**No. 25-**

# In the Supreme Court of the United States

DERICK IRISHA BROWN,
*Petitioner*,

v.

UNITED STATES,
*Respondent*.

**On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

18 U.S.C. § 1201(a)(1) makes kidnapping a federal offense where the defendant uses "any means, facility, or instrumentality of interstate or foreign commerce."

The Question Presented is whether an automobile is per se an instrumentality of interstate commerce, which would make a federal offense of every kidnapping involving an automobile.

## PARTIES TO THE PROCEEDINGS BELOW

Petitioner Derick Irisha Brown was the defendant-appellant below. Respondent United States was the plaintiff-appellee below.

## RELATED PROCEEDINGS

U.S. Court of Appeals for the Eleventh Circuit: *United States v. Brown*, No. 23-10870 (December 31, 2025)

U.S. District Court for the Northern District of Alabama: *United States v. Brown*, No. 7:20-cr-00243-LSC-SGC (March 7, 2023)

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## PETITION FOR A WRIT OF CERTIORARI

Derick Irisha Brown respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is unpublished. It is available at 2025 WL 3771990. The order of the District Court (Appendix B) is unreported.

## JURISDICTION

The Court of Appeals entered its judgment on December 31, 2025. The Court of Appeals denied a timely petition for panel rehearing and rehearing en banc on February 24, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause, U.S. Const. art. I, § 8, cl. 3, provides: "The Congress shall have Power … To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

18 U.S.C. § 1201(a)(1) provides: "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 … 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; … 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."

## STATEMENT

Does the Commerce Clause give Congress the authority to prohibit double parking? Failure to signal a turn? Driving with an expired license?

In the Eleventh Circuit, it does.

In the decision below, the Eleventh Circuit held that an automobile is per se an instrumentality of interstate commerce, and thus that Congress may criminalize any conduct involving an automobile. Several other circuits have reached the same conclusion. The Tenth Circuit, by contrast, holds that an automobile is not per se an instrumentality of interstate commerce.

The Tenth Circuit's view is correct. Under the Eleventh Circuit's mistaken view, there would be scarcely any limit to the power of the federal government under the Commerce Clause to take over the traditional functions of the states. Congress could criminalize any offense, so long as it involves an automobile in some way. Congress could create a federal law of torts to govern car accidents and a federal law of contracts to govern car sales. Congress could enact nationwide parking and traffic regulations. The Eleventh Circuit's view would give Congress a plenary police power over automobiles.

The Court should grant certiorari and reverse.

1. Derick Brown was charged in Alabama state court with capital murder for allegedly kidnapping and killing a three-year-old girl in 2019. App. 11a. She is still awaiting trial on this charge, however, because after the state charged her with murder, the federal government also indicted her for kidnapping and conspiracy to kidnap, in violation of 18 U.S.C. § 1201(a)(1) and (c). *Id.*

The federal indictment alleged only one ground for federal jurisdiction—that Brown committed the offenses by using "a means, facility, or instrumentality of interstate commerce," i.e., a "Toyota Sequoia motor vehicle." *Id.* at 12a. The indictment did not allege that the Toyota crossed state lines, because the offense took place entirely within Alabama. Nor did the indictment allege that Brown used the Toyota in interstate commerce, because she did not. As both sides have recognized throughout this case, the indictment alleges a federal offense only if an automobile is per se an instrumentality of interstate commerce.

Brown moved to dismiss the indictment on the ground that section 1201(a)(1) exceeds Congress's power under the Commerce Clause. *Id.* at 12a-13a.

The District Court denied Brown's motion to dismiss the indictment. *Id.* at 12a-16a. The court held that Eleventh Circuit precedent "forecloses the argument … that § 1201(a)(1) is unconstitutional to the extent it criminalizes intrastate conduct facilitated by something capable of use in interstate commerce." *Id.* at 15a.

After a jury trial, Brown was convicted on both counts. *Id.* at 1a. She received two life sentences, to be served concurrently with each other and consecutively to any sentence on the pending state charges.

2. The Court of Appeals affirmed. *Id.* at 1a-10a.

The Court of Appeals recognized that Brown made two distinct arguments that hinged on whether an automobile is per se an instrumentality of interstate commerce. *Id.* at 2a-4a. First, she made a statutory argument that section 1201(a)(1) does not extend to her conduct because the Toyota was not used in interstate commerce. *Id.* at 2a-3a. Second, she made a constitutional argument that if section 1201(a)(1) does extend to her conduct, it exceeds Congress's power under the Commerce Clause. *Id.* at 3a-4a.

