No. _____

In the

Supreme Court of the United States

October Term, 2024

_____

MICHAEL DAVIS, Petitioner

v

UNITED STATES OF AMERICA, Respondent

_____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Starting with first principles, Congress's power to regulate interstate commerce is limited by the "constitutionally mandated division of authority between the Federal Government and the states," *United States v Lopez*, 514 US 549, 552 (1995), and the closely related principle that regulation and punishment of violent street crime is part of the general police powers possessed by the states.

In this case, the lower courts justified use of commerce power under the channels and instrumentalities categories to broadly regulate violent street crime by evidence of intrastate use of cell phones and an automobile.

The Question Presented is:

> Whether an indictment charging murder-for-hire in violation of 18 USC § 1958 by intrastate use of cellphones and an automobile exceeds the proper limits on Congress' power under the channels and instrumentalities categories of the Commerce Clause?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of this case.

RELATED CASES

United States v Williams et al., No 18-cr-20085 (E.D. Mich. 9/21/23)

United States v Michael Davis, No. 22-1717 (6th Cir. 8/3/22)

United States v David Allen, No. 22-1698 (6th Cir. 7/28/22)

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The panel decision of the United States Court of Appeals for the Sixth Circuit is published at 86 F4th 295 and appears in the Appendix to the Petition ("App") at App A. The order denying rehearing en banc appears in the Appendix at App B. The order from the US District Court appears in the Appendix at App C.

JURISDICTION

The judgment of the Court of Appeals that gives rise to this petition was entered on November 9, 2023. (App A). A timely Petition for Rehearing was denied on February 15, 2024. (App B). This Court has jurisdiction under 28 USC §1254(1). The instant Petition is timely filed within 90 days of February 15, 2024, the date the Sixth Circuit Court of Appeals denied Petitioner's Petition for Rehearing En Banc.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

US Constitution, Article I, Sec. 8, cl 3

Section 8: Powers of Congress

The Congress shall have Power . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

18 USC § 1958. Use of Interstate Commerce Facilities in the Commission of Murder-For-Hire

(a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined under this title or imprisoned for not more than twenty years, or both; and if death results, shall be punished by death or life imprisonment, or shall be fined not more than $250,000, or both.

(b) As used in this section and section 1959—

(1) "anything of pecuniary value" means anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage;

(2) "facility of interstate or foreign commerce" includes means of transportation and communication; and

(3) "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Davis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE

This case presents an important and recurring question concerning the limits on federal power to authorize prosecution of local violent crime under channels and instrumentalities categories of the Commerce Clause left undecided by *United States v. Lopez*, 514 US 549 (1995) and *United States v. Morrison*, 529 US 598 (2000).

The lower courts in this case and others holding that Congress has authority under the channels and instrumentalities categories to punish local violent crime committed with intrastate use of cellphones and automobiles "threatens the proper limits on Congress's commerce power and may allow Congress to exercise police powers that our Constitution reserves to the States." *Alderman v. United States*, 562 US 1163 (2011)(Mem.)(Thomas, J. and Scalia, J., dissenting from denial of certiorari).

A. Statutory Background

As relevant here, the murder-for-hire statute, 18 USC §1958, punishes anyone who "uses . . . any facility of interstate or foreign commerce, with intent that a murder be committed . . . as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value." 18 USC §1958(b)(2).

The statute's legislative history is limited. 18 USC §1958 has its origins in the Interstate Travel in Aid of Racketeering Statute ("Travel Act"). *See*, 18 USC §1952 (1961), *amended by* 18 USC §1952A (1984). The Travel Act prohibits travel or use of a facility in interstate or foreign commerce with intent to commit a crime of violence or to promote an unlawful activity. *United States v. Nardello*, 393 US 286, 292 (1969). Travel Act legislative history reveals that §1952 was primarily aimed at state line crossings to commit crimes by organized crime groups and persons who reside in one state while operating or managing illegal activities located in another. *Rewis v. United States*, 401 US 808, 811 (1971). This history explains that Congress sought "to take effective action against the racketeer who conducts an unlawful business but lives far from the scene in comfort and safety, as well as against other hoodlums." *Rewis, Id.* at fn 6. *Id.* at fn. 1, citing S. Rep. No. 644, 87th Cong, 1st sess. 2-3, dated July 27, 1961.

