

IN THE SUPREME COURT OF THE UNITED STATES

RALPH KEVIN TOVAR, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's contention that his attempt to exchange money for sex with two minors whose services were advertised on the Internet, through arrangements that petitioner made via cellphone text messages, was sufficient to show conduct "in or affecting" interstate commerce for purposes of his convictions for attempted sex trafficking of minors, in violation of 18 U.S.C. 1591(a)(1) and 1594(a).

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Tovar, No. 22-cr-20205 (Feb. 27, 2023)

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

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

IN THE SUPREME COURT OF THE UNITED STATES

No. 25-6344

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1, at 1-17)¹ is reported at 146 F.4th 1318.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2025. On October 29, 2025, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including

¹ The appendix to the petition for a writ of certiorari is not consecutively paginated. This brief refers to the appendix as if it were consecutively paginated.

December 8, 2025, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of attempted sex trafficking of a minor under age 14, in violation of 18 U.S.C. 1591(a)(1) and 1594(a); one count of attempted sex trafficking of a minor over age 14, in violation of 18 U.S.C. 1591(a)(1) and 1594(a); and one count of attempted coercion and enticement of a minor to engage in sexual activity, in violation of 18 U.S.C. 2422(b). Judgment 1. He was sentenced to 180 months of imprisonment, to be followed by ten years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1, at 1-17.

1. In early 2022, federal agents placed fake advertisements for young girls on an Internet website known for sex trafficking. Pet. App. A1, at 2. Petitioner responded to one such advertisement shortly after midnight, texting that he was looking for a "unique experience." Id. at 3. When agents did not immediately respond, petitioner called the listed number, but no one answered. Ibid. Petitioner then sent another text message at 2:01 a.m., asking "[i]s those girls available sometime tonight or tomorrow?" Ibid. He did not receive a reply and, after waiting nine hours, he sent the same message again. Ibid.

Federal agents responded three hours later, explaining that they had "two young, beautiful girls available." Pet. App. A1, at 3. They stated that one girl was 15 years old and the other girl was 13 years old. Ibid. Petitioner asked how late the girls would be available and said that he wanted to "make an appointment." Ibid. He also requested photos and explained that he was interested in "two girls at the same time." Ibid. The agents did not send the requested photos, but reiterated that the two girls were "15 years old and 13 years old" and stated that they were "super pretty and are up for almost anything." Ibid. Petitioner said that was okay and asked "[y]ou are not working for the law or something. Right?" Ibid. The agents responded, "no, I take my business very serious so you better not be a cop." Ibid. Petitioner replied that he also was "not a cop" and noted that he would "bring a lot of cash" to the meetup spot. Ibid.

Agents set the price at \$400 an hour and added that the girls would "do everything and anything but the 13-year-old doesn't do anal. Is that okay?" Pet. App. A1, at 3. Petitioner criticized the agents for talking about sex acts over text message, but confirmed that he was "okay" with the restriction. Id. at 3-4. Petitioner also stated that he "might text from [a] different number because you kind [of] messed up by texting about anal. This is very confidential because of their age already." Id. at 4.

Before switching to the new number, petitioner asked if he could buy extra "services" in exchange for "more cash." Pet. App. A1, at 4. Agents responded that petitioner could engage in unprotected sex, anal sex (with the 15-year-old girl), and have pictures of the encounter for an extra \$50 each. Ibid. Petitioner selected all three, confirmed that the total price would be \$550, and again stated that he was "not a cop." Ibid.

Petitioner and the agents planned to meet at 9 p.m. at a hotel in Doral, Florida. Pet. App. A1, at 4. Petitioner first stopped at a bank to withdraw the \$550. Ibid. He then met with an undercover agent in the hotel parking lot. Ibid. During their conversation, the agent told petitioner again that the girls were 13 and 15 years old. Ibid. Petitioner then handed the agent \$550 in exchange for a hotel room key. Ibid. After the exchange, petitioner was arrested. Ibid.