The Court of Appeals rejected both arguments. *Id.* at 2a-4a.

First, the Court of Appeals held that "§ 1201(a)'s jurisdictional language is unambiguous." *Id.* at 2a. The court found it "clear that Congress used the phrase 'uses … any means, facility, or instrumentality of interstate or foreign commerce' in § 1201(a) to exercise to the fullest extent its power under the Commerce Clause to regulate instrumentalities of interstate commerce." *Id.* at 3a. The court thus "read § 1201(a) to unambiguously extend to the wholly intrastate use of an automobile as an instrumentality of interstate commerce if the regulation of such a use falls within Congress's power under the Commerce Clause." *Id.*

Second, the Court of Appeals relied on recent circuit precedent to reject Brown's constitutional argument. *Id.* at 3a-4a. In *United States v. Bryan*, 159 F.4th 1274, 1294-97 (11th Cir. 2025), decided just the previous month, the court had "held that automobiles, such as the truck used by the defendants, are *per se* instrumentalities of interstate commerce." App. 4a (citing *Bryan*, 159 F.4th at 1295). The Court of Appeals concluded: "Because, under *Bryan*, an automobile is *per se* an instrumentality of interstate commerce, even if it is used purely intrastate, Brown's § 1201(a) conviction does not violate the Commerce Clause." *Id.*

In seeking rehearing en banc, Brown pointed out that the Court of Appeals' decisions in her case and in *Bryan* conflict with *United States v. Chavarria*, 140 F.4th 1257 (10th Cir. 2025), which held that motor vehicles are *not* per se instrumentalities of interstate commerce, and thus that the Commerce Clause does not empower Congress to criminalize an intrastate kidnapping based solely on the fact that an automobile was involved. The Court of Appeals nevertheless denied rehearing en banc. App. 20a.

## REASONS FOR GRANTING THE WRIT

This case presents an important, recurring question about the outer bounds of Congress's power under the Commerce Clause. The decision below reinforces a circuit split over whether, in a prosecution for kidnapping under 18 U.S.C. § 1201(a)(1), automobiles are per se instrumentalities of interstate commerce. In the Tenth Circuit they are not, while in the Eleventh Circuit and a few others, they are. This question has applications well beyond kidnapping, because there are many other federal criminal statutes with the same jurisdictional hook.

The Tenth Circuit's view is the correct one. Under the Eleventh Circuit's view, there would be virtually no limit to the power of Congress. The Court should grant certiorari and reverse.

## I. The circuits are split over whether, in a prosecution under 18 U.S.C. § 1201(a)(1), an automobile is per se an instrumentality of interstate commerce.

Kidnapping is a federal offense where, among other things, the defendant uses "any means, facility, or instrumentality of interstate or foreign commerce." 18 U.S.C. § 1201(a)(1). When a kidnapping involves an automobile that neither crosses a state line nor is used in commerce, is the automobile nevertheless an instrumentality of interstate commerce? The Courts of Appeals have reached conflicting answers to this question.

### A. In the Tenth Circuit, an automobile is not per se an instrumentality of interstate commerce.

The Tenth Circuit holds that an automobile is not per se an instrumentality of interstate commerce. *United States v. Chavarria*, 140 F.4th 1257 (10th Cir. 2025). "Allowing the government to bring charges based on the use of any ordinary motor vehicle (here, a Jeep) to commit a purely intrastate crime would transform any crime that uses a vehicle into a federal matter," the court explained. *Id.* at 1259. "That interpretation—unbound by a cognizable limiting principle—stretches Congress's authority beyond the Constitution's boundaries." *Id.*

The Tenth Circuit accordingly concluded that "an 'instrumentality *of interstate commerce*' must actually serve the 'end' of interstate commerce. 'Commerce' is the wellspring from which Congress's constitutional authority arises—not something's status as an instrumentality." *Id.* at 1264. In other words, "[a]n instrumentality must affect interstate commerce in some way for its use to warrant federal interest." *Id.* at 1265. The court thus rejected the government's contention that "'motor vehicles' are always presumed to be instrumentalities of interstate commerce." *Id.*

The Tenth Circuit relied on this Court's decisions classifying trains, airplanes, and the telegraph as instrumentalities of interstate commerce. *Id.* at 1265-66. The court explained that, unlike automobiles, "telegraphs were overwhelmingly used for commercial transactions. Trains and aircraft are similarly used almost exclusively for the commercial transportation of people or goods—*i.e.*, interstate commerce." *Id.* (footnote omitted). "These cases," the Tenth Circuit concluded, "do not obviate [the] requirement that something actually be put to the *end* of interstate commerce to be an *instrumentality* of interstate commerce." *Id.* at 1265.

