NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2025

RALPH TOVAR,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a general challenge to the sufficiency of the evidence, pursuant to Rule 29(a), preserves for *de novo* review the full range of sufficiency challenges, stated or unstated.

II. Whether the intrastate use the internet, in furtherance of a crime, necessarily places that crime "in commerce," thereby satisfying that jurisdictional element of numerous federal offenses.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Ralph Tovar, No. 22-20205-Cr-Gayles (February 24, 2023)

United States Court of Appeals (11th Cir.):

United States v. Ralph Tovar, No. 23-10755 (August 8, 2025)

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

INTERESTED PARTIES ii

RELATED PROCEEDINGS iii

TABLE OF AUTHORITIES vi

PETITION 1

OPINION BELOW 1

STATEMENT OF JURISDICTION 2

STATUTORY AND OTHER PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

I. The Court should resolve the 7-2 circuit split regarding whether a "general" Rule 29(a) argument preserves all challenges to the sufficiency of the evidence for *de novo* review 5

II. The Court should resolve the separate circuit split regarding whether intrastate internet use necessarily places conduct "in commerce." 11

a. The Eleventh Circuit now incorrectly holds that intrastate internet use necessarily places conduct "in commerce," because the use of any instrumentality of interstate commerce places conduct "in commerce." 11

b. At least three other circuits also incorrectly hold—albeit for different reasons—that intrastate internet use necessarily places conduct "in commerce." 21

c. Two circuits correctly hold that intrastate internet use does not necessarily place conduct "in commerce." 23

III. This petition provides an excellent vehicle to resolve the questions presented 26

CONCLUSION 28

Appendix

Decision of the Court of Appeals for the Eleventh Circuit,
United States v. Ralph Tovar, 23-10755
(August 8, 2025) A-1

Judgment imposing sentence A-2

TABLE OF AUTHORITIES

CASES:

A.L.A. Schlechter Poultry Corp. v. United States,

295 U.S. 495 (1935) 13, 18

Burks v. United States,

437 U.S. 1 (1978) 10

City of Chicago v. Environmental Defense Fund,

511 U.S. 328 (1994) 16-17

Connecticut Nat. Bank v. Germain,

503 U.S. 249 (1992) 13

Corley v. United States,

556 U.S. 303 (2009) 15

Gibbons v. Ogden,

22 U.S. 1 (1824) 13

Jones v. United States,

529 U.S. 848 (2000) 18

Puckett v. United States,

556 U.S. 129 (2009) 10

Ratzlaf v. United States,

510 U.S. 135 (1994) 15

Rewis v. United States,

401 U.S. 808 (1971) 16

United States v. Alpers,

338 U.S. 680 (1950) 16

United States v. Am. Bldg. Maint. Indus.,

422 U.S. 271 (1975) 13

United States v. Arif,

154 F.4th 592 (8th Cir. 2025) 20

United States v. Baker,

155 F.4th 1188 (10th Cir. 2025) 25

United States v. Bass,

404 U.S. 336 (1971) 18, 26

United States v. Baston,

818 F.3d 651 (11th Cir. 2016) 4-5, 7

United States v. Bryan,

No. 22-12792, -- F.4th --, 2025 WL 3187262 (11th Cir. Nov. 14, 2025) 17-19

United States v. Carroll,

105 F.3d 740 (1st Cir. 1997) 21-22

United States v. Chance,

306 F.3d 356 (6th Cir. 2002) 6

United States v. Chong Lam,

677 F.3d 190 (4th Cir. 2012) 7

United States v. Clark,

24 F.4th 565 (6th Cir. 2022) 24

United States v. Clarke,

564 F.3d 949 (8th Cir. 2009) 6

United States v. Cooper,

654 F.3d 1104 (10th Cir. 2011) 6

United States v. Cunningham,

No. 24-3059, 2025 WL 3153070 (10th Cir. Nov. 12, 2025) 25

United States v. Daniels,

930 F.3d 393 (5th Cir. 2019) 6

United States v. Evans,

476 F.3d 1176 (11th Cir. 2007) 5

United States v. Five Gambling Devices,

346 U.S. 441 (1953) 19

United States v. Graf,

610 F.3d 1148 (9th Cir. 2010) 6

United States v. Haas,

37 F.4th 1256 (7th Cir. 2002) 23

United States v. Hammoude,

51 F.3d 288 (D.C. Cir. 1995) 6

United States v. Harris,

548 F.App'x 679 (2d Cir. 2013) 22

United States v. Hosseini,

679 F.3d 544 (7th Cir. 2012) 9

United States v. Hoy,

137 F.3d 726 (2d Cir. 1998) 6

United States v. Kieffer,

991 F.3d 630 (5th Cir. 2021) 6

United States v. Lewis,

554 F.3d 208 (1st Cir. 2009) 21

United States v. Lopez,

514 U.S. 549 (1995) 18-19, 26

United States v. MacEwan,

445 F.3d 237 (3d Cir. 2006) 21, 24

United States v. Maez,

960 F.3d 949 (7th Cir. 2020) 6, 8

United States v. Marston,

694 F.3d 131 (1st Cir. 2012) 6-7, 10

United States v. McDowell,

498 F.3d 308 (5th Cir. 2007) 6-7

United States v. Mellies,

329 F. App'x 592 (6th Cir. 2009) 23

United States v. O'Donovan,

126 F.4th 17 (1st Cir. 2025) 21

United States v. Parks,

823 F.3d 990 (11th Cir. 2016) 11

United States v. Runyan,

290 F.3d 223 (5th Cir. 2002) 22

United States v. Samuels,

874 F.3d 1032 (8th Cir. 2017) 7

United States v. Schaefer,

501 F.3d 1197 (10th Cir. 2007) 24-25

United States v. Staggers,

961 F.3d 745 (5th Cir. 2020) 6

United States v. Steiger,

99 F.4th 1316 (11th Cir. 2024) 11

United States v. Sturm,

672 F.3d 891 (10th Cir. 2012) 24

United States v. Tovar,

146 F.4th 1318 (11th Cir. 2025) 4-6, 12, 17-18, 26

United States v. White,

2 F.App'x 295 (4th Cir. 2001) 23

United States v. Williams,

974 F.3d 320 (3d Cir. 2020) 6-7

United States v. Wright,

625 F.3d 583 (9th Cir. 2010) 23

Wickard v. Filburn,

317 U.S. 111 (1942) 13

Yee v. Escondido,

503 U.S. 519 (1992) 9

STATUTORY AND OTHER AUTHORITY:

