No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2023

- -

GEORGE OSCAR MESSER

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

- -

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

- -

ROBERT L. ABELL
120 North Upper Street
Lexington, KY 40507
859-254-7076
Robert@RobertAbellLaw.com

COUNSEL OF RECORD

QUESTIONS PRESENTED

---

(1) Whether the residual clause of "or otherwise" of the federal kidnapping statute, 18 U.S.C. § 1201, is void for vagueness under the due process clause of the Fifth Amendment?

(2) Whether the mere use of an instrumentality of interstate commerce – driving a car on a street – empowers Congress to federalize a wholly intrastate, noneconomic, violent crime?

LIST OF PARTIES

The parties to the proceedings and in this Court are Petitioner George Oscar Messer, the defendant-appellant below, and the United States of America, the plaintiff-appellee below.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases **Page(s)**

No. _____

- -
- -

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2023
- -

GEORGE OSCAR MESSER

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

- -

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

- -

Petitioner George Oscar Messer respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on June 21, 2023. The Sixth Circuit denied a petition for rehearing by order entered August 16, 2023.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit entered June 21, 2023, is reported at 71 F.4th 452. A copy is attached as Appendix A. A copy of the

Sixth Circuit's order denying a petition for rehearing entered August 16, 2023, is attached as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit for which petitioner seeks review was entered June 21, 2023. A copy is attached as Appendix B.

Petitioner timely filed a petition for rehearing and that petition for rehearing was timely filed but denied by Order entered August 16, 2023. Appendix C.

The United States District Court for the Eastern District of Kentucky exercised jurisdiction over this case pursuant to 18 U.S.C. § 3231 and 28 U.S.C. § 97(a), because the indictment alleged offenses against the laws of the United States occurring with the Eastern District of Kentucky.

The United States Court of Appeals for the Sixth Circuit exercised jurisdiction over this case pursuant to 28 U.S.C. § 1291.

This Court's jurisdiction arises under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

There are two constitutional provisions involved in this case. One is the due process clause of the Fifth Amendment to the United States Constitution which provides as follows:

AMENDMENT V

> No person shall be … deprived of life, liberty, or property, without due process of law; …

ART. I, § 8, CL. III

The second is the "commerce clause" which appears at Article I, § 8, clause III of the Constitution and it provides as follows:

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

STATEMENT OF THE CASE

The charges: kidnapping, 18 U.S.C. § 1201(a)(1)

The indictment charged petitioner and a co-defendant, Jake Messer, his son, with two counts of kidnapping in violation of 18 U.S.C. § 1201(a)(1). Indictment, R. 8, #28. The charges were repeated in a superseding indictment, which merely corrected a typographical error. Superseding Indictment, R. 129, #488.

The case regards events occurring on April 28-29, 2018, and only within the state of Kentucky, its Whitley and Clay counties. *Id*. The alleged kidnappings were federalized by the allegation that defendants used "a means, facility, and instrumentality of interstate commerce, to wit: the Internet, Facebook accounts, Interstate Highway 75, Kentucky Highway 80, and a Ford Expedition (1999) … in committing and in furtherance of the commission of such offense(s)." *Id*. The charged purpose(s) of the kidnappings: "assault." *Id*.

Petitioner's motion to dismiss

Petitioner moved to dismiss the indictment on two grounds: (1) the residual purpose of "otherwise" in the federal kidnapping statute, 18 U.S.C. § 1201, is unconstitutionally vague; and (2) it is beyond the scope of Congress' commerce

clause powers to make a federal crime of non-economic, wholly intrastate violent crime. Motion to Dismiss, R. 30, #94.

The district court denied the motion. Order, R. 44, #161. First, the court rejected the vagueness challenge based on this Court's decisions in *Gooch v. United States*, 297 U.S. 124 (1936) and *United States v. Healy*, 376 U.S. 75 (1964), and the Sixth Circuit's decision in *Daulton v. United States*, 474 F.2d 1248, 1248-49 (6th Cir. 1973). Order at 6, #166.

