

No. 25-1061

In the Supreme Court of the United States

HOLLY ANN ELKINS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the federal prohibition on cyberstalking, 18 U.S.C. 2261A(2), is a valid exercise of Congress's Commerce Clause authority as applied to petitioner.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement.....	1
Argument.....	5
Conclusion.....	9

TABLE OF AUTHORITIES

Cases:

<i>Gonzales v. Raich</i> , 545 U.S. 1 (2005)	7
<i>Pensacola Telegraph Co. v. Western Union</i> <i>Telegraph Co.</i> , 96 U.S. 1 (1878).....	5, 6
<i>United States v. Chavarria</i> , 140 F.4th 1257 (10th Cir. 2025)	7, 8
<i>United States v. Corum</i> , 362 F.3d 489 (8th Cir. 2004), cert. denied, 543 U.S. 1056 (2005).....	6
<i>United States v. Evans</i> , 476 F.3d 1176 (11th Cir.), cert. denied, 552 U.S. 878 (2007).....	6
<i>United States v. Gilbert</i> , 181 F.3d 152 (1st Cir. 1999).....	6
<i>United States v. Giordano</i> , 442 F.3d 30 (2d Cir. 2006), cert. denied, 549 U.S. 1213 (2007).....	6
<i>United States v. Lopez</i> , 514 U.S. 549 (1995)	3, 5, 7
<i>United States v. Marek</i> , 238 F.3d 310 (5th Cir.), cert. denied, 534 U.S. 813 (2001).....	3-6
<i>United States v. Morgan</i> , 748 F.3d 1024 (10th Cir.), cert. denied, 574 U.S. 915 (2014).....	8

IV

Cases—Continued:	Page
<i>United States v. Richeson</i> , 338 F.3d 653 (7th Cir.), cert. denied, 540 U.S. 934 (2003).....	6
<i>United States v. Smith</i> , 110 F.4th 817 (5th Cir. 2024), cert. denied, 146 S. Ct. 356 (2025)	6
<i>United States v. Stackhouse</i> , 105 F.4th 1193 (9th Cir.), cert. denied, 145 S. Ct. 558 (2024)	6, 7
<i>United States v. Taplet</i> , 776 F.3d 875 (D.C. Cir. 2015)	6
<i>United States v. Weathers</i> , 169 F.3d 336 (6th Cir.), cert. denied, 528 U.S. 838 (1999).....	6
<i>United States v. Windham</i> , 53 F.4th 1006 (6th Cir. 2022).....	6
Constitution and statutes:	
U.S. Const. Art. I, § 8, Cl. 3 (Commerce Clause).....	3-7, 9
Travel Act, 18 U.S.C. 1952	6
18 U.S.C. 371	1, 2
18 U.S.C. 924(c).....	4
18 U.S.C. 924(c)(1)(A)(iii)	2, 3
18 U.S.C. 924(c)(3)(A)	4
18 U.S.C. 1958(a)	6
18 U.S.C. 2261(b)	1, 2
18 U.S.C. 2261A(2)	3, 5
18 U.S.C. 2261A(2)(A)	1, 2, 4
18 U.S.C. 2261A(2)(B)	1, 2, 4

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 161 F.4th 899. The order of the district court (Pet. App. 27a-39a) is reported at 725 F. Supp. 3d 570.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 2025. The petition for a writ of certiorari was filed on March 4, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of conspiring to commit cyberstalking, in violation of 18 U.S.C. 371, 2261A(2)(A) and (B); cyberstalking using a dangerous weapon and resulting in death, in violation of 18 U.S.C. 2261(b), 2261A(2)(A) and (B); and

using, carrying, brandishing, and discharging a firearm during a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii). Judgment 1-2; Pet. App. 1a-2a. Petitioner was sentenced to two consecutive life terms of imprisonment, to be followed by five years of supervised release. Judgment 2-3; Pet. App. 45a-46a. The court of appeals vacated in part and affirmed in part. Pet. App. 1a-26a.