U.S. Const. Art. I, § 8, CL. 3 2

Sup.Ct.R. 13.1 2

Part III of the Rules of the Supreme Court of the United States 2

18 U.S.C. § 116(d)(3) 14

18 U.S.C. § 844(e) 15

18 U.S.C. § 1201 17

18 U.S.C. § 1201(a)(1) 14

18 U.S.C. § 1343 21

18 U.S.C. § 1591 ..... 2, 5, 16, 20

18 U.S.C. § 1591(a)(1) 3-4, 16, 20

18 U.S.C. § 1591(b)(1) 3

18 U.S.C. § 1594 5

18 U.S.C. § 1594(a) 3

18 U.S.C. § 1958(a) 14

18 U.S.C. § 2251 ..... 15, 22

18 U.S.C. § 2251A 15

18 U.S.C. § 2252 15

18 U.S.C. § 2252A 15

18 U.S.C. § 2252A(a)(1) 24

18 U.S.C. § 2252A(a)(2)(B) 22

18 U.S.C. § 2252A(a)(5)(B) 23

18 U.S.C. § 2261A 17

18 U.S.C. § 2421A 15

18 U.S.C. § 2422(b) 3, 14

18 U.S.C. § 2425 14

18 U.S.C. § 3742 2

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 2

Fed. R. Crim. P. 29 ..... 2, 6, 8-10

Fed. R. Crim. P. 29(a) ..... i, 3-6, 8-11

Fed. R. Civ. P. 46 8

Fed. R. Crim. P. 47 8

Fed. R. Crim. P. 47(b) 9

Fed. R. Crim. P. 50(a)(2) 9

Fed. R. Crim. P. 51(b) 8-9

Fed. R. Crim. P. 52(b) 9

Allison Orr Larsen & Neal Devins, "Circuit Personalities," 108 Va. L. Rev. 1315, 1325-26 (2022) (available at http://dx.doi.org/10.2139/ssrn.4035789) (estimating the circuit's oral argument rate at less than 15%) 26

Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 93 (2012) 13

Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 STAT. 1488 (2000) 16

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PETITION FOR WRIT OF CERTIORARI

Ralph Tovar respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 23-10755 in that court on August 8, 2025, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the published decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on August 8, 2025. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional and statutory provision:

U.S. CONST. ART. I, § 8, CL. 3

> The Congress shall have the Power . . . to regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.

18 U.S.C § 1591

(a) Whoever knowingly–

> **(1) in or affecting interstate or foreign commerce . . .** patronizes, or solicits by any means a person;
> . . .
>
> knowing, or . . . in reckless disregard of the fact . . . that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

Fed. R. Crim. P. 29

> **(a) Before Submission to the Jury**. After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for

> which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

STATEMENT OF THE CASE

Petitioner Ralph Tovar viewed a staged online prostitution advertisement, and used his cellphone to communicate with government agents to arrange for sex with two fictitious minor girls, in violation of 18 U.S.C. §§ 1591(a)(1), (b)(1), (b)(2); 1594(a); & 2422(b).

At his jury trial, Mr. Tovar stipulated that the internet, and cellphones, are each a "facility of interstate commerce." His intrastate use of these two facilities of interstate commerce was the only evidence supporting: § 1591(a)(1)'s jurisdictional "in interstate commerce" element,[1] and § 2422(b)'s jurisdictional "using" "any facility" "of interstate commerce" element. After Mr. Tovar testified, he made a "general" renewed challenge to the sufficiency of the evidence, pursuant to Rule 29(a). That motion was denied. Mr. Tovar was convicted on all counts, and sentenced to 15 years imprisonment.

On appeal, Mr. Tovar challenged only his § 1591 and 1594 convictions.

[1] The full jurisdictional element addresses conduct "in or affecting interstate or foreign commerce." 18 U.S.C. § 1591(a)(1). However, the government did not argue at trial that petitioner's attempted solicitation "affected commerce," and the Eleventh Circuit did not address that separate question.

He first contended that the sufficiency of the evidence should be reviewed *de novo* for multiple reasons, including that his general renewed Rule 29(a) motion preserved all sufficiency arguments.

Next, on the merits, Mr. Tovar argued that the intrastate use of a facility of interstate commerce was insufficient, as a matter of statutory interpretation, to satisfy § 1591(a)(1)'s jurisdictional "in interstate commerce" element. He contended that the term "in commerce" has always required proof of movement of people or things across state lines, and that such evidence was absent from the record. He further argued that, when Congress wants to exercise its Commerce Clause authority over the mere intrastate use of a facility of interstate commerce, it does so explicitly—as it did when drafting § 2422(b)'s jurisdictional "using" "any facility" "of interstate commerce" element (the statute of Mr. Tovar's unchallenged enticement conviction). Finally, he cited federal statutes that include all three jurisdictional hooks: "using" "any facility" "of interstate commerce," "in interstate commerce," *and* "affecting interstate commerce," to support the contention that these legal terms of art have mutually exclusive meanings.

After oral argument, the Eleventh Circuit affirmed.