The murder-for-hire statute was enacted in 1984 as an amendment to the Travel Act as 18 USC §1952A, Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2136. According to a Senate Committee report, the murder-for-hire statute was intended to focus on murder in violation of state or federal law where there is a proper nexus to interstate or foreign commerce. S.Rep. No. 98-225, at 305 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182."Even though the statute was not intended to usurp the authority of state and local officials, the 1983 Senate Judiciary Committee report states, 'the option of Federal investigation and

prosecution should be available when a murder is committed or planned as consideration for something of pecuniary value and the proper Federal nexus, such as interstate travel, use of the facilities of interstate commerce, or use of the mails, is present.'" *United States v. Marek*, 238 F3d 310, 321 (5th Cir 2001)(en banc), *citing* S.Rep. No. 98-225, at 305(1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3484.

The statute was renumbered in 1988 as §1958 and language added to prohibit conspiracy to murder. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §7058(b), 102 Stat 4181; Crime Contract Act of 1990, Pub L. No. 101-647, §§1205(k), 3558, 104 Stat. 4789, 4831, 4927. A technical amendment in 2004 replaced the word "in" ("facility *in* interstate or foreign commerce") with the word "of" ("facility *of* interstate or foreign commerce") without explanation but followed criticisms of the conflicting prepositions "of" and "in." H.R. REP. No. 108-505, at 8 (May 20, 2004); Michael P. Murphy,"*Of" As A Loaded Word: Congress Tests the Boundaries Of Its Commerce Power With An Amendment To The Federal Murder-For-Hire Statute*, 13 Wm.& Mary Bill Rts. J. 1375, 1382.

B. Factual and Procedural Background

1. Deangelo Pippen was killed by gunfire from a passing vehicle on December 29, 2016, while stopped at a traffic light in Norton Shores, a suburb of Muskegon, Michigan. (Pet App D: ECF 1: Indictment, ED MI Case No. 18-20085). According to facts agreed upon by the parties at Petitioner Michael Davis' guilty plea hearing, Dwight Williams met with Michael Davis in Detroit where Williams

agreed to pay Michael Davis to drive about three hours west across the state, from Detroit to Norton Shores, along with David Allen and Christopher Davis, to shoot Pippen. (Pet App H: ECF 322: Rule 11 Agreement). The three drove from Detroit on December 28, 2016, stayed at a hotel in Grand Rapids over night, and continued on the next morning to the vicinity of Pippen's apartment in Norton Shores. After seeing Pippen drive from his apartment in a Chrysler Pacifica, the three followed the Pacifica in a GMC Terrain. When Pippen's vehicle stopped for a traffic light, the GMC Terrain with Davis as a passenger pulled along side Pippen. Shots were fired from the GMC Terrain by Michael Davis and Christopher Davis resulting in Pippen's death. After the shooting, the three drove back to Detroit where Williams' payment was divided among the three. (Id.).

2. Cell phones were used among the three within Michigan to communicate with Williams during the trip to Norton Shores and back to Detroit. The Government's evidence established that service providers for the cell phones used out-of-state switching equipment to complete the calls. Also according to the government's evidence, the GMC Terrain used for the trip from Detroit to Norton Shores and back was rented from and returned to an inner-city facility in Detroit. (Id.).

3. Michael Davis was indicted with three co-defendants as a result of the shooting for violating 18 USC §§1958(a). The indictment charged the defendants violated the statute by using cell phones and a vehicle as facilities of interstate

commerce with intent to murder Pippen in violation of the laws of the State of Michigan and in exchange for the payment of money. (Pet App D: ECF 1: Indictment). The murder charge was eligible for the Death Penalty. Michigan's Constitution banned the death penalty in 1846 for capital offenses prosecuted in state courts. Mich. Const 1963, Art. IV, § 46, Eff. Jan. 1, 1964. Use of the Death Penalty in Davis's case was eventually declined by the US Attorney General on March 13, 2019.