2. A grand jury in the Southern District of Florida charged petitioner with one count of attempted sex trafficking of a minor under age 14, in violation of 18 U.S.C. 1591(a)(1) and 1594(a); one count of attempted sex trafficking of a minor over age 14, in violation of 18 U.S.C. 1591(a)(1) and 1594(a); and one count of attempted coercion and enticement of a minor to engage in sexual activity, in violation of 18 U.S.C. 2422(b). Pet. App. A1, at 4.

With respect to the sex-trafficking counts, Section 1591(a)(1) prohibits sex trafficking "in or affecting interstate

or foreign commerce.” 18 U.S.C. 1591(a)(1). At trial, the government and petitioner stipulated that the Internet and his cellphone were each a facility of interstate commerce. D. Ct. Doc. 75, at 120.

At the close of the government’s case, petitioner moved for a judgment of acquittal on all counts under Federal Rule of Criminal Procedure 29 and argued that the government had failed to present sufficient evidence “to prove the first element on any of the three counts” that “he knowingly attempted to recruit [or] entice” a minor child. D. Ct. Doc. 75, at 239-240. The district court denied the motion. Id. at 240.

Petitioner testified in his defense. D. Ct. Doc. 76, at 14-87. After testifying, petitioner again moved for a judgment of acquittal based on “all the grounds that [petitioner] stated yesterday plus the additional credible testimony that [he] presented today.” Id. at 88. The district court denied the motion. Id. at 89. The jury subsequently found petitioner guilty on all counts. D. Ct. Doc. 43.

3. The court of appeals affirmed. Pet. App. A1, at 1-17.

Petitioner principally argued that the district court erred in denying his motion for a judgment of acquittal on the sex-trafficking counts on the theory that his conduct was legally insufficient to satisfy the interstate-commerce element of 18 U.S.C. 1591(a)(1). Pet. App. A1, at 5. The court of appeals

reviewed that claim for plain error because petitioner had not raised the claim in the district court, rejecting petitioner's contention that his motion had preserved the claim for appellate review. Id. at 11 & n.3.

The court of appeals accordingly required petitioner to show that "(1) an error occurred, (2) the error was obvious, and (3) the error affected his substantial rights." Pet. App. A1, at 11 (citing Rosales-Mireles v. United States, 585 U.S. 129, 134-135 (2018)). The court also noted its "discretion to correct the error only if it seriously impaired the 'fairness, integrity or public reputation of judicial proceedings.'" Ibid. (quoting Rosales-Mireles, 585 U.S. at 135). And the court ultimately found "[n]o error" and, accordingly, "no plain error" with respect to petitioner's interstate-commerce challenge. Id. at 13; see id. at 11-13.

The court of appeals stated that the statutory "phrase '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.'" Pet. App. A1, at 11-12 (quoting United States v. Ballinger, 395 F.3d 1218, 1233 (11th Cir.) (en banc), cert. denied, 546 U.S. 829 (2005)). The court observed that the Internet and cellphones -- both of which petitioner "used * * * when he tried to purchase sex with two minors" -- qualify as instrumentalities of interstate commerce. Id. at 12 (citing

United States v. Hornaday, 392 F.3d 1306, 1311 (11th Cir. 2004), cert. denied, 545 U.S. 1134 (2005); United States v. Evans, 476 F.3d 1176, 1180 (11th Cir.), cert. denied, 552 U.S. 878 (2007)). The court also noted that “‘a defendant whose illegal acts ultimately occur intrastate still acts “in commerce” if he uses the channels or instrumentalities of interstate commerce to facilitate their commission.’” Ibid. (quoting United States v. Baston, 818 F.3d 651, 664 (11th Cir. 2016), cert. denied, 580 U.S. 1182 (2017)). And after reviewing the trial evidence, the court of appeals found that “[petitioner’s] use of the internet and his cell phone ‘facilitated’ his attempted trafficking because he needed these instrumentalities to arrange the transaction -- sex with a thirteen-year-old and a fifteen-year-old.” Ibid.

