No. 25-

IN THE

Supreme Court of the United States

HOLLY ANN ELKINS,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

BRETT ORDIWAY
Counsel of Record
ORDIWAY PLLC
8350 North Central Expressway,
Suite 1900
Dallas, Texas 75206
(469) 205-1600
brett@ordiway.com

Counsel for Petitioner

131974

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

This Court has identified three broad categories of activity that Congress may regulate under its commerce power, the second of which comprises "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). Some courts take a categorical approach to this category, as the Fifth Circuit did here: phones just *are* instrumentalities of interstate commerce. *United States v. Elkins*, 161 F.4th 899, 912 (2025). In the Tenth Circuit, however, something that *can* be an instrumentality, like a motor vehicle, is not necessarily one. *United States v. Chavarria*, 140 F.4th 1257, 1265 (10th Cir. 2025). It must actually "affect interstate commerce in some way for its use to warrant federal interest." *Id.*

Is the Fifth Circuit's categorical approach to instrumentalities of interstate commerce constitutional?

LIST OF PARTIES

Petitioner Holly Ann Elkins was the defendant in the district court and the appellant in the court of appeals.

Respondent United States of America was the plaintiff in the district court and the appellee in the court of appeals.

LIST OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Elkins*, 161 F.4th 899 (5th Cir. 2025) (affirming in part and vacating in part the district court's judgment)

- *United States v. Elkins*, 725 F. Supp. 3d 570 (N.D. Tex. 2024) (denying defendant's motion to dismiss)

There are no other proceedings in state or federal trial or appellate courts, including in this Court, that are directly related to this case within the meaning of the Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES:

Page

Page

Page

STATUTES & OTHER AUTHORITIES:

Cited Authorities

Page

PETITION FOR A WRIT OF CERTIORARI

Petitioner Holly Ann Elkins respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 161 F.4th 899. The district court's memorandum opinion and order denying Elkins's motion to dismiss the indictment is reported at 725 F. Supp. 3d 570.

JURISDICTION

The Fifth Circuit entered its judgment on December 10, 2025. *United States v. Elkins*, 161 F.4th 899 (5th Cir. 2025). This Court has jurisdiction to review the Fifth Circuit's decision under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Under Article 1, Section 8, of the United States Constitution, Congress "shall have Power . . . [t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3.

Under 18 U.S.C.§ 2261A(2), a person commits an offense if, with the requisite intent, she "uses the mail, 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 (1)

places a person in reasonable fear of death or serious bodily injury or (2) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress.

Under 18 U.S.C. § 371, a person commits an offense if, with one or more other people, she "conspire[s] . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy."

STATEMENT OF THE CASE

In the brutal culmination of an ugly, long-running fight over the custody of their daughter, Andrew Beard murdered Alyssa Burkett in October of 2020. Beard eventually pleaded guilty to cyberstalking[1] and using a firearm in the course of committing a crime of violence, earning every bit of a combined 43-year sentence. *See* 18 U.S.C. §§ 2261A(2), 2261(b); 18 U.S.C. § 924(c)(1)(A)(iii). But the Government was not satisfied. One month later, a grand jury in the Northern District of Texas returned an indictment accusing Beard's girlfriend, Holly Ann Elkins, of the same crimes and of conspiring with Beard to cyberstalk Burkett. Dist. Ct. Doc. 1; *see* 18 U.S.C. § 371. On the cyberstalking and firearm counts, the grand jury

1. Under 18 U.S.C. § 2261A, a person may commit the offense of stalking in two ways. Subsection (1) covers a person who, in the course of committing the offense, "travels in interstate or foreign commerce or is present within the special maritime and territorial jurisdiction of the United States, or enters or leaves Indian country by traveling in interstate or foreign commerce." Subsection (2)—commonly referred to as the "cyberstalking" subsection—covers a person who uses a "facility of interstate or foreign commerce" to commit the offense.

alleged that Elkins was liable as a co-conspirator under *Pinkerton v. United States*, 328 U.S. 640 (1946). Dist. Ct. Doc. 1.

Elkins moved to dismiss the indictment. *United States v. Elkins*, 725 F. Supp. 3d 570 (N.D. Tex. 2024). On the conspiracy and cyberstalking counts, she urged that as applied to her conduct, the cyberstalking statute exceeds Congress's power to regulate interstate commerce. On the firearm count, she explained that, as charged here, cyberstalking, even where it results in death, is not a crime of violence. *Id.* The district court rejected both arguments following a hearing, and the court set the case for trial in April of 2024. *Id.*

Unlike Beard, Elkins insisted on her innocence. She helped him surveil Burkett, yes. But only to get proof that Burkett was violating their custody agreement and to help Beard with his legal battle. It was not with the intent to kill, injure, harass, or intimidate Burkett, *see* 18 U.S.C. § 2261A(2), and Elkins had nothing to do with Beard's desperate, last-ditch efforts. When he attempted to frame Burkett for drug dealing and, when that failed, murdered her, he was literally and figuratively on his own. Elkins did not, and could not, foresee what he would do. *See, e.g., United States v. Danhach*, 815 F.3d 228, 235 (5th Cir. 2016) ("Under *Pinkerton* [*v. United States*, 328 U.S. 640 (1946)], a conspirator can be found guilty of a substantive offense committed by a co-conspirator and in furtherance of the conspiracy, so long as the co-conspirator's acts are reasonably foreseeable.").

Because the Government chose not to call Beard as a witness, it was left with only circumstantial evidence to argue otherwise. Nonetheless persuaded, the jury found

Elkins guilty on all three counts. Pet. App. 40a. The court then sentenced Elkins to five years' imprisonment on the conspiracy count, life imprisonment on the cyberstalking count, and life imprisonment on the firearm count, the latter two sentences running consecutively. Pet. App. 45a. Elkins timely notified the court that she would appeal.

Before the Fifth Court of Appeals, Elkins persisted in her arguments that, as applied here, the cyberstalking statute exceeds Congress's Commerce Clause powers and that, as charged here, cyberstalking is not a crime of violence under 18 U.S.C. § 924(c). As to the former contention, Elkins acknowledged that her argument was foreclosed by circuit precedent. *Elkins*, 161 F.4th at 910 (citing *United States v. Marek*, 238 F.3d 310, 318-19 (5th Cir. 2001) ("[I]ntrastate use of interstate facilities is properly regulated under Congress's second-category *Lopez* power . . . Interstate commerce facilities that have created a criminal federal jurisdictional nexus during intrastate use include telephones, automobiles, and airplanes." (citations omitted))). But seeking to preserve the issue for further review, Elkins urged the court that her mere use of a phone—"essentially a prerequisite to participation in modern society," *United States v. Smith*, 110 F.4th 817, 833 (5th Cir. 2024)—was insufficient to invoke federal jurisdiction. Rather, Congress may regulate cyberstalking only that affects interstate commerce. Brief at 43.

Reasoning that "[t]he use of a phone—even intrastate—involves the use of an instrumentality of interstate commerce," the Fifth Circuit "agree[d] that Elkins's as-applied challenge to the cyberstalking statute [was] foreclosed" and affirmed the district court's judgment as

to her cyberstalking and conspiracy convictions. *United States v. Elkins*, 161 F.4th 899, 910, 912 (5th Cir. 2025) (citing *Marek*, 238 F.3d at 318-19). Further agreeing that cyberstalking, as charged here, is not a crime of violence, however, the court vacated Elkins's conviction and life sentence on the firearm count. *Id.* at 909.

REASONS FOR GRANTING THE WRIT

1. Unlike the Tenth Circuit, the Fifth Circuit takes a categorical approach to instrumentalities of interstate commerce.

"The Constitution expressly delegates to Congress authority over only four specific crimes." *Taylor v. United States*, 579 U.S. 301, 312 (2016) (Thomas, J., dissenting). Unsurprisingly, cyberstalking is not one of them. Under the Constitution's Commerce Clause, however, Congress has the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. And though "the Founders denied the National Government [the police power]," trusting it to the States, this Court has interpreted the Commerce Clause as empowering Congress to create federal criminal law. *See, e.g., Perez v. United States*, 402 U.S. 146, 150 (1971). Today, most of the federal criminal code stems from the Commerce Clause. *See* Adam H. Kurland, First Principles of American Federalism and the Nature of Federal Criminal Regulation, 45 Emory L.J. 1, 1-15 (1996).

Since *Perez*, this Court has organized Congress's broad authority under the Commerce Clause into three general "categories[.]" *Id.* at 150. First, Congress may regulate "the channels of interstate commerce." *Gonzales*

v. Raich, 545 U.S. 1, 16 (2005). Second, Congress may regulate the "instrumentalities of interstate commerce" and the "persons or things in" that commerce. *Id.* at 16–17. And third, Congress may regulate activities that "substantially affect interstate commerce." *Id.* at 17.

The cyberstalking statute, under which Elkins was convicted and sentenced to life imprisonment, explicitly invokes federal jurisdiction under the second category. As relevant here, a person commits an offense if, with the requisite intent, she "uses the mail, 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 places a person in reasonable fear of death or serious bodily injury or that causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress. 18 U.S.C.§ 2261A(2) (emphasis added); *see United States v. Marek*, 238 F.3d 310, 317 n. 26 (5th Cir. 2001) (finding "no meaningful distinction between the terms 'facilities' and 'instrumentalities' of interstate commerce"). In affirming Elkins's conviction, the Fifth Circuit held that proof of as much is enough to satisfy the Commerce Clause: "The use of a phone—even intrastate—involves the use of an instrumentality of interstate commerce." *Elkins*, 161 F.4th at 912.