Second, the district court rejected petitioner's Commerce Clause challenge based mainly on the Sixth Circuit's in *United States v. Small*, 988 F.3d 241, 252 (6th Cir.), *cert. denied*, 142 S.Ct. 191 (2021), which rejected a Commerce Clause challenge – one resting on different grounds than presented here -- to the kidnapping law, and *United States v. McHenry*, 97 F.3d 125, 127 (6th Cir. 1996), *cert. denied*, 519 U.S. 1131 (1997), which identified a car as an instrumentality of interstate commerce. The district court also noted that "multiple alleged interstate commerce instrumentalities" were charged as involved, Order at 10, #170, including "a vehicle, the internet, and Facebook." *Id*. The upshot, the district court asserted, was that Congress was empowered by the Commerce Clause to prohibit use of an instrumentality of interstate commerce for harmful purposes, "'even if the targeted harm itself occurs outside the flow in interstate commerce and is purely local in nature.'" *Id*. at 11, *quoting United States v. Ballinger*, 395 F.3d 1218, 1226 (11th Cir. 2005), and also *citing United States v. Brown*, 2014 WL 4473372 (S.D.N.Y. 2014).

Petitioner renewed his motion to dismiss and arguments at the close of the government's case and the close of the case, and they were denied. Criminal Minutes, R. 158, #627; Criminal Minutes, R. 161, #670.

The trial evidence

The absence of any interstate or commerce nexus

The evidence at trial did not establish or attempt to establish any interstate or commercial nexus. Instead, it showed that Petitioner traversed, all within the state of Kentucky, I-75, Ky. Highway 80 and some other roads in Kentucky in a Ford Expedition SUV. A least one cell phone call involved Petitioner. A Facebook audio call was made by an accomplice to Petitioner to a co-defendant as Petitioner sought to locate a trailer. There was also testimony and exhibits showing text messages and cell phone communications between and among the co-defendant and several other persons present at the trailer. At all times during all these communications, each of these individuals was located within the state of Kentucky. The government did not present any evidence that the signals for any of the cell phone calls, text messages or other communications were routed across state lines.

The government did not charge and did not argue to the jury that there was a financial, economic or pecuniary purpose for the kidnappings. The indictment charged the violent criminal purpose of assault, which the government argued in summation included not just the assault of V1 but also the sexual assaults of V2. Tr., R. 269, #2077.

There was no violence *directed at* any channel or instrumentality of interstate commerce. Rather, the channels and instrumentalities of interstate commerce were used incidental to non-economic, wholly intrastate violent crimes.

The evidence regarding the crimes

The evidence at trial showed that the case began with a proposed marijuana transaction. V1[1] contacted Jake Messer around mid-day on April 28, 2018, and pitched the deal to him. Tr. (V1), R. 180, #983. Messer needed more cash to meet his end so he borrowed $3,000 from a third party, Scott Patterson. Tr. (Patterson), R. 179, #913-14.

Jake Messer, V1, V2, who was V1's girlfriend, and some others met up at the house in Whitley County, Kentucky, where Jake Messer lived with Petitioner, his mother and others. Tr. (V1), R. 180, #983-84. Jake Messer and V1 drove to Corbin, Kentucky to execute the marijuana transaction. *Id*. at 985. They were ripped off; the supposed sellers succeeded in absconding with the buy money, and no marijuana was transferred. *Id*.

After the buy money was stolen, Jake Messer texted, Facebook messaged and phoned Patterson and reported the robbery to him. Tr. (Patterson), R. 179, #917-18. Patterson, along with his girlfriend, Myra Van Denk, then drove to the Messer residence to meet up with Jake Messer, V1 and the others. Id. at #918; Tr. (Van Denk), R. 180, #968.