The Tenth Circuit acknowledged that other circuits have held that automobiles are per se instrumentalities of interstate commerce. *Id.* at 1266 (citing *United States v. Windham*, 53 F.4th 1006, 1013 (6th Cir. 2022); *United States v. Protho*, 41 F.4th 812, 828-29 (7th Cir. 2022); *United States v. Cobb*, 144 F.3d 319, 322 (4th Cir. 1998); *United States v. Robinson*, 62 F.3d 234, 236-37 (8th Cir. 1995); and *United States v. Oliver*, 60 F.3d 547, 550 (9th Cir. 1995)). The Tenth Circuit said of these decisions that "their perfunctory rationales are not persuasive." *Id.* at 1267.

Rather than following the other circuits, the Tenth Circuit declared, "[w]e follow *Gibbons*," *id.* at 1267—that is, *Gibbons v. Ogden*, 22 U.S. 1 (1824), the Court's first extended discussion of the Commerce Clause. The Tenth Circuit recognized that its holding "also accords with the Court's recognition that Congress's Commerce Clause 'power is subject to outer limits.'" 140 F.4th at 1268 (quoting *United States v. Lopez*, 514 U.S. 549, 556-57 (1995)). "In fact," the court added, "*Lopez* warned against 'embrac[ing] effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'" *Id.* (quoting *Lopez*, 514 U.S. at 557).

### B. In several other circuits, an automobile *is* per se an instrumentality of interstate commerce.

In *United States v. Bryan*, 159 F.4th 1274 (11th Cir. 2025), a divided Eleventh Circuit rejected the view taken by the Tenth Circuit in *Chavarria*. "We hold that automobiles, like Travis's truck, are *per se* instrumentalities of interstate commerce," the Eleventh Circuit declared. *Id.* at 1295. Instrumentalities, the court reasoned, are "the people and things themselves moving in commerce, including automobiles." *Id.* (internal quotation marks omitted). "Because automobiles are the transportation equipment used to traverse highways, automobiles fit as the instrumentalities used on highways, just as railcars and airplanes are the instrumentalities used on railroads and in airspace, respectively." *Id.* at 1296 (citation and internal quotation marks omitted). The Eleventh Circuit concluded that "Congress may regulate even local use of instrumentalities of interstate commerce." *Id.*

Judge Calvert dissented. She noted that the majority's view "places our circuit on the wrong side of a developing split by overly broadening federal jurisdiction over automobiles." *Id.* at 1299 (Calvert, J., dissenting). She explained: "I agree with the Tenth Circuit's decision in *United States v. Chavarria*, which … held that motor vehicles are not *per se* instrumentalities." *Id.* at 1301 (citation omitted). The majority's view, she suggested, "risks 'obliterat[ing] the distinction between what is national and what is local in the activities of commerce.'" *Id.* at 1302 (quoting *Lopez*, 514 U.S. at 567).

The Fifth, Sixth, and Seventh Circuits agree with the Eleventh that automobiles are per se instrumentalities of interstate commerce, and thus that Congress may criminalize any kidnapping involving an automobile, regardless of whether the automobile has any connection to interstate commerce. *United States v. Gonzalez*, 2022 WL 1421032, *1 (5th Cir. 2022) ("[T]he interstate nexus requirement for federal crimes is satisfied by, as pertinent here, the wholly intrastate use of an automobile.") (citing *United States v. Marek*, 238 F.3d 310, 318-19 (5th Cir. 2001) (en banc) ("Interstate commerce facilities that have created a criminal federal jurisdictional nexus during intrastate use include telephones, automobiles, and airplanes.") (footnotes omitted)); *United States v. Windham*, 53 F.4th 1006, 1013 (6th Cir. 2022) ("The issue is therefore whether cars and cell phones are instrumentalities of interstate commerce, *not* whether they were used interstate. This Court has held repeatedly and unambiguously that cars and phones are instrumentalities of interstate commerce."); *United States v. Protho*, 41 F.4th 812, 828 (7th Cir. 2022) ("[W]e do not agree with Protho's view that the Commerce Clause asks us to consider each automobile's specific use in interstate commerce. Instead, it's the *nature* of the regulated object's class (here, automobiles) rather than the particular *use* of one member of that class (Protho's Ford Explorer) that matters."). *See also United States v. Frazier*, 129 F.4th 392, 402-03 (7th Cir. 2025) ("There is no question cars and cellphones are instrumentalities of interstate commerce.").