Like the Fifth Circuit here, many circuit courts have taken this "categorical approach to instrumentalities." *United States v. Bryan*, 159 F.4th 1274, 1301 (11th Cir. 2025) (Calvert, J., concurring in part and dissenting in part). The Sixth Circuit is a good example. In *United States v. Windham*, 53 F.4th 1006 (6th Cir. 2022), the

court rejected a Commerce Clause challenge to the federal kidnapping statute, which, like the cyberstalking statute, punishes a person who "uses . . . any means, facility, or instrumentality of interstate or foreign commerce" to commit a kidnapping. *Id.* at 1010 (quoting 18 U.S.C. § 1201(a)(1)). There, the government charged the defendant with using a cellphone to kidnap the victim, but no evidence suggested that the defendant had made interstate calls or engaged in interstate activity. *Id.* at 1009, 1011. The Sixth Circuit held that this did not matter: Because phones are "instrumentalities of interstate commerce," Congress may regulate even their "intrastate" use. *Id.* at 1013. Then, in *United States v. Roberts*, 84 F.4th 659 (6th Cir. 2023), the Sixth Circuit held, like the Fifth Circuit here, that "[b]ecause 'Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or person or things in interstate commerce, even though the threat may come only from intrastate activities,'" the cyberstalking statute is constitutional. *Id.* at 671 (citing *United States v. Lopez*, 514 U.S. 549, 558 (1995)).

Several other circuit courts similarly have held that a defendant's mere use of a car or a phone gives Congress the power to regulate crime. *See, e.g., United States v. Stackhouse*, 105 F.4th 1193, 1202 (9th Cir. 2024); *United States v. Runyon*, 707 F.3d 475, 488–89 (4th Cir. 2013); *United States v. Mandel*, 647 F.3d 710, 716–17, 720–22 (7th Cir. 2011); *United States v. Gilbert*, 181 F.3d 152, 157–59 (1st Cir. 1999); *United States v. Giordano*, 442 F.3d 30, 41 (2d Cir. 2006) (Sotomayor, J.). And several circuit courts have held that "[a] showing that a regulated activity substantially affects interstate commerce (as required for the third category) is not needed when Congress regulates activity in the first two categories."

United States v. Gil, 297 F.3d 93, 100 (2d Cir. 2002); *see United States v. Al-Zubaidy*, 283 F.3d 804, 811 (6th Cir. 2002) ("Where Congress seeks to regulate the channels or instrumentalities of interstate commerce, it is not bound by the 'substantial effects' test and retains plenary power to regulate things and activity that cross state lines."); *United States v. Ballinger*, 395 F.3d 1218, 1226 (11th Cir. 2005) ("Plainly, congressional power to regulate the channels and instrumentalities of commerce includes the power to prohibit their use for harmful purposes, even if the targeted harm itself occurs outside the flow of commerce and is purely local in nature.").

But not all circuit courts take this categorical approach to instrumentalities of interstate commerce. *See Bryan*, 159 F.4th at 1299 (Calvert, J., concurring and dissenting) (noting the "developing circuit split"). In a decision last summer, the Tenth Circuit held that a person's mere use of a "motor vehicle" in committing a kidnapping was insufficient to invoke federal jurisdiction. *United States v. Chavarria*, 140 F.4th 1257 (10th Cir. 2025). To be sure, motor vehicles can affect interstate commerce. *Id.* at 1266 (recognizing that "many" motor vehicles are instrumentalities of interstate commerce). But "[g]oing on a picnic," "[t]aking your child to school," "[v]isiting a relative," [r]iding an ATV along a backwoods trail," and "[s]imply enjoying the open road" also "require use of a motor vehicle." *Id.* (emphasis removed). And in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1 (1877), this Court "did not say that any items which *could* be used for interstate commerce are automatically instrumentalities of interstate commerce." *Id.* (emphasis in original) (citing *Pensacola*, 96 U.S. at 9). Rather, this Court "took pains to explain that the 'electric telegraph'

had '*become* one of the necessities of commerce,'" as "more than eighty per cent of all the messages sent by telegraph related to commerce." *Id.* (citing *Pensacola*, 96 U.S. at 9 (emphasis added)). This Court "applied similar logic in determining that railroads and aircraft were per se instrumentalities of interstate commerce." *Id.* (citing *Houston, E. & W.T.R. Co. v. United States*, 234 U.S. 342, 351–53 (1914); *Perez*, 402 U.S. at 150). These decisions accord with *Gibbons v. Ogden*, 22 U.S. 1 (1824), in which this Court demanded "that something actually be put to the end of interstate commerce to be an instrumentality of interstate commerce." *Chavarria*, 140 F.4th at 1265 (citing *Gibbons*, 22 U.S. at 194). The Tenth Circuit thus concluded that "[a]n instrumentality must affect interstate commerce in some way for its use to warrant federal interest." *Id.* at 1265; *see also id.* ("[N]ot all people and things that have ever moved across state lines qualify as permissible targets of regulation.") (quoting *Durham*, 902 F.3d at 1198). "[W]here a crime's relation to interstate commerce is so tangential that it can be connected only in the hypothetical by reference to the broadest possible conception of an instrumentality's class, prosecution must be left to the states." *Id.* at 1268.

Moreover, not all judges accept the categorical approach. Most recently, Judge Calvert on the Eleventh Circuit explained that he did "not read *Lopez* . . . to support the categorical approach to instrumentalities" and instead "agree[d]" with *Chavarria*. *Bryan*, 159 F.4th at 1301 (Calvert, J., concurring and dissenting). Judge Calvert "would utilize traditional tools of statutory interpretation[ ] and consider whether the specific facts in an individual case align both with Congress's commerce power and Congress's purpose in enacting the specific legislation

at issue." *Id.* at 1302 (citing *United States v. Bass*, 404 U.S. 336, 350 (1971) ("Absent proof of some interstate commerce nexus in *each case*, § 1202(a) dramatically intrudes upon traditional state criminal jurisdiction.") (emphasis added)).

Concurring in *United States v. Allen*, 86 F.4th 295 (6th Cir. 2023), Judge Murphy on the Sixth Circuit similarly concluded that, while a person's use of a phone *can* invoke federal jurisdiction, the "broad view allowing Congress to regulate any activity done with a phone undercuts not just [this Court's] limits on its substantial-effects test but also [states'] citizenry's right to govern themselves." *Id.* at 313-14 (Murphy, J., concurring). Further back, Judge Becker on the Third Circuit concurred and dissented in *United States v. Bishop*, 66 F.3d 569, 598 (3d Cir. 1995), in which the Third Circuit upheld the federal carjacking statute's constitutionality "on the theory that 'automobiles' are often used as instrumentalities of interstate commerce." *Id.* at 599 (Becker, J., concurring and dissenting). In Judge Becker's view, the majority "dramatically and improperly enhance[d] the scope of federal power under [the instrumentalities] branch of Congress's Commerce Clause authority." *Bishop*, 66 F.3d. at 599 (Becker, J., concurring and dissenting). Judge Becker explained that "[t]he fact that automobiles can be used as instrumentalities of interstate commerce does not grant Congress plenary authority to regulate the use and operation of every individual's automobile." *Id.*; *see also United States v. McHenry*, 97 F.3d 125, 132–34 (6th Cir. 1996) (Batchelder, J., dissenting) (similarly critiquing the rule that treated cars as per se instrumentalities of interstate commerce and thus that gave Congress the right to regulate all local activities completed with cars).

2. The Tenth Circuit's rejection of a categorical approach to instrumentalities is correct.

As well explained by *Chavarria* and those judges, the Fifth Circuit's categorical rule is contrary to the Commerce Clause's original meaning, and this Court's caselaw hardly justifies it. Beginning with the clause's original meaning, "[t]he best historical scholarship indicates that in addition to its primary sense of buying, selling, and transporting merchandise, the term 'commerce' was understood at the Founding to include the compensated provision of services as well as activities in preparation for selling property or services in the marketplace, such as the production of goods for sale." *United States v. Patton*, 451 F.3d 615, 624 (10th Cir. 2006) (citing Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 Iowa L.Rev. 1, 9–42, 107–110 (1999)). "Justice Thomas has espoused [an even] narrower historical definition, confining the term to its primary sense of buying and selling goods and excluding preparatory activities." *Id.* at n. 5 (citing *Lopez*, 514 U.S. at 585–87 (Thomas, J., concurring)). Under Justice Thomas's approach, "[t]he Commerce Clause, as originally understood, […] 'empowers Congress to regulate [only] the buying and selling of goods and services trafficked across state lines.'" *Taylor*, 579 U.S. at 313 (Thomas, J., dissenting) (quoting *Gonzales v. Raich*, 545 U.S. 1, 58 (2005) (Thomas, J., dissenting)); *see also* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 146 (2001) ("The most persuasive evidence of original meaning . . . strongly supports Justice Thomas's and the Progressive Era Supreme Court's

narrow interpretation of Congress's power [under the Commerce Clause].").

In any case, there is nothing to suggest that the Commerce Clause, as originally understood, gave Congress the power to regulate all activities completed using a phone. "Of course, phones (like cars) did not exist at the founding." *Allen*, 86 F.4th at 310 (Murphy, J., concurring). "But we often 'must apply the legal rules' that flow from a 'fixed constitutional' provision 'to new technologies in an evolving world.'" *Id.* (quoting *United States v. Miller*, 982 F.3d 412, 417 (6th Cir. 2020)). And there is nothing to suggest that "Congress had a power to regulate all activities completed through the intrastate delivery of a letter." *Id.* "Indeed, if the Commerce Clause gave Congress this power over all activities done with letters, why would the Founders have felt the need separately to permit Congress '[t]o establish Post Offices and post Roads'?" *Id.* (quoting U.S. Const. art. I, § 8, cl. 7). And "if Congress historically lacked the power to regulate all activities involving letters, why should it now possess the power to regulate all activities involving phones?" *Id.*

This Court's decisions also do not suggest that Congress possesses such a power. In *Perez*, this Court explained that "[t]he Commerce Clause reaches [. . .] *protection* of the instrumentalities of interstate commerce, as for example, the destruction of an aircraft, or persons or things in commerce, as, for example, thefts from interstate shipments." 402 U.S. at 150 (emphasis added). In *Lopez*, this Court then explained that "Congress is empowered to regulate and protect the instrumentalities of interstate commerce . . . even though *the threat* may come only from intrastate activities." 514 U.S. at 558 (emphasis added).

