No. 21-10631

In the

Supreme Court of the United States

Damien Dre Gonzales,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is a district court's Guidelines error always harmless when the court states that it would have imposed the same sentence regardless of the Guidelines?

II. Is the federal kidnapping statute—as amended by the 2006 Adam Walsh Act—a facially unconstitutional exercise of Congress's Commerce Clause power?

PARTIES TO THE PROCEEDING

Petitioner is Damien Dre Gonzales, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Northern District of Texas and the United States Court of Appeals for the Fifth Circuit:

- *United States v. Gonzales*, No. 21-10631, 2022 WL 1421032, 2022 U.S. App. LEXIS 12297, (5th Cir. May 5, 2022)
- *United States v. Gonzales*, No. 5:20-cr-00123-H-BQ-1 (June 10, 2021)

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Damien Dre Gonzales seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court's judgement and sentence is attached as Appendix A. The unpublished opinion of the Court of Appeals is reported at *United States v. Gonzales*, No. 21-10631, 2022 WL 1421032, 2022 U.S. App. LEXIS 12297, (5th Cir. May 5, 2022). It is reprinted in Appendix B to this Petition.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on May 5, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULES, STATUTES, AND CONSTITUTIONAL PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 52 reads as follows:

> (a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
>
> (b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Section 3553(a) of Title 18 reads as follows:

> (a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

Section 3742 of Title 18 provides in relevant part:

(f) Decision and Disposition.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate.

The Adam Walsh Child Protection and Safety Act of 2006 reads as follows:

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when –

(1) the person is willfully transported in interstate or foreign commerce, regardless of whether the person was alive when transported across a State boundary, or the offender travels in interstate or foreign 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;

(2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;

(3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 46501 of title 49;

(4) the person is a foreign official, an internationally protected person, or an official guest as those terms are defined in section 1116(b) of this title; or

> (5) the person is among those officers and employees described in section 1114 of this title and any such act against the person is done while the person is engaged in, or on account of, the performance of official duties,
>
> shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.

Article I, Section 8, Clause 3 of the United States Constitution reads as follows:

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

Article I, Section 8, Clause 18 of the United States Constitution reads as follows:

> The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

STATEMENT OF THE CASE

Introduction

On August 23, 2020, Damien Dre Gonzales, Petitioner, was at a birthday party in Levelland, Texas. (ROA.47-49). At a moment when the other guests were distracted, Mr. Gonzales led Jane Doe, a minor, to his vehicle and drove her from the party. (ROA.47-49). When the guests realized that Jane Doe was missing and that she had left with Mr. Gonzales, they called the police. (ROA.47-49). Police soon located Mr. Gonzales's vehicle and were able to rescue Jane Doe from an ongoing sexual assault. (ROA.47-49).

Presentence Litigation and Sentencing Hearing

The government charged Mr. Gonzales with one count of Kidnapping, in violation of §§ 1201(a)(1), 1201(d), and 1201(g)(1) (ROA.10-12). Mr. Gonzales filed a motion to dismiss the indictment, arguing that the federal kidnapping statute was unconstitutional after the 2006 revisions by the Adam Walsh Act. (ROA.36-40). Specifically, Mr. Gonzales argued that Congress exceeded its Commerce Clause power when it authorized the federal government to criminalize purely intrastate activity, as in this case. (ROA.36-40). The government responded, arguing that although the only instrumentality here was a motor vehicle, that was enough to trigger federal jurisdiction. (ROA.42-45). The district court denied Mr. Gonzales's motion, applying *United States v. Salerno*' s broad no-set-of-circumstances test to a facial constitutional challenge. (ROA.66-70). Meanwhile, Mr. Gonzales entered into a conditional guilty plea, reserving the right to pursue his motion to dismiss on appeal. (ROA.162).

In its Presentence Investigation Report (PSR), U.S. Probation assessed one criminal history point for one of Mr. Gonzales's prior terroristic threat charges, which was "adjudicated" through an idiosyncratic mechanism provided in Texas Penal Code § 12.45. (ROA.177, ROA.212). Mr. Gonzales argued that it should not have counted toward his criminal history score and that it had the effect of moving him from Criminal History Category III to Criminal History Category IV. (ROA.196-97, ROA.204-07, ROA.126-35). The district court overruled Mr. Gonzales's objection and imposed a top-of-the-Guidelines sentence of 365 months. (ROA.140-42, ROA.149).