Other circuits, in cases involving different federal criminal statutes, have likewise held that automobiles are per se instrumentalities of interstate commerce.

In *United States v. Bishop*, 66 F.3d 569, 590 (3d Cir. 1995), the Third Circuit held that "motor vehicles are instrumentalities of interstate commerce. Thus, Congress may criminalize activities involving their use even though the wrongful conduct, such as carjacking, occurs wholly intrastate." Judge Becker dissented. He explained that in assessing the scope of Congress's power to regulate instrumentalities of interstate commerce, "courts have, to date, appropriately limited its application to congressional regulation of instrumentalities actually engaged in interstate commerce, or objects such as railcars or railway bridges, which are integrally related to an interstate commerce network." *Id.* at 597 (Becker, J., concurring in part and dissenting in part).

The Fourth and Ninth Circuits have taken the same view as the Third Circuit. *See United States v. Cobb*, 144 F.3d 319, 322 (4th Cir. 1998) ("[I]f planes and trains qualify as instrumentalities of interstate commerce, so too do automobiles. The fact that not every car, train, or plane trip has an interstate destination has never been thought to remove these means of transport from the category of an instrumentality of commerce."); *United States v. Runyon*, 707 F.3d 475, 489 (4th Cir. 2013) (reaffirming *Cobb*); *United States v. Oliver*, 60 F.3d 547, 550 (9th Cir. 1995) ("[C]ars are themselves instrumentalities of commerce, which Congress may protect.").

In *Bryan*, the Eleventh Circuit tried to minimize the difference between its view and the Tenth Circuit's view by noting that in *Chavarria*, the Tenth Circuit analyzed the status of "motor vehicles," while in *Bryan*, the Eleventh Circuit analyzed the status of "automobiles." *Bryan*, 159 F.4th at 1296 n.17. The Tenth Circuit tried to draw a similar distinction in *Chavarria*. 140 F.4th at 1267. But this is no distinction at all, as Judge Calvert recognized in her dissenting opinion in *Bryan*. 159 F.4th at 1301 n.2. While "motor vehicles" may in theory be a broader term because it encompasses other motorized vehicles such as lawnmowers, in real life all these cases involved automobiles. Kidnappers use cars, not lawnmowers. The indictment in *Chavarria* did use the term "motor vehicle," but so did the indictment in our case. Indictment, Count One, 11th Cir. Appendix at 31-32 (alleging that Derick Brown used "a means, facility and instrumentality of interstate commerce, including, but not limited to, a Toyota Sequoia motor vehicle"). If our case had been in the

Tenth Circuit, Brown's conviction would have been reversed under *Chavarria*.

This circuit split is very unlikely to be resolved without this Court's intervention. After the Tenth Circuit decided *Chavarria*, the government declined to seek rehearing en banc, which suggests that the Tenth Circuit will not have any opportunity to reconsider its view. This issue will no longer arise in the Tenth Circuit, where indictments should now include a basis for federal jurisdiction other than an automobile's status as a per se instrumentality of commerce. Only this Court can resolve the split.

## II. This issue is important, and this case is an excellent vehicle.

The question presented would be important even if it could only arise in kidnapping cases. The federal government brings well over a hundred kidnapping prosecutions every year,[1] many of which are premised on the assumption that automobiles are per se instrumentalities of interstate commerce. *See, e.g.*, *United States v. Bachicha*, 2025 WL 2898382 (D.N.M. 2025); *United States v. Mitchell*, 2024 WL 3636038 (D. Ariz. 2024); *United States v. Rhoden*, 2024 WL 449245 (N.D. Iowa 2024); *United States v. Clements*, 2024 WL 130964 (D.N.M. 2024); *United States v. Glover*, 672 F. Supp. 3d 1072 (D. Or. 2023). Indeed, as we explained above, there is already a four-to-one circuit split in kidnapping cases alone.