[1] The district court ordered post-trial that the individuals the jury found Petitioner had kidnapped be referred to in the trial transcripts as V1 and V2. Sealed Order, R. 174, #891; Order, R. 215, #1372.

Jake Messer and Patterson conferred at the Messer residence. Tr. (Van Denk), R. 180, #969; Tr. (V2), R. 180, #1102. They suspected that V1 was in cahoots with the robbers. Tr. (Patterson), R. 179, #921; Tr. (Van Denk), R. 180, #969. They resolved that Jake Messer and V1 would attempt to locate the robbers and retrieve the buy money. Tr. (Patterson), R. 179, #921; Tr. (V2), R. 180, #1102. Meanwhile, V2 remained with Patterson serving, as Patterson stated, as "insurance," and Patterson, V2 and Van Denk drove to Clay County, Kentucky, which was less than hour away. Tr. (Patterson), R. 179, # 922. On the way, Patterson dropped Van Denk off so she could run some errands, and he and V2 stopped for some while at a store and played video poker. *Id*. at #923; Tr. (Van Denk), R. 180, #970. Patterson had asked V2 for and she had given him her cell phone. Tr. (Patterson), R. 179, #922. V2 told Patterson while they were playing video poker that she was "cool." *Id*. at #957.

Somewhere in this time frame, Jake Messer called Petitioner on his cell phone and reported the robbery, according to Josh Mills who was with Petitioner and driving Petitioner's Ford Expedition. Tr. (Mills), R. 180, #1019. Upon receiving Jake Messer's call, Mills and Petitioner returned to the Messer residence and retrieved some firearms, two pistols and an AR-15. *Id*. at 1019-20. They then, along with Mills' young son and a woman Mills did not know, drove to the trailer in Clay County, Kentucky, where Jake Messer had indicated. *Id*. at 1019-21. They had difficulty locating the trailer, and Mills made a Facebook audio call to Jake Messer on the woman's Facebook account. *Id*. at 1022-23. Their route was entirely in the state of Kentucky. *Id*. at 1031.

The testimony regarding events at the trailer is disturbing. Petitioner, by numerous witnesses' account, was very intoxicated, armed and made numerous statements threatening harm to V1 and others. There was rampant drug use especially methamphetamine by many present. V1 was threatened with various forms of violence. V1 and V2 were separated and not permitted to see one another. V2 was sexually assaulted by Jake Messer. Petitioner sexually abused V2, although he claimed in a recorded statement that the sexual contact between the two was consensual, notwithstanding his concessions that V1 was not free to leave the trailer and that he displayed a firearm during the contact.

Petitioner, Mills, V1, V2, Mills' son and the unidentified female left the trailer around 4 – 5 a.m. the morning of April 29, 2018. Tr. (Van Denk), R.180, #977-78. The testimony regarding the events and goings on April 29, 2018, is a little mixed. The group returned to Petitioner's residence, at some point gathered some firewood, at another visited a Dustin Walters in an attempt to retrieve a generator that Petitioner had loaned Walters, went to the residence of V1 and V2 where Petitioner rummaged through their things and eventually stopped near Petitioner's residence where Petitioner began to give V2 a pistol-shooting lesson. Tr. (Walters), R. 179, #1007-08; Tr. (Mills), R. 180, #1033; Tr. (V1), R. 180, #995-96; Tr. (V2), R. 180, #1111. Walters testified that V1 told him that he (V1) and V2 were being held hostage by Petitioner, which Petitioner, according to Walters, confirmed. Tr., R. 179, # 1009. Regina Brooks, V1's mother, came upon them, told V1 and V2 to get in her vehicle, they did and then retrieved V1's truck which was parked at Petitioner's

residence nearby. Tr. (V2), R. 180, #1102; Tr. (V1), R. 180, #999; Tr. (Woods), R. 180, #1094-96.

