No. 25-6344

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2025

RALPH KEVIN 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

PETITIONER'S REPLY BRIEF

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REPLY ARGUMENT

The government sidesteps both questions presented, their merits, and the underlying circuit splits. It instead offers distortions of the record—including the holding below—rehashed appellate arguments, and the offense conduct[1] as reasons to reject petitioner's writ. Despite superficial appeal, close inspection of the government's approach reveals only that both questions warrant review.

As to whether intrastate internet use necessarily places conduct "in commerce," the government defends a strawman. It argues that the Eleventh Circuit was right to hold that petitioner's intrastate internet and cellphone use satisfied the jurisdictional "in *or affecting* commerce" element of 18 U.S.C. § 1591(a)(1) (emphasis added). Yet the opinion below did not discuss, much less decide, whether petitioner's intrastate internet or cellphone use "affects commerce" under § 1591(a)(1). The Eleventh Circuit held that, because petitioner "used both his cell phone and the internet"—both "instrumentalities of interstate commerce"—"to arrange sex with minors, his conduct qualifies as 'in commerce,'" "whether or not he or the victims physically crossed state lines." *United States v. Tovar*, 146 F.4th 1318, 1326 (11th Cir. 2025). The government never defends that holding, or its reasoning. Strawman aside, the decision below directly implicates the widening circuit split about what "in commerce"—a jurisdictional hook in countless federal statutes—means for our online society.

[1] Even if the relief petitioner seeks were granted in full, he would remain imprisoned due to his unchallenged 18 U.S.C. § 2422(b) conviction, and its corresponding ten-year minimum sentence (to be followed by supervised release, and a lifetime of sex offender restrictions). Petitioner seeks only a fair and full review of the interstate nexus evidence supporting two of his three convictions, and, with it, the answers to important, recurring questions that reverberate well beyond his case.

The government concedes that petitioner was denied relief on the merits of the interstate commerce question, not because any error was not "plain." Because there was a ruling on the merits below, there is now "a reasonable probability" that "curing the [interstate commerce] error will yield a different outcome," and the Court should not hesitate to grant review of the interstate commerce question alone. *See Hicks v. United States*, 137 S.Ct. 2000, 2000 (2017) (Gorsuch, J., concurring with GVR). If the Court ultimately rules that intrastate internet use is not necessarily "in commerce," it could simply remand petitioner's case for the court of appeals to resolve "whether the error affected the defendant's substantial rights and implicated the fairness, integrity, or public reputation of judicial proceedings." *See id*. (describing the Court's "routine" practice of identifying legal errors and remanding the case for the lower court to decide whether the petitioner is entitled to relief from that error). *See also Tapia v. United States,* 564 U.S. 319, 335 (2011) (identifying a sentencing error for the first time and remanding case for the court of appeals to decide whether petitioner was entitled to relief on plain error review).

However, there are good reasons to grant review of the Rule 29 question, along with the interstate commerce question, and to hold that the court of appeals should have applied *de novo* review. The government acknowledges that the circuits are divided about whether a general Rule 29 motion preserves the sufficiency of the evidence for plenary review, and it does not defend the minority rule—joined by the Eleventh Circuit below—that a general Rule 29 motion preserves nothing on appeal. The government instead insists that resolution of this question does not matter to petitioner's case. This position misreads both the record and the law. The court of appeals correctly declined

the government's similar suggestion to characterize petitioner's renewed Rule 29 motion as specific rather than general, and petitioner's sufficiency argument could be reviewed *de novo* in other circuits. The government's related contention that the Rule 29 question improperly asks the Court to "decide abstract questions of law" is also shortsighted. If the Court were to grant relief as to both questions—which is the precise outcome sought—petitioner would return to the Eleventh Circuit with new precedent that would undermine the validity of two of his three convictions *and* force the government to prove harmless error. Granting review of both questions presented would increase petitioner's likelihood of relief, while efficiently resolving two important, recurring circuit splits in one fell swoop.

I. The interstate commerce question warrants review.

The government contends that the sufficiency of the interstate commerce evidence underlying petitioner's § 1591(a)(1) convictions does not warrant review because the statute at issue prohibits solicitation "in *or affecting* commerce" (emphasis added). By using the phrase "affecting commerce," the government argues, Congress indicated its intent to "regulate to the outer limits on its authority under the Commerce Clause," necessarily extending beyond conduct "that occur[s] in commerce or in interstate facilities," and thereby encompassing intrastate internet use. *See* Opp. I, 12-15.