But the question arises in other kinds of cases too, because kidnapping is just one of several federal of-

[1] Bureau of Justice Statistics, *Federal Criminal Case Processing Statistics Data Tool*, www.fccps.bjs.ojp.gov.

fenses that expressly require use of an instrumentality of interstate commerce. *See* 18 U.S.C. §§ 116(d) (female genital mutilation), 249(a)(2)(B) (hate crimes), 1352(b)(1) (demands for bribes), 1369(b)(1) (destruction of veterans' memorials), 1466A(d)(1) (obscene depictions of children), 2423(d)(2) (transportation of minors). *See also id.* § 1958(a) (murder for hire) (requiring use of a "facility" of interstate commerce). If a defendant drives to the scene of a hate crime, or drives to the park to deface a veterans' memorial, a court will have to decide whether an automobile is per se an instrumentality of interstate commerce.

The issue also arises in cases involving other statutes. In *United States v. McHenry*, 97 F.3d 125, 126-27 (6th Cir. 1996), for example, a divided Sixth Circuit affirmed a conviction under 18 U.S.C. § 2119, the carjacking statute, on the ground that automobiles are per se instrumentalities of interstate commerce. Judge Batchelder dissented on the ground that automobiles are instrumentalities of interstate commerce only when they are used in interstate commerce. *Id*. at 132-34 (Batchelder, J., dissenting).

*See also Bishop*, 66 F.3d at 588 (affirming a conviction for carjacking on the ground that automobiles are per se instrumentalities of interstate commerce); *Cobb*, 144 F.3d at 322 (same); *Oliver*, 60 F.3d at 550 (same); *United States v. Mandel*, 647 F.3d 710, 720-23 (7th Cir. 2011) (addressing the issue in a prosecution under 18 U.S.C. § 1958(a), the murder for hire statute); *United States v. Williams*, 2023 WL 4372687, *3 (E.D. Mich. 2023) (same); *United States v. Ballinger*, 395 F.3d 1218, 1226-29 (11th Cir. 2005) (addressing the issue in a prosecution under 18

U.S.C. § 247, which prohibits destruction of religious property); *United States v. Jenkins*, 909 F. Supp. 2d 758, 771 (E.D. Ky. 2012) (addressing the issue in a prosecution under 18 U.S.C. § 249(a)(2)(B), the hate crime statute); *United States v. Maybee*, 2013 WL 3930562, *7-*8 (W.D. Ark. 2013) (same); *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1249-50 (11th Cir. 2008) (addressing the issue in the course of deciding whether a rental car company is immune from liability under 49 U.S.C. § 30106); *Subrogation Div., Inc. v. Brown*, 446 F. Supp. 3d 542, 553-54 (D.S.D. 2020) (same); *Flagler v. Budget Rent A Car System, Inc.*, 538 F. Supp. 2d 557, 559-60 (E.D.N.Y. 2008) (same); *Stampolis v. Provident Auto Leasing Co.*, 586 F. Supp. 2d 88, 96-97 (E.D.N.Y. 2008) (same); *Vanguard Car Rental USA, Inc. v. Huchon*, 532 F. Supp. 2d 1371, 1379-80 (S.D. Fla. 2007) (same); *Dupuis v. Vanguard Car Rental USA, Inc.*, 510 F. Supp. 2d 980, 985 (M.D. Fla. 2007) (same).

This case is a perfect vehicle (no pun intended) in which to address the question presented. The question was fully litigated in the District Court and the Court of Appeals. *Cf. Bryan*, 159 F.4th at 1281 ("Defendants do not raise any constitutional challenges on appeal."). It is the only issue left in the case. It is outcome-determinative. If the Court is to address this issue, no other case could be a better vehicle.

### III. The decision below is wrong.

Certiorari is also warranted because the decision below is wrong. An automobile is not per se an instrumentality of interstate commerce, either as a statutory or a constitutional matter.

### A. Automobiles are not per se instrumentalities of interstate commerce under 18 U.S.C. § 1201(a)(1).

Section 1201(a)(1) makes kidnapping a federal offense where the victim or the offender crosses state lines, where the offender uses the mail, and where the offender uses "any means, facility, or instrumentality of interstate or foreign commerce." There are four good reasons to believe that Congress did not intend the term "instrumentality of interstate … commerce" to encompass every automobile in the United States, regardless of whether the automobile is used in interstate commerce, and indeed regardless of whether the automobile is driven at all.