1. Petitioner and her fiancé, Andrew Beard, sought to obtain sole custody of Beard’s child by stalking and harassing Beard’s ex-girlfriend, Alyssa Burkett. Pet. App. 3a. Among other things, petitioner and Beard “installed a GPS tracker on Burkett’s car”; falsely reported to police that Burkett “was driving dangerously and recklessly on an interstate highway”; falsely reported to police that Burkett’s mother had assaulted petitioner; and together “conspired to plant a gun and drugs in Burkett’s car before Beard called police to accuse Burkett of dealing drugs.” *Ibid.*

When all of that failed to cause Burkett to yield the child to Beard, petitioner “encouraged Beard to take further steps.” Pet. App. 3a. “Ultimately, Beard disguised himself as a Black man, drove to Burkett’s work, and shot and stabbed her to death.” *Ibid.* Petitioner purchased the makeup that Beard used to alter his appearance, and was with him when they “purchased small-gauge shotguns shells and a large knife” to use in the killing. *Ibid.*

2. A grand jury in the Northern District of Texas indicted petitioner for conspiring to commit cyberstalking, in violation of 18 U.S.C. 371, 2261A(2)(A) and (B); cyberstalking using a dangerous weapon and resulting in death, in violation of 18 U.S.C. 2261(b), 2261A(2)(A) and (B); and using, carrying, brandishing, and

discharging a firearm during a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii). Pet. App. 1a-2a.

Petitioner moved to dismiss the indictment, arguing (*inter alia*) that the federal cyberstalking statute exceeded Congress's authority under the Commerce Clause as applied to her conduct. Pet. App. 30a. The cyberstalking provision, 18 U.S.C. 2261A(2), applies to a person who:

with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses * * * any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that—

(A) places that person in reasonable fear of the death of or serious bodily injury to [that] person * * * ; or

(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to [that] person.

18 U.S.C. 2261A(2).

The district court denied the motion to dismiss. Pet. App. 27a-39a. With respect to petitioner's Commerce Clause challenge, the court quoted this Court's precedent to explain that Congress may constitutionally regulate "the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Id.* at 33a (quoting *United States v. Lopez*, 514 U.S. 549, 558 (1995)). The district court additionally noted that "[t]he Fifth Circuit has recognized phones to be facilities of interstate commerce." *Id.* at 34a (citing *United States*

v. *Marek*, 238 F.3d 310, 319-320 (5th Cir.) (en banc), cert. denied, 534 U.S. 813 (2001)). And the court found that the indictment here, which alleged that petitioner had used a phone multiple times in the commission of her offenses, was “within the constitutional bounds of Congress’s power.” *Ibid.*

The jury found petitioner guilty on all counts. Pet. App. 43a. The district court sentenced petitioner to five years of imprisonment on the conspiracy count and consecutive terms of life imprisonment on the cyberstalking and firearm counts. *Id.* at 2a. In doing so, the court recognized that petitioner “had been the mastermind behind the couple’s campaign of terror against Burkett.” *Id.* at 3a.

3. The court of appeals vacated in part and affirmed in part. Pet. App. 1a-26a. The court vacated petitioner’s conviction on the 18 U.S.C. 924(e) count, based on the view that cyberstalking under Section 2261A(2)(B) was not categorically a “crime of violence” under 18 U.S.C. 924(e)(3)(A)—even where it results in death—and that the jury instructions had permitted conviction under either Section 2261A(2)(A) or Section 2261A(2)(B). Pet. App. 4a-18a. But the court affirmed petitioner’s other two convictions. *Id.* at 18a-25a.