As an initial matter, the Court rejected Mr. Tovar's claim that he preserved the sufficiency of the evidence through a "general" renewed Rule 29 motion, since the "circuit has never adopted that rule, and we decline to do so today." *United States v. Tovar*, 146 F.4th 1318, 1325 n. 3 (11th Cir. 2025) (citing *United States v. Baston*, 818 F.3d 651, 663–64 (11th Cir. 2016)).

Next, reviewing for plain error, the Court observed that the term "in commerce" refers to both the "channels within which people and goods move through the flow of commerce," and the "instrumentalities used to facilitate that movement." *Tovar*, 146 F.4th at 1325 (internal citation omitted). Further, "[t]hese instrumentalities include things like the internet and cell phones." *Id*. The Court reasoned that its prior precedents compelled the broad conclusion "that a defendant's intrastate crimes qualify as 'in commerce' when he uses the instrumentalities of interstate commerce to facilitate their commission." *Id*. at 1327 (citing *Baston*, 818 F.3d at 664; *United States v. Evans*, 476 F.3d 1176, 1180-81 (11th Cir. 2007)). Thus, the Court held that, "because Tovar used both his cell phone and the internet to arrange sex with minors, his conduct qualifies as 'in commerce'—whether or not he or the victims physically crossed state lines," and the evidence was thus sufficient to affirm his §§ 1591 & 1594 convictions. *Id.* at 1326.

REASONS FOR GRANTING THE WRIT

I. The Court should resolve the 7-2 circuit split regarding whether a "general" Rule 29(a) argument preserves all challenges to the sufficiency of the evidence for *de novo* review.

There is a lopsided and long-standing 7-2 circuit divide about whether "general" sufficiency of the evidence motions at trial preserve all sufficiency arguments for *de novo* review on appeal. The standard of review is often outcome-determinative, and plenary review of the sufficiency of the evidence is too important to depend on where a defendant is tried. The Court should thus grant this petition to ensure that the plurality view is uniformly applied.

Seven circuits hold that a general challenge to sufficiency of the evidence, pursuant to Rule 29, preserves for *de novo* review "the full range of [sufficiency] challenges, whether stated or unstated." *See United States v. Marston*, 694 F.3d 131, 134 (1st Cir. 2012) (citing *United States v. Hammoude,* 51 F.3d 288, 291 (D.C. Cir. 1995)). *Accord United States v. Hoy,* 137 F.3d 726, 729 (2d Cir. 1998); *United States v. Chance*, 306 F.3d 356, 370–71 (6th Cir. 2002); *United States v. Maez*, 960 F.3d 949, 959 (7th Cir. 2020); *United States v. Graf*, 610 F.3d 1148, 1166 (9th Cir. 2010); *United States v. Cooper,* 654 F.3d 1104, 1117 (10th Cir. 2011). *See also United States v. Williams*, 974 F.3d 320, 361 (3d Cir. 2020) (declining to decide whether "a broadly stated Rule 29 motion preserves all arguments bearing on the sufficiency of the evidence" but recognizing that "a plurality of circuits" apply that rule, and that "uniformity in federal criminal practice has value").

Only the Eighth and the Eleventh Circuits apply plain error review to Rule 29(a) motions that were only "generally made" below. *United States v. Clarke,* 564 F.3d 949, 953–56 (8th Cir. 2009) (applying plain error because only a "general" motion for judgment of acquittal was made at trial); *Tovar*, 146 F.4th, at 1325 & 1325 n. 3 (same). The Fifth Circuit sometimes applies *de novo* review to "general" sufficiency of the evidence challenges, *see United States v. Staggers*, 961 F.3d 745, 754 (5th Cir. 2020); *United States v. Daniels*, 930 F.3d 393, 402 (5th Cir. 2019); but sometimes reviews those same challenges only for "manifest injustice," *see United States v. McDowell*, 498 F.3d 308, 312 (5th Cir. 2007). *See also United States v. Kieffer*, 991 F.3d 630, 639 (5th Cir. 2021) (Oldham, J., dissenting) (discussing the "deep and

puzzling tension" within circuit precedent).

Every circuit to consider a related question has also held that, when a defendant raises *only* a specific sufficiency argument in his Rule 29 motion, all other sufficiency arguments that were not raised are waived or forfeited. *See Williams*, 974 F.3d at 361 (collecting cases); *United States v. Chong Lam*, 677 F.3d 190, 200 (4th Cir. 2012) (collecting cases).

Combining the two rules' effect, in the minority of circuits that equate general Rule 29 motions with waiver or forfeiture, a defendant must raise *every single potential argument* regarding insufficiency at trial, in order to preserve *any* of those sufficiency arguments for *de novo* review. *See United States v. Samuels*, 874 F.3d 1032, 1036 (8th Cir. 2017); *Baston,* 818 F.3d at 663-64; *United States v. McDowell*, 498 F.3d 308, 312–13 (5th Cir. 2007) ("To preserve *de novo* review, however, a defendant must specify at trial the particular basis on which acquittal is sought[.]"). There thus is no way for a defendant in the minority circuits to preserve the issue of sufficiency of the evidence, writ large, *and* to provide "helpful examples" of specific sufficiency gaps, to the trial court. *See Marston, 694 F.3d at 135* (explaining that "it is helpful to the trial judge to have specific concerns explained even where a general motion is made," and that, "to penalize the giving of examples, which might be understood as abandoning all other grounds, discourages defense counsel from doing so and also creates a trap for the unwary defense lawyer").

For at least three additional reasons—unique to Rule 29—the majority view, that a general Rule 29(a) motion is sufficient to preserve all arguments regarding the

sufficiency of the evidence for *de novo* review, is the right one.

First, the governing rules of criminal procedure do not require greater specificity in a motion for a judgment of acquittal based on insufficiency of the evidence.