First, there are several other provisions in Title 18 in which Congress clearly did not think that all automobiles are instrumentalities of interstate commerce. These provisions create federal offenses involving automobiles, but only automobiles with a sufficient nexus to interstate commerce. *See, e.g.,* 18 U.S.C. §§ 33(a) (destruction of motor vehicles "employed in interstate or foreign commerce"), 2119 (stealing "a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce"), 2312 (transporting a stolen vehicle "in interstate or foreign commerce"), 2313(a) (receiving a stolen vehicle "which has crossed a State or United States boundary"), 2322(b) (operating a chop shop to dispose of a "vehicle or vehicle part in interstate or foreign commerce"). All this jurisdictional language would be superfluous if every automobile was, by definition, an instrumentality of interstate commerce. There is no reason to think that Congress, after decades of legislating on the assumption that not all automobiles are instrumentalities of interstate commerce, would suddenly change its mind when it comes to kidnapping.

Second, while most of section 1201 was enacted in 1932 following the Lindbergh kidnapping, the "instrumentality" provision was added to the statute more than seventy years later. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 213, 120 Stat. 587, 616-17. The new provision was added to subsection (a)(1) of the statute, where it joined other jurisdictional hooks, including transporting the victim in interstate commerce and the defendant's own travel in interstate commerce. 18 U.S.C. § 1201(a)(1). These other jurisdictional hooks involve the actual crossing of state lines. If Congress intended every automobile in the country to be an instrumentality of interstate commerce, even automobiles that never cross state lines and are never used in commerce, the new provision would have fit more naturally into the statute as a stand-alone subsection, or perhaps in one of the other statutory subsections, which describe jurisdictional hooks that do not involve crossing state lines.

Third, when Congress added the "instrumentality" provision to the kidnapping statute, the Court had recently put a stop to the anything-goes interpretation of the Commerce Clause that once prevailed. *See United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000). The Court normally "assume[s] that, when Congress enacts statutes, it is aware of relevant judicial precedent," *Ryan v. Gonzalez*, 568 U.S. 57, 66 (2013) (internal quotation marks omitted), an assumption that must be especially true of high-profile decisions like *Lopez* and *Morrison*. No member of Congress in 2006 who paid the slightest attention to the Court could blithely have assumed that every automobile in the United States is an instrumentality of interstate commerce. Rather, a well-informed member of Congress would have realized that this Court's precedent (which we will discuss shortly) pointed toward the opposite conclusion.

Finally, to the extent section 1201(a)(1) is ambiguous, the canon of constitutional avoidance counsels against interpreting the statute to mean that automobiles are per se instrumentalities of interstate commerce. "Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018). As we will explain below, treating automobiles as per se instrumentalities of interstate commerce would at the very least raise serious constitutional doubts, because it would give Congress plenary power under the Commerce Clause to regulate everything having to do with automobiles.

Interpreting section 1201(a)(1) so as not to render every automobile a per se instrumentality of interstate commerce would still allow the federal government to prosecute kidnappings where there is a federal interest in doing so. Kidnapping would still be a federal offense where the victim is transported across state lines, 18 U.S.C. § 1201(a)(1), where the offender crosses state lines, *id.*, where the offender uses the mail, *id.*, where any part of the kidnapping takes place within the maritime, territorial, or aircraft jurisdiction of the United States, *id.* §§ 1201(a)(2) and (3), where the victim is a foreign official, *id.* § 1201(a)(4), and where the victim is an officer or employee of the federal government, *id.* § 1201(a)(5). Kidnapping would also still be a federal offense where the offender uses a genuine instrumentality of interstate commerce. The only kidnappings that would be left to the states would be kidnappings that are entirely intrastate, where an automobile happened to be involved. The states are surely up to the task.

For these reasons, section 1201(a)(1) is best interpreted to mean that automobiles are not per se instrumentalities of interstate commerce.

### B. Automobiles are not per se instrumentalities of interstate commerce under the Commerce Clause.

The Commerce Clause does not authorize Congress to regulate everything having to do with automobiles. To the extent that section 1201(a)(1) rests on such an outlandish proposition, it exceeds the power of Congress.

The Commerce Clause empowers Congress to regulate *interstate* commerce. Congress lacks the power to regulate matters, even commercial matters, "which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere." *Gibbons v. Ogden*, 22 U.S. 1, 195.