4. Davis filed a motion before his trial date to ask the district court to dismiss the murder-for-hire counts of his indictment on grounds of federalism. He argued that §1958, as applied in his case, exceeded limited authority under the Commerce Clause to prosecute local violent crime. (Pet App E: ECF 218: Motion to Dismiss). In its response, the Government "concede[d] that the activity regulated in §1958 does not have a substantial effect on interstate commerce" and argued the activities as alleged fell within the scope of the Commerce Clause channels and instrumentalities categories. (Pet App F: ECF 231: Gov't Response, App F-011). Petitioner filed his reply brief. (Pet App G: ECF: 234: Reply). The district court denied the motion. (Pet App. C: ECF 244: D Ct Order Denying Dismissal).

5. Davis entered a guilty plea on January 14, 2022 pursuant to Rule 11(a)(2)(Conditional Plea) authorizing Davis to appeal from the district court's denial of his motion to dismiss. (Pet App H: ECF 322: Rule 11 Agreement).

6. The Court of Appeals affirmed in a published decision. (Pet App A;

United States v. Allen, 86 F4th 295 (6th Cir. 2023)). It relied on *United States v. Weathers*, 169 F3d 336, 341 (6th Cir. 1999), and decisions from other circuits, *United States v. Evans*, 476 F3d 1176, 1180-81 (11th Cir, 2007) and *United States v. Taplet*, 776 F3d 875, 882 (DC Cir. 2015), *Id.*, explaining that "[m]any courts (including our own) have held that a phone is a 'facility of interstate or foreign commerce' within the meaning of the murder-for-hire statute or similar laws." (Pet App A: Opinion, App A-008); *Allen*, 86 F4th at 301. Based on that precedent, it held without constitutional analysis that Davis's conduct fell within the "channels" and "instrumentalities" "categories of activities that Congress may regulate" because cell phones and vehicles are inherently facilities of interstate commerce. (Pet App A-009)("To begin with, we have held that a defendant uses "the channels of interstate commerce"– the channels subject to congressional regulation under the first category – when the defendant makes *intrastate* phone calls that require the use of *interstate* switches for their connection."). The Court found "[t]his case law dooms Davis's . . . arguments in this case." (*Id.* at App-010).

7. Two members of the panel, Judges Murphy and Bush, concurred. They explained they were required to follow *Weathers*, but remained *particularly unconvinced* by the Sixth Circuit's broad rule allowing Congress to regulate any intrastate activity using a phone. In their views, "[i]f correct, this holding would all but undo the Supreme Court's recent limits on its substantial effects test." (Pet App A-020), 86 F4th at 308.

> In short, our main decision holding that the Commerce Clause gives Congress the power to regulate all activities completed through a local phone [*United States v. Weathers*] did not discuss the clause's original meaning. It also did not seek to reconcile its rule with the Supreme Court's most recent precedent. It instead relied solely on circuit cases. And it may have overread those cases.

Allen, 86 F4th at 313 (Pet App A-027).

8. En banc rehearing was denied on February 15, 2024. (Pet App B).

REASON FOR GRANTING THE WRIT

I. This Case Presents an Important and Recurring Question Concerning The Limits Of Authority Under The Commerce Clause Channels and Instrumentalities Categories To Regulate Intrastate Criminal Activities.

A. Lower Courts Are Divided On The Question Whether Intrastate Use of Cell Phones and Cars is Sufficient.

The question at the center of this case – whether the limits on Congress's authority under the Commerce Clause, explained in *Lopez* and *Morrison*, extend to authority to prosecute local crime under the Commerce Clause channels and instrumentalities categories – requires definitive resolution by this Court.

Numerous lower court judges addressing the issue have explained that they feel bound by this Court's expansive pre-*Lopez* decisions in analyzing the limits of Commerce Clause jurisdiction under the channels and instrumentalities categories, but that they are discomfited by the result they believe those earlier cases require them to reach. Only this Court can provide guidance they seek about whether and how these categories reach intrastate activity, particularly violent criminal activity,

an area of law enforcement "which has always been the prime object of the State's police power." *Morrison*, 529 US at 615. More specifically, only this Court can determine whether older decisions addressing interstate commerce regulation of intrastate railroad safety and rates, *Southern Railroad Co. v. United States*, 222 US 20 (1911) and *Shreveport Rate Cases*, 234 US 342 (1914), justify federal regulation of non-economic local violence.