There are two major flaws in the government's approach.

The first flaw is that the government's theory does not apply to the holding below. The contention that petitioner's intrastate internet (or cellphone) use "affected commerce" was not why the Eleventh Circuit upheld petitioner's §§ 1591(a)(1)

and 1594 convictions. That is why the petition does not ask whether intrastate internet use necessarily "affects commerce," *see* Pet. i, and why an argument answering that unasked question is a non-sequitur.

Like the government now, the government below suggested that the court of appeals affirm under the "affecting commerce" prong of § 1591(a)(1). *See* Opp. 12-15; Brief for the United States, at 16, *United States v. Tovar*, No. 23-10755 (11th Cir. 2023). The court of appeals declined to do so, holding instead that petitioner's intrastate use of his cellphone, and the internet—both "instrumentalities" "of interstate commerce"—placed his attempted solicitation "in commerce." *Tovar*, 146 F.4th at 1326. *See also id.* at 1327 ("[A] defendant's intrastate crimes qualify as 'in commerce' when he uses the instrumentalities of interstate commerce to facilitate their commission."); *United States v. Segari*, 2026 WL 653757, at *4 (M.D. Fla. Mar. 9, 2026) (relying on *Tovar* to find that the defendant's internet use was sufficient to establish that her threats were transmitted "in interstate commerce," for purposes of 18 U.S.C. § 875(c), regardless of whether any transmission actually crossed state lines).

Only through distorting the holding below can the government claim that it does not directly conflict with the two circuits that have held that intrastate internet use does *not* necessarily establish conduct "in commerce." *See* Opp. 7, 13-15 (attempting to distinguish *United States v. Schaefer*, 501 F.3d 1197 (10th Cir. 2007), *United States v. Baker*, 155 F.4th 1188 (10th Cir. 2025), and *United States v. Wright*, 625 F.3d 583 (9th Cir. 2010)).[2] As discussed at length in the petition, and unrebutted by the government,

[2] The government's reliance on other circuits' opinions holding that using the internet or cellphones, to further sex trafficking, counts as conduct "in or affecting commerce," under § 1591(a)(1), is misplaced for the same reason. *See* Opp. 14 (citing

the circuits disagree about whether intrastate internet use necessarily places conduct "in commerce." *See* Pet. 11-25. Because many statutes contain the jurisdictional term of art "in commerce," this disagreement is not limited to any one statute. The Eleventh Circuit, through petitioner's case, picked the majority side—which the Sixth Circuit has also recently joined. *See United States v. Goldy*, 164 F.4th 493, 502 (6th Cir. 2026) (observing that "transmission over the internet is sufficient evidence on its own to show" that a wire was transmitted "in interstate commerce"). Now at 5-2, the conflict presents complex constitutional and statutory questions, implicates scores of federal statutes, and calls for the Court's resolution.

The second flaw in the government's approach flows from its failure to address the actual holding below—or its rationale. Again, the court of appeals reasoned that, "a defendant's intrastate crimes qualify as 'in commerce' when he uses the instrumentalities of interstate commerce to facilitate their commission." *Tovar*, 146

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. Willoughby*, 742 F.3d 229, 240 (6th Cir. 2014) (among other unpublished cases)). None of those opinions hold, as the Eleventh Circuit did below, that the intrastate use of the internet (or cellphones) necessarily establishes conduct "in commerce." *See Renteria*, 84 F.4th at 594 & n. 1 (holding that § 1591(a)(1) extends to purely local crimes when the government has established an interstate commerce connection, which it did by showing that the appellant had used the internet to interact with the victim, used a cellphone "made in Vietnam" to abuse the victim, and bought the victim a bike from out of state); *Koech*, 992 F.3d at 693 (upholding appellant's § 1591(a)(1) conviction because he conspired with a "pimp," who traveled with the victim out of state, where they used appellant's payments to buy drugs, the "pimp" advertised the victim on the internet, and the appellant used a Chinese-made cellphone to arrange "dates"); *Willoughby*, 742 F.3d at 240 (affirming that the government satisfied its burden to prove that the appellant's use of a Chinese-made cellphone, and purchase of out-of-state condoms and clothes for the victim, all in furtherance of sex trafficking, was "in or affecting" interstate commerce under § 1591(a)(1)).