"So, for example, the Commerce Clause gives Congress the power to require railroad companies to use safety equipment on train cars traveling 'on any railroad which is a highway of interstate commerce.'" *Allen*, 86 F.4th at 311 (Murphy, J., concurring) (quoting *S. Ry. Co. v. United States*, 222 U.S. 20, 26 (1911)). "And because train cars traveling only intrastate on these railroads pose 'dangers' to this interstate traffic, Congress may require these cars to use that safety equipment too." *Id.* (quoting *S. Ry. Co.*, 220 U.S. at 26–27). Likewise, the Commerce Clause gives Congress the power to set the prices that railroad companies charge for interstate trips. *See Houston, E. & W. Tex. Ry. Co. v. United States (Shreveport Rate Cases)*, 234 U.S. 342, 350–55 (1914). And because those companies might try to subsidize intrastate trips by raising their interstate prices, Congress may require the companies to treat the two types of trips equally. *See id.*

In short, this Court's decisions support that Congress "may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations *to the injury* of interstate commerce." *Id.* at 353 (emphasis added); *see also Taylor*, 579 U.S. at 316 (Thomas, J., dissenting) ("A robbery that forces an interstate freeway to shut down thus may form the basis for a valid Hobbs Act conviction. So too might a robbery of a truckdriver who is in the course of transporting commercial goods across state lines."). This Court's decisions do not support that Congress may regulate the mere use of any phone in America. To the contrary, the Fifth Circuit's categorical approach "would eviscerate [this Court's] more recent limits" on the third category: activities that "substantially affect interstate commerce." *Allen*, 86 F.4th at 312 (Murphy, J., concurring).

"By 1990, many had opined that [the third category] spelled the 'death of our federal system,'" reasoning that the power to regulate anything that substantially affected national commerce gave the federal government the unlimited "police power" reserved to the States. *Id.* at 309 (quoting *David P. Currie*, The Constitution in the Supreme Court: The Second Century, 1888–1986, at 236 (1990); citing *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (opinion of Roberts, C.J.)). Instead, in *Lopez*, *Morrison*, and *NFIB*, this Court "placed concrete limits on its substantial-effects test." *Id.* (citing *Lopez*, 514 U.S. at 558-59; *United States v. Morrison*, 529 U.S. 598, 608–09 (2000); *NFIB*, 567 U.S. at 536). Reiterating that the "States possess primary authority for defining and enforcing criminal law," *Lopez*, 514 U.S. at 561 n. 3 (internal quotation omitted), this Court emphasized that the Commerce Clause "must be read carefully to avoid creating a general federal authority akin to the police power." *NFIB*, 567 U.S. at 536. "When Congress criminalizes conduct already denounced as criminal by the States," this Court explained, it "effects 'a change in the sensitive relation between federal and state criminal jurisdiction.'" *Lopez*, 514 U.S. at 561 n. 3 (quoting *United States v. Enmons*, 410 U.S. 396, 411–12 (1973) (quotation omitted)). It is "inconsistent with the letter and spirit of the Constitution" and "subvert[s] basic principles of federalism and dual sovereignty." *Taylor*, 579 U.S. at 316 (Thomas, J., dissenting) (citing *Raich*, 545 U.S. at 65; *McCulloch*, 4 Wheat. at 421); *see Screws v. United States*, 325 U.S. 91, 109 (1945) (plurality opinion) ("Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States."). This Court likewise "warned

against 'embrac[ing] effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'" *Chavarria*, 140 F.4th at 1268 (quoting *Lopez*, 514 U.S. at 557).

If Congress may regulate any use of a phone, that is precisely what has occurred. As this Court observed more than a decade ago, cell phones are "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." *Riley v. California*, 573 U.S. 373, 385 (2014). More recently, the Fifth Circuit recognized that carrying a cell phone is "essentially a prerequisite to participation in modern society." *United States v. Smith*, 110 F.4th 817, 833 (5th Cir. 2024). If Congress may regulate the mere use of a phone, its commerce power therefore is *not* "subject to outer limits." *Lopez*, 514 U.S. at 556–57 ("But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits."). This is "precisely the sort of creep in general applicability that would sanction federal overreach." *Chavarria*, 140 F.4th at 1268 ("Recognizing congressional authority to regulate all 'motor vehicles' is precisely the sort of creep in general applicability that would sanction federal overreach.").

As the Tenth Circuit explained in *Chavarria*, the better approach is to follow this Court's decision in *Gibbons*, "where Chief Justice Marshall chastened that individual objects are 'instruments' of commerce 'only in so far' as they bear a connection 'with the commerce which Congress has power to regulate.'" 140 F.4th at 1267 (quoting *Gibbons*, 22 U.S. at 95). When cell phones are used

for "non-commercial, intrastate purposes," and "without any other allegation of interstate commercial impact, 'neither that employment, nor its regulation or prohibition, falls within the purview of the federal constitution.'" *Id.* (quoting *Gibbons*, 22. U.S. at 94–95). The Fifth Circuit thus erred in holding that the cyberstalking statute is constitutional as applied to Elkins merely because "[t]he use of a phone—even intrastate—involves the use of an instrumentality of interstate commerce." *Elkins*, 161 F.4th at 910.

3. The question presented is important, and this case is an ideal vehicle for resolving it.

The split between the Fifth and Tenth Circuits is reason enough for this Court to grant this petition. But this case also presents an issue of exceptional national importance for the reason just identified: again, cell phones' ubiquity means that if Congress can regulate their mere use, Congress can regulate anything.

Furthermore, this issue is recurring. As set out above, the circuit courts have repeatedly faced the question of whether the Commerce Clause gives Congress the power to prohibit the mere use of supposed instrumentalities of interstate commerce, like cars and phones. *See supra*. And the issue is cleanly presented here. Because Elkins "raised this question of law in the district court," the Fifth Circuit reviewed it de novo. *Elkins*, 161 F.4th at 910. And the court did not offer any alternative justifications for its decision. Indeed, the Fifth Circuit did not, and could not, rule that the question made no difference where the district court explicitly instructed the jury that phones, the Internet, and email are facilities of interstate commerce, no matter how they are used. Dist. Ct. Doc. 91 at 11. Moreover, the

Government did not allege, much less prove, that any of Elkins's alleged actions actually affected interstate commerce. Under even the government's telling, Elkins and her boyfriend used a computer, the internet, email, a telephone, and a GPS tracker not to affect commerce, but to place his cross-town ex-girlfriend in fear of death or serious bodily injury and to cause her substantial emotional distress.

Finally, the consequences of the Fifth Circuit's decision in this case are permanent and severe in light of Elkins's life sentence. Whether she will die in prison should not depend on whether she allegedly stalked the victim in the Dallas–Fort Worth metroplex or some eighty miles north, in the Tenth Circuit. To Elkins and the nation, this case therefore is of exceptional importance.

CONCLUSION

This Court should grant this petition for a writ of certiorari.

Respectfully submitted,

Brett Ordiway
Counsel of Record
Ordiway PLLC
8350 North Central Expressway,
Suite 1900
Dallas, Texas 75206
(469) 205-1600
brett@ordiway.com

Counsel for Petitioner

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED DECEMBER 10, 2025

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-10753

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HOLLY ANN ELKINS,

Defendant-Appellant.

Filed December 10, 2025

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:23-CR-247-1

Before SMITH, DENNIS, and RICHMAN, *Circuit Judges.*

PRISCILLA RICHMAN, *Circuit Judge*:

Holly Ann Elkins was convicted by a jury of Count One: conspiracy to stalk, an offense under 18 U.S.C. §§ 371, 2261A(2)(A) and (B); Count Two: cyberstalking using a dangerous weapon and resulting in death, an offense under

18 U.S.C. §§ 2261A(2)(A) and (B) and punishable under § 2261(b); and Count Three: using, carrying, brandishing, and discharging a firearm during a crime of violence, an offense under 18 U.S.C. § 924(c)(1)(A)(iii). Elkins was sentenced to five years of imprisonment on Count One, a life sentence on Count Two, and a consecutive life sentence on Count Three.

Elkins challenges the life sentence imposed as a consequence of her conviction under Count Three. The predicate "crime of violence" offense for Count Three was the offense charged in Count Two. She contends that the offense for which she was convicted under 18 U.S.C. §§ 2261A(2)(A) and (B), and 2261(b), on which Count Two was based, is not a "crime of violence." She asserts that the offense does not have as an element the use, attempted use, or threatened use of physical force against the person or property of another and therefore cannot serve as a predicate offense for a conviction under § 924(c)(1)(A)(iii).

We conclude that although the offenses set forth in subsections (2)(A) and (B) of § 2261A are divisible, the jury instructions permitted the jury to convict Elkins under either subsection (2)(A) or (B), and the subsection (2)(B) offense is not categorically a "crime of violence." We do not consider whether a subsection (2)(A) offense is a "crime of violence." We vacate the conviction under Count Three and the corresponding life sentence but otherwise affirm the district court's judgment.

Appendix A

I

Holly Ann Elkins and her fiancé, Andrew Beard, stalked and harassed Beard's ex-girlfriend Alyssa Burkett, who was also the mother of Beard's child, as part of a plan to gain sole custody of the child. Elkins and Beard installed a GPS tracker on Burkett's car. Elkins made false reports to the police about Burkett. She photographed Burkett's license plate then called 9-1-1 to report, falsely, that Burkett was driving dangerously and recklessly on an interstate highway, giving the 9-1-1 operator Burkett's license plate number and a description of her vehicle. Subsequently, Elkins and Beard conspired to plant a gun and drugs in Burkett's car before Beard called the police to accuse Burkett of dealing drugs at the apartment complex where she worked. Elkins also falsely reported that Burkett's mother had assaulted her.

These schemes failed to achieve sole custody of Beard's child. Elkins encouraged Beard to take further steps. Ultimately, Beard disguised himself as a Black man, drove to Burkett's work, and shot and stabbed her to death. Elkins purchased the Maybelline Java foundation makeup that Beard smeared on his face to effect his disguise on the day of the murder. Elkins and Beard had together purchased small-gauge shotgun shells and a large knife. A jury convicted Elkins on multiple counts, and at sentencing, the district court concluded that Elkins had been the mastermind behind the couple's campaign of terror against Burkett.

II

Elkins argues that an offense under 18 U.S.C. § 2261A(2) that results in death (charged in Count Two) is not a "crime of violence" and therefore may not serve as a predicate to support her conviction of conspiring to use or discharge a firearm during a "crime of violence," an offense under 18 U.S.C. § 924(c)(1)(A)(iii) (charged in Count Three). Because of the manner in which this case was submitted to the jury, it is only necessary to consider subsection (B) of § 2261A(2), and we conclude that the offense defined in that subsection is not categorically a "crime of violence."