In *Southern Railroad*, this Court ruled that it was within Congress's power to regulate the safety of intrastate railcars integrated into interstate rail traffic "to secure the safety of the persons and property" transported in interstate commerce even though "the dangers intended to be avoided arise in whole or in apart, out of matters connected with intrastate commerce." *Southern Railroad*, 222 US at 27. In the *Shreveport Rate Cases*, this Court upheld the authority of the Interstate Commerce Commission to regulate intrastate freight rates where "the interstate and intrastate transactions of carriers are so related that the government of one involves the control of the other . . . " 234 US at 351. The principle sometimes discerned from these cases is that "Congress may regulate threats to instrumentalities 'even though the threat may come only from intrastate activities.'" *United States v. Bishop*, 66 F3d 569, 588 (3rd Cir 1995).

In this case a per curiam panel of the Sixth Circuit concluded, without constitutional analysis, that the defendants' intrastate use of cell phones and an automobile fell within the Supreme Court's channels and instrumentalities categories of activity that Congress may regulate. (Pet App A-010); *Allen*, 86 F4th at

302. It did so by relying on its "well established rule," following the precedent in *Southern Railroad* and *Shreveport Rate Cases*, that cellphones are inherently instrumentalities of interstate commerce and that their intrastate use is enough to satisfy the jurisdictional requirements of the murder-for hire statute. (Pet App A-007), *Allen*, 86 F4th at 308; *Weathers*, 169 F3d at 341; cf. *United States v. Watson*, 852 Fed Appx 164, 168 (6th Cir 2021); *United States v. Windham*, 2022 WL 17090506 at *4 (6th Cir 2022)(Affirming the defendant's kidnapping conviction in violation of 18 USC §1201(a)(1), the Court explained that: "[t]he issue is therefore whether cars and cell phones are instrumentalities of interstate commerce, *not* whether they were used interstate.").

Other circuits have followed the same rule, that Congress has the authority under the Commerce Clause to regulate intrastate crime committed with cars and cellphones, not because cars and cellphones are used in interstate commerce but because they are inherently instrumentalities of interstate commerce or because they merely have the potential to be used in interstate commerce. *See, Allen*, 86 F4th at 302 listing cases; and *United States v. Drury*, 396 F3d 1303 (11th Cir 2005). In *United States v. Marek*, 238 F3d 310 (5th Cir 2001)(en banc), the Court affirmed the defendant's conviction under the murder-for-hire statute, finding as a matter of statutory construction that "jurisdiction is supplied by the nature of the instrumentality or facility used, not by separate proof of interstate movement." *Marek, supra.* at 317. In so ruling, it "reject[ed] the notion that Congress has not

spoken with sufficient clarity to criminalize conduct traditionally the subject of state criminal laws." *Id* at 323.

Given the ubiquitous presence of both cellphones and automobiles in almost every aspect of our daily lives,[1] the logic of these decisions provides authority under the Commerce Clause for federal regulation that "would make virtually every murder-for-hire a federal crime, because any use of a telephone or an automobile would qualify." *Marek*, 238 F3d at 326. As Judge Murphy put it in this case, "[if anything, the government's broad reading would eviscerate the Supreme Court's more recent limits on its substantial-effects test." (Pet App A-004-005); 86 F4th at 312 (Murphy, J., dissenting).

B. THE LOWER COURTS HAVE EXPRESSLY AND REPEATEDLY SOUGHT THIS COURT'S GUIDANCE IN ADDRESSING THE QUESTION PRESENTED.

Lacking further guidance from this Court, lower courts have been struggling to apply both expansive pre-*Lopez* holdings and the framework for limits on Congress's commerce power outlined in *Lopez* and *Morrison* to federal prohibitions of criminal conduct within the traditional powers of the states. The logic of the holdings in these lower court concurring and dissenting opinions supports the reasons offered in this petition that this Court should grant review.

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[1] *See*, *Riley v. California*, 573 US 373, 385 (2014)("[M]odern cellphones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."); *Carpenter v. United States*, 138 S Ct 2206, 2211 (2018)("There are 396 million cell phone service accounts in the United States–for a Nation of 326 million people.")