The general criminal rule as to the preservation of claimed error provides that a "party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, *or* the party's objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b) (emphasis added). Thus, *unlike* an objection, when a party to a criminal case moves the court to take a specific action—here, to enter a judgment of acquittal for insufficiency of the evidence—Rule 51(b) does not require the moving party to state additional grounds. *See id*. The analogous civil rule, in contrast, requires litigants to provide "the grounds for the request" for *both* objections *and* for court action. *See* Fed. R. Civ. P. 46.

This interpretation of Rule 51(b) finds support in the general rule governing motions in criminal cases, which—again, unlike the corresponding civil rule—does *not* require that the grounds of a motion for relief be stated "with particularity." *See Maez*, 960 F.3d, at 959 n. 6; Fed. R. Crim. P. 47, Advisory Committee's Note to 1944 adoption ("This rule is substantially the same as the corresponding civil rule [], except that it . . . does not require that the grounds upon which a motion is made shall be stated 'with particularity,' as is the case with the civil rule.").

The rule governing motions for judgment of acquittal also does not require

specificity. *See* Fed. R. Crim. P. 29. This, too, makes Rule 29 motions "unlike its analogue in the Federal Rules of Civil Procedure." *See United States v. Hosseini,* 679 F.3d 544, 550 (7th Cir. 2012) (comparing Rule 29 with Federal Rule of Civil Procedure 50(a)(2), the latter of which requires that civil motions for judgment as a matter of law "must specify the judgment sought *and the law and facts that entitle the movant to the judgment*").

Rule 52(b) also provides that plain error review does *not* apply where an error was "brought to the court's attention." Fed. R. Crim. P. 52(b). A Rule 29(a) motion brings the error—insufficiency of the evidence—to the court's attention. Thus, a plain reading of Rules 29, 47(b), 51(b), and 52(b), combined, does not demand specificity from Rule 29 motions.

Second, accepting a general Rule 29(a) motion as preserving the sufficiency of the evidence for *de novo* review aligns with the Court's longstanding view that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *See Yee v. Escondido,* 503 U.S. 519, 534 (1992). The sole claim raised by any argument in support of a Rule 29(a) motion is insufficiency of the evidence. *See* Fed. R. Crim. P. 29(a). And—regardless of *why* the evidence is insufficient—the sole form of relief is a judgment of acquittal. *Id.* Because insufficiency of the evidence is a single "federal claim," a Rule 29(a) motion that generally alleges insufficiency of the evidence ought to preserve any arguments—stated or unstated—in support of that claim.

Finally, the policy principles animating plain error review do not apply equally

to general Rule 29 motions.

Defendants are supposed to "object with specificity," in part, "to avoid unnecessary retrials." *Marston*, 694 F.3d, at 135. Yet, if the evidence is found to be insufficient—either in the district court, or on appeal—there will be no retrial. *See id.*; *Burks v. United States*, 437 U.S. 1, 10–11 (1978) (holding that appeal from a judgment of acquittal is barred by the Double Jeopardy Clause). That is true irrespective of the specificity of the defendant's Rule 29 motion. *See id.*

That a defendant will not be subject to an appeal, nor ever again risk a conviction by jury, upon a judgment of acquittal at trial, *id.*, provides powerful motivation to present a persuasive motion in the first instance—rather than to present a "general" motion, and test one's luck on appeal. Moreover, if the evidence is insufficient at the time of a Rule 29(a) motion, the district court cannot fix the government's mistake. The only remedy is dismissal. Fed. R. Crim. P. 29(a) ("[T]he court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction."). The practical reality that there is *no* strategic advantage to failing to make persuasive Rule 29(a) arguments negates the "sandbagging" concern underlying plain error review. *See Puckett v. United States*, 556 U.S. 129, 134 (2009) (explaining that contemporaneous objections often allow the district court to "correct or avoid" "procedural error," and thus "prevent[] a litigant from 'sandbagging,'" or "remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor").

Plain error review is also meant to penalize litigants who fail to fully develop

the record for appellate review. *United States v. Parks*, 823 F.3d 990, 996 (11th Cir. 2016), *overruled in other part by United States v. Steiger,* 99 F.4th 1316 (11th Cir. 2024). It is often important for the Court of Appeals to know the reason for district court rulings, and to consider any mitigation efforts; specific objections are more meaningful in that regard. *See id*. However, as mentioned, the district court cannot avoid, correct, or otherwise mitigate insufficient evidence. And, in reviewing the sufficiency of the evidence on appeal, it is enough for the appellate court to know how the district court ruled. The district court's reasoning is irrelevant, and the record of admitted evidence speaks for itself. *See id*. (observing that record development is not as necessary when "a silent record exposes the error").

Because there is no textual support for the minority position requiring defendants to raise every single argument supporting the insufficiency of the evidence, to fully preserve that claim for review, and because the policy reasons for plain error review do not apply to Rule 29(a) motions, a "general" Rule 29(a) motion must suffice to preserve all sufficiency arguments, stated or unstated. The Court should grant this petition and explicitly adopt the majority position.

II. The Court should resolve the separate circuit split regarding whether intrastate internet use necessarily places conduct "in commerce."

Whether intrastate internet use necessarily places conduct "in interstate commerce," is an increasingly urgent question that risks converting a wide swath of otherwise purely local crimes into federal ones, without a clear statement from Congress that it intends to so upset the federal-state balance in criminal prosecutions. This important and recurring question of statutory interpretation has

divided the circuits, with four published opinions, and three unpublished opinions, finding that intrastate internet use necessarily places conduct "in commerce," and two circuits publishing contrary opinions.

