No. 25-1061

IN THE
Supreme Court of the United States

HOLLY ANN ELKINS,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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Reasoning only that "[t]he use of a phone—even intrastate—involves the use of an instrumentality of interstate commerce," the Fifth Circuit held that the federal government had the power to prosecute Holly Ann Elkins for stalking. *United States v. Elkins*, 161 F.4th 899, 910 (5th Cir. 2025). In the Tenth Circuit, however, it would not have been so simple. There, "[a]n instrumentality must affect interstate commerce in some way for its use to warrant federal interest." *United States v. Chavarria*, 140 F.4th 1257, 1265 (10th Cir. 2025). To resolve this circuit split, Elkins petitioned this Court to grant review.

In opposition, the Government does not dispute that the Fifth Circuit's approach would allow for federal regulation of nearly everything, effectively handing Congress a general police power under its Commerce Clause authority. *See Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 567 U.S. 519, 536 (2012) (opinion of Roberts, C.J.) (explaining that the Commerce Clause "must be read carefully to avoid creating a general federal authority akin to the police power"). The Government likewise does not dispute that the Fifth Circuit's approach is a far cry from the original understanding of the Commerce Clause. Pet. 11-13; *see United States v. Patton*, 451 F.3d 615, 624 (10th Cir. 2006) (explaining that at the founding, "commerce" meant "buying, selling, and transporting merchandise," compensated services, and "activities in preparation for selling property or services in the marketplace"). And the Government does not dispute that the question presented is important and recurring, and indeed, the pending petition in *Brown v. United States*, No. 25-1342 (U.S. May 21, 2026), supported by the Cato Institute and Professor

Randy Barnett, similarly argues that an automobile is "per se an instrumentality of interstate commerce [only] if its dominant use is for interstate commerce." Pet. for Cert. at 20; *see also* Texas Criminal Defense Lawyers Association Br. 3–8 (explaining that continued federalization of traditional state offenses would shift onto the federal courts indigent-defense burdens the States have never managed to carry). The Government also does not dispute that the issue was preserved, reviewed de novo by the Fifth Circuit, and resolved on the court's categorical approach alone. Pet. 16–17.

The Government claims that this case would be a poor vehicle to review that approach, however, because Elkins also used other instrumentalities of interstate commerce, so "many alternative paths to the same result would remain." Opp. 8-9. The Government further contends that the Fifth Circuit's approach is in line with this Court's (Opp. 5) and that there is no circuit split (Opp. 7-8). And the Government argues that the Fifth Circuit appropriately treats modern cell phones as per se instrumentalities of interstate commerce. Opp. 5-6.

In each respect, the Government is mistaken. *First*, the Government points to the indictment's allegation that Elkins and her boyfriend also used "other instrumentalities of interstate commerce": "a computer, the internet, electronic mail . . . and a global positioning system ('GPS')." Opp. 8. But in the district court, the Government did not allege, much less prove, that Elkins's use of any of those other things affected interstate commerce, either. On the contrary, the district court instructed the jury that "[a] 'facility of interstate or foreign commerce' includes a telephone or cellphone, even when the phone was not used to make an interstate or foreign call or used in any interstate or foreign activity," and that "the Internet and email are also facilities of interstate or foreign commerce." Dist. Ct. Doc. 91, at 11. The Government's "alternative paths" therefore present the same issue proposed for review: whether something may be categorically declared an instrumentality of interstate commerce without regard to its use. If the Fifth Circuit's categorical approach is wrong, Elkins's mere use of those devices does not give Congress the police power any more than her mere use of a cell phone. If the Tenth Circuit's approach is correct—if "[a]n instrumentality must affect interstate commerce in some way for its use to warrant federal interest," *Chavarria*, 140 F.4th at 1265—the alternative paths lead nowhere. Accordingly, this is no basis to ignore all the powerful reasons to grant review.

Second, the Government argues that, in fact, there is no circuit split because in *Chavarria*, 140 F.4th 1257, the Tenth Circuit recognized that "[c]ertain items—by virtue of their class and with judicial economy in mind—permit the reasonable inference that they are per se instrumentalities of interstate commerce." *Id.* at 1265; Opp. 7-8. This is unsurprising, the Government suggests, because in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1 (1877), this Court also treated the telegraph as a "per se" instrumentality of interstate commerce. Opp. 5-6 (citing *Pensacola*, 96 U.S. at 9).