In this case, the panel held that cell phones and automobiles are instrumentalities of commerce, but two of the three panel judges concurred to explain their skepticism for that outcome. In their view, neither *Southern Railroad* nor the *Shreveport Rate Cases* justify the broad rule followed in the Sixth Circuit "that Congress *automatically* may regulate all [intrastate] activities done with phones [or automobiles]" without a nexus "necessary to make a regulation of intestate commerce effective[.]" (Pet App A-024), *Allen* 86 F4th at 312; *Gonzales v. Raich,* 545 US 1, 35 (2005)(Scalia, J., concurring in the judgement);" *see also*, *Marek*, *supra* at 312-313.

The concurring opinion also explains that under the Court's holding, "Congress may regulate *any* activity (whether the completion of a crime or the operation of a school) that uses a phone." *Id*. at 310. According to Judges Murphy and Bush, that outcome is contrary to the Commerce Clause as originally understood. *Id.*

Their concurring opinion joined similar critiques of equally broad rules that treat intrastate acts of carjacking as violations of 18 USC § 2119 under the instrumentalities category in *United States v. McHenry*, 97 F3d 125, 132-34 (6th Cir. 1996)(Batchelder, J., dissenting), and *Bishop*, 66 F3d at 597-600)(Becker, J., concurring in part and dissenting in part)[2]. In *McHenry*, the court majority ruled

[2] 18 USC §2119 provides, in part, that" "[w]hoever, with intent to cause death or serious bodily harm, takes a motor vehicle that has been transported, shipped or received in interstate or foreign commerce . . ."

that regulated instrumentalities only need "the *inherent potential* to affect commerce in order to come within the instrumentalities category. *McHenry, supra* at 127. Judge Batchelder dissented from the holding in *McHenry* that prosecution of carjacking as a violation of 18 USC § 2119 is a valid exercise of commerce power under the instrumentalities and substantial effects categories. According to Judge Batchelder, the majority's "inherent potential" rule would extend Commerce Clause authority to "federal criminalization of simple car theft or turnstile-jumping in a municipality's rapid-transit system." *Id.* at 133.

Likewise, in *Bishop, supra*, the court held the carjacking statute, 18 USC §2119, is authorized under category two of the Commerce Clause as a regulation of motor vehicles, "quintessential instrumentalities of modern commerce." "In the present age, cars represent Americans' primary mode of transportation, both within and among the States." *Id*. at 590. The opinion also upheld Commerce Clause authority for the statute under category one, channels of commerce, because "Congress had a rational basis for believing that carjacking substantially affects interstate commerce," and because the statute requires an adequate nexus to interstate commerce. *Id.* at 576.

In dissent in *Bishop*, Judge Becker argued that, after *Lopez*, *Southern Railroad* and the *Shreveport Rate Cases* cannot be read to justify plenary authority to regulate "all automobiles in all instances." *Id* at 598. (Becker, J., dissenting). "Such an approach would constitute a dramatic encroachment on the regulation of

automobiles, a traditional area of state concern, and would permit Congress to pass federal laws requiring individuals to wear seatbelts (as opposed to requiring that cars be manufactured with seatbelts) or banning motorists from making a right turn at a red light." *Id*. at 599.

In *Marek*, *supra*, where the en banc majority held the murder-for-hire statute was sufficiently clear to authorize concurrent federal and state jurisdiction, five judges dissented to explain that the "majority's interpretation would make virtually every murder-for-hire a federal crime, because any use of a telephone or an automobile would qualify." *Marek, supra.* at 326 (Jolly, J., dissenting).

All told, three courts of appeals have generated four concurring and dissenting opinions highlighting the need for this Court to act. *See*, Pet App.A (concurring opinion)(Pet App A-019) (Murphy, J., and Bush, J., concurring); *McHenry*, 97 F3d at 129 (Batchelder, J., dissenting)*; Bishop*, 66 F3d at 597, et seq.; *Marek*, 238 F3d at 324 (Jolly, J., Jones, J., Smith, J., Barksdale, J., and DeMoss, J., dissenting).