As argued below, the Court should grant this petition, reverse the Eleventh Circuit's opinion below, and hold—consistent with the Ninth and Tenth Circuits—that the intrastate use of the internet does *not* necessarily qualify as conduct "in interstate commerce." Instead, as the Court has always held, and must reaffirm, for criminal conduct to satisfy a jurisdictional "in commerce" element, the government must present some evidence of movement across state lines—in every case.

a. The Eleventh Circuit now incorrectly holds that intrastate internet use necessarily places conduct "in commerce," because the use of any "instrumentality" "of interstate commerce" places conduct "in commerce."

No other circuit has yet reasoned, as the Eleventh Circuit did below, that the intrastate use of any facility or instrumentality of interstate commerce necessarily places that conduct "in interstate commerce." *See Tovar*, 146 F.4th at 1327. The Court must ensure that no circuit follows the Eleventh Circuit's reasoning, or its conclusion, for several reasons.

First, the assertion that the use of any instrumentality of interstate commerce to commit a crime necessarily places that conduct "in interstate commerce," violates the "cardinal canon" to which a "court should always turn" "before all others": "a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992). *See also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012)

(describing the "omitted-case" canon, which holds that nothing should be added to what a statute states or reasonably implies."). Because the term "in interstate commerce" does not reference a facility, instrumentality, or means, "of" interstate commerce—no court should read that additional text into the term. *See id.*

Instead, the only meaning to derive from Congress's selection of the jurisdictional "in interstate commerce" element, in any statute, is no more, or less, than what that term has always meant: *actual movement across states*. *See, e.g., United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271, 285 & n. 12 (1975) (finding that California janitorial company was not "engaged in interstate commerce," because it "did not participate directly in the sale, purchase, or distribution of goods or services" in any state outside of California, nor was their evidence that its service contracts were obtained through "interstate" "communications"); *Wickard v. Filburn*, 317 U.S. 111, 128 (1942) (explaining how wheat produced and consumed within the same state nonetheless "competes with wheat in commerce"); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542–43 (1935) (holding that slaughterhouse and meat re-sale did not involve "transactions in interstate commerce," because the relevant conduct occurred only in the State of New York, irrespective of fact that animals or meat had previously been in the "flow" of interstate commerce). *See generally Gibbons v. Ogden*, 22 U.S. 1, 195 (1824) (discussing how constitutional term "commerce" excludes "the completely internal commerce of a State").

When Congress *instead* wants to exercise federal jurisdiction over an offense involving the "use of a facility" or "instrumentality of interstate commerce," it says so explicitly. *See, e.g.*, 18 U.S.C. § 2422(b) (prohibiting the enticement of a minor "using the mail or any facility or means of interstate or foreign commerce"); 18 U.S.C. § 2425 (prohibiting "using the mail or any facility or means of interstate or foreign commerce," to transmit information about a minor).

When Congress wants to exercise federal jurisdiction over criminal conduct involving the "use of a facility" or "instrumentality of interstate commerce," *and* certain conduct "in interstate commerce," it says that, too. *See, e.g.*, 18 U.S.C. § 1201(a)(1) (prohibiting kidnapping when the person is "transported in interstate commerce," or "the offender travels in interstate commerce," "or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense"); 18 U.S.C. § 1958(a) (prohibiting "travel in interstate or foreign commerce," or using "the mail or any facility of interstate or foreign commerce, with intent that a murder be committed").

Finally, when Congress wants to exercise federal jurisdiction to the fullest extent permitted under the Commerce Clause, it uses all *three* jurisdictional hooks: use of a "facility" or "instrumentality" "of interstate commerce," "in interstate commerce," and "affecting interstate commerce." *See, e.g.*, 18 U.S.C § 116(d)(3) (conferring federal jurisdiction where "any payment of any kind was made . . . using any means, channel, facility, or instrumentality of interstate or foreign commerce or in or affecting interstate or foreign commerce"); 18 U.S.C. § 844(e) (criminalizing

threats made "through the use of the mail, telephone, telegraph, or other instrument of interstate or foreign commerce, or in or affecting interstate or foreign commerce"); 18 U.S.C. § 2251 (referring to specified offenses "using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce"); 18 U.S.C. § 2251A (same); 18 U.S.C. § 2252 (same); 18 U.S.C. § 2252A (same); 18 U.S.C.A. § 2421A (same).

The analysis could, and perhaps should, end there. For the sake of completeness, however, additional canons *also* refute the Eleventh Circuit's atextual conclusion that the term "in commerce," is satisfied by intrastate conduct merely involving the use of an instrumentality of interstate commerce.

For example, another "of the most basic interpretive canons [is] that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States,* 556 U.S. 303, 314 (2009) (internal quotation marks and alteration omitted). This is especially true when the statutory provisions at issue outline the elements of a criminal offense. *Ratzlaf v. United States,* 510 U.S. 135, 140–141 (1994). And yet if the term "in interstate commerce," necessarily incorporates, and is satisfied by, the mere use of any facility of interstate or foreign commerce, that would make the separate listing of these two jurisdictional elements, in numerous criminal statutes, superfluous and insignificant.

In general, criminal statutes must be narrowly construed, and "judicial interpretation deviates from this salutary principle when statutory language is

expanded to include conduct that Congress might have barred, but did not, by the language it used." *United States v. Alpers*, 338 U.S. 680, 685–86 (1950) (Black, J., Frankfurter, J., & Jackson, J., dissenting). *See also Rewis v. United States*, 401 U.S. 808, 812 (1971) (reciting related rule of lenity). Section 1591 is a criminal statute in which Congress chose not to include the jurisdictional element of "using" a "facility" or "instrumentality" "of interstate commerce." 18 U.S.C. § 1591(a)(1). By reading that element into the statute, and thereby expanding the reach of § 1591(a)(1), the Eleventh Circuit violated this principle, too.