The proof at trial regarding Petitioner's use of "a means, facility and instrumentality of interstate commerce" was as follows. All the pertinent events, communications and travel took place in the state of Kentucky or, in the case of communications, were between individuals themselves located in the state of Kentucky. Tr. (Mills), R. 180, #1081, 1083; Tr. (Van Denk), R. 180, #981; Tr. (V1); R. 180; #1001; Tr. (Patterson), R. 179, #956; Tr. (Jewell), R. 180, #1054, 1059. Mills testified that he and Petitioner and their passengers drove from Petitioner's residence in Whitley County, Kentucky and the trailer in Clay County, Kentucky by way of I-75, Ky. Hwy. 80 and other roads. Tr. (Mills), R. 180, #1021. This was a wholly intrastate and local crime. The government did put on proof that the 1999 Ford Expedition in which Petitioner rode had been manufactured in Michigan. Tr. (Jesse Armstrong), R. 180, #1075. There was no evidence that any of the signals for the cell phone calls crossed any state line.

The Sixth Circuit's Ruling

After Petitioner filed his brief in the Sixth Circuit on August 24, 2022, the Sixth Circuit issued a ruling in *United States v. Windham*, 53 F.4th 1006 (6th Cir. 2022). *Windham* bound the Sixth Circuit panel in this case.

Windham took a step that it appears no other court has yet taken and which this Court should correct. The Sixth Circuit in *Windham* ceded general police power to the federal government as to wholly intrastate violent crime based merely on the

intrastate use of an instrumentality of interstate commerce – a cell phone call, driving a car down a road – to further or commit the crime. The court in *Windham* recognized that it was facing a question of first impression, noted the dearth of authority and then by its ruling unbound a federal government of supposedly limited, enumerated powers.

The defendant in *Windham*, while remaining at all times within the state of Ohio, used a cell phone and a motor vehicle in furtherance of the kidnapping. 53 F.4th at 1009. Their use, however, was entirely intrastate. *Id*. at 1011. There is no mention of any evidence that any cell phone call crossed any state line in transmission. The defendant pleaded guilty and then challenged on appeal the kidnapping statute on Commerce Clause grounds.

The Sixth Circuit rejected the defendant's Commerce Clause challenge, finding, as a question of "first impression," that defendant's "intrastate use of a cell phone and automobile satisfies [the kidnapping statute's] interstate commerce requirements." 53 F.4th at 1011. First, the Sixth Circuit recited some history of the Commerce Clause and related jurisprudence including this Court's admonition in *United States v. Morrison,* 529 U.S. 598 (2000) that "[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the states." *Id*., *quoting*, *Morrison*, 529 U.S. at 618.

Second and ultimately, the *Windham* court turned to its prior decision in *United States v. Weathers*, 169 F.3d 336 (6th Cir.), *cert. denied*, 528 U.S. 838 (1999),

which involved a Commerce Clause challenge to the federal murder-for-hire statute, 18 U.S.C. § 1958.

The Sixth Circuit in *Weathers* was asked to "decide whether the use of a cellular telephone in a murder-for-hire scheme satisfies the interstate commerce jurisdictional requirement of the federal murder-for-hire statute, 18 U.S.C. § 1958, where both parties to the conversation were within the state of Kentucky at the time of the telephone calls, but use of the cellular phone involved an interstate signal sent to communications equipment in both Kentucky and Indiana." 169 F.3d at 337. The Court held that it did.

First, the Sixth Circuit distinguished between statutory language using the phrase "instrumentality *in* interstate commerce" as opposed to statutory references to an "instrumentality *of* interstate commerce" and concluded that "a statute that speaks in terms of an instrumentality *in* interstate commerce rather than an instrumentality *of* interstate commerce is intended to apply to interstate activities only." *Weathers*, 169 F.3d at 341, *quoting*, *United States v. Barry,* 888 F.2d 1092, 1095 (6th Cir.1989)(emphasis in *Weathers*). Second, the Court then held that the government must prove the instrumentality was used "*in* interstate commerce." *Weathers*, 169 F.3d at 342. (emphasis in original). Third, the Sixth Circuit then concluded that the government had proved this with evidence that the defendant's cell phone call had to be transmitted from Kentucky across state lines to Indiana and back to Kentucky. *Id*. In sum, *Weathers* did not hold that a wholly intrastate

cell phone call to further a violent crime could satisfy a constitutionally-sound interstate commerce nexus.