There are two statutory definitions of "crime of violence" set forth in 18 U.S.C. § 924(c)(3). The first is 18 U.S.C. § 924(c)(3)(A), the so-called "elements clause." For an offense to be a "crime of violence" within the meaning of that subsection, the offense must have "as an element the use, attempted use, or threatened use of physical force against the person or property of another."[1] The second definition—the so-called "residual clause" contained in § 924(c)(3)(B)—has been held unconstitutional[2] and is not at issue.

To assess whether a given offense falls within the elements clause, § 924(c)(3)(A) (or a similar though not identical provision of the Armed Career Criminal Act

1. 18 U.S.C. § 924(c)(3)(A).

2. *See United States v. Davis*, 588 U.S. 445, 470, 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019).

(ACCA) that defines "violent felony"[3]), courts employ a categorical approach.[4] The offense must have as an element the use, attempted use, or threatened use of physical force.[5] That an offense *was* committed with the use, attempted use, or threatened use of physical force is of no moment;[6] if it *can* be committed *without* the use, attempted use, or threatened use of physical force, it is not a crime of violence. We must look to the "*least* serious conduct"[7] criminalized by the statute. If the commission of the offense does not necessitate the use, attempted use, or threatened use of physical force, then the offense is not a "crime of violence."

The statute at issue, entitled "Stalking," provides in subsection 2:

---

3. 18 U.S.C. § 924(e)(2)(B)(i).

4. *See Taylor v. United States*, 495 U.S. 575, 600, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) (discussing the categorical approach as applied to § 924(e)).

5. 18 U.S.C. § 924(c)(3)(A).

6. *See Mathis v. United States*, 579 U.S. 500, 510, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016) ("[W]e consider [only] the *elements of the offense* [,] without inquiring into the specific conduct of this particular offender." (alteration in original) (quoting *Sykes v. United States*, 564 U.S. 1, 7, 131 S.Ct. 2267, 180 L.Ed.2d 60 (2011))).

7. *See Borden v. United States*, 593 U.S. 420, 441, 141 S.Ct. 1817, 210 L.Ed.2d 63 (2021).

Appendix A

Whoever—

* * *

(2) with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, 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 a person, a pet, a service animal, an emotional support animal, or a horse described in clause (i), (ii), (iii), or (iv) of paragraph (1)(A); or

(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A),

shall be punished as provided in section 2261(b) or section 2261B, as the case may be.[8]

8. 18 U.S.C. § 2261A(2).

The penalty for violating § 2261A includes "for life or any term of years, if death of the victim results."[9] The jury found that the offense charged in Count Two, under 18 U.S.C. § 2261A(2), resulted in Burkett's death.

A threshold question we consider is whether § 2261A(2) is divisible. That means, does § 2261A(2) set forth more than one offense for purposes of determining whether Elkins was convicted of a "crime of violence"? A statute is divisible when it "sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building *or* an automobile."[10]

> If one alternative (say, a building) matches an element in the generic offense, but the other (say, an automobile) does not, the modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction.[11]

When a court confronts a divisible statute, it applies the modified categorical approach to determine which "branch" of the statute formed the basis for the

9. 18 U.S.C. § 2261(b)(1).

10. *Descamps v. United States*, 570 U.S. 254, 257, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013).

11. *Id.*

defendant's conviction.[12] When performing this inquiry, it may consider the indictment and jury instructions, but not the facts of the particular case.[13] It then applies the ordinary categorical approach[14] to ask whether the least serious conduct under that "branch" necessitates the use, attempted use, or threatened use of force.

Section 2261A(2) is divisible because, in separate subsections, it sets forth the elements of two distinct offenses. A defendant violates § 2261A(2)(A) when, with the specified intent, she uses certain means to "place[] [the victim] in reasonable fear of the death of or serious bodily injury to a person [or specified animals]." By contrast, a defendant violates § 2261A(2)(B) when, with the specified intent, she uses certain means to "cause[], attempt[] to cause, or would be reasonably expected to cause substantial emotional distress to a person described [elsewhere in § 2261A]."[15]

Count Two of the indictment asserted that Elkins violated both subsections (A) and (B) of § 2261A(2). It did not assert either of these divisible offenses in the alternative.

---

12. *Id.*

13. *See id.* at 264 n.2, 133 S.Ct. 2276 (listing approved documents for conducting the analysis as "indictment, jury instructions, plea colloquy, and plea agreement").

14. *Id.* at 257, 133 S.Ct. 2276.

15. *Cf. United States v. Yung*, 37 F.4th 70, 76 (3d Cir. 2022) (describing § 2261A(2) as requiring an act, an intent, and one of two alternative results outlined by (2)(A) and (B)).

However, the district court instructed the jury that it could convict Elkins under Count Two if it found that she committed either the offense described in subsection (A) *or* the offense described in subsection (B). Accordingly, while § 2261A(2) is divisible, the jury instruction did not require the jury to indicate which offense it found she committed. The statute was therefore not "divided," and we cannot ascertain the basis or bases for the conviction under Count Two. If either of the offenses set forth in subsections (A) and (B) is not categorically a "crime of violence," then the conviction under Count Three, which requires a predicate "crime of violence," cannot stand.

The least serious conduct that would support a conviction under § 2261A(2)(B) is that the defendant, "with intent to . . . harass [or] intimidate," uses one of the means described "to engage in a course of conduct that . . . would be reasonably expected to cause substantial emotional distress to a person described in [specified sections of § 2261A]." That offense does not have "as an element the use, attempted use, or threatened use of physical force against the person or property of another."[16] For instance, a defendant could satisfy the elements of § 2261A(2)(B) by engaging in a course of conduct, such as using an electronic communication service, with intent to harass, causing substantial emotional distress to the victim. No use or threatened use of force is required. Our court has sustained a conviction under § 2261A(2)(B) when the defendant "publish[ed] his ex-girlfriend's nude images and

16. 18 U.S.C. § 924(c)(3)(A).

videos and exhibitionist and masturbatory stories that he wrote in her name."[17]

The fact that the death of the victim results as a consequence of a stalking offense defined under subsection (B) does not change our analysis. The penalty provision in § 2261(b) permits the imposition of a life sentence "if death of the victim results." It does not require that the stalker use or attempt to use or threaten to use physical force to cause the death of the victim. For example, the victim could experience such severe emotional distress from the publication of nude images and sex videos of her that she commits suicide. Her death would result from the stalking without the use, threatened use, or attempted use of physical force by the stalker.

There is an additional reason that the offense defined by § 2261A(2)(B) is not a "crime of violence" even if death of the victim results. In *Borden v. United States*,[18] the Supreme Court held that crimes that can be committed recklessly are not violent felonies within the meaning of the ACCA's analogous elements clause.[19] The plurality

---

17. *United States v. Uhlenbrock*, 125 F.4th 217, 220 (5th Cir. 2024), *cert. denied*, ___ U.S. ___, 145 S. Ct. 2853, ___ L.Ed.2d ___ (2025).

18. 593 U.S. 420, 141 S.Ct. 1817, 210 L.Ed.2d 63 (2021) (plurality opinion).

19. *Id.* at 429, 141 S.Ct. 1817; *cf. United States v. Manley*, 52 F.4th 143, 145 (4th Cir. 2022) (observing that the ACCA elements clause at issue in *Borden* is "materially similar" to the elements clause in § 924(c)).

opinion in *Borden* reasoned that the statutory language "against the person of another" covered only purposeful and knowing acts.[20] The concurring opinion by JUSTICE THOMAS also concluded that crimes that can be committed recklessly could not be violent felonies within the meaning of the ACCA's elements clause, but that opinion rested its reasoning on the phrase "use of physical force."[21] JUSTICE THOMAS wrote, "As I have explained before, a crime that can be committed through mere recklessness does not have as an element the 'use of physical force' because that phrase 'has a well-understood meaning applying only to intentional acts designed to cause harm.'"[22] We view the holding of *Borden* as being that position taken by those Justices who concurred in the judgment on the narrowest grounds.[23] It suffices for the purpose of this case to say that an offense that can be committed recklessly cannot satisfy the elements clause of § 924(c).

The government confronts the *Borden* issue by citing our court's decision in *United States v. Conlan*,[24] asserting that § 2261A(2) "is a specific intent crime" and "the defendant must act with intent to *harm*." In *Conlan*, we rejected the argument that the terms "harass"

---

20. *Borden*, 593 U.S. at 430-32, 141 S.Ct. 1817.

21. *Id.* at 446, 141 S.Ct. 1817 (THOMAS, J., Concurring).

22. *Id.* (quoting *Voisine v. United States*, 579 U.S. 686, 713, 136 S.Ct. 2272, 195 L.Ed.2d 736 (2016) (THOMAS, J., dissenting)).

23. *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977).

24. 786 F.3d 380 (5th Cir. 2015).

and "intimidate" rendered § 2261A unconstitutionally vague.[25] We explained that "[a]ny vagueness concerns are further alleviated by the list of easily understood terms surrounding 'harass' and 'intimidate'—'kill, injure . . . or cause substantial emotional distress'—and by the statute's scienter requirement, which narrows its scope and mitigates arbitrary enforcement."[26] But acting with intent to "cause substantial emotional distress" is not the same as "the use, attempted use, or threatened use of physical force." A person can intend to cause substantial emotional distress, and as discussed above, her conduct can recklessly cause another person to commit suicide. Such a scenario fits within subsection (B) of § 2261A(2) and the "resulting in death" provision of § 2261(b).

The government candidly recognizes in its briefing in our court that § 2261A(2) "does not tie [its] mens rea element to 'the resulting-in-death element,'" but the government argues that "in any realistic case, the [mens rea element] must nonetheless carry forward to the resulting-in-death element," quoting the Fourth Circuit's decision in *Runyon*.[27] But the "realistic probability" test is appropriate only when assessing whether a *state* statute can serve as the predicate for a federal sentence

25. *Id.* at 385-86.

26. *Id.* at 386.