Appellate Proceedings

On Appeal, Mr. Gonzales challenged the district court's criminal history score calculation—contesting the district court's error of including the charges "adjudicated" under Texas Penal Code § 12.45 in the criminal history report—and maintained that the Guidelines determination cannot support a finding of harmlessness. Mr. Gonzales noted two standards, established by the Fifth Circuit, to evaluate harmlessness regarding the Guidelines error. *See United States v. Richardson*, 676 F. 3d 491, 511 (5th Cir. 2012) ("[A] guidelines calculation error is harmless where the district court has considered the correct guidelines range and has stated that it would impose the same sentence even if that range applied."); *United States v. Ibarra-Luna*, 628 F.3d 712, 714 (5th Cir. 2010) ("[T]he harmless error doctrine applies only if the proponent of the sentence convincingly demonstrates both (1) that the district court would have imposed the same sentence had it not made the error, and (2) that it would have done so for the same reasons it gave at the prior sentencing."). The Court of Appeals declined to follow the "more demanding standard"

established in *United States v. Ibarra-Luna* and held that the "Government has established that any error was harmless." *United States v. Gonzales*, No. 21-10631, 2022 WL 1421032, 2022 U.S. App. LEXIS 12297, at *2 (5th Cir. May 5, 2022). The Court of Appeals noted that the sentencing court considered both Guidelines ranges and "expressly stated that it would impose the same 365-month sentence for the same stated reasons in light of the 18 U.S.C. § 3553(a) factors." *Id.* The Court of Appeals ultimately affirmed the district court's judgement on harmless error grounds, citing *United States v. Vega-Garcia*, 893 F.3d 607, 612 (5th Cir. 2009) and *United States v. Guzman-Rendon*, 864 F.3d 409, 410-12 (5th Cir. 2017), and established its preference for the more "forgiving" harmless error standard, as stated in *Richardson*. *Id.*

Mr. Gonzales preserved his facial challenge to 18 U.S.C. § 1201(a)(1) that was foreclosed by the Fifth Circuit's broad application of *United States v. Salerno*'s "no set of circumstance" standard. The Court of Appeals rejected Mr. Gonzales' argument—claiming that the statute exceeded Congress's authority under the Commerce Clause—because the Fifth Circuit has recognized that "the interstate nexus requirement for federal crimes is satisfied by, as pertinent here, the wholly intrastate use of an automobile." *Id* at *2-3. (citing *United States v. Marek*, 238 F.3d 310, 318-19 (5th Cir. 2001)). Notably, the Court of Appeals did not evaluate Mr. Gonzales' facial challenge under the Fifth Circuit's broad application of *Salerno*. *Id.* The Fifth Circuit also declined to reach Mr. Gonzales' argument under § 12.45—an issue of first impression—because the court believed any error was harmless in light of the district

court's statement that it would have imposed the same sentence independent of the Guidelines. *Id.* at *1-2.

REASONS FOR GRANTING THE PETITION

Petitioner challenges the Fifth Circuit's erroneous view of harmlessness that denies a defendant appellate review of Guidelines error whenever a district court states that it would have imposed the same sentence irrespective of the Guidelines. Here, the error was especially eventful because it caused the Fifth Circuit to decline to reach an issue of first impression that would have lowered the defendant's advisory sentencing range. This case is an also appropriate vehicle to address the circuit split among the courts of appeals regarding the harmlessness standard in which courts of appeals review sentencing errors.

Petitioner additionally challenges the Fifth Circuit's decision to uphold the Adam Walsh Child Safety and Protection Act of 2006 because of its erroneous view of the breadth of the Commerce Clause. Petitioner argues that the Act is an unconstitutional expansion of the scope of Congress's authority to regulate purely local, violent crime. This case is an appropriate vehicle to address the validity of a facial challenge under the federal government's Commerce Clause authority. Therefore, this Court should grant certiorari to resolve both issues.

I. A Guidelines error is not always harmless whenever a district court states that it would have imposed the same sentence irrespective of the correctly calculated range.

In federal sentencing proceedings, the advisory Guidelines Manual is the "starting point and the initial benchmark." *Gall v. United States*, 552 U.S. 38, 49 (2007). Accordingly, before imposing a sentence, the sentencing court must calculate and consider the correct Guidelines range. *Id*; *see also Molina-Martinez v. United States*, 578 U.S. 189, 198 (2016) ("Federal courts understand that they "must begin

their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.") (citations omitted). Consequently, when a district court fails to identify and consider the applicable Guidelines range, it not only commits procedural error, but fails to meet its obligation imposed by the Supreme Court. *Gall*, 552 U.S. at 51.