The *Windham* court recited *Weathers*' distinction between "a statute that speaks in terms of an instrumentality *in* interstate commerce rather than an instrumentality *of* interstate commerce is intended to apply to interstate activities only." 53 F.4th at 1012-13. From this the *Windham* panel drew the following assertion: "Conversely, therefore, statutes that refer to instrumentalities *of* interstate commerce apply to intrastate activities." *Id.* at 1013. (emphasis in original).

The *Windham* Court then concluded that the issue was only whether instrumentalities of interstate commerce – "whether cars and cell phones are instrumentalities of interstate commerce, not whether they were used interstate." *Id.* And since cars and cell phones are instrumentalities of interstate commerce and since the defendant had used them in furtherance of the kidnapping, the Sixth Circuit rejected the Commerce Clause challenge.

With all due respect to the Sixth Circuit, the question it had to answer but evaded is whether the Commerce Clause empowers Congress to regulate and punish "intrastate violence that is not *directed at* the instrumentalities" of interstate commerce. This Court plainly stated in *Morrison* that it does not. 529 U.S. at 616. That assertion relied upon Chief Justice John Marshall's opinion in *Cohens v. Virginia*, 6 Wheat. 264 (1821), a case decided in our Republic's early era more than 200 years ago, as its support for the proposition. If driving a car around

the corner and down the street is sufficient to federalize a noneconomic, violent crime, Congress's police power under the Commerce Clause is nearly boundless. *Windham* would allow this.

Petitioner was obliged to concede to the Sixth Circuit that his argument regarding the void-for-vagueness aspect of the "or otherwise" residual clause of the kidnapping statute was foreclosed by this Court's egregiously erroneous decision in *Gooch v. United States*, 297 U.S. 124 (1936). 71 F.4th at 458.

The Sixth Circuit panel noted, as Petitioner was obliged to also concede, that it was bound by its earlier panel decision in *Windham* as to the Commerce Clause argument. Id. at 457.

Petitioner sought *en banc* review on the Commerce Clause argument. The Sixth Circuit denied that petition by order issued August 16, 2023. See Appendix C. The Sixth Circuit has just issued its decision in *United States v. Allen*, 2023 WL 7401802 (6th Cir., November 9, 2023), where the concurring opinion observes that *Windham* strays from this Court's Commerce Clause caselaw.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari and correct the egregious errors that coalesced here and allowed federal prosecution under a constitutionally infirm statute of a wholly intrastate violent crime with no shown connection however fleeting and tenuous to interstate commerce.

(1) A vague law is no law at all

"[A] vague law is no law at all," the Court observed recently in *United States v. Davis*, 139 S.Ct. 2319, 2323 (2019). When, nevertheless, Congress ignores this basic point, the Court's role is to "treat the law as a nullity and invite Congress to try again." *Id*. The federal kidnapping statute, 18 U.S.C. § 1201(a) suffers this infirmity.

The Court needs to revisit and overrule *Gooch v. United States,* 297 U.S. 124 (1964), where it abandoned a commonsense reading of the statute and the principle of *ejusdem generis* to rely upon legislative reports to conclude that Congress amended the statute to add the residual "otherwise" to encompass nonpecuniary purposes in addition to reward and ransom. 297 U.S. at 127-128.