F.4th at 1327. As petitioner observed, however, some federal crimes—though not § 1591(a)(1)—explicitly include, within their jurisdictional element: 1) the use of a facility or instrumentality of interstate commerce, *and* 2) conduct "in commerce," *and* 3) conduct "affecting commerce." *See* Pet. 14-15; 18 U.S.C. §§ 116(d), 249(2)(B), 844(e). Conflating the jurisdictional "facility" or "instrumentality" "of interstate commerce" language with the well-established term of art "in commerce"—as the Eleventh Circuit did, below—violates most, if not all, canons of statutory construction. Pet. 12-20. The government's utter silence in response to petitioner's statutory construction argument likely speaks to its strength. *See id.*

The Eleventh Circuit's undefended position that intrastate internet use necessarily places conduct "in commerce"—now shared with four other circuits—also improperly converts wide swaths of local crime into federal crime, without Congress's explicit say-so, impermissibly lowers the government's burden to establish the jurisdictional element in each case, and directly conflicts with two other circuits. *See id.* The Court should therefore grant review of this critical question.

Moreover, the parties agree that the Eleventh Circuit ruled on the merits, despite applying plain error review. Opp. 11 ("No error means no plain error.") (quoting *Tovar,* 146 F.4th at 1326). This petition is therefore an appropriate vehicle to address whether intrastate internet use is necessarily "in commerce," irrespective of whether the Court grants review of the Rule 29 question.

II. The Rule 29 question warrants review.

If the Court remains concerned about answering the interstate commerce question, because the Eleventh Circuit applied plain error review, it should grant both questions presented and hold that plain error review was wrongly applied.

The government concedes that there is a clear circuit split regarding whether a general Rule 29 motion preserves the sufficiency of the evidence for plenary review. Opp. 8-9 & n. 2 (collecting cases). Indeed, the Third Circuit recently joined the minority position by holding that a "general" Rule 29 motion does *not* preserve all sufficiency arguments, stated or unstated, for appellate review. *See United States v. Abrams*, 165 F.4th 784, 797-801 (3d Cir. 2026).

Counting the Eleventh, Eighth, Fifth, and now Third, Circuits in the minority, the Rule 29 circuit split stands at 7-4. *But see* Pet. 6-7 (discussing the Fifth Circuit's intracircuit split). As argued, the minority position is incorrect, and the Court should intervene to ensure that the majority position is uniformly applied. *See* Pet. 7-11. The government does not seriously contend otherwise; it instead asserts that this petition is not the right vehicle for the question. Opp. 9-11.[3]

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[3] The government does claim, in passing, that, "any potential divergence in the circuits' analytical paths for applying plain-error review is not the sort of circuit conflict that warrants certiorari," because the Court "reviews judgments, not statements in opinions." Opp. 10-11 (internal citation omitted). This framing distorts the question presented, which is whether a Federal Rule of Criminal Procedure 29(a) motion requires more specific "grounds" than the "general" insufficiency of the evidence, to preserve all sufficiency arguments for plenary review. *See* Pet. i, 7-11. Resolving a circuit split about the interpretation of a federal rule is precisely the kind of question that the Court answers. *See, e.g.*, *Waetzig v. Halliburton Energy Servs., Inc.*, 604 U.S. 305, 307, 310 (2025) (resolving circuit split to hold that, dismissal without prejudice under Federal Rule of Civil Procedure 41(a) counts as a "final proceeding," and thus qualifies for Rule 60(b) relief); *McIntosh v. United States*, 601 U.S. 330, 333, 336 & n. 3 (2024) (resolving circuit split to hold that Federal Rule of Criminal Procedure 32.2(b)(2)(B) is a "time-

The government's vehicle concerns are misplaced for four reasons.

First, the assertion that prevailing on the Rule 29 question "would offer petitioner no practical relief," Opp. 11, puts the cart before the horse. Petitioner here asks the Court to grant review of both questions presented, to hold that intrastate internet use does not necessarily establish conduct "in commerce," and to hold that the Eleventh Circuit should have applied *de novo* review. If the Court agreed on all fronts, petitioner would return to the court of appeals in a better position for vacatur of his §§ 1591(a)(1) convictions, and 15-year mandatory minimum sentence, than if the Court had only granted relief on the interstate commerce question. That is because plain error review places a more difficult burden on the defendant than harmless error review. *See Greer v. United States*, 593 U.S. 503, 508 (2021) (internal citations omitted). The possibility of an improved outcome for petitioner upon remand brings this question beyond an "abstract question[] of law," because, if decided in his favor, it would positively affect his rights. *See* Opp. 11 (quoting *Supervisors v. Stanley*, 105 U.S. 305, 311 (1882)).