In addition to considering the applicable Guidelines range, the sentencing court is required to "make an individualized assessment" and provide a thorough explanation, regarding the imposed sentence "to allow for meaningful appellate review." *Id*. at 50. Because a miscalculation of the Guidelines range will typically be enough to establish prejudice, a thorough explanation protects the defendant from being denied relief on appeal "simply because there is no other evidence that the sentencing outcome would have been different had the correct range been used." *Molina-Martinez*, 578 U.S. at 200. The record of consideration must clearly indicate that the sentencing court's individualized assessment underlies the sentence imposed. *Rita v. United States*, 551 U.S. 338, 358 (2007) (finding the sentencing court conducted a sufficient review and noting that the sentencing court reviewed the parties' arguments, supporting evidence, defendant's physical ailments, work experience, and military service).

The Circuits are divided regarding appellate review of a Guidelines error. The First, Fourth, and Fifth Circuits' review of the sentencing court's record, regarding a Guidelines error, undermines this Court's standard for evaluating harmlessness.

Moreover, the forgiving standard in these Circuits, as explained below, is at odds with the majority of the circuit courts that adhere to this Court's standards.

A. The Circuits are divided regarding the proper standard for evaluating the harmlessness of Guidelines error.

The court below established two standards for appellate review of a Guidelines error. First, in order to support a finding of harmlessness in the Fifth Circuit—where the district court considered the correct guidelines range—the district court must meet its "heavy burden" to establish: (1) the Guidelines error "did not affect the district court's selection of the sentence imposed," and (2) "the district court considered the correct advisory guidelines range in its analysis and stated that it would impose the same sentence even if that range applied." *United States v. Leontaritis*, 977 F.3d 447, 452 (5th Cir. 2020); *United States v. Ibarra-Luna,* 628 F.3d 712, 717 (5th Cir. 2010); *United States v. Delgado-Martinez*, 564 F.3d 750, 753 (5th Cir. 2009). Second, where the sentencing court fails to consider the correct range, the sentencing court must establish: (1) it "would have imposed a sentence outside the correct Guidelines range for the same reasons"; and (2) the sentence imposed "was not influenced in any way by the erroneous Guidelines calculation." *Ibarra-Luna*, 628 F.3d at 718-19.

In the Fifth Circuit, a record of the district court's decision to impose a certain sentence must clearly evidence that the Guidelines error would not have affected the sentencing imposed. *United Sates v. Rebulloza*, 16 F.4th 480, 484 (5th Cir. 2021). In order to allow for meaningful appellate review, the record must "proffer sufficiently persuasive evidence" to support a finding of harmlessness. *United States v. Huskey*,

137 F.3d 283, 289 (5th Cir. 1998) (citation omitted). The Fifth Circuit claims that the district court must meet a "heavy burden" to support a finding of harmlessness; however, simply considering the applicable Guidelines range and concluding that it would have imposed the same sentence, regardless of the Guidelines is sufficient to meet this burden. *Ibarra-Luna*, 628 F.3d at 717; *see Leontaritis*, 977 F.3d at 452 ("Because the district court's statements show that the sentence was not based on the guidelines range and that the district court would have imposed the same sentence without the alleged error for the same reasons, any error in imposing the two-level enhancement for abuse of position of trust is harmless."). As such, the Fifth Circuit's standard to prove harmlessness—taking the sentencing court's word at face value—entirely removes Guidelines error from appellate review.

The First and Fourth Circuits are similarly forgiving on the issue of harmlessness. The First Circuit has routinely held that a procedural error is harmless if "the district court would have imposed the same sentence." *United States v. Tavares,* 705 F.3d 4, 25 (1st Cir. 2013) (quoting *Williams v. United States*, 503 U.S. 193, 203 (1992)); *United States v. Espinoza-Roque*, 26 F.4th 32 (1st Cir. 2022). The Fourth Circuit has continuously held that an incorrect application of the Guidelines is harmless if the district court establishes: (1) it "would have reached the same result even if it had decided the [G]uidelines issue the other way, and (2) the sentence would be reasonable even if the [G]uidelines issue had been decided in the defendant's favor." *United States v. Cisson*, 33 F.4th 185, 190 (4th Cir. 2022) (quoting *United States v. Mills*, 917 F.3d 324, 330 (4th Cir. 2019)); *United States v. Gomez-Jimenez*,