27. *See United States v. Runyon*, 994 F.3d 192, 203 (4th Cir. 2021) ("While these mens rea elements are not explicitly tied to the resulting-in-death element, in any realistic case, they must nonetheless carry forward to the resulting-in-death element.").

enhancement.[28] Here, we assess whether a *federal* statute can serve as the predicate offense, and the "realistic probability" test has no place in that analysis.[29]

The government's response to the suicide scenario discussed in Elkins's briefing is lacking. The government asserts:

> Elkins also posits that the hypothetical victim's death could result from the reckless *use of force* if she took "her own life" or "one of her many visitors [killed] her." . . . These arguments overlook that the required specific intent to harm—to kill, injure, harass, intimidate—"modifies the cumulative course of conduct as a whole," such that "the resulting-in-death element" [sic] must "carry forward to the resulting-in-death element."[30]

First, § 2261A(2)(B) does not require a "use of force." An offense can be committed when the defendant intends to harass or intimidate the victim and uses specified

---

28. *United States v. Taylor*, 596 U.S. 845, 858-59, 142 S.Ct. 2015, 213 L.Ed.2d 349 (2022); *see also United States v. Minor*, 121 F.4th 1085, 1093 n.9 (5th Cir. 2024) ("We continue to apply that realistic probability test to state court convictions, but application to federal statutes should no longer apply as made clear by the Supreme Court and referenced by us.").

29. *Minor*, 121 F.4th at 1093 n.9.

30. (emphasis added) (first quoting *Conlan*, 786 F.3d at 386 then quoting *Runyon*, 994 F.3d at 203).

means to engage in a "course of conduct" that "causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress."[31] That offense does not have as an element the use or threatened use of physical force against the person or property of another.

Second, the "specific intent" can be, as the government recognizes, intent to harass or intimidate. That is not an intent to kill or physically harm another person.

Third, the "resulting-in-death" element is contained in § 2261(b)(1). That provision does not require that the defendant used, attempted to use, or threatened to use physical force against the victim. It does not even require that the defendant contemplated use or threatened use of physical force. It only requires that the "death of the victim results" from the defendant's conduct. The death of the victim can result from reckless conduct, such as posting photos on the internet, motivated by intent to harass or intimidate.

Fourth, our decision in *Conlan* did not "carry forward" the resulting-in-death element in § 2261(b)(1), the penalty statute, into the intent elements in § 2261A(2)(B), or vice versa. Our decision in *Conlan* addressed the "fear that § 2261A criminalizes 'otherwise legal actions—such as sending a letter or traveling from one state to another . . . even if some of those actions were undertaken without any ill intent."[32] In explaining why that fear was "unfounded,"

31. 18 U.S.C. § 2261A(2)(B).

32. *Conlan*, 786 F.3d at 386.

we looked to the statutory definition of "course of conduct" in 18 U.S.C. § 2266(2) and the Fourth Circuit's decision in *United States v. Shrader*.[33] We said in *Conlan* that § 2266(2) "makes clear that [§ 2261A's] intent requirement 'modifies the cumulative course of conduct as a whole,' and 'avoids sweeping up innocent acts.'"[34] Our decision in *Conlan* did not purport to "carry forward" a use-of-force element into every offense under § 2261A(2)(B) that results in the death of the victim.

Finally, the government's assertion that a resulting-in-death element is imported from § 2261(b)(1) into § 2261A(2)(B) is inconsistent with its recognition earlier in its brief that § 2261A(2) "does not tie [its] mens rea element to 'the resulting-in-death element.'"

The government's arguments regarding an offense resulting in the death of the victim have considerable commonsensical appeal. However, commonsensical appeal has not been the defining characteristic of the categorical approach and determining what constitutes a "crime of violence" or a "violent felony."[35]

---

33. *Id.*; *see United States v. Shrader*, 675 F.3d 300 (4th Cir. 2012).

34. *Conlan*, 786 F.3d at 386 (quoting *Shrader*, 675 F.3d at 311-12).

35. *See United States v. Rodriguez*, 711 F.3d 541, 545 n.2 (5th Cir. 2013) (en banc) (observing that "confusion and gymnastics" frequently attend the task of defining "crime of violence"), *abrogated in part by, Esquivel-Quintana v. Sessions*, 581 U.S. 385, 137 S.Ct. 1562, 198 L.Ed.2d 22 (2017).

The government relies on *In re Hall*[36] for the proposition that if death of a person results, an enhanced sentence of up to life in prison is applicable under § 2261(b)(1). Our holding in *Hall* in this regard[37] has been called into question by *Borden*. In *Hall*, we concluded that kidnapping resulting in death was a crime of violence—despite the fact that "kidnapping" might occur via force-free inveiglement, and death might then result recklessly, for example, via a car crash with the inveigled kidnapping victim in the vehicle.[38] We reasoned that the use of force was "*not* limited to the intentional or knowing use of force—it also includes conduct that recklessly disregards the risk of injury to another person."[39] But in *Borden*,

---

36. 979 F.3d 339 (5th Cir. 2020).

37. *Id.* at 344 ("The federal kidnapping resulting in death provision involves different elements of conviction from the general federal crime of kidnapping—namely, the additional requirement that 'the death of [a] person results'—and triggers an enhanced penalty. Accordingly, we conclude that kidnapping resulting in death is a different offense than generic kidnapping." (citations omitted)).

38. *Id.* at 344-46.

39. *Id.* at 344 (emphasis added); *see also id.* ("[K]idnapping *resulting in death*, necessarily contemplates the reckless disregard of the risk of serious injury to the victim" and "[s]o '[w]here a perpetrator intentionally kidnaps a victim, and the kidnapping results in the victim's death, the perpetrator's mental state is sufficient to show that he necessarily "used" force against the victim.'" (quoting *United States v. Ross*, 969 F.3d 829, 839 (8th Cir. 2020) (alteration in original))).

the Supreme Court held the opposite[40] and vacated an Eighth Circuit decision[41] on which our decision in *Hall* had relied for support.[42] The *Borden* decision did not, however, call into question the additional, alternative holding in *Hall* that a conviction for the capital crime of kidnapping resulting in death under 18 U.S.C. § 3591(a)(2) is a crime of violence because § 3591(a)(2)(A) requires a finding beyond a reasonable doubt that the defendant "intentionally killed the victim."[43]

A defendant who stalks a victim using any of the means set forth in § 2261A, intending to harass the victim and cause severe emotional distress, and who recklessly triggers their suicide, has engaged in culpable conduct. But they need not have used, threatened to use, or attempted the use of force against a person to be convicted under §§ 2261A(2)(B) and 2261(b). We therefore hold that an offense under § 2261A(2)(B) resulting in punishment based on the death of the victim under § 2261(b) is not a crime of violence within the meaning of § 924(c)'s elements

---

40. *See Borden v. United States*, 593 U.S. 420, 429, 141 S.Ct. 1817, 210 L.Ed.2d 63 (2021) ("We must decide whether the elements clause's definition of 'violent felony'—an offense requiring the 'use of physical force against the person of another'—includes offenses criminalizing reckless conduct. We hold that it does not." (footnote omitted)).

41. *See King v. United States*, ___ U.S. ___, 142 S. Ct. 332, 211 L.Ed.2d 175 (2021) (Mem) (vacating *King & Ross v. United States*, 969 F.3d 829 (8th Cir. 2020)).

42. *Hall*, 979 F.3d at 344 (citing *Ross*, 969 F.3d at 839).

43. *Id.* at 345-46.

clause. Elkins's conviction and sentence on Count Three must be vacated. We do not address whether § 2261A(2)(A) standing alone, or §§ 2261A(2)(A) and 2261(b) together, is a crime of violence within the meaning of § 924(c)'s elements clause.

III

This leaves the question of Elkins's sentences under Count One and Count Two.[44] Elkins argues that they must be vacated and remanded for resentencing if the conviction and sentence under Count Three is vacated.

Resentencing is required "when the sentences or counts are interrelated or interdependent—for example, when the reversal of the sentence on one count *necessarily* requires the review of the entire sentence."[45] That is not the case here. The record does not suggest that Count Three influenced the district court's application of the Sentencing Guidelines to Counts One and Two. Elkins's Presentence Report (PSR) grouped Counts One and Two and applied the cross-reference for first-degree murder, yielding a base offense level of 43 and a guideline range of life imprisonment. At sentencing, the district court adopted the PSR's findings. Count Three was not grouped with Counts One and Two, nor was it part of a sentencing

44. *See United States v. Clark*, 816 F.3d 350, 360 (5th Cir. 2016) ("In some cases, when we reverse convictions or sentences on fewer than all counts, the aggregate sentence must be unbundled, and the defendant must be resentenced on all counts.").

45. *Id.*

package, nor did the sentence for Count Three run concurrently with those for Counts One and Two.

Elkins also argues that vacatur of Count Three would permit the court to apply a USSG § 2A6.2(b)(1) enhancement for possession or threatened use of a dangerous weapon to Counts One and Two[46]—and thus this court should vacate for a full resentencing hearing. This argument lacks force. Elkins already received life imprisonment on Count Two; it is implausible that the district court would seek to impose an additional enhancement. Accordingly, we decline to disturb Elkins's sentences on Counts One and Two.

IV

Elkins challenges her convictions for Counts One and Two on the grounds that as applied to her conduct, the cyberstalking statute exceeds Congress's Commerce Clause power. She raised this question of law in the district court, and thus we review it *de novo.* However, Elkins recognizes that her argument is foreclosed, and she makes it to preserve the issue for further review.

In *United States v. Lopez*,[47] the Supreme Court identified three categories of activities Congress may regulate under its Commerce Power: (1) the use of the

46. *See United States v. Benbrook*, 119 F.3d 338, 339 (5th Cir. 1997) (noting that a defendant sentenced under § 924(c) cannot also be subjected to a dangerous weapon enhancement).

47. 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995).

channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities that substantially affect interstate commerce.[48] The use of a phone—even intrastate—involves the use of an instrumentality of interstate commerce.[49] The indictment alleged that Elkins used or facilitated phone use four times while committing the conspiracy to stalk and cyberstalking. We therefore agree that Elkins's as-applied challenge to the cyberstalking statute is foreclosed.