In *Pensacola*, however, this Court held that the telegraph was a per se instrumentality of interstate commerce because it was principally used for commerce. 96 U.S. at 9. In *Chavarria*, the Tenth Circuit likewise explained that this Court's precedents "recognize that specific instrumentalities commonly or categorically serve as instruments of interstate commerce" because they are "overwhelmingly" or "almost exclusively" used for commerce. 140 F.4th at 1265-66. The Fifth Circuit, by contrast, undertook no such inquiry. Citing a 25-year-old decision, it simply declared that "[t]he use of a phone—even intrastate—involves the use of an instrumentality of interstate commerce," *Elkins*, 161 F.4th at 910 (citing *United States v. Marek*, 238 F.3d 310, 318-19 (5th Cir. 2001)), dispensing with the "requirement 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 v. Ogden*, 22 U.S. 1, 194 (1824)). The split, then, is not over whether per se instrumentalities exist. It is over what makes something one. Under *Pensacola* and in the Tenth Circuit, per se status is the conclusion of an inquiry into how a class of items is actually used. In the Fifth Circuit, it is a label that forecloses that inquiry.

Third, the Government contends that, regardless, modern cell phones are per se instrumentalities of commerce, unlike "'motor vehicles'—[the] undefined, generic term" which *Chavarria* held were not. Opp. 8 (quoting 140 F.4th at 1268). The Government notes that the Tenth Circuit itself "has previously 'held that telephones are instrumentalities of interstate commerce.'" Opp. 8 (quoting *United States v. Morgan*, 748 F.3d 1024, 1033 n.11 (10th Cir. 2014), *cert. denied*, 574 U.S. 915 (2014)). And the Government claims that modern cell phones are like telegraphs because they are ubiquitous and "indispensable as a means of inter-communication . . . in commercial transactions." Opp. 6, 8 (quoting *Pensacola*, 96 U.S. at 9).

The Tenth Circuit held as much in 1974, however, long predating this Court's modern Commerce Clause jurisprudence. *Morgan*, 748 F.3d at 1033 n.11 (citing *Kerbs v. Fall River Indus.*, 502 F.2d 731, 738 (10th Cir. 1974), *abrogated on other grounds by Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994)); *see NFIB*, 567 U.S. 519 (opinion of Roberts, C.J.); *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). Of course, that holding long predated modern cell phones, too. *See generally Riley v. California*, 573 U.S. 373, 385 (2014) (recognizing that smart phones in 2014 were "unheard of ten years ago" and that even "less sophisticated phones" had "been around for less than 15 years"). And *Pensacola* recognized that "instrumentalities of commerce . . . keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances." 96 U.S. at 9. "The implication is not only that things can transform into instrumentalities, but also that they can transition away from being an instrumentality as they are used less for commerce and more for personal use." *Chavarria*, 140 F.4th at 1266 n.16. Moreover, this Court has repeatedly recognized—including just weeks ago, in *Chatrie v. United States*, No. 25-112, 2026 WL 1855568 (U.S. June 29, 2026)—that modern cell phones are no ordinary thing.

Furthermore, the question is not whether telephones are used in commerce—it is whether they are "overwhelmingly" or "almost exclusively" used for commerce. *Chavarria*, 140 F.4th at 1265-66. The Government does not claim that they are, and indeed, the modern cell phone is ubiquitous precisely because it is used for everything, much of which, like taking photographs, jotting notes, or keeping a calendar, is not commerce. *See*

Chatrie, 2026 WL 1855568, at *4 (observing that modern cell phones are "a pervasive and insistent part of daily life") (quoting *Carpenter v. United States*, 585 U.S. 296, 315 (2018)); *see also Riley*, 573 U.S. at 385. Under the Fifth Circuit's approach, however, this ubiquity means only more federal power. Precisely *because* 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*, 573 U.S. at 385, a rule under which every use of every phone is federally regulable is a rule without an outer limit. If the label alone suffices, Congress may attach federal criminal liability to virtually any human activity—precisely the "general federal authority akin to the police power" this Court has insisted the Commerce Clause does not confer. *NFIB*, 567 U.S. at 536 (opinion of Roberts, C.J.).

The Government has no answer to this, no answer to the Commerce Clause's original meaning (Pet. 11–13), and no answer to Judge Murphy's observation that if Congress historically lacked the power to regulate all activities completed through the intrastate delivery of a letter, it can hardly possess the power to regulate all activities involving phones. *United States v. Allen*, 86 F.4th 295, 310 (6th Cir. 2023) (Murphy, J., concurring). Instead, the Government merely observes that in the Fifth Circuit, and while preserving the issue for further review, Elkins acknowledged that this Court has "condoned the government's regulation of instrumentalities of interstate commerce, no matter whether the regulated activity actually affects interstate commerce." Opp. 7 (quoting Pet. C.A. Reply Br. 11-12). But Elkins cited decisions from the Second, Fifth, Sixth, and Eleventh Circuits—not this Court. *See* Pet. C.A. Br. 42–43. And even if this Court's decisions did suggest that an instrumentality need not affect interstate commerce in some way for its use to warrant federal interest, review would still be warranted. The Tenth Circuit and the many judges cited in Elkins's petition (Pet. 9–10) read those decisions differently, and now that *Chavarria* is settled law in the Tenth Circuit, only this Court can settle what its precedents mean.

CONCLUSION

For these reasons and those stated in Elkins's petition, this Court should grant review.

Respectfully submitted,

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