750 F.3d 370, 382 (4th Cir. 2014). The forgiving standard in the Fourth Circuit requires the district court only to "adequately explain the sentence." *Id.*

The Sixth and Eleventh Circuits—requiring the district court to meet a slightly heavier burden than the former circuits—do not adhere to the Supreme Court standard to support a finding of harmlessness as a result of a Guidelines error. The Sixth Circuit, requiring slightly more than a cursory statement, expects district courts to explain the sentence by considering the 18 U.S.C. § 3553(a) factors. *United States v. Bacon,* 617 F.3d 452, 457 (6th Cir. 2010); *United States v. Anderson*, 526 F.3d 319, 330 (6th Cir. 2008). The Eleventh Circuit—rejecting the Sixth Circuit's assessment—requires the sentencing court to clearly indicate that the "district court would have imposed the same sentence without the error," not just consider the factors listed in 18 U.S.C. § 3553(a) in order to "provide the basis for a holding of harmless error." *United States v. Barner*, 572 F.3d 1239, 1248 (11th Cir. 2009); *United States v. Garcia Morales*, 846 Fed. App'x 872, 879 (11th Cir. 2021).

Other circuits, including the Second Circuit, are reluctant to assume that the Guidelines error is harmless, unless the record unambiguously establishes that the sentence would not have been affected by the miscalculation. *United States v. Feldman*, 647 F.3d 450, 460 (2d Cir. 2011). Indeed, the Second Circuit rejects the sufficiency of the statement: "I would impose the same sentence regardless of any errors calculating the applicable Guidelines range." *Id.* Such a "simple incantation"––excepted by the First, Fourth, and Fifth Circuits—does not preclude appellate review of an imposed sentence. *Id.* Moreover, the Second Circuit urges sentencing

courts to refrain from answering the "hypothetical question of whether or not it definitely would impose the same sentence" absent a Guidelines error. *Id*. For that reason, the Second Circuit requires the district court to make an "explicit and unambiguous declaration that an urged Guidelines adjustment would not affect its ultimate sentence in any event." *United States v. Figueroa*, 738 Fed. App'x 719, 721 (2d Cir. 2018); *see also United States v. Jass*, 569 F.3d 47 (2d Cir. 2009).

The Third Circuit seeks to conduct meaningful appellate review by urging sentencing courts to preserve an unambiguous record of the sentencing proceeding in order to "improve the clarity of the record, promote efficient sentencing, and obviate questionable appeals." *United States v. Zabielski*, 711 F.3d 381, 389 (3d Cir. 2013). The record must show that "the district court would have imposed the same sentence absent the erroneous factor." *United States v. Smalley*, 517 F.3d 208, 212 (3d Cir. 2008) (quoting *Williams*, 503 U.S. at 203). The statements, however, are not taken at face value—as seen in the First, Fourth, and Fifth Circuits. Rather, the Third Circuit requires a "thorough explanation of the district court's reasoning." *Zabielski*, 711 F.3d at 389. The district court must "possess a 'sure conviction' that the sentence would be the same, not merely an assumption that "places us in the zone of speculation and conjecture."" *United States v. Raia*, 993 F.3d 185, 195 (3d Cir. 2021) (citations omitted). "Bare statement[s] devoid of any justification" are "at best an afterthought" and precludes the Third Circuit from determining that the erroneous Guidelines error was in fact harmless. *Smalley*, 517 F.3d at 215. Moreover, while the sentencing court's statements are "probative of harmless error, these statements will not always

suffice to show that an error in calculating the Guidelines range is harmless." *Zabielski*, 711 F.3 at 381. The Third Circuit, accordingly, will require resentencing when the district court fails to thoroughly justify the imposed sentence. *Smalley*, 517 F.3d at 215-16; *see also United States v. Wright*, 642 F.3d 148, n.6 (3d Cir. 2011); *United States v. Hester*, 910 F.3d 78, 91-92 (3d Cir. 2018).