V

Elkins raises two further challenges to the district court's conduct of her trial. First, she alleges that the district court violated her due process right when the court prevented her from offering her own gloss on the meaning of reasonable doubt. Next, she offers this exercise of the trial court's discretion as an example of what she contends was judicial bias against her. Elkins preserved her objection to being prevented from offering a gloss on reasonable doubt during her closing argument, and she raised her objection to the fundamental fairness of her trial at sentencing. Because the issue is preserved, we review the rulings of a district court concerning statements made during a closing argument for abuse of

48. *Id.* at 558-59, 115 S.Ct. 1624.

49. *See United States v. Marek*, 238 F.3d 310, 318-19 (5th Cir. 2001) ("[I]ntrastate use of interstate facilities is properly regulated under Congress's second-category *Lopez* power . . . Interstate commerce facilities that have created a criminal federal jurisdictional nexus during intrastate use include telephones, automobiles, and airplanes." (citations omitted)).

discretion.[50] We review her claim of judicial partiality for whether any errors by the trial court were so substantial as to prejudice her case.[51]

The Fifth Circuit's pattern jury instructions, used at Elkins's trial, define proof "beyond a reasonable doubt" as "proof of such a convincing character that you would be willing to rely and act upon it without hesitation in making the most important decisions of your own affairs."[52] During voir dire, defense counsel suggested that whether "to remove my child's life support" would be such a decision. The district court interjected that it did not "know if that is the standard, but go ahead."

In closing, defense counsel returned to the life-support theme: "[W]hen you're thinking about the most important decisions, think about a loved one on life support." The district court interjected: "No, no, no, no. That—I don't think that's reasonable doubt. I think that's all doubt, and I'm not going to let you go through that again because I disagreed with it on Opening and I disagree with it now." Defense counsel objected for the record. After closing arguments, the district court properly instructed the jury on reasonable doubt in line with the pattern instruction. It further instructed the jury to "not assume from anything I may have done or said during the trial that I have any

50. *United States v. Griffin*, 324 F.3d 330, 361 (5th Cir. 2003).

51. *United States v. Williams*, 809 F.2d 1072, 1090-91 (5th Cir. 1987).

52. Fifth Circuit Pattern Criminal Jury Instructions § 1.05 (2024).

opinion concerning any of the issues in this case" and that jurors "should disregard anything I may have said during the trial" except for "instructions . . . on the law."

The district court is the "governor of the trial process, vested with the duty to insure that the law is properly administered,"[53] and may properly interrupt, comment, or clarify in the presence of the jury.[54] It is a constitutional requirement that the jury be instructed "on the necessity that the defendant's guilt be proved beyond a reasonable doubt."[55] It is not a constitutional requirement that—given the presence of a proper instruction—counsel be permitted to offer their own gloss on the standard.[56] A proper instruction was present in this case; nothing more was needed. Assuming *arguendo* that Elkins's life-support gloss on reasonable doubt was a fair example of "the most important decisions of your own affairs," the

---

53. *United States v. Jacquillon*, 469 F.2d 380, 387 (5th Cir. 1972).

54. *See United States v. Hawkins*, 661 F.2d 436, 450 (5th Cir. Unit B Nov. 1981).

55. *Victor v. Nebraska*, 511 U.S. 1, 5, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994).

56. *See Miles v. United States*, 103 U.S. 304, 312, 26 L.Ed. 481 (1880) ("Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury."); *cf. United States v. Pinkney*, 551 F.2d 1241, 1244 (D.C. Cir. 1976) ("Judicial attempts to clarify the meaning of the phrase 'reasonable doubt' by explanation, elaboration or illustration . . . more often than not tend to confuse or mislead.").

district court did not abuse its discretion when it prevented her from offering it.

Elkins alleges that the district court's refusal to entertain her life-support hypothetical—when paired with other interruptions at trial—created the appearance of partiality toward the government. Because a trial judge has enormous influence on the jury, we view these assertions seriously.[57] However, the issue is not "whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the appellants] a fair, as opposed to a perfect, trial."[58]

The district court afforded Elkins a fair trial. Where the district court did make a stray remark, it offered curative instructions. For instance, during Elkins's examination of a witness, the district court sustained the prosecution's objection to a speculative question: "Sustained. And I don't think it's true, but sustained anyway." This was a comment on the veracity of Elkins's assertion, contained within the speculative question, that she and Beard had hired an investigator "to do work for the custody dispute." The district court should not have

57. *United States v. Williams*, 809 F.2d 1072, 1086 (5th Cir. 1987).

58. *Id.* (quoting *United States v. Pisani*, 773 F.2d 397, 402 (2d Cir. 1985)).

offered it.[59] But the district court recognized as much and gave a specific curative instruction: "I shouldn't have said that . . . I don't mean it at all. You should not consider that in any way as any evidence in the case." It also offered general curative instructions, delineating the role of judge and jury, when it formally charged the jury. While "[s]ome comments . . . may be so prejudicial that even good instructions will not cure the error,"[60] this district court's isolated unguarded remarks over the course of a seven-day trial are not among them. Our review of the record does not suggest that "the district judge's actions, viewed as a whole . . . amount[ed] to an intervention that could have led the jury to a predisposition of guilt by improperly confusing the functions of judge and prosecutor."[61]

Nor do we find merit in Elkins's assertion that she was interrupted unduly frequently. Elkins asserts that the defense's presentation was interrupted at least a dozen times. But a judge's active participation in keeping a trial on track is not error.[62] Our review of the interruptions cited by the defense largely reveals a trial judge's asking clarifying questions and evenhandedly enforcing the

---

59. *See United States v. Cisneros*, 491 F.2d 1068, 1076 (5th Cir. 1974) (observing that when credibility issues before the jury are close and important, "commenting on the evidence is a perilous endeavor, to be undertaken with caution").

60. *Williams*, 809 F.2d at 1088.

61. *United States v. Bermea*, 30 F.3d 1539, 1569 (5th Cir. 1994).

62. *See United States v. Hawkins*, 661 F.2d 436, 450 (5th Cir. Unit B Nov. 1981).

rules of evidence. The district court also interrupted the prosecution—even without an objection by the defense—to cut off inappropriate lines of questioning. On balance, we see nothing in this experienced trial judge's conduct that "convey[ed] to the jury an impression of partiality toward the government to such an extent that it became a factor in their deliberations."[63] If anything, the trial court was scrupulously protective of Elkins's right to present a defense: it permitted her to qualify a defense witness as an expert in the field of makeup, and then to have the expert apply contouring makeup to Elkins's face in front of the jury.

VI

Because we vacate Elkins's conviction and sentence under Count Three, we do not reach her argument that the district court misconstrued the Sentencing Guidelines range for that Count.

* * *

Elkins's conviction and sentence under Count Three is VACATED. In all other respects, the district court's judgment is AFFIRMED.

---

63. *Williams*, 809 F.2d at 1091 (quoting *United States v. Pisani*, 773 F.2d 397, 404 (2d Cir. 1985)).

Appendix A

JAMES L. DENNIS, *Circuit Judge*, concurring:

I write separately to make explicit what the majority opinion, in its careful phrasing, necessarily establishes: *Borden v. United States*, 593 U.S. 420, 141 S.Ct. 1817, 210 L.Ed.2d 63 (2021), abrogated *In re Hall*, 979 F.3d 339 (5th Cir. 2020), in at least two respects. First, *Hall*'s holding that crimes committed with a *mens rea* of recklessness satisfy the elements clause has been abrogated. 979 F.3d at 344-46. Second, *Hall*'s application of the realistic probability test outside its limited context of federal courts interpreting state statutes has likewise been abrogated. *Id.* at 345, 347; *see also United States v. Taylor*, 596 U.S. 845, 859, 142 S.Ct. 2015, 213 L.Ed.2d 349 (2022) ("[N]o such federalism concern is in play here.").

We are therefore not following *Hall* today because *Borden* and its progeny supply an intervening change in the law. *See Burge v. Par. of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999) (citing *Billiot v. Puckett*, 135 F.3d 311, 316 (5th Cir.), *cert. denied*, 525 U.S. 966, 119 S.Ct. 413, 142 L.Ed.2d 336 (1998)) ("It is a firm rule of this circuit that in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the United States Supreme Court, a panel cannot overrule a prior panel's decision.").

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION, FILED MARCH 26, 2024

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CRIMINAL CASE NO. 3:23-CR-0247-B

UNITED STATES OF AMERICA,

Plaintiff,

v.

HOLLY ANN ELKINS,

Defendant.

Filed March 26, 2024

MEMORANDUM OPINION ORDER DENYING MOTION TO DISMISS INDICTMENT

Before the Court is Defendant Holly Ann Elkins' Motion to Dismiss (Doc. 26). The Court held a hearing on March 20, 2024 to address arguments raised by each side. Having carefully considered the arguments raised at the hearing and in the motion papers, as well as the applicable law, the Court **DENIES** Defendant's Motion.

Appendix B

I.

BACKGROUND

The three-count criminal indictment charges Defendant with the following: (I) Conspiracy to Stalk in violation of 18 U.S.C. § 371; (II) Stalking Using a Dangerous Weapon and Resulting in Serious Bodily Injury, Life Threatening Bodily Injury, and Death, in violation of 18 U.S.C. §§ 2261(b), 2261A(2)(A) & (B); and (III) Using, Carrying, Brandishing, and Discharging a Firearm During and in Relation to a Crime of Violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii). Doc. 1, Indictment. The Government alleges Defendant conspired with her then-boyfriend, Andrew Beard, to cyberstalk and murder the mother of Beard's child. *Id.* at 1. Defendant allegedly used the following devices to cyberstalk: "a computer, the internet, electronic mail, a telephone, and a global positioning system ('GPS')." Doc. 1, Indictment, 5. According to the Indictment, Defendant did the following: she and Beard placed a GPS on the victim's car, she made two telephone calls to the police in which she "falsely reported" the victim driving dangerously on a highway and that the victim's mother had assaulted Defendant, and Defendant texted Beard a photo of the victim's license plate to facilitate another "false[] report[]" call to police after she and Beard "planted illegal drugs and a pistol" in the victim's car. *See id.* at 2-3. Additionally, Defendant is alleged to have purchased shotgun shells and a knife with Beard. *Id.* at 4. Beard murdered the victim by shooting and stabbing the victim to death. *See* Docs. 61, Factual Resume, *United States v. Beard*, No. 3:20-CR-567-B

(N.D. Tex); Doc 62, Plea Agreement. Defendant later "attempted to provide an alibi for Beard by falsely telling law enforcement that Beard was . . . with her at the time of [the victim's] murder." Doc. 1, Indictment, 4.