ARGUMENT

Petitioner contends that the court of appeals erred in reviewing his sufficiency claim for plain error (Pet. 5-11) and finding sufficient evidence to support the jury’s verdict that petitioner’s attempted sex trafficking of minors was “in or affecting” interstate commerce as required by 18 U.S.C. 1591(a)(1) (Pet. 11-26). The decision below is correct and does not conflict with any decision of this Court or another court of appeals. This Court has denied petitions for certiorari raising similar arguments, see, e.g., Liddy v. United States, 145 S. Ct. 2791 (2025) (No. 24-735) (Internet communications in interstate

commerce); Koech v. United States, 142 S. Ct. 371 (2021) (No. 21-5523) (cellphone communications in or affecting commerce); Ricks v. United States, 580 U.S. 1001 (2016) (No. 16-5278) (plain error review of sufficiency claim). It should follow the same course here.

1. Under Federal Rule of Criminal Procedure Rule 29(a), a defendant may move for judgment of acquittal if “the evidence is insufficient to sustain a conviction.” Federal Rule of Criminal Procedure 51(b) further requires that parties object to asserted errors and state “the grounds for th[e] objection.” Errors “not brought to the court’s attention” are reviewed only for plain error. Fed. R. Crim. P. 52(b).

The court of appeals correctly applied that framework. The court observed that petitioner had failed to challenge the sufficiency of the evidence addressing Section 1591(a)(1)’s interstate-commerce element in his Rule 29 motion to the district court. Pet. App. A1, at 11. And it accordingly reviewed this claim for plain error. Ibid.

Some circuits have taken the view that a general, “broadly stated” Rule 29 motion is “sufficient to preserve [for de novo review] the full range of challenges, whether stated or unstated, to the sufficiency of the evidence.” United States v. Hammoude,

51 F.3d 288, 291 (D.C. Cir.), cert. denied, 515 U.S. 1128 (1995).² The court below in this case has declined to definitively embrace or reject that approach. See Pet. App. A1, at 11 n.3 (“Our Circuit has never adopted that rule, and we decline to do so today.”) (citing United States v. Baston, 818 F.3d 651, 663-664 (11th Cir. 2016)); see Baston, 818 F.3d at 663-664 (“Other circuits have held that a defendant preserves all challenges to the sufficiency of the evidence if he raises a ‘general’ challenge in the district court. We need not decide whether those decisions are consistent with the law in this Circuit.”) (citations omitted), cert. denied, 580 U.S. 1182 (2017)).

This case did not present the court of appeals with an appropriate vehicle -- and does not present this Court with an appropriate vehicle -- for deciding whether that approach is correct. Even in jurisdictions where “a general sufficiency-of-the-evidence objection preserves all possible sufficiency arguments” for appellate review, the courts of appeals have emphasized that “a motion raising only specific sufficiency arguments waives unenumerated arguments,” United States v. Foley,

² See United States v. Marston, 694 F.3d 131, 134 (1st Cir. 2012); United States v. Gjurashaj, 706 F.2d 395, 399 (2d Cir. 1983); United States v. Wesley, 417 F.3d 612, 617 (6th Cir. 2005); United States v. Hosseini, 679 F.3d 544, 550 (7th Cir.), cert. denied, 568 U.S. 1011 (2012), 568 U.S. 1055 (2012); United States v. Graf, 610 F.3d 1148, 1166-1167 (9th Cir. 2010); United States v. Kelly, 535 F.3d 1229, 1234-1235 (10th Cir. 2008), cert. denied, 555 U.S. 1203 (2009); United States v. Hammoude, 51 F.3d 288, 291 (D.C. Cir.), cert. denied, 515 U.S. 1128 (1995).