Recognizing "the frequency with which sentencing judges are relying on inoculating statements," *United States v. Ashbury*, 27 F.4th 576, 581 (7th Cir. 2022), the Seventh Circuit reemphasized that district courts must provide "a detailed explanation of the basis for the parallel result." *United States v. Abbas*, 560 F.3d 660, 667 (7th Cir. 2009). The Seventh Circuit refuses to accept the sentencing court's "terse comments" at face value. *United States v. Loving*, 22 F.4th 630, 636 (7th Cir. 2022). Therefore, the Seventh Circuit created a framework for the standard the district court must meet in order for it to support a finding of harmlessness; the sentencing court must provide: (1) a detailed inoculating statement; and (2) an explanation that suggests a "parallel result." *Ashbury*, 27 F.4th at 581-82 ("By that, we mean that it must be 'tied to the decisions the court made' and account for why the potential error would not 'affect the ultimate outcome.'") (citations omitted). Consequently, if the inoculating statement fails to meet the standard, the Seventh Circuit cannot find that the miscalculation was harmless. *Id*. at 582.

The Eighth Circuit requires the sentencing court to provide more than a "blanket identical alternative sentence," *United States v. Ortiz*, 636 F.3d 389, 395 (8th Cir. 2011), to establish a "clear record that the judge intended to impose the same

sentence." *United States v. Henson*, 550 F.3d 739, 742 (8th Cir. 2008); *see also United States v. Lewis*, 827 F.3d 787, 790 (8th Cir. 2016) (noting that the district court considered the defendant's extensive criminal history and pending state charges when deciding to impose an upward variance from the advisory range); *United States v. Tegler*, 650 Fed. App'x 903, 906 (8th Cir. 2016) (noting that the district court considered the defendant's criminal history, service, health issues, as well as society's need for protection from the defendant's criminal conduct). The Ninth Circuit requires states that the sentencing court "explain, among other things, the reason for the extent of [a] variance." *United States v. Garcia-Jimenez*, 807 F.3d 1079, 1089 (9th Cir. 2015) (quoting *United States v. Acosta-Chavez*, 727 F.3d 903, 910 (9th Cir. 2013)) (citations omitted). The sentencing court's assertion that it would have imposed the same sentence "cannot, without more, cure the prejudice resulting from its incorrect Guidelines calculation." *Garcia-Jimenez*, 807 F.3d at 1089.

The Tenth Circuit rejects the notion that sentencing courts "can insulate sentencing decisions from review" by simply stating its consideration of the correct Guidelines range. *United States v. Burris*, 29 F.4th 1232, 1238 (10th Cir. 2022) (quoting *United States v. Gieswein*, 887 F.3d 1054, 1062-63 (10th Cir. 2018)). In order to conduct meaningful appellate review, the Tenth Circuit requires the district court to offer a "cogent explanation," rather than a perfunctory statement establishing that "the same sentence would be imposed even if the advisory [Guidelines] range was determined to be improperly calculated." *Burris*, 29 F.4th at 1238 (quoting *United States v. Pena-Hermosillo*, 522 F.3d 1108, 1117 (10th Cir. 2008)). Consequently, the

Tenth Circuit is inclined to hold that the district court has failed to support a finding of harmlessness when the "district court's exercise of discretion [is] untethered from the correct calculation" of the Guidelines. *Burris*, 29 F.4th at 1239.

Here, the Fifth Circuit accepted the sentencing court's word at face value. During the sentencing proceeding, the district court reviewed the § 3553(a) factors and explained that it would have imposed a 365-month sentence as an upward variance even if the Guidelines advised a lower range. (ROA.152-54). The district court did not provide the record with anything other than this bare statement. Nevertheless, the Fifth Circuit upheld the imposed sentence under its more forgiving standard for evaluating harmlessness—not the standard that requires the sentencing court to "convincingly" show that the same sentence would have been imposed "for the same reasons." *United States v. Gonzales*, 2022 WL 1421032, 2022 U.S. App. LEXIS 12297, (5th Cir. May 5, 2022).

Accordingly, the Fifth Circuit's standard not only fails to meet its obligation imposed by this Court but continues to prejudice defendants by taking the sentencing court's decision at face value. This Court—and the majority of other circuits—requires more than the district court's simple incantation that it would have imposed the same sentence absent a Guidelines error. Therefore, this Court should vacate the sentence imposed on Mr. Gonzales and resolve the circuit split over harmless error review.

II. The Adam Walsh Act is facially unconstitutional because it accords federal jurisdiction whenever—as in this case—a defendant does no more than drive a vehicle for a few intrastate miles.

The federal government is limited to the enumerated powers granted by the Constitution, and the powers reserved for the states are "numerous and indefinite." *United States v. Lopez*, 514 U.S. 549, 552 (1995) (quoting The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961). The Constitution grants the federal government the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3. The federal government, accordingly, has the authority to enact legislation that is "necessary and proper" to carry out its enumerated duties under the Commerce Clause. U.S. Const., Art. I, § 8, cl. 18.