II.

LEGAL STANDARD

In this Circuit, "'[t]he propriety of granting a motion to dismiss an indictment under [Federal Rule of Criminal Procedure] 12 by pretrial motion is by-and-large contingent upon whether the infirmity in the prosecution is essentially one of law or involves determinations of fact.'" *United States v. Fontenot*, 665 F.3d 640, 644 (5th Cir. 2011) (citation omitted). "If a question of law is involved, then consideration of the motion is generally proper." *Id.* (citation omitted). On the other hand, if at its core an argument raises a question of fact, that question must go to a jury. *United States v. USPlabs, LLC*, 338 F. Supp. 3d 547, 584 (N.D. Tex. 2018) (Lindsey, J.) (quoting *Sparf v. United States*, 156 U.S. 51, 78-79, 15 S.Ct. 273, 39 L.Ed. 343 (1895) ("It is the province of the court, and of the court alone, to determine all questions of law arising in the progress of a trial; and it is the province of the jury to pass upon the evidence, and determine all contested questions of fact.")).

Appendix B

III.

ANALYSIS

I. Counts One & Two Do Not Exceed Congress's Commerce Clause Power

Defendant contends that Counts One and Two must be dismissed because as applied to the Indictment, the charges exceed congressional power under the Commerce Clause and violate the Tenth Amendment. Doc. 26, Mot., 2-7. Both Counts depend on the Government proving the offense of cyberstalking, reproduced in relevant part below.

> Whoever—
>
> (2) with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, 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 a person, a pet, a service animal, an emotional support animal, or a horse described in clause (i), (ii), (iii), or (iv) of paragraph (1)(A); or

> (B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A)
>
> shall be punished as provided in section 2261(b) or section 2261B, as the case may be.

18 U.S.C. § 2261A.

The Government must also prove a "result" of cyberstalking, reproduced in relevant part below:

> A person who violates this section or section 2261A shall be fined under this title, imprisoned--
>
> (1) for life or any term of years, if death of the victim results;
>
> (2) for not more than 20 years if permanent disfigurement or life threatening bodily injury to the victim results;
>
> (3) for not more than 10 years, if serious bodily injury to the victim results or if the offender uses a dangerous weapon during the offense;
>
> or both fined and imprisoned.

18 U.S.C. § 2261(b); *see also* Fifth Circuit Pattern Jury Instruction (Criminal Cases) § 2.86B (2019) (requiring as

an element of § 2261A(2) the result of death, serious bodily injury, or life-threatening injury when seeking enhanced sentence under § 2261(b)).

Defendant's central qualm appears to be with two alleged facilities of interstate commerce—the phone and GPS devices. She contends neither device was directly used against the victim to stalk nor subjectively known to the victim. Doc. 26, Mot., 3-7 ("Indictment . . . shows no allegation of a direct, communicative use of any of its purported instruments of interstate commerce that placed [the victim] in fear or subjected her to emotional distress."). Defendant also questions whether a GPS device, as used here, is a facility of interstate commerce under § 2261A(2) because "there was no interstate use of GPS trackers." *Id.* at 6. Finally, Defendant argues that because Counts One and Two are not within Congress's constitutional powers that they must also be dismissed for infringing upon the Tenth Amendment. *Id.* at 7.

The Court finds that Counts One and Two are not rendered legally defective in the absence of a "direct, communicative" act of stalking. Defendant's argument would add a requirement to the cyberstalking statute that does not exist. Neither the text of § 2261A(2) nor other courts in this Circuit require the facilities of interstate commerce to be used in a direct, communicative manner against the victim. Instead, the cyberstalking statute requires only that the facilities be used with the requisite intent "to engage in a course of conduct." 18 U.S.C. § 2261A(2). Moreover, the Court finds at least some cases raised by Defendant did not involve using a facility

"directly" against the victim. *See* Doc. 26, Mot., 4 (citing *United States v. Petrovic*, 701 F.3d 849 (8th Cir. 2012) and *United States v. Sayer*, 748 F.3d 425 (1st Cir. 2014)).

The cyberstalking statute also has no textual basis for Defendant's contention that the victim be subjectively aware of each use of a facility of interstate commerce. Doc. 26, Mot., 5-7. A defendant's "course of conduct" against the victim is what must "place[] that person in reasonable fear of . . . death . . . or serious bodily injury" or "cause, attempt[] to cause, or . . . be reasonably expected to cause substantial emotional distress." 18 U.S.C. §§ 2261A(2)(A)-(B). From this text, the Court finds no express or implied statutory mandate that an intentional use of any single facility of interstate commerce be subjectively known to the victim. *Id.*

Finally, the Court need not address Defendant's contention that GPS devices are not facilities of interstate commerce because the facts alleged in the Indictment overcome her Commerce Clause challenge. Doc. 26, Mot., 6; § 2261A(2). A valid "course of conduct" must include intentional use of "mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce." 18 U.S.C. § 2261A(2). Congress may regulate "the instrumentalities of interstate commerce, or person or things in interstate commerce, *even though the threat may come only from intrastate activities*," *See United States v. Lopez*, 514 U.S. 549, 558, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (emphasis added); *cf.* Doc. 26, Mot., 2, 6. It is not necessary that a

device cross state lines to be an instrumentality or facility of interstate commerce. *United States v. Marek*, 238 F.3d 310, 319-20 (5th Cir. 2001).

The cyberstalking statute at issue defines a "course of conduct" as "a pattern of conduct composed of 2 or more acts, evidencing a continuity of purpose." 18 U.S.C. § 2266(2). The plain language of § 2261A(2) also does not require that each of the "2 or more acts" constituting a "course of conduct" involve use of a facility of interstate commerce. *Accord United States v. Shrader*, No. 1:09-cr-00270, 2010 WL 2425900, at *4 (S.D.W. Va. June 10, 2010). The Fifth Circuit has recognized phones to be facilities of interstate commerce. *Marek*, 238 F.3d at 319-20. Here, that hook to interstate commerce power exists. The Indictment alleges Defendant used or facilitated phone use four times while committing the conspiracy to stalk and cyberstalking. Doc. 1, Indictment, 3; *accord* Doc. 26, Mot., 5. Accordingly, regardless of whether a GPS is a facility of interstate commerce, the Indictment is within the constitutional bounds of Congress's power.

II. Count Three Involves a "Crime of Violence"

Count Three charges Defendant with "knowingly us[ing,] carr[ying,] brandish[ing,] and discharge[ing] a firearm . . . during and in relation to a crime of violence . . . namely stalking using a dangerous weapon resulting in serious bodily injury, life threatening bodily injury, and death." Doc. 1, Indictment, 6 (charging violation of 18 U.S.C. § 924(c)(1)(A)(iii)). Defendant moves to dismiss Count Three, contending that generic cyberstalking

alone does not constitute a predicate "crime of violence" under § 924(c). Doc. 26, Mot., 12-14. The Government responds that the Court must review the offense as well as the charged results when assessing whether there is a predicate crime of violence. Doc. 29, Resp., 7-10.

Section 924(c)'s "elements clause" is the only remaining source of analysis to define a crime of violence. *See United States v. Davis*, 588 U.S. 445, 139 S. Ct. 2319, 2336, 204 L.Ed.2d 757 (2019) (invalidating "residual clause" under 18 U.S.C. § 924(c)(3)(B)); *Borden v. United States*, 593 U.S. 420, 424, 141 S.Ct. 1817, 210 L.Ed.2d 63 (2021). Under the elements clause, a crime of violence means an offense that has as a required element "the use, attempted use, or threatened use of force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). The force must be "capable of causing physical pain or injury to another." *In re Hall*, 979 F.3d 339, 343 (5th Cir. 2020). Recently, the Supreme Court also clarified that if an offense only has mere reckless, negligent, or accidental use of force as an element, that offense cannot be a crime of violence. *Borden*, 593 U.S. at 429, 141 S.Ct. 1817 ("The phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual. Reckless conduct is not aimed in that prescribed manner."). In effect, the force must be purposeful or knowing. *See id.*

Defendant and the Government urge the Court to determine whether the purported crime of violence—cyberstalking as charged in Count Two—satisfies the elements clause. A finding that the offense charges in

Count Two is a crime of violence has not been raise in this Circuit. To determine whether Count Two meets the definition of a "crime of violence" is thus a question of first impression.

The parties' motion papers contain ample argument regarding use of the "categorical approach" versus the "modified categorical approach" but both of these tests were developed in the sentencing context, and are predominantly used in *post-trial* matters. For example, the "categorical approach," was developed so that a *sentencing court* could determine whether a defendant's prior conviction qualified as a predicate offense for purposes of an Armed Career Criminal Act ("ACCA") sentencing enhancement. *Taylor v. United States*, 495 U.S. 575, 598-602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990); *see also Descamps v. United States*, 570 U.S. 254, 257, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013) ("To determine whether a past conviction is [a violent felony], courts use what has become known as the 'categorical approach.'"). The categorical approach teaches that a sentencing court may "look only to the statutory definitions"—i.e., the elements—of a defendant's offense and not "to the particular facts underlying [the offense]" in determining whether the offense qualifies as a "crime of violence" for purposes of a sentencing enhancement. *Taylor*, 495 U.S. at 600, 110 S.Ct. 2143. A standardized approach such as this takes into account the realities of sentencing, including having to analyze a conviction that may be several years old. But as some courts have also found, the sentencing stage is distinguishable from the context of a motion to dismiss an indictment. *United States v. Checora*, 155

F. Supp. 3d 1192, 1196 (D. Utah 2015) ("This court agrees with the reasoning of the courts questioning whether the categorical approach is appropriate in the context of a § 924(c)(3) case, especially in the context of deciding a pretrial motion to dismiss."); *United States v. Wells*, No. 214-CR-280, 2015 WL 10352877, at *4 (D. Nev. Dec. 30, 2015), *report and recommendation adopted*, 2016 WL 697107 (D. Nev. Feb. 19, 2016), *aff'd*, 827 F. App'x 664 (9th Cir. 2020).