Gooch rests on the discredited practice of relying upon legislative history as a tool of statutory construction. "As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.,* 545 U.S. 546, 568 (2005); *see also United States v. Laton*, 352 F.3d 286, 313 (6th Cir. 2003), *cert. denied,* 542 U.S. 937 (2004)(Sutton, J., dissenting)("when clarity in the text of a law is required, legislative history by definition cannot supply it.").[2]

A further step away from the statutory text, as well as any notion or consideration of the constitutional limitations on Congress' commerce clause powers and federalism, was taken in *United States v. Healy,* 376 U.S. 75, 81 (1964), which

[2] Judge Sutton also emphasizes the hazards of using "legislative history to *broaden* the reach of a law" where doing so both risks altering the federal-state balance and imposes a criminal sanction. *Id*. at 313-14.

again invoked legislative history to hold that "otherwise" was not limited to illegal or criminal purposes. *See also United States v. Atchison,* 524 F.2d 367, 368 (7th Cir. 1975)(guilt for kidnapping established by evidence that defendant abducted a child because of "concern for the child's well-being and a belief that she was being mistreated by her parents."). So the application of the kidnapping statute has strayed so far from constitutional mooring to reach not just legal purposes but also legal and benevolent purposes; ordinary people do not and should not conceive that the latter could constitute a crime of any kind.

The Court first began to restore the vitality of the vagueness doctrine in *Johnson v. United States*, 576 U.S. 591 (2015). In *Johnson*, the Court invalidated on vagueness grounds the residual provision of the Armed Career Criminal Act that embraced "any crime" that "otherwise involves conduct that presents a serious potential risk of physical injury to another." Subsequently, in *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018), the Court struck down on vagueness grounds the residual clause of 18 U.S.C. § 16, which defines "crime of violence" for purposes of many federal statutes as "any other [felony] offense … that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Finally and most recently, in *United States v. Davis*, 139 S.Ct. 2319 (2019), the Court held that the residual provision of 18 U.S.C. § 924(c)(3)(B) was void for vagueness, that statute being virtually indistinguishable from the statute involved in *Dimaya. See* 139 S.ct. at 2324.

While held void for vagueness, the statutes involved in *Johnson*, *Dimaya* and *Davis* were substantially more limited and specific than is the residual provision of "otherwise" found in 18 U.S.C. § 1201(a)(1). The statute in *Johnson* limited the "otherwise" in its residual clause to offenses involving "conduct that presents a serious potential risk of physical injury to another." The statutes in *Dimaya* and *Davis* both limited their application to some limited number of situations where there was posed a "substantial risk that physical force" was or could have been used. The residual "otherwise" in 18 U.S.C. § 1201, however, contains no such limitation. As used in § 1201, "otherwise" means "in a different manner" or "in another way." *James v. United States,* 550 U.S. 192, 218 (2007)(Scalia, J., dissenting). If, as in *Johnson, Dimaya* and *Davis,* the limitations to some subset of laws and scenarios on the "otherwise" involved in those cases' statutes leave the statutes nevertheless void for vagueness, the completely unlimited "otherwise" in 18 U.S.C. § 1201 is similarly void for vagueness.

The most natural reading of § 1201 is that its residual "otherwise" is fulfilled only by some purpose similar to the enumerated purposes of "reward or ransom." "In other words, [these] enumerated [purposes] are examples of what Congress had in mind under the residual provision, and the residual provision should be interpreted with those examples in mind." *James* (Scalia, J., dissenting), *supra.* This commonsense observation is nothing more than recitation of the "canon of *ejusdem generis*: '[W]hen a general word or phrase follows a list of specific persons

or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed.'" *Id.*

Healy and the Seventh Circuit case, *United States v. Atchison,* 524 F.2d 367, 368 (7th Cir. 1975), illustrate how removed from due process requirements is the residual "otherwise" clause of the kidnapping statute. *Healy* says "otherwise" can mean something that is a crime or something that is not a crime. This complete ambiguity fails the base requirement that the federal criminal laws must "give ordinary people fair warning about what the law demands of them." Davis, 139 S.Ct. at 2323. No reasonable person would conceive they could commit a federal crime by acting in good-faith to protect a child. The magnitude of the error becomes even more pronounced when the Sixth Circuit's erroneous commerce clause case law is considered as will be shown below.