To ensure a "healthy balance of power between the States and the Federal Government" remains, this Court must enforce the outer limits of the federal government's power to regulate purely local activity under the Commerce Clause. *Lopez*, 514 U.S. at 552, 566. The Constitution accords the States a plenary police power and restricts the federal government from intruding into the zone of activities reserved for the States—a distinction between "what is truly national and what is truly local" must remain. *Id.* at 567-68. Indeed, this Court has historically limited the federal government's power to exercise a police power, *id*. at 584 (Thomas, J., concurring), because reserving the police power to the States is deeply ingrained in our constitutional history. *United States v. Morrison*, 529 U.S. 598, n.8 (2000). Indeed, there is "no better example of the police power, which the Founders denied the

National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Morrison*, 529 U.S. at 618.

A. The federal government's 2006 Amendment to the Adam Walsh Act reaches beyond its broad, but not unlimited, authority to regulate purely local activity.

The 2006 Amendment to 18 U.S.C. § 1201(a)(1) is an improper exercise of congressional authority under the Commerce Clause. The Act's regulation of purely criminal, noneconomic activity undermines this Court's precedent. Under the Commerce Clause, the federal government may regulate only:

(1) "channels of interstate commerce";
(2) "instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and
(3) "activities having a substantial relation to interstate commerce."

Lopez, 514 U.S. at 558-59. Because Petitioner seeks to challenge the regulation of purely local, criminal activity under 18 U.S.C. § 1201(a)(1), we must analyze whether such activity substantially effects interstate commerce. This Court, in *Lopez*, developed a framework to analyze challenges to statutes under the Commerce Clause; this Court must determine whether the statute: (1) regulates intrastate economic activity that substantially affects interstate commerce; (2) includes a "jurisdictional element which would ensure, through case-by-case inquiry, that the [activity] in question affects interstate commerce"; (3) includes legislative findings regarding the effects of the purely local, criminal conduct—kidnapping as in this case—has on interstate commerce; and (4) lacks a nexus between the criminal conduct and the effects it has on interstate commerce. *Morrison*, 529 U.S. at 609-12

Under the *Lopez* framework, Congress exceeded its authority under the Commerce Clause by regulating criminal conduct that lacks a substantial relation or effect on interstate commerce. First, this Court restricts the federal government's power to regulate intrastate activity by striking legislation solely focused on noneconomic, criminal conduct. *Morrison*, 529 U.S. at 610-11 ("Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor."). Similar to the criminal statue in *Lopez*, regulating firearm possession within a school zone, kidnapping lacks any relation to an "economic enterprise" nor is it "an essential part of a larger regulation of economic activity." *Lopez*, 514 U.S. 561. Therefore, Congress has no authority to regulate such noncommercial, intrastate activity.

Second, the 2006 Amendment essentially erased the jurisdictional element to 18 U.S.C. § 1201(a)(1). Requiring a jurisdictional element ensures that the criminal conduct has an "explicit connection with or effect on interstate commerce." *Id*. at 562. Prior to 2006, 18 U.S.C. § 1201(a)(1) included a jurisdictional element tied to the federal government's enumerated powers under the Commerce Clause and maintained a "healthy balance of power between the States and the Federal Government" by limiting federal jurisdiction to cases where the victim was transported in interstate or foreign commerce. *Id*. at 552; Colin V. Ram, *Regulating Intrastate Crime: How the Federal Kidnapping Act Blurs the Distinction Between What is Truly National and What Is Truly Local*, 65 Wash. & Lee L. Rev 767, 786

(2008). However, Act's 2006 Amendment erases the distinct line between the states and federal government's ability to regulate violent crime. As a result, Congress "dramatically increased the scope of federal jurisdiction under the Act." *Id*. at 786; *see* Pub. L. No. 109-248, § 213, 120 Stat. 587, 616-17 (2006). The amended statute fails to limit the federal government's power under the Commerce Clause, and instead, demonstrates Congress's broad reach to regulate local crime.