The court of appeals agreed with petitioner that her Commerce Clause challenge to the cyberstalking provision was “foreclosed” by circuit precedent. Pet. App. 19a-20a. The court observed that this Court has “identified three categories of activities Congress may regulate under its Commerce Power: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities that substantially affect interstate commerce.” *Id.* at 19a-20a. And it observed that under circuit precedent, “[t]he use of a

phone—even intrastate—involves the use of an instrumentality of interstate commerce.” *Id.* at 20a (citing *Marek*, 238 F.3d at 318-319). Accordingly, the court of appeals found that because petitioner used a phone multiple times in her crime, her “as-applied challenge to the cyberstalking statute is foreclosed.” *Ibid.*

ARGUMENT

Petitioner renews her contention that the cyberstalking prohibition, 18 U.S.C. 2261A(2), is unconstitutional as applied to her conduct. Pet. 12. That contention does not warrant this Court’s review. The decision below is correct. It does not conflict with the decision of any other court of appeals. And at any rate, this case would be a poor vehicle, because the record reveals that petitioner used a number of instrumentalities of commerce besides a phone in committing her offenses.

1. The court of appeals correctly rejected petitioner’s as-applied Commerce Clause challenge. This Court’s precedent has “identified three broad categories of activity that Congress may regulate under its commerce power.” *United States v. Lopez*, 514 U.S. 549, 558 (1995). One of those categories (the second) allows Congress to “regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.” *Ibid.*

As petitioner appears to accept, this Court’s precedent treats certain things as “per se” instrumentalities of interstate commerce. Pet. 9-10 (citations omitted). For example, more than a century ago, this Court recognized that telegraph lines were “instrumentalities of commerce” such that any use fell within “the regulating power of Congress.” *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1, 9 (1878). The Court

observed that the telegraph had become “indispensable as a means of inter-communication,” especially “in commercial transactions.” *Ibid.*

The same rationale applies to telephones today. As petitioner herself emphasizes, phones are now “essentially a prerequisite to participation in modern society.” Pet. 4 (quoting *United States v. Smith*, 110 F.4th 817, 833 (5th Cir. 2024), cert. denied, 146 S. Ct. 356 (2025)). Accordingly, consistent with the decision below, every court of appeals to consider the issue has recognized that “[t]elephones are instrumentalities of interstate commerce” that Congress may regulate under the Commerce Clause. *United States v. Stackhouse*, 105 F.4th 1193, 1199 (9th Cir.) (citation omitted), cert. denied, 145 S. Ct. 558 (2024); see *United States v. Weathers*, 169 F.3d 336, 341 (6th Cir.) (recognizing it is “well established that telephones, even when used intrastate, constitute instrumentalities of interstate commerce”), cert. denied, 528 U.S. 838 (1999).*

* See also, *e.g.*, *United States v. Windham*, 53 F.4th 1006, 1011–1013 (6th Cir. 2022); *United States v. Evans*, 476 F.3d 1176, 1180–1181 (11th Cir.), cert. denied, 552 U.S. 878 (2007); *United States v. Giordano*, 442 F.3d 30, 39–42 (2d Cir. 2006), cert. denied, 549 U.S. 1213 (2007); *United States v. Corum*, 362 F.3d 489, 493 (8th Cir. 2004), cert. denied, 543 U.S. 1056 (2005); *United States v. Marek*, 238 F.3d 310, 318 & n.35 (5th Cir.) (en banc), cert. denied, 534 U.S. 813 (2001); *United States v. Gilbert*, 181 F.3d 152, 158–159 (1st Cir. 1999). Equivalently, particularly for purposes of Congress’s regulatory authority as a constitutional matter, several circuits have recognized that telephones are “facilit[ies]” of interstate commerce under the murder-for-hire statute, 18 U.S.C. 1958(a), and the Travel Act, 18 U.S.C. 1952. See *United States v. Taplet*, 776 F.3d 875, 882 (D.C. Cir. 2015); *United States v. Richeson*, 338 F.3d 653, 661 (7th Cir.), cert. denied, 540 U.S. 934 (2003); see also, *e.g.*, *Marek*, 238 F.3d at 317 n.26 (“We find no meaningful distinction between the