Second, even if relief were granted on the Rule 29 question alone, reaffirmance is not guaranteed on remand. In an opinion published after petitioner's case, the Eleventh Circuit observed that a statute regulating an instrumentality "'in' commerce," "by its terms," is "limited" to instrumentalities "actually traveling in interstate commerce," whereas regulation of an instrumentality "of" commerce, more broadly regulates an instrumentality, "that could be used in

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related directive," and therefore that failure to comply is a non-jurisdictional error, subject to harmless-error review on appeal).

interstate commerce." *See* Pet. 17-18 (discussing *United States v. Bryan*, 159 F.4th 1274 (11th Cir. 2025)). As explained previously, *Bryan*'s reasoning conflicts with the reasoning, below, that the use of any instrumentality "of interstate commerce," occurs "in interstate commerce," whether or not any state lines are crossed. *Id*. Upon remand for *de novo* review, this intracircuit conflict could be resolved in petitioner's favor by the panel, or the court of appeals *en banc*.

Third, the government distorts the record when it argues that the Eleventh Circuit has not taken sides on the Rule 29 question. *See* Opp. 9. It has. Like the government now, the government below asserted that petitioner's Rule 29 arguments were specific to knowledge and should be reviewed for plain error on that basis. *See id.* 9-10; Brief for the United States, at 12, *United States v. Tovar*, No. 23-10755 (11th Cir. 2023). The Eleventh Circuit did not deny plenary review for that reason, however. It instead rejected petitioner's request that the court, "review his challenge de novo because he made a 'general' challenge to the adequacy of the evidence," *because* the court of appeals "has never adopted that rule." *See Tovar*, 146 F.4th at 1325 & n. 3. Moreover, when it "decline[d]" to adopt the majority Rule 29 rule, the court of appeals applied—and adopted by default—the minority rule. *See id*. *See also United States v. Nattiel*, 2026 WL 22065, at *16 (11th Cir. Jan. 5, 2026) (applying plain error review to appellant's sufficiency claim because he "raised only a general [Rule 29] challenge" below, and citing *Tovar*, among others, in support).

Finally, petitioner's renewed Rule 29 argument was not specific to knowledge, so other circuits could apply plenary review to his sufficiency claim. *See* Opp. 9-11. Contrary to the government's contention (now, and below),

petitioner's renewed Rule 29 motion was not directed exclusively at the knowledge element and was accordingly not treated by either the prosecution or the district court as specific to knowledge. (D. Ct. Doc. 76, at 88-89). This record presumably explains why even the Eleventh Circuit did not treat petitioner's motions for judgment of acquittal as specific to knowledge—despite the government's request that it do so. It follows that petitioner's renewed Rule 29 motion would also be general enough to preserve all sufficiency arguments in circuits that follow the majority rule. *See, e.g.*, *United States v. Chance*, 306 F.3d 356, 371 (6th Cir. 2002) (holding that the defendant's Rule 29 motions were sufficiently general to preserve sufficiency on all counts, despite addressing specific issues as to certain counts, in part because the government, and the trial judge, responded as though the motions were general); *United States v. Baxley*, 982 F.2d 1265, 1268 (9th Cir. 1992) (treating a Rule 29 "motion" that was never made as sufficient to preserve all sufficiency claims, because the district court considered the defendant to have made the motion, and denied it as though it were generally made). At worst, petitioner's renewed Rule 29 argument could be considered ambiguous—thereby still permitting plenary review in other circuits. *See, e.g.*, *United States v. Marston*, 694 F.3d 131, 135 (1st Cir. 2012) (reasoning that an "ambiguous" Rule 29 motion that was both general and specific should be considered general, thereby preserving all sufficiency claims, as a policy matter).

The Eleventh Circuit rejected petitioner's claim that a general Rule 29 argument preserves all sufficiency arguments for plenary review. That decision conflicts with seven circuits and resulted in plain error review of petitioner's sufficiency claim. Because petitioner's sufficiency claim could have been reviewed *de novo* in other circuits,

and because he could receive relief upon remand for plenary review, this petition is an appropriate vehicle to resolve the entrenched Rule 29 split.

However, if the Court concludes that *only* the Rule 29 issue warrants review, but agrees with the government that petitioner's case is not the appropriate vehicle to answer that question, petitioner respectfully directs the Court to the petition in *Abrams v. United States* (filed April 16, 2026). In that event, the petitioner requests that the Court consider the cases together, grant plenary review in *Abrams*, hold this petition pending disposition of *Abrams*, and then grant, vacate and remand in light of the disposition of that case on the merits.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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