Finally, courts must presume "that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *City of Chicago v. Environmental Defense Fund,* 511 U.S. 328, 302 (1994) (internal citation omitted). Title 18 United States Code Section 1591 was passed as part of the Victims of Trafficking and Violence Protection Act (TVPA) of 2000. In addition to § 1591, which is directed at sex trafficking, the Act also defined "interstate stalking," which, in pertinent part, prohibits: "travel[] in interstate commerce," "with the intent to . . . and in the course of, or as a result of, such travel places that person in reasonable fear of the death of, or serious bodily injury," *or "*us[ing] the mail or any facility of interstate or foreign commerce to engage in a course of conduct that places that person in reasonable fear of the death of, or serious bodily injury[.]" *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 STAT. 1488 (2000); 18 U.S.C. § 2261A (emphasis added). Courts must presume that Congress "intentionally and purposely" included *both* travel "in interstate commerce,"

and the "use" of "any facility of interstate commerce," in § 2261A, but *omitted* the latter term from § 1591(a), since both statutes are from the same Act. *See id.*; *Chicago v. EDF*, 511 U.S. at 302.

Given that the Eleventh Circuit's reasoning in *Tovar* runs contrary to so many canons of construction, it is unsurprising that an intracircuit division has already emerged. The Court of Appeals recently held that automobiles are "*per se* instrumentalities of interstate commerce," even if they are used "purely locally," and thus that the defendants' truck use, to commit the attempted kidnapping (and murder) of Ahmad Arbery, satisfied the jurisdictional element of the kidnapping statute, which requires the "use" of "an instrumentality of interstate . . . commerce in committing or in furtherance," of that offense. *United States v. Bryan*, No. 22-12792, --- F.4th ---, 2025 WL 3187262, at *15 (11th Cir. Nov. 14, 2025) (citing 18 U.S.C. § 1201). The dissenting judge in *Bryan* expressed concern that the majority's opinion, "creates inconsistencies with other statutes that refer to motor vehicles 'in' interstate commerce." *See id.* at *16. In dismissing that concern, the *Bryan* majority observed that statutes that regulate instrumentalities "'in' interstate commerce," "by their terms, regulate a different, *more limited* class of" instrumentalities: specifically, "vehicles *actually travelling in interstate commerce*." *Id.* (emphasis added). By instead "referring to "instrumentalit[ies] *of* interstate . . . commerce," Congress "deliberately *chose not to limit* the kidnapping statute," in the same way. *Id.* (emphasis added). The reasoning in *Bryan*—that when Congress chooses to use the "more limited" term, "in interstate commerce," it refers to instrumentalities "actually travelling in

interstate commerce," *as opposed to* the broader term, which is using instrumentalities "of interstate commerce," 2025 WL 3187262, at *15-16—directly conflicts with its reasoning below, that, "a defendant's intrastate crimes qualify as 'in commerce' when he uses the instrumentalities of interstate commerce to facilitate their commission." *See Tovar*, 146 F.4th, at 1327.

Second, conflicts in reasoning aside, under the holdings of *Bryan* and *Tovar*, a defendant in the Eleventh Circuit who uses a personal automobile in furtherance of *entirely intrastate* criminal conduct, now commits that crime "in interstate commerce." It follows that the Eleventh Circuit's "in commerce" interpretation in *Tovar* vastly broadens the federal government's authority over local crimes. Yet, out of respect for the "delicate balance," of federalism—which reserves general police power for the States—the Court has repeatedly cautioned lower courts against "obliterat[ing] the distinction between what is national and what is local in the activities of commerce." *See United States v. Lopez*, 514 U.S. 549, 567 (1995) (quoting *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 554). Courts therefore need a "clear statement" from Congress before assuming that it has "'significantly changed the federal-state balance' in the prosecution of crimes." *See Jones v. United States*, 529 U.S. 848, 858 (2000) (quoting *United States v. Bass*, 404 U.S. 336, 349-350 (1971)). Congress has never stated that the mere use of an instrumentality of interstate commerce—including the internet—necessarily satisfies the jurisdictional "in commerce" element.

Moreover, as noted above, "in commerce" has a particularized meaning that is understood to require proof of *actual* movement, of something, across state lines. Conflating that particularized term with a broader jurisdictional "use" of a "facility" or "instrumentality" "of interstate commerce" element—without a clear statement from Congress—unquestionably "upsets the federal-state balance." Given the ubiquity of smartphones in modern America, this conclusion would hold true even if "facilities" or "instrumentalities" "of interstate commerce," were limited to the internet, or cellphones. However, they are not so limited. The category of facilities and instrumentalities of interstate commerce extends to include: automobiles, "shipments of goods," boats, airplanes, airspace, railcars, railroads, waterways, and highways. *See Bryan*, at *13-15. The Court of Appeals opinion below therefore extends federal criminal "in commerce" jurisdiction to the local use of facilities that most if not all Americans use *every day*. However, general federal police power is unconstitutional. *See Lopez*, 514 U.S. at 567. The decision in petitioner's case thus also violates the "old and deeply embedded" principle "that this Court will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative." *See United States v. Five Gambling Devices,* 346 U.S. 441, 448 (1953) (plurality opinion).

There are reasonable alternatives, however. The Eighth Circuit recently had to decide whether the defendant's use of a Mississippi-made vehicle to drive a minor victim on local Arkansas roads, and his cash offers for sex, satisfied § 1591(a)(1)'s jurisdictional element. *See United States v. Arif*, 154 F.4th 592, 598 (8th Cir. 2025).