The Government, on the other hand, asks the Court to employ what is known as the "modified categorical approach" to decide whether Count Two would constitute a crime of violence. Doc. 29, Resp., 8-9. The modified categorical approach—also usually conducted *after trial*—permits a court to review the indictment to determine what part of a divisible statute was the basis for a conviction. *See In re Hall*, 979 F.3d at 343 (5th Cir. 2020). After determining the underlying convicted offense, the Court asks whether such a conviction qualifies as a crime of violence. *Id.* Here, the Government must prove two divisible sections of cyberstalking: the offense itself and the results clause. *See* 18 U.S.C. §§ 2261A(2), 2261(b); Fifth Circuit Pattern Jury Instruction (Criminal Cases) § 2.86B (2019) (requiring as an element of § 2261A(2)(A) the result of death, serious bodily injury, or life-threatening injury when seeking enhanced sentence under § 2261(b)). But even under the modified categorical approach, the mandate to categorically define Count Two as a crime of violence especially complex. There are several permutations of Count Two, and without a conviction to consider, the Court must consider each permutation to reach a decision.

Appendix B

As a threshold matter, the Court finds neither the categorical approach nor the modified categorical approach applicable in the context of a motion to dismiss an indictment. *Accord United States v. McDaniels*, 147 F. Supp. 3d 427, 432 (E.D. Va. 2015). But because the Court must determine whether Count Two constitutes a crime of violence, *United States v. Credit*, 95 F.3d 362, 364 (5th Cir. 1996) ("[I]n the context of jury instructions, the definition of a 'crime of violence' is a matter of statutory interpretation that is 'purely legal judgment' for the Court."), the Court assumes the modified categorical approach were to apply. *See McDaniels*, 147 F. Supp. 3d at 432. Under this approach, the Court concludes the charged offense under §§ 2261A(2) and 2261(b) qualifies as a crime of violence. Given the intentionality behind the *actus rea* in § 2261A(2) and the physical severity of the results in § 2261(b)(1)-(3), execution of the offense at the very least requires intentional attempted or threatened use of force under the elements clause. 18 U.S.C. § 924(c)(3)(A). In other words, engaging in multiple, intentional acts through a "course of conduct" that proximately causes death, serious bodily injury, or life-threatening bodily injury involves a sufficiently high degree of contemplated violence to knowingly attempt to cause or threaten physical pain or injury, under the definition of a crime of violence. *Borden*, 593 U.S. at 429, 141 S.Ct. 1817; *In re Hall*, 979 F.3d at 343. The Court has a difficult time imagining a case where an actor commits a violation under §§ 2261A(2) and 2261(b)(1)-(3), with the requisite level of intention and harm, and does not also intentionally attempt or threaten to use force. *See United States v. Runyon*, 994 F.3d 192, 203 (4th Cir. 2021); *United*

States v. Tsarnaev, 968 F.3d 24, 104 (1st Cir. 2020); *United States v. Conlan*, 786 F.3d 380, 386 (5th Cir. 2015) ("To violate [§ 2261A(2)] one must both intend to cause victims serious harm and in fact cause a reasonable fear of death or serious bodily injury.").

At this stage of the case, the Court finds that any permutations of Count Two may be considered a crime of violence under Count Three. But to hold that all possible convictions arising out of §§ 2261A and 2261(b) constitute crimes of violence would be premature, and ultimately only serve as an advisory opinion. Therefore, the Court's determination is limited to the charged offense in Count Two, as used to support Count Three.

IV.

CONCLUSION

For the reasons stated above, Defendant's Motion to Dismiss Indictment is **DENIED**. If the facts adduced at trial suggest there is no basis for a finding of a crime of violence, Defendant may raise this argument again in motion practice after trial.

SO ORDERED.

SIGNED: March 26, 2024.

/s/ Jane J. Boyle
JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

APPENDIX C — VERDICT OF THE JURY OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION, FILED APRIL 17, 2024

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CRIMINAL ACTION NO. 3:23-CR-247-B

UNITED STATES OF AMERICA,

v.

HOLLY ANN ELKINS,

Defendant.

VERDICT OF THE JURY

We, the Jury, find Defendant, Holly Ann Elkins:

"Guilty" or "Not Guilty" as to Count 1 of the Indictment:
Guilty

"Guilty" or "Not Guilty" as to Count 2 of the Indictment:
Guilty

> Only If "Guilty" on Count Two: Do you unanimously find that the government proved beyond a reasonable doubt that the offense resulted in the death of the victim?
>
> ☐ No ☒ Yes

Proceed to Question Only If "No" Above: Do you unanimously find that the government proved beyond a reasonable doubt that the offense resulted in life threatening bodily injury to the victim?

☒ No ☐ Yes

Proceed to Question Only If "No" Above: Do you unanimously find that the government proved beyond a reasonable doubt that the offense resulted in serious bodily injury to the victim?

☒ No ☐ Yes

Proceed to Question Only If "No" Above: Do you unanimously find that the government proved beyond a reasonable doubt that a dangerous weapon was used during the offense?

☒ No ☐ Yes

"Guilty" or "Not Guilty" as to Count 3 of the Indictment:
Guilty

Only If "Guilty" on Count Three: Do you find that the firearm was discharged during the commission of the offense?

☐ No ☒ Yes

/s/ Lisa J. Jankowski
JURY FOREPERSON

4/17/2024
DATE

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FILED AUGUST 19, 2024

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Case Number: 3:23-CR-00247-B(1)
USM Number: 07931-506

UNITED STATES OF AMERICA

v.

HOLLY ANN ELKINS

Stephen James Green and Jeff Daniel Clark
Defendant's Attorney

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:

☐	pleaded guilty to count(s)	
☐	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
☐	pleaded nolo contendere to count(s) which was accepted by the court	

☒	was found guilty on count(s) after a plea of not guilty	**Counts 1, 2, and 3 of the three-count Indictment filed June 21, 2023**

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	**Offense Ended**	**Count**
18 U.S.C. § 371(18 U.S.C. § 2261A(2)(A) and (B)) Conspiracy to Stalk	10/02/2020	1
18 U.S.C. §§ 2261A(2)(A) and (B) and 2261(b) Stalking Using a Dangerous Weapon and Resulting in Serious Bodily Injury, Life Threatening Bodily Injury, and Death	10/02/2020	2
18 U.S.C. § 924(c)(1)(A)(iii) Using, Carrying, Brandishing, and Discharging a Firearm During and in Relation to a Crime of Violence	10/02/2020	3

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

Appendix D

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

August 15, 2024
Date of Imposition of Judgment

/s/ Jane J. Boyle
Signature of Judge

JANE J. BOYLE, UNITED STATES DISTRICT JUDGE
Name and Title of Judge

August 19, 2024
Date

Appendix D

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

60 months on Count 1; Life on Count 2, with Counts 1 and 2 to run concurrently with each other; and Life on Count 3, to run consecutive to all other counts.

☒ The court makes the following recommendations to the Bureau of Prisons:

that the defendant be allowed to serve her sentence at FMC Carswell, if eligible. Further, that the defendant be allowed to participate in mental health treatment while in the custody of the Bureau of Prisons, if eligible.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____ , with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from impisonment, the defendant shall be on supervised release for a term of: **three (3) years on Count 1 and five (5) years on each of Counts 2 and 3, with all counts to run concurrently, for a total aggregate term of five (5) years.**

Appendix D

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.

2. You must not unlawfully possess a controlled substance.

3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*

4. ☒ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*

5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*

6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex

offender registration agency in the location where you reside, work, are a stu-dent, or were convicted of a qualifying offense. *(check if applicable)*

7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4. You must answer truthfully the questions asked by your probation officer.

5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify

the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the

person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

SPECIAL CONDITIONS OF SUPERVISION

Pursuant to the Mandatory Victims Restitution Act of 1996, the defendant is ordered to pay restitution in the amount of $1,071,649.84, joint and several with Andrew Beard (Case No. 3:20-cr-567-B), payable to the U.S. District Clerk, 1100 Commerce Street, Room 1452, Dallas, Te.xas 75242. Restitution shall be payable immediately and shall be disbursed to:

Teresa Collard

If the restitution has not been paid in full within 30 days of the date of this judgment, the defendant shall make

payments on such unpaid balance in monthly installments of not less than 10 percent of the defendant's gross monthly income, or at a rate of not less than $50 per month, whichever is greater, until the balance is paid in full. In addition, at least 50 percent of the receipts received from gifts, tax refunds, inheritances, bonuses, lawsuit awards, and any other receipt of money shall be paid toward the unpaid balance within 15 days of receipt. This payment plan shall not affect the ability of the United States to immediately collect payment in full through garnishment, the Treasury Offset Program, the Federal Debt Collection Procedures Act of 1990 or any other means available under federal or state law. Furthermore, it is ordered that interest on the unpaid balance is waived pursuant to 18 U.S.C. § 3612(f)(3).

The defendant shall pay any remaining balance of restitution in the amount of $1,071,649.84, as set out in this Judgment.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments page.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 300.00	$1,071,649.84	$ .00	$.00	$.00

☐ The determination of restitution is deferred until . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Restitution of $1,071,649.84 to:

TERESA COLLARD

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments page may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the
☐ fine ☒ restitution.

☐ the interest requirement for the
☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $ 1,071,649.84 due immediately, balance due

☐ not later than , or
☒ in accordance with ☒ C, ☐ D, ☐ E, or ☐ F below, or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☒ Payment in equal monthly *(e.g., weekly, monthly, quarterly)* installments of not less than 10 percent

of the defendant's gross monthly income, or at a rate of not less than $50 per month, whichever is greater, until the balance is paid in full, to commence 30 days *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal monthly *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties.

It is ordered that the Defendant shall pay to the United States a special assessment of $300.00 for Counts 1, 2 and 3, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except

those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☒ Joint and Several

See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Andrew Beard – 3:20-cr-567-B - $1,071,649.84

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.