As reflected in their opinions, these courts have attempted to grapple with the issue remaining after *Lopez* and *Morrison*, how to apply limits on the application of the Commerce Clause in order to "withhold from Congress a plenary police power that would authorize enactment of every type of legislation." *Lopez*, 514 US at 546.

This struggle to define limits on Commerce Clause jurisdiction to regulate

local crime also reflects, at least in part, scholarly criticism of the expansive use of the channels and instrumentalities categories of Commerce Clause authority after *Lopez* and *Morrison. See,* Diane McGimsey, *The Commerce Clause and Federalism after Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole*, 90 Cal L. Rev. 1675, 1679 (2002)("Since *Lopez* and *Morrison*, commentators have noted the Court's failure to address these other two areas of Commerce Clause regulation and have suggested ways in which the Court might reform its interpretation of the Commerce Clause to protect the federalism principles articulated in *Lopez* and *Morrison*."); George D. Brown, *Counterrevolution?-National Criminal Law After Raich*, 66 Ohio St l J 947, 1004 (2005)("It is time for guidance as to how to handle regulation under categories one and two through the use of jurisdictional elements of the nexus variety."); Susan A. Ehrlich*, The Increasing Federalization Of Crime*, 32 Ariz. St. L.J. 825 (2000). These scholars have joined with the lower courts in calling on this Court to limit Congress's Commerce Clause power under the channels and instrumentalities categories in order to protect federalism.

In sum, as explained by Justice Thomas in his dissent from denial of certiorari in *Alderman*, "[t]his Court has a duty to defend the integrity of its precedents, and we should grant certiorari to affirm that *Lopez* provides the proper framework for a Commerce Clause analysis of this type." *Alderman v. United*

States, 562 US 1163 (2011).[3]

It is not necessary in this case to reassess the continued use of the channels and instrumentalities categories in every possible context. But it is critically important to clarify the limits of these categories for prosecution of local violent crime based on intrastate use of cellphones and automobiles in order to defend the integrity of the limits on Commerce Clause authority provided in *Lopez* and *Morrison*.

II. This Court's Recent Decisions Have Properly Recognized a Need To Fully Reexamine Commerce Clause Limits.

This case presents an important question left undecided by *United States v. Lopez,* 514 US 549 (1995) and *United States v. Morrison*, 529 US 598 (2000), whether non-economic violent crime is within the scope of Commerce Clause power to regulate channels and instrumentalities of commerce.

The question is important because, as explained in *Lopez*, limits on Congressional power to regulate persons and things in interstate commerce under the instrumentalities category, "even though the threat may come only from intrastate activities," *Lopez* at 558, is essential in order to assure a discernible separation of political accountability between Federal and State government. "Were

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[3] In *Alderman*, the defendant pled guilty to violating 18 USC §931 which prohibits possession of body armor by certain felons. 18 USC §921(a)(35) defines the term "body armor" to mean "any product sold or offered for sale, in interstate or foreign commerce, as personal protective body covering intend to protect against gunfire, regardless of whether the product is to be worn alone or sold as a complement to another product or garment."

the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Lopez*, at 577 (Kennedy, J., concurring).[4]

Here, evidence of intrastate cell phone and vehicle use provides no discernible distinction between federal and state activity because each is essentially a function of daily life. *Carpenter v. United States*, 138 S Ct 2206, 2220 (2018)("In the first place, cell phones and the services they provide are 'such a pervasive and insistent part of daily life' that carrying one is indispensable to participation in modern society."), citing *Riley v. United States*, 573 US 373, 395 (2014). The same is true for vehicles. *See, Bishop*, 66 F3d at 598; David Harrison, *We Own More Cars Than Ever, So Why Are We Driving Less,* Wall Street Journal, 12/25/23.