(2) The mere use of an instrumentality of interstate commerce does not empower Congress to federalize a wholly intrastate, non-economic violent crime

The Constitution's Commerce Clause empowers Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]" U.S. Const. Art. I, § 8, cl. 3. "More generally, the idea of commerce seems closer to the idea of "trade" than to other economic activities." R. Epstein, *The Proper Scope of the Commerce Power*, 73 Va.L.Rev. 1387, 1389 (1987). "It is in just this sense that the term was used in ordinary discourse at the time of the founding." *Id.*

"The Federal Government 'is acknowledged by all to be one of enumerated powers.'" *Nat'l Fed. of Ind. Business v. Sebelius*, 567 U.S. 519, 534 (2012)(*NFIB*), *quoting McColloch v. Maryland*, 4 Wheat. 326, 405 (1819). "The enumeration of powers is also a limitation of powers, because '[t]he enumeration presupposes something not enumerated.'" *Nat'l Fed. of Ind. Business, supra, quoting Gibbons v. Ogden*, 9 Wheat. 1, 195 (1824). The states retain and maintain the general powers of government, the result of a "constitutionally mandated division of authority 'adopted by the Framers to ensure protection of our fundamental liberties.'" *United States v. McHenry*, 97 F.3d 125, 129 (6th Cir. 1996)(Batchelder, J., dissenting), *cert. denied*, 519 U.S. 1311 (1997). 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." *United States v. Morrison*, 529 U.S. 598, 618 (2000).

The Court's most important cases regarding the Commerce Clause issue presented here are *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000). *Lopez* was the first case in 60 years where the Supreme Court invalidated a federal statute on Commerce Clause grounds. D. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez,* 94 Mich.L. Rev. 554, 554 (1995). *Morrison* did the same only five years later.

Lopez involved the Gun-Free School Zone Act, which criminalized possession of a firearm at a place an individual knew or had reasonable cause to believe was a

school zone. The defendant brought a .38 pistol and some bullets to his high school in San Antonio and was prosecuted under the act. The Court struck the law down because it "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce." 514 U.S. at 551.

The Court recited three categories of activity that Congress's Commerce Clause permitted it to regulate. The first is the use of channels of interstate commerce. 514 U.S. at 558. Second, Congress may "regulate and protect the instrumentalities of interstate commerce, even though the threat may come only from intrastate activities." 514 U.S. at 558. Finally, Congress may regulate those activities having a substantial effect on interstate commerce. 514 U.S. at 558. This case involves only the second of these categories – the instrumentalities of interstate commerce.

Five years later the Court took up *Morrison* to provide further clarification. At issue in *Morrison* was whether Congress had exceeded its Commerce Clause powers by providing in the Violence Against Women Act of 1994 a federal cause of action arising from gender-based violence. The Court held that Congress had. The Court observed that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity … [and] thus far in our nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." 529 U.S. at 613. The Court noted that "a fair reading of *Lopez* shows that the non-economic, criminal nature of the conduct at issue was central to our decision in that case." *Id*. at 610.

Although *Lopez* and *Morrison* both arose and were analyzed under the third *Lopez* category, the "affecting commerce" category, which is supposed to provide the broadest grant of Commerce Clause power to Congress, *Circuit City Stores v. Adams*, 532 U.S. 105, 115 (2001)("The phrase 'affecting commerce' indicates Congress' intent to regulate to the outer limits of its authority under the Commerce Clause."), two observations in *Morrison* apply to this case. First, the Court cautioned that the Commerce Clause does not grant Congress a general police power: "If Congress may regulate gender-based violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impact than the larger class of which it is part." *Morrison*, 529 U.S. at 615.