783 F.3d 7, 12 (1st Cir. 2015), and restricts appellate review to plain error, id. at 12-13; see also, e.g., United States v. Delano, 55 F.3d 720, 726 (2d Cir. 1995); United States v. Hills, 27 F.4th 1155, 1172 (6th Cir. 2022), cert. denied, 143 S. Ct. 305 (2022); 143 S. Ct. 606 (2023); United States v. Hosseini, 679 F.3d 544, 550 (7th Cir.), cert. denied, 568 U.S. 1011 (2012), 568 U.S. 1055 (2012); United States v. Graf, 610 F.3d 1148, 1166 (9th Cir. 2010); United States v. Leffler, 942 F.3d 1192, 1197 (10th Cir. 2019); United States v. Spinner, 152 F.3d 950, 955-956 (D.C. Cir. 1998).

Under that principle, other circuits would -- like the decision below -- have reviewed petitioner's interstate-commerce challenge for plain error. Petitioner did not advance a general challenge to the sufficiency of the evidence to the district court. Instead, his Rule 29 motions raised specific challenges that did not include the contention that the evidence failed to demonstrate Section 1591(a)(1)'s interstate-commerce element. See D. Ct. Doc. 75, at 239-240 ("[T]he Government has failed to prove the first element[.] * * * They haven't established that [petitioner] knowingly attempted to recruit, entice. The 'knowingly' aspect of it, * * * they haven't met their burden."); D. Ct. Doc. 76, at 88 ("We renew all the grounds that we stated yesterday plus the additional credible testimony that my client presented today."). And any potential divergence in the circuits' analytical paths for

applying plain-error review is not the sort of circuit conflict that warrants certiorari. See Black v. Cutter Laboratories, 351 U.S. 292, 297 (1956) (This Court "reviews judgments, not statements in opinions.")

Furthermore, even if the court of appeals was mistaken to apply the plain-error standard applied, that error had no effect on its resolution of this case, because the court ultimately concluded that the district court had committed no error at all in denying petitioner's Rule 29 motion. See Pet. App. A1, at 13 ("No error means no plain error, and we reject [petitioner's] interstate-commerce challenge."). Petitioner's convictions would have therefore been upheld even if reviewed under the de novo standard that petitioner advocates here. Because prevailing on the first question presented would offer petitioner no practical relief, this case is at minimum an unsuitable vehicle for addressing that issue. See Supervisors v. Stanley, 105 U.S. 305, 311 (1882) (explaining that this Court does not grant a writ of certiorari to "decide abstract questions of law * * * which, if decided either way, affect no right" of the parties).

2. Petitioner's renewed sufficiency claim likewise does not warrant this Court's review.

This Court has "identified three broad categories of activity that Congress may regulate under its commerce power." United States v. Lopez, 514 U.S. 549, 558 (1995). "First, Congress may

regulate the use of the channels of interstate commerce.” Ibid. Second, Congress may “regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.” Ibid. And third, Congress may “regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.” Id. at 558–559 (citation omitted).

“Congress is aware of the ‘distinction between legislation limited to activities “in commerce” and an assertion of its full Commerce Clause power so as to cover all activity substantially affecting interstate commerce.’” Scarborough v. United States, 431 U.S. 563, 571 (1977) (citation omitted). Thus, in prohibiting sex-trafficking activities “in or affecting” interstate commerce, 18 U.S.C. 1591(a)(1) (emphasis added), Congress “must have meant more than to outlaw” conduct “that occur[s] in commerce or in interstate facilities.” Scarborough, 431 at 572.

In this case, petitioner used the Internet and cellphones to facilitate his attempted sex trafficking of minors. “‘Telephones,’” including “landlines and cellphones,” have been considered “‘instrumentalities of interstate commerce.’” United States v. Stackhouse, 105 F.4th 1193, 1199 (9th Cir.) (citation omitted), cert. denied, 145 S. Ct. 558 (2024); see Pet. App. A1, at 12. Likewise, the Internet can readily be described as “an

instrumentality and channel of interstate commerce.” United States v. Sutcliffe, 505 F.3d 944, 953 (9th Cir. 2007); see also Pet. App. A1, at 12; United States v. Morgan, 748 F.3d 1024, 1033 (10th Cir.) (“[T]he Internet is an instrumentality of interstate commerce.”), cert. denied, 574 U.S. 915 (2014). Indeed, petitioner stipulated to both points at trial. D. Ct. Doc. 75, at 120.