In the proceedings below, petitioner “acknowledged that the Supreme Court has condoned the government’s regulation of instrumentalities of interstate commerce, no matter whether the regulated activity actually affects interstate commerce.” Pet. C.A. Reply Br. 11-12. And here, because phones are instrumentalities of interstate commerce, Congress may “[f]orbid[]” their “use” to “further intrastate crime.” *Stackhouse*, 105 F.4th at 1200; see, e.g., *Lopez*, 514 U.S. at 559 (“Congress is empowered to regulate and protect the instrumentalities of interstate commerce * * * even though the threat may come only from intrastate activities.”); see also *Gonzales v. Raich*, 545 U.S. 1, 34 (2005) (Scalia, J., concurring in the judgment) (recognizing that power to regulate “instrumentalities of interstate commerce” is “self-evident” because “they are the ingredients of interstate commerce”). Therefore, petitioner’s use of a phone to accomplish her cyberstalking offense, see Pet. App. 20a, 28a, 34a, deprives her as-applied claim under the Commerce Clause of any merit.

2. Petitioner fails to show that any court of appeals would have reached a different result in the circumstances of this case. The only actual circuit decision she highlights as potentially supportive of her as-applied claim is the Tenth Circuit’s decision in *United States v. Chavarria*, 140 F.4th 1257 (2025), which she characterizes as rejecting as adopting a case-by-case approach to whether a particular item is an “instrumentalit[y] of interstate commerce,” Pet. 8. But her reliance on that decision is misplaced.

Chavarria recognized—as petitioner herself did in the proceedings below, see Pet. C.A. Reply Br. 11-12—

terms ‘facilities’ and ‘instrumentalities’ of interstate commerce.”) (citation omitted).

that “[c]ertain items—by virtue of their class and with judicial economy in mind—permit the reasonable inference that they are per se instrumentalities of interstate commerce.” 140 F.4th at 1265. And it further recognized that this Court had held that telegraphs—which are substantially similar in relevant respects to modern phones—were one such item. *Ibid.* It concluded “only that ‘motor vehicles’—an undefined, generic term” that the court viewed to include “e-bikes,” “[l]awnmowers,” and “[e]lectric scooters”—“are not per se instrumentalities of interstate commerce for purposes of the federal kidnapping statute.” *Id.* at 1266, 1268.

That limited conclusion does not suggest that petitioner’s case would have turned out differently in the Tenth Circuit. Indeed, the Tenth Circuit has previously “held that telephones are instrumentalities of interstate commerce.” *United States v. Morgan*, 748 F.3d 1024, 1033 n.11, cert. denied, 574 U.S. 915 (2014); see *ibid.* (noting that while no published circuit precedent addresses whether cellphones are also instrumentalities of interstate commerce, an unpublished circuit decision and other circuits have recognized that they are).

3. At all events, this would be a poor vehicle to review that consensus. Petitioner’s offense involved multiple other instrumentalities of interstate commerce besides a telephone. In particular, the indictment alleged that the offense involved “a computer, the internet, electronic mail, a telephone, and a global positioning system (‘GPS’).” C.A. ROA 36-37. And the evidence at trial established that petitioner used those instruments as well in committing her offense.

For example, petitioner searched the internet for whether it was legal to track someone’s car, whether a person must “admit to calling 911 anonymously,” and

whether a person could avoid going to court by obtaining a psychiatrist's note. C.A. ROA 971, 1921; see *id.* at 1840, 1844, 1892-1893, 1915, 1922. Petitioner used e-mail to communicate with a detective about her false accusations against Burkett's mother. *Id.* at 1910-1915. And petitioner's GPS device transmitted the device's location from satellites to servers located "[i]n the U.S. and throughout the world" before sending that location data to end users like petitioner and Beard. *Id.* at 1305. Thus, even if the court of appeals erred in relying on petitioner's phone use to reject her Commerce Clause challenge, see Pet. App. 20a, many alternative paths to the same result would remain.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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