Third, the legislative history of the Act and its 2006 Amendment fails to contain legislative findings that a single kidnapping occurrence within the confines of a single state substantially affects interstate commerce. Rather, legislative history suggests that the primary concern addressed by the 2006 Amendment was internet safety and the need to protect children from sexual predators while using such an "important economic tool." Michelle Martinez Campbell, *The Kids Are Online: The Internet, The Commerce Clause, and the Amended Federal Kidnapping Act*, 14 U. Pa. J. Const. L. 215, 242 (2011) ("This focus on the safety of Internet use was explicit in the floor debate on the Adam Walsh Act."). Further, because this Court acknowledges that congressional findings are probative, not dispositive, this Court must determine "whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question." *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring). And here, the noncommercial, criminal activity—conducted within a single county in Texas—falls outside the federal government's scope of power to regulate such conduct.

Last, the nexus between a single kidnapping occurrence within a state and its effects on interstate commerce is too attenuated. The ability for Congress to regulate purely local, noneconomic activity would "permit Congress to 'regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.'" *Morrison*, 529 U.S. at 612-13 (citation omitted). If even a brief or incidental driving on such a highway within a single interior county gives rise to total federal control, then the expansion of federal power has severely infringed upon that of the states.

With the enactment of the 2006 Amendment to the Adam Walsh Act, the Court's fear became true: the power of the federal government to regulate purely local crimes has "virtually no limit." *Lopez*, 514 U.S. at 555 (citation omitted). Petitioner's noneconomic, criminal conduct—kidnapping—occurred solely in Levelland, Texas without an exchange of money for commercial reasons. Levelland, Texas does not touch any state or national border. Further, the indictment and discovery are unclear as to whether Mr. Gonzales even alleged to have driven on an interstate highway. Even if he did, basing federal jurisdiction on that act alone would be an unconstitutional expansion of plenary federal criminal jurisdiction. Therefore, this Court should limit the federal government's power to regulate noneconomic, violent criminal activity and hold 18 U.S.C. § 1201(a)(1) unconstitutional.

B. 18 U.S.C. § 1201(a) is unconstitutional even under the standard established in *United States v. Salerno*.

This Court should reconsider the "no set of circumstances" standard constructed in *United States v. Salerno* for analyzing facial challenges to statutes.

481 U.S. 739 (1987). In *Salerno*, this Court established: in order to succeed on a 'typical' facial challenge, litigants "must establish that no set of circumstances exists under which the [statute] would be valid." *Id*. at 745. Under this stringent standard, litigants must carry the "heavy burden" of establishing that a statute cannot conceivably operate constitutionally under any set of circumstances. *Id*. Because the Court regards facial challenges as "disfavored," the Court formulated the *Salerno* standard in order to circumvent premature invalidation of statutes and avoid judicial speculation about theoretical cases and controversies. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-50 (2008). *But see* Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 Cal. L. Rev. 915, 935 (2011) ("[T]he Court has held statutes wholly invalid under nearly every provision of the constitution under which it has adjudicated challenges to statutes.").

The Court seemingly developed this difficult standard to preserve legislative purposes and avoid "shortcircuit[ing] the democratic process." *Wash. State Grange*, 552 at 450-51. Unfortunately, *Salerno* fell short of establishing a 'typical' standard for analyzing facial challenges, and ultimately, established a heavily criticized and disregarded standard that deters litigants from challenging the vast power of the federal government. *See* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 239 (1994). Additionally, members of this Court have expressed the need for granting certiorari to resolve the issue of uncertainty regarding *Salerno*'s applicability and to state a clear standard for analyzing facial challenges to statutes. *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S.

1174, 1180 (1996) (Scalia, J., dissenting the denial of granting certiorari) ("All the more reason to grant certiorari and make [the proper standard for evaluating facial challenges] clear."). Accordingly, Petitioner Gonzales respectfully requests the same and for this Court to hold, for the reasons stated below, that the *Salerno* "no set of circumstances" standard is inapplicable to this case.

The "no set of circumstances" standard is not consistently applied by this Court or by the lower courts when analyzing facial challenges to statutes. *City of Chicago v. Morales*, 527 U.S. 41, n.22 (1999) (Stevens, J., plurality opinion). Moreover, the "draconian" *Salerno* standard "does not accurately characterize the standard for deciding facial challenges." *Janklow,* 517 U.S. at 1175 (Stevens. J., mem. respecting the denial of certiorari) ("Salerno's rigid and unwise dictum has been properly ignored in subsequent cases."). Moreover, the Court has failed to utilize the *Salerno* standard when addressing facial challenges concerning various substantive constitutional doctrines. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (abortion); *United States v. Stevens*, 559 U.S. 460 (2010) (free speech); *Broadrick v. Oklahom*a, 413 U.S. 601 (1973) (free expression); *Lopez*, 514 U.S. 549 (commerce clause); *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529 (2013) (voting rights); *Johnson v. United States*, 576 U.S. 591 (2015) (due process); *Romer v. Evans*, 517 U.S. 620 (1996) (equal protection). Furthermore, this Court has failed to provide an explanation for its eschewal from the *Salerno* standard. *Johnson*, 576 U.S. 591 (Alito, J., dissenting) ("There is no reason why the no-set-of-circumstances rule should not apply.").