Because petitioner sought to arrange for commercial sex acts through the use of messages on cellphones that he initiated in response to an Internet-wide advertisement, his conduct was necessarily “in or affecting” interstate commerce. Petitioner’s assertion that he remained within one State throughout his course of conduct accordingly does not entitle him to relief. Lopez, 514 U.S. at 558; see ibid. (“[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses * * * is no longer open to question.”) (citation and internal quotation marks omitted; brackets in original).

b. Contrary to petitioner’s contention (Pet. 23-26), the court of appeals’ decision in this case does not conflict with any decision of another court of appeals. The other circuits to confront the issue have likewise recognized that a defendant’s use of the Internet or a cellphone to facilitate sex-trafficking activities is sufficient to satisfy Section 1591(a)(1)’s “in or affecting” commerce element. See United States v. Taylor, No. 22-50028, 2024 WL 1108829, at *1 (9th Cir. Mar. 14, 2024), cert.

denied, 145 S. Ct. 1064 (2025); United States v. Renteria, 84 F.4th 591, 594 & n.1 (5th Cir. 2023); United States v. Koech, 992 F.3d 686, 693 (8th Cir.), cert. denied, 142 S. Ct. 371 (2021); United States v. Gray-Sommerville, 618 Fed. Appx. 165, 168 (4th Cir.) (per curiam), cert. denied, 577 U.S. 894 (2015); United States v. Willoughby, 742 F.3d 229, 240 (6th Cir. 2014).

Petitioner errs in asserting (Pet. 24-25) that the decision below conflicts with the Tenth Circuit's decisions in United States v. Schaefer, 501 F.3d 1197 (2007), and United States v. Baker, 155 F.4th 1188 (2025). Schaefer addressed the since-amended provisions of child-pornography statutes requiring proof that a visual image "has been mailed, or has been shipped or transported in interstate or foreign commerce * * * by any means including by computer." 18 U.S.C. 2252(a)(2) and (a)(4)(B). After the Tenth Circuit took the view that "an Internet transmission, standing alone," did not satisfy "the interstate commerce requirement," 501 F.3d at 1200, Congress superseded the decision by amending the statute to clarify that "[t]he transmission of child pornography using the Internet constitutes transportation in interstate commerce," Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, § 102(7), 122 Stat. 4002. And Baker took the view the wire-fraud statute's element of "transmit[ing] or caus[ing] to be transmitted by means of wire * * * communication in interstate or foreign commerce," 18 U.S.C. 1343, could not be

satisfied by “an individual’s use of the internet, standing alone.” Baker, 155 F.4th at 1202 (internal quotation marks and citation omitted). Neither decision addressed the statute here, which uses the phrase “‘affecting commerce,’” which “indicates Congress’ intent to regulate to the outer limits of its authority under the Commerce Clause.” Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001); see 18 U.S.C. 1591(a).

Petitioner also errs in asserting (Pet. 23-24) that the decision below conflicts with the Ninth Circuit’s decision in United States v. Wright, 625 F.3d 583 (2010). Wright mirrors Schaefer, in that it concerned the since-amended child-pornography laws, which were worded differently from Section 1591(a), at issue here. Petitioner has accordingly identified no precedent of either the Tenth or the Ninth Circuit that would have entitled him to relief in the circumstances of this case. Cf. United States v. Tuan Ngoc Luong, 965 F.3d 973, 981 (9th Cir. 2020) (recognizing that “when Congress chooses to use the words ‘affecting interstate commerce,’ it intends to regulate to the outer limits of its Commerce Clause authority”) (internal quotation marks and citation omitted), cert. denied, 142 S. Ct. 336 (2021).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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