Second, the Court addressed the limited scope of Congress' Commerce Clause powers regarding the instrumentalities of interstate commerce: "The regulation and punishment of intrastate violence that is not *directed at* the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." *Id*. at 616 (emphasis added), *citing Cohens v. Virginia*, 6 Wheat. 264, 426, 428 (1821)(Marshall, C.J.)(stating that Congress "has no general right to punish murder committed within any of the States," and that it is "clear … that Congress cannot punish felonies generally."). This last point applies here: while Congress may prohibit intrastate acts of violence *directed at* the channels and instrumentalities of interstate commerce, the Commerce Clause does not empower

Congress to punish non-economic, wholly intrastate acts of violence based solely on the incidental use of instrumentalities of interstate commerce.

The Sixth Circuit's caselaw expands the second Lopez category of commerce clause powers – regulation of the "instrumentalities of interstate commerce" -- boundlessly and certainly beyond the third Lopez category, the "substantially effects interstate commerce" category. The Court observed in *NFIB*, *supra*, that if Congress could regulate anything that substantially affected national commerce, the federal government would have achieved the general "police Power" reserved for the states. 567 U.S. at 536. But under the Sixth Circuit's logic as applied here, in *Windham*, in *Weathers* and now most recently in *Allen*, "Congress may regulate any activity (whether the completion of a crime or the operation of a school) that uses a phone." *Allen*, 2023 WL 7401802 *12 (Murphy, J., concurring).

The Court recited the limit to Congress powers to regulate the instrumentalities of interstate commerce was identified by the Court in *United States v. Morrison*, 529 U.S. 598, 616 (2000):

> The regulation and punishment of intrastate violence that is not *directed at* the instrumentalities, channels or goods involved in interstate commerce has always been the province of the States[,] and beyond the reach of Congress's power under the Commerce Clause.

Windham is inconsistent with this limit. It involved, as does this case, wholly intrastate violence that was not directed at any instrumentality of interstate commerce. *Windham* is also inconsistent with the observation in *Morrison* that 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." 529 U.S. at 618.

The vagueness infirmities of the kidnapping statute and the limitless grant of federal power the Sixth Circuit has determined repeatedly it grants is illustrated in a scenario where a couple has divorced and pursuant to a court order is following a judicial custodial order establishing a time-sharing schedule with their children. That visitation order specifies days and times at which the children are to be delivered from one parent to the other; it is the type of order very, very common in our Nation's family courts. One of the parents drives over in a car (both the car and the city, suburban or rural road/street being an instrumentality of interstate commerce) to pick up the children on Friday evening at 7:00 PM in accordance with the order. Over the course of the next couple of days, the parent becomes legitimately concerned about the children's welfare and safety at the other parent's house. As a result of that legitimate concern, the parent elects not to return the children to the other parent's residence at the time directed by the judicial order. The appointed hour passes, and the parent is violating the order by keeping his or her children at his or her residence.

This parent, acting in admirable intent and good faith, is subject to prosecution under the federal kidnapping law. *Healy* tells us that the parent's honorable, even admirable and certainly understandable purpose in keeping the children at his or her home means nothing. The parent is unlawfully holding the children since there is a court order requiring their return to the other parent's

residence. Furthermore, since the parent drove a car to pick up the children and bring them back to that parent's residence, the parent has used at least two instrumentalities of interstate commerce – the car and the road drove on -- to further the kidnapping. This is a ridiculous, absurd and indefensible result that is made possible by the egregious errors in the *Gooch* and *Healy* decisions and by the Sixth Circuit's erroneous and misguided body of caselaw that expands boundlessly Congress' powers under the commerce clause.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should be issued to the United States Court of Appeals for the Sixth Circuit to review the questions presented by this Petition.

Respectfully submitted,

By: /s/ Robert L. Abell
ROBERT L. ABELL
120 North Upper Street
Lexington, KY 40507
859-254-7076
Robert@RobertAbellLaw.com
COUNSEL OF RECORD