The uncertainty regarding the applicable standard for evaluating facial challenges—promulgated by the Court's inconsistent application of *Salerno*—resulted in disagreement, confusion, and criticism from judges and legal scholars alike. Notably, the lower courts acknowledge the concerns regarding the viability of the *Salerno* standard and express the desire for this Court to resolve the issue. In its discussion of an appropriate applicable standard, the Second Circuit noted that the Court has failed to set forth a clear standard for analyzing facial challenges, even in cases outside the scope of the First Amendment's overbreadth exception. *Lerman v. Bd. Of Elections in City of New York*, 232 F.3d 135, 144, n.10 (2d Cir. 2000) (citing *City of Chicago*, 527 U.S. 41, n.22 (plurality opinion) (the Second Circuit, disagreeing with the district court's application of *Salerno*, applied the overbreadth doctrine to a facial challenge). *See also United States v. Rybicki*, 354 F.3d 124, 132 n.3 (2d Cir. 2003) ("[W]e have noted that competing views in the Supreme Court have been set out in dicta."). In a narrower sense, the Sixth Circuit explained that the uncertainty has led to disagreements and inconsistent applications of *Salerno* within the circuit itself. *Staley v. Jones*, 239 F.3d 769, 790, n.26 (6th Cir. 2001). The Seventh Circuit explained the lower courts' frustration with the Court's "disregard" of the *Salerno* rule in Supreme Court cases because it "leaves [courts] with irreconcilable directives" and "put[s] courts of appeals in a pickle" when evaluating facial challenges. *A Woman's Choice-E. Side Women's Clinic v. Newman*, 305 F.3d 684, 687 (7th Cir. 2002). As a result of the Court's "spotty" application of the "no set of circumstances" standard, the Court provides unclear directives to discern the applicable standard for

the facial challenge in question, leaving lower courts to the task. *Mineral Policy Center v. Norton*, 292 F.Supp.2d 30, 39 (D.D.C. 2003) (also noting other circuits courts' conflicting perspective with the *Salerno* standard).

The inconsistency and criticism is founded in an incorrect interpretation of the *Salerno* standard—the "no set of circumstances" standard is "but a description of the outcome of a facial challenge in which a statute fails to satisfy the appropriate constitutional framework." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1123 (10th Cir. 2012). Accordingly, this Court repeatedly applies the applicable doctrinal standard to a statute when evaluating facial challenges, disregarding the *Salerno* standard. Thus, following an unconstitutional determination of a particular statute, indeed, there are "no set of circumstances" in which the statute would be constitutional. David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 Iowa L. Rev. 41 (2006) (citation omitted). As a result, the *Salerno* standard should not be viewed as a threshold requirement for all facial challenges, and instead, viewed as the result of a successful facial challenge. *Id*. at 60-61.

This Court has failed to apply—or even discuss—the *Salerno* standard in Commerce Clause facial challenges. *See Lopez*, 514 U.S. 549; *Morrison* 529 U.S. 598. Accordingly, this Court should evaluate the Adam Walsh Act as a facial challenge by determining whether the "statute is invalid on its face because of a constitutional infirmity that inheres in the statute as written, regardless of the facts or circumstances surrounding particular applications." David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 Iowa L. Rev. 41, 44,

90 (2006). Both *Lopez* and *Morrison* are examples of this application; the Court's analysis of the statutes in *Lopez* and *Morrison* was measured against the Commerce Clause standard for validating statutes—whether an appropriate legislative purpose and a commercial nexus to the regulated conduct was evident in the statute. *Id*. at 94. Because the Adam Wash Act does not have a permissible regulatory purpose to regulate purely local, noneconomic criminal conduct—as explained above—the Act exceeds the federal government's authority pursuant to the Commerce Clause.

Therefore, the facial challenge to the Adam Walsh Act is a proper challenge under the federal government's authority under the Commerce Clause, and this Court should hold that the Act exceeds congressional authority.

Conclusion

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted on June 30, 2022.

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