Like the Eleventh Circuit below, the government in *Arif* contended that the defendant's intrastate use of any facility of interstate commerce—including automobiles, roadways, and currency—was *per se* sufficient to place the defendant's conduct "in commerce." *See id.* at 597-598. In rejecting that position, the Eighth Circuit first recognized that the Commerce Clause allows Congress to "prohibit conduct committed through the use of a facility or instrument of interstate or foreign commerce." *Id.* at 597 (internal citation omitted). However, § 1591 is "textually different," because it requires conduct "in or affecting commerce," "not use of an instrumentality of interstate commerce." *Id.* at 597-598 (internal citation omitted). Thus, the Eight Circuit Court of Appeals held that, as to § 1591, "merely using the channels or instrumentalities of interstate commerce is relevant but does not necessarily demonstrate" conduct "in commerce." *Id.* The Eighth Circuit accordingly and correctly affirmed the district court's directed judgment of acquittal notwithstanding the verdict below. *Id.* at 599. Under the Eleventh Circuit's reasoning, however, because the defendant in *Arif* used an instrumentality of interstate commerce, his local conduct was nonetheless "in commerce," and his conviction by jury would have been affirmed, instead.

Because the Eleventh Circuit's opinion in petitioner's case disregards the constraints of textualism, and federalism, and will "significantly change[] the federal-state balance in the prosecution of crimes" without a clear statement from Congress of that intent, it must be reversed.

b. At least three other circuits also incorrectly hold—albeit for different reasons—that intrastate internet use necessarily places conduct "in commerce."

When the Eleventh Circuit found that petitioner's intrastate internet use necessarily placed his attempted solicitation "in commerce," it joined—in result, but not reasoning—the First, Third, and Fifth Circuits.

In *United States v. O'Donovan*, the First Circuit recently considered whether the defendant's iMessage, sent to another person in the same state, in furtherance of a scheme to defraud, satisfied the jurisdictional element of wire fraud. 126 F.4th 17, 34-36 (1st Cir. 2025). Wire fraud's jurisdictional element requires a transmission "in interstate commerce." *Id.* (citing 18 U.S.C. § 1343). There was no evidence that the iMessage transmission crossed state lines, but it did occur over the internet. *Id.* While noting that "there is a circuit split on the issue," the Court determined that it was bound by prior circuit precedent, holding that transportation or receipt over the internet is "per se sufficient," to establish "transportation," or "shipment," "in interstate commerce." *Id.* at 34-35 (citing *United States v. Carroll*, 105 F.3d 740, 741-42 (1st Cir. 1997), and *United States v. Lewis*, 554 F.3d 208, 213-14 (1st Cir. 2009)). Thus, the First Circuit held that the defendant's iMessage was per se sufficient to establish transmission "in interstate commerce"—irrespective of whether the iMessage crossed state lines. *Id.*

In *United States v. MacEwan*, the Third Circuit considered whether downloading child sexual abuse material (CSAM) from the internet was per se sufficient to establish the receipt of images that had been "transported in interstate

commerce," as the jurisdictional element of 18 U.S.C. § 2252A(a)(2)(B)) requires. 445 F.3d 237, 243 (3d Cir. 2006). Quoting the First Circuit's reasoning, in *Carroll*, that the "transmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce," the Third Circuit agreed that, "because of the very interstate nature of the Internet, once a user submits a connection request to a website server or an image is transmitted from the website server back to user, the data has traveled in interstate commerce." *Id*. at 244 (citing *Carroll*, 105 F.3d, at 742). Because the defendant possessed CSAM that had "left the website server and entered the complex global data transmission system that is the Internet," those images had been "transmitted in interstate commerce," thereby satisfying the jurisdictional element of § 2252A(a)(2)(B). *Id*.

The Fifth Circuit has also agreed with the First Circuit's decision in *Carroll*, finding that "[t]ransmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce" for the purposes of 18 U.S.C. § 2251. *United States v. Runyan*, 290 F.3d 223, 239 (5th Cir. 2002) (quoting *Caroll*, 105 F.3d at 742).

Three additional circuits have agreed with the First, Third, and Fifth Circuits, in unpublished opinions. *See United States v. Harris*, 548 F. App'x 679, 682 (2d Cir. 2013) (concluding that intrastate internet use satisfied 18 U.S.C. § 2252(a)(2)'s transportation "in interstate commerce" element); *United States v. Mellies*, 329 F. App'x 592, 606–07 (6th Cir. 2009) (citing *MacEwan* and approving jury instruction

that "any image of child pornography that was transmitted or received over the Internet moved in interstate commerce"); *United States v. White*, 2 F. App'x 295, 298 (4th Cir. 2001) (concluding in an unpublished decision that intrastate internet transmission satisfied 18 U.S.C. § 2252A(a)(5)(B)'s element requiring that images be shipped or transported "in interstate commerce"). *See also United States v. Haas*, 37 F.4th 1256, 1264 (7th Cir. 2022) (acknowledging circuit split as to whether intrastate internet use places conduct "in commerce" in wire fraud statute). These unpublished opinions highlight the need for the Court's intervention before more circuits hold—without a clear statement from Congress of its intention to so upset the federal-state balance—that intrastate internet use necessarily places conduct "in commerce."

c. Two circuits correctly hold that intrastate internet use does not necessarily place conduct "in commerce."

The Ninth and Tenth Circuits hold that intrastate internet use does not necessarily place conduct "in interstate commerce." This conclusion aligns with the particularized meaning of the jurisdictional "in commerce" language that was selected by Congress, and avoids the unnecessary constitutional implications of other circuits' atextual holdings.