The principles outlined in *Lopez* and *Morrison* define a framework for the outer limits on Congress's authority to regulate interstate commercial activity pursuant to the Commerce Clause generally. *National Federation of Independent Businesses v. Sebelius*, 567 US 519, 546 (2012). They explain three broad categories of activity Congress may regulate consistent with enumerated powers adopted by

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[4] *See also Jones v. United States*, 529 US 848, 857 (2000)"Were we to adopt the Government's expansive interpretation of §844(i), hardly a building in the land would fall outside the federal statute's domain"); *Bond v. United States*, 572 US 844, 863-64 (2014).

the Framers to ensure protection of fundamental liberties and a healthy balance of power between the States and the Federal Government. *Lopez*, 514 US at 552. These categories include the channels of interstate commerce, the instrumentalities of interstate commerce, and activities that have a substantial relation to interstate commerce. *Id.* at 558. In *Lopez*, the Court held that the Gun-Free School Zones Act of 1990 (GFSZA), 18 USC §922(q)(1)(A)(1988 ed. Supp. V), that regulated possession of firearms in a place defined as a school zone, exceeds the authority of Congress to regulate commerce because "[t]he Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce." *Lopez, supra.* at 551. In *Morrison*, the Court held that the civil remedy provisions of the Violence Against Women Act (VAWA),42 USC §13981, exceeds the outer bounds of Commerce Clause authority to reach gender-motivated violence under the same category.

More specifically, each decision holds that Congress's regulation of criminal conduct exceeded commerce power under the third and broadest category having substantial effects on interstate commerce. In *Lopez*, this Court reached its conclusion because §922(q) was a criminal statute that had nothing to do with commerce or economic activity, the statute contained no jurisdictional element to assure a nexus between firearm possession and commerce, and because the statute had no supporting legislative history. *Lopez, supra,* at 559-563. The decision explains that to adopt the government's arguments to the contrary would require

the Court "to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. *Lopez*, *supra* at 567.

The decision in *Morrison* reaches a similar result because VAWA prohibited purely intrastate violent crime. ("The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."). *Morrison*, 529 US at 618; *Cohens v. Virginia*, 6 Wheat 264, 426, 428, 5 LEd 257 (1821)(Marshall, C.J.)("'stating that Congress 'has no general right to punish murder committed within any of the states,' and that it is 'clear ... that congress cannot punish felonies generally.' Indeed, we can think of no better example of the police power which the Founders denied the National Government and reposed in the State, than the suppression of violent crime and vindication of its victims.").

Based on the *Lopez/Morrison* framework, this Court should grant review to resolve the important question presented here, whether evidence of intrastate cell phone and vehicle use as jurisdictional hooks for a murder-for-hire prosecution also exceeds the channels and instrumentalities category. The *Lopez/Morrison* framework should also apply under the channels and instrumentalities categories because federal prosecution of local violence in either category of Commerce Clause authority "threatens the proper limits on Congress' commerce power and may allow congress to exercise police powers that our Constitution reserves to the States." *Alderman v. United States*, 562 US 1163 (2011)(Mem.); *Lopez*, 514, US at 577

(Kennedy, J., concurring). To conclude otherwise would tacitly nullify the limits on Commerce Clause jurisdiction under *Lopez* and *Morrison*. *Marek*, 238 F3d 310, 326 (5th Cir., 2001)(en banc)(Jolly, E., dissenting).

Judge Murphy, joined by Judge Bush, concurred in the lower court decision in this case because, in their view, they were required to do so by controlling circuit precedent, but wrote separately to explain that using evidence of intrastate cell phone and automobile use to create federal jurisdiction under the murder-for-hire statute exceeds Commerce Clause jurisdiction. Their concurring opinion echoes Judge Jolly's dissent joined by four other judges in *Marek*. ("I write to explain why I remain particularly unconvinced by our broad rule allowing Congress to regulate any activity using a phone. If correct, this holding would all but undo the Supreme Court's recent limits on its substantial-effects test.")(Pet App A-020) *Allen*, 86 F4th at 308. The rule in this case and in the Sixth Circuit in *Weathers* should be corrected because other circuits have followed it as precedent to hold that mere evidence of a cell phone or vehicle use is a "jurisdictional hook" sufficient for the murder-for-hire statute. *Marek*, 238 F3d at 319; *Drury*, *supra*; *United States v. Mandel*, 647 F3d 710 (7th Cir 2011).

Mr. Davis' case presents this important question concerning the proper limits under the Commerce Clause channels and instrumentalities categories in a clean vehicle that highlights the stakes involved. This Court should grant review and reverse.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Date: May 7, 2024