circuits will not be forced to build their position on a simple chain of precedent tracing back to *Carroll*'s indefensible reliance on two cases that do not stand for the underlying proposition.⁸⁴

Opponents of this approach may argue that in criminal cases, rebuttable presumptions are appropriate when the presumed fact is more likely than not to be the case.⁸⁵ There is currently a dearth of research and data on the locality of purely intrastate internet transmissions in the United States, and, as a result, it is difficult to ascertain whether most intrastate transmissions pass solely through in-state routers.⁸⁶ Although additional research would undoubtedly shed light on the statistical aspect of the issue, the abundant case law across circuits holding that the internet is an instrumentality of interstate commerce, along with the reference to the very interstate nature of the internet by the *MacEwan* court and other courts on both sides of the circuit split, accounts for this gap.⁸⁷ Indeed, if a defendant has used an instrumentality of interstate commerce, then they have come dangerously close to causing something to enter and travel through it, and, therefore, will need to affirmatively rebut the aforementioned presumption.⁸⁸

CONCLUSION

Federalizing every internet transmission is just as wrong as letting criminals escape liability under properly enacted laws on a router-by-router technicality. On the one hand, categorically treating all internet transmissions as having crossed state lines risks overreach of the federal criminal system into

⁸³ See 31A C.J.S. *Evidence*, *supra* note 77, § 201 (stating that a party may present evidence to the contrary to counter a rebuttable presumption).

⁸⁴ See *United States v. O'Donovan*, 126 F.4th 17, 36 (1st Cir. 2025) (following the *Carroll* and *Lewis* courts' approach using the Per se Rule); *United States v. Lewis*, 554 F.3d 208, 213 (1st Cir. 2009) (following the *MacEwan*, *Runyan*, and *Carroll* courts in reaffirming the Per se Rule in the First Circuit); *United States v. MacEwan*, 445 F.3d 237, 245 (3d Cir. 2006) (basing its decision to adopt the Per se Rule on *Carroll* and abandoning its own analysis of the matter from the immediately preceding paragraphs that focused on expert testimony of internet traffic).

⁸⁵ See 31A C.J.S. *Evidence*, *supra* note 77, § 201 (stating that courts require a rational basis that the presumed facts are likelier than not to be the case, considering other already proven facts); see also *Schaefer*, 501 F.3d at 1201 (conceding that many, or even most, online transmission cases are likely to involve at least some interstate movement, despite ultimately rejecting the Per se Rule).

⁸⁶ See Candela et al., *supra* note 19, at 2 (surveying the locality of internet transmissions by geographic region). This source catalogues the locality of internet communications, but only goes so far as to survey based on geographic regions and countries, not by state. See *id.* (surveying internet locality but limiting the survey in its geographic detail).

⁸⁷ See, e.g., *MacEwan*, 445 F.3d at 244 (recognizing the internet as an instrumentality of interstate commerce); *United States v. Sutcliffe*, 505 F.3d 944, 953 (9th Cir. 2007) (same).

⁸⁸ See *MacEwan*, 445 F.3d at 244 (finding the internet to be an instrumentality of interstate commerce); *Schaefer*, 501 F.3d at 1201 (stating that in most cases internet communications will cross state lines); 31A C.J.S. *Evidence*, *supra* note 77, § 201 (defining a rebuttable presumption generally).

realms it was not intended to enter. On the other hand, requiring that the government prove internet use in all cases imposes a heavy evidentiary burden on the government, in a way defeating the purpose of the federal nexus elements and the relevant statutes. A rebuttable presumption of interstate travel followed by a shift in burden to the defendant to produce credible evidence to the contrary filters out cases where there is no real dispute as to the applicability of the statutes, all the while avoiding acquittals on overly technical grounds and categorical overreach of the federal criminal system. It is the only defensible approach that addresses valid concerns raised by both sides of the jurisdictional split without reaching the absurdity of either camp's position.

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