In *United States v. Wright,* the Ninth Circuit considered whether the defendant's intrastate use of the internet to download child pornography qualified as the "transport[ation] or ship[ment] in interstate or foreign commerce" of CSAM, as the jurisdictional element of the statute required at that time. 625 F.3d 583, 590 (9th Cir. 2010), *superseded by statute* 18 U.S.C. § 2252A(a)(1). It was undisputed in *Wright* that the internet is a facility of interstate commerce, and that the downloaded images

never crossed state lines. *Id*. at 593-95. The government argued that the defendant's use of the internet was sufficient because the internet is "a facility of interstate commerce." *See id*. But the Ninth Circuit declined to read the terms "facility" and "of interstate commerce" into the statute, finding instead that Congress meant what it said, not what it didn't: mere intrastate use of a "facility of interstate commerce" was insufficient to establish transportation "in interstate or foreign commerce." *Id*. 590-95. Instead, the Court held that the statute's "in commerce" language required evidence that the prohibited material was *actually* shipped or transported *across state lines* (via the internet or otherwise). *Id*.[2]

In *United States v. Schaefer*, the Tenth Circuit explicitly disagreed with the First Circuit in *Carroll*, and the Third Circuit in *MacEwan*, holding instead that the defendant's intrastate internet use did not satisfy the "in commerce" element of the former § 2252(a). 501 F.3d 1197, 1202-05 (10th Cir. 2007), *overruled on other grounds by United States v. Sturm*, 672 F.3d 891, 901 (10th Cir. 2012). In *Schafer*, the Court observed that, "the plain language" of the statute at issue, "speaks of movement 'in commerce,' and 'giving the words used their ordinary meaning" this signifies a movement between states." *Schafer*, 501 F.3d at 1201. The Tenth Circuit recognized

[2] Presumably in response to the circuit split that emerged regarding the jurisdictional "in interstate commerce" element of §2252A(a)(1) and other statutes, in 2008 Congress subsequently "expanded" the jurisdictional language of that and several other related statutes, to "add the phrase 'using any means or facility of interstate commerce.'" *See United States v. Clark*, 24 F.4th 565, 573–74 (6th Cir. 2022) (agreeing "with other circuit courts that have interpreted this amendment as an 'expansion' of the statute's 'jurisdictional coverage.'") (collecting cases).

that, "in many, if not most, situations the use of the Internet will involve the movement of communications or materials between states." *Id*. However, "this fact does not suspend the need for evidence of this interstate movement." *Id*

The Tenth Circuit has recently reaffirmed the validity of *Schafer*'s holding as to intrastate internet use. In *United States v. Baker*, the Tenth Circuit again declined to "assume that Internet use automatically equates with a movement across state lines," and reiterated that, "[t]he government—not the court—must connect the dots between a defendant's use of the Internet and interstate movement." 155 F.4th 1188, 1201-03 (10th Cir. 2025). Because the government at trial offered no proof that the defendant's internet communication "*actually* travelled outside Utah," and indeed the evidence. "hardly exclude[d] the possibility that the [relevant] servers" "were 'located in the same state as the computers used to access the website,'" the Court of Appeals found the evidence insufficient to satisfy wire fraud's "in commerce" element. *Id*. The Tenth Circuit came to the same conclusion, for the same reasons, in *United States v. Cunningham*, No. 24-3059, 2025 WL 3153070, at *8 (10th Cir. Nov. 12, 2025).

Both circuits in the minority are correct.

The Ninth Circuit is correct because reading the broader term "use of a facility" or "instrumentality" "of interstate commerce," into the particularized term "in interstate commerce," is contrary to the text, and to the "clear statement" rule, among numerous other canons of construction, as outlined above. And the Tenth Circuit is correct because presuming that intrastate internet use necessarily involves some movement across state lines impermissibly lowers the government's burden to

establish the jurisdictional element in each case. *See Bass*, 404 U.S. at 350 (observing that, "[a]bsent proof of some interstate commerce nexus in each case," prosecution by the federal government of local offenses "dramatically intrudes upon traditional state criminal jurisdiction"); *Lopez*, 514 U.S. at 561 (explaining that requirement that government prove jurisdictional elements "ensure[s], through case-by-case inquiry" that a given offense has a sufficient connection to interstate commerce for the federal government to exercise jurisdiction over the conduct in question).

III. This petition provides an excellent vehicle to resolve the questions presented.

This petition is an excellent vehicle to resolve the important questions posed.

Each question was preserved below. Mr. Tovar contended that his sufficiency of the evidence claim was preserved through a "general" renewed Rule 29 motion, and the Court—rather than agreeing with the government that Mr. Tovar did not present a general Rule 29 motion—explicitly declined to adopt the plurality rule that would apply *de novo* review to his insufficiency claim. *See Tovar*, 146 F.4th 1318, 1325 n. 3. And, even though it purported to apply plain error review, the Eleventh Circuit did not find that any sufficiency error below was not "plain." The Court chose, instead, to hear oral argument,[3] and issue a published opinion, holding, on the merits, that petitioner's intrastate use of the internet and cellphones necessarily placed his

[3] The Eleventh Circuit hears oral argument at a lower rate than all but two other circuits. *See* Allison Orr Larsen & Neal Devins, "Circuit Personalities," 108 Va. L. Rev. 1315, 1325-26 (2022) (available at http://dx.doi.org/10.2139/ssrn.4035789) (estimating the circuit's oral argument rate at less than 15%).

conduct "in commerce," because the internet and cellphone are "instrumentalities of interstate commerce." *Id*. at 1326-27.

The favorable resolution of these questions would bring meaningful relief to petitioner. No one should be sentenced to 15 years of mandatory minimums in federal prison, and deprived of plenary review of the evidence supporting the convictions underlying that sentence, simply because he committed a crime in Florida, instead of California or Colorado. And no one should be convicted of a federal offense for purely local conduct unless Congress has clearly stated its intention to upset the federal-state balance in the prosecution of that particular crime, *and* the government's proof at trial satisfies the jurisdictional element that Congress has selected for that offense. Yet each of those bad outcomes came to bear in petitioner's case.

Both questions presented are also the subject of entrenched circuit splits, on impactful issues of federal law, that can, and should, be resolved by granting the instant petition and reversing the decision of the Eleventh Circuit below.

C**ONCLUSION**

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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