Under the Commerce Clause, as the Court has explained several times, Congress may regulate the "channels" of interstate commerce, the "instrumentalities" of interstate commerce, and activities substantially affecting interstate commerce. *See Gonzalez v. Raich*, 545 U.S. 1, 16-17 (2005); *United States v. Morrison*, 529 U.S. 598, 608-09 (2000); *United States v. Lopez*, 514 U.S. 549, 558-59 (1995); *Perez v. United States*, 402 U.S. 146, 150 (1971). This is a mighty power, but it is "subject to outer limits." *Lopez*, 514 U.S. at 557. It "must be considered in the light of our dual system of government and may not be extended so as to … effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

An "instrumentality" is "[s]omething which is used to bring about a result or accomplish a purpose." *Oxford English Dictionary*, oed.com. An instrumentality of interstate or foreign commerce is a means by which interstate or foreign commerce is accomplished. The cargo containers used for shipping, for example, "are instrumentalities of foreign commerce, both as a matter of fact and as a matter of law." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445-46 (1979) (footnotes omitted). Shipping containers are per se instrumentalities of foreign commerce because they are "used constantly and exclusively for the transportation of cargo for hire in foreign commerce." *Id.* at 446 n.9.

Shipping containers are an easy case because they have scarcely any use other than in foreign and interstate commerce. The harder cases involve things like automobiles that are sometimes, but not always, used in interstate commerce. When are such things per se instrumentalities of interstate commerce? And when, by contrast, must each case be assessed on its own facts?

A clear principle emerges from the Court's cases in this area: Something is per se an instrumentality of interstate commerce if its dominant use is for interstate commerce, even if it also has other uses. In the days of the telegraph, the telegraph was a per se instrumentality of interstate commerce, because "more than eighty per cent of all the messages sent by telegraph relate[] to commerce. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured, and the movement of ships directed. The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information." *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U.S. 1, 9-10 (1877). Some people sent noncommercial messages by telegraph, and some telegraph messages did not cross a state line, but because the dominant use of the telegraph was for interstate commerce, the Commerce Clause empowered Congress to regulate all matters relating to the telegraph.

For the same reason, interstate rail carriers are per se "instruments of interstate commerce." *Houston, East & West Texas Ry. Co. v. United States*, 234 U.S. 342, 351 (1914). Congress's "authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic." *Id.* The railroad lines also carried some intrastate traffic, but "[t]he fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter." *Id.*

The Court has also (without explanation, in dicta) referred to airplanes as per se instrumentalities of interstate commerce. *Perez*, 402 U.S. at 150. This makes sense, because the dominant use of airplanes is for interstate commerce. Most flights are commercial flights—few people fly their own plane. And while some flights don't cross a state line, the vast majority do. That is enough to classify airplanes as instrumentalities of interstate commerce.

Automobiles are different. Most automobiles are personal cars used to drive around town. They are not used for commerce at all, much less interstate commerce, and the typical trip by car doesn't cross a state line. This is the point Judge Becker made in his dissenting opinion in *Bishop*. "The regulation of air and rail travel is simply not a valid analogy," he explained, because "airplanes and trains are, nearly exclusively, used as instrumentalities of interstate commerce—that is, air and rail travel involves, overwhelmingly, the *sale* of both inter- and intrastate transportation services for persons and/or cargo." *Bishop*, 66 F.3d at 598 (Becker, J., concurring in part and dissenting in part).

To be sure, automobiles used in interstate commerce, such as commercial trucks, rental cars, and the like, *are* instrumentalities of interstate commerce. But most automobiles are not. Unlike planes, trains, and the telegraph, the dominant use of automobiles is not to engage in interstate commerce. Automobiles are therefore not per se instrumentalities of interstate commerce.

If automobiles were per se instrumentalities of interstate commerce, Congress would have the power under the Commerce Clause to regulate everything involving an automobile. Congress could enact nationwide parking and traffic regulations. Congress could create a federal law of contracts to govern purchases and leases of automobiles, and a federal law of torts to govern automobile accidents. Congress could turn any state crime into a federal crime if any of the participants drove to or from the scene. Congress would gain "a 'police power' over all aspects of American life" involving automobiles. *Lopez*, 514 U.S. at 584 (Thomas, J., concurring).

For these reasons, the Tenth Circuit got it right in *Chavarria*, while the Eleventh Circuit got it wrong in *Bryan* and in our case. Under the Commerce Clause, automobiles are not per se instrumentalities of interstate commerce.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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