

**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**

REPLY BRIEF FOR PETITIONER

TOBIE J. SMITH
Criminal Defense Clinic
University of Alabama
School of Law
101 Paul W. Bryant
Drive, East
Tuscaloosa, AL 35487

STUART BANNER
Counsel of Record
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-8506
banner@law.ucla.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR PETITIONER	1
I. The circuits are split.	1
II. The decision below is wrong.	3
CONCLUSION	9

TABLE OF AUTHORITIES

CASES

<i>Gonzalez v. Raich</i> , 545 U.S. 1 (2005)	7
<i>Houston, East & West Texas Ry. Co. v. United States</i> , 234 U.S. 342 (1914)	6
<i>Japan Line, Ltd. v. County of Los Angeles</i> , 441 U.S. 434 (1979)	6
<i>Jennings v. Rodriguez</i> , 583 U.S. 281 (2018)	5
<i>Jones v. United States</i> , 529 U.S. 848 (2000)	5
<i>McMichael v. United States</i> , No. 25-7371	3
<i>Perez v. United States</i> , 402 U.S. 146 (1971)	6
<i>TRW Inc. v. Andrews</i> , 534 U.S. 19 (2001)	4
<i>United States v. Bishop</i> , 66 F.3d 569 (3d Cir. 1995)	2, 6
<i>United States v. Bryan</i> , 159 F.4th 1274 (11th Cir. 2025)	1
<i>United States v. Chavarria</i> , 140 F.4th 1257 (10th Cir. 2025)	1-3
<i>United States v. Hemani</i> , 146 S. Ct. 1677 (2026)	6
<i>United States v. Lopez</i> , 514 U.S. 549 (1995)	8
<i>Wickard v. Filburn</i> , 317 U.S. 111 (1942)	8
<i>Yee v. City of Escondido</i> , 503 U.S. 519 (1992)	8

STATUTES

18 U.S.C.	
§ 33(a)	4
§ 1201(a)(1)	3-4
§ 2119	4
§ 2312	4
§ 2313(a)	4
§ 2322(b)	4

REPLY BRIEF FOR PETITIONER

The government fails to grapple with, or even notice, the breathtaking implications of its argument. If automobiles were per se instrumentalities of interstate commerce, the Commerce Clause would authorize Congress to criminalize all conduct involving a car or a truck. Did one person punch another in a bar? That could be a federal offense if he drove home afterwards. Did a teenager swipe a soda from a 7-Eleven? That would be a federal offense too if he got a lift to the store. Speeding, driving with an expired license, parking for two hours in a one-hour zone—all would be within Congress’s remit, according to the government’s theory. The Commerce Clause has no doubt been interpreted elastically in some prior cases, but the government stretches it past its breaking point.

The brief in opposition contends that the circuits are not split, BIO 10-12, and that the decision below is correct, *id.* at 5-10. Both contentions are wrong.

I. The circuits are split.

The decision below cannot be reconciled with *United States v. Chavarria*, 140 F.4th 1257, 1260-66 (10th Cir. 2025), which held that motor vehicles are *not* per se instrumentalities of interstate commerce. As Judge Calvert recognized, the Eleventh Circuit’s view “places our circuit on the wrong side of a developing split by overly broadening federal jurisdiction over automobiles.” *United States v. Bryan*, 159 F.4th 1274, 1299 (11th Cir. 2025) (Calvert, J., dissenting).

The government attempts to distinguish *Chavarria* on the ground that our case involves an “automobile,” while *Chavarria* involved a “motor vehicle.”

BIO 11. The government suggests that motor vehicles are a broader category, which includes, among other things, lawnmowers and elevators along with automobiles. *Id.*

This is mere wordplay. All the cases on both sides of the split involved automobiles. Kidnappers do not transport their victims on lawnmowers or in elevators. They use automobiles. In *Chavarria* they used a Jeep Cherokee. 140 F.4th at 1259. In our case, the indictment alleged that Derick Brown used a Toyota Sequoia. Indictment, Count One, 11th Cir. Appendix at 31-32. In both cases, the indictment used the term “motor vehicle” rather than “automobile,” but everyone knew that the government was not accusing the defendants of kidnapping by lawnmower or elevator. If our case had arisen in the Tenth Circuit, Derick Brown’s conviction would have been reversed under *Chavarria*, because the indictment alleged that the instrumentality of interstate commerce was a “motor vehicle,” just as in *Chavarria*. That’s a circuit split.

The government errs in suggesting (BIO 11) that the Tenth Circuit in *Chavarria* “reserved judgment” on whether automobiles are per se instrumentalities of interstate commerce. In fact, the Tenth Circuit rejected the decisions in which other circuits held that automobiles *are* per se instrumentalities of interstate commerce, because “their perfunctory rationales are not persuasive.” 140 F.4th at 1267. The Tenth Circuit agreed instead with Judge Becker’s view that “[t]he fact that automobiles can be used as instrumentalities of interstate commerce does not grant Congress plenary authority to regulate the use and operation of every individual’s automobile.” *Id.* (quoting *United States v. Bishop*, 66 F.3d 569, 599

(3d Cir. 1995) (Becker, J., concurring in part and dissenting in part)). The Tenth Circuit concluded that “Judge Becker’s dissent in *Bishop* is compelling on this point.” *Id.*

This circuit split is relatively new, but the Court should resolve it now. The issue arises frequently because kidnapping is just one of many federal offenses that require use of an instrumentality of interstate commerce. *See* Pet. 12-14. The Tenth Circuit will have no opportunity to change its view. The government declined to seek rehearing en banc in *Chavarria*, and the issue will no longer arise in the Tenth Circuit, where indictments must now include some other basis for federal jurisdiction. In the wake of *Chavarria*, the Court is likely to see a flood of certiorari petitions from other circuits citing this split. The pending certiorari petition in *McMichael v. United States*, No. 25-7371 (petition filed May 5, 2026), is an early example.

There is nothing to be gained, moreover, from further percolation. The meaning of the Commerce Clause has been discussed at great length for more than two centuries. There is nothing new to be said on either side.

II. The decision below is wrong.

The Eleventh Circuit erred in holding that automobiles are per se instrumentalities of interstate commerce.

A. The word “instrumentalities” in the kidnapping statute, 18 U.S.C. § 1201(a)(1), does not include every car and truck in the country. Other federal offenses involving automobiles explicitly require a 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”). This jurisdictional language would be unnecessary if every automobile was already an instrumentality of interstate commerce.

The government’s only response is to emphasize the prepositions in these statutes. The government points out that section 1201(a)(1) refers to instrumentalities *of* interstate commerce, while the other statutes refer to vehicles *in* interstate commerce. BIO 7. But the government does not explain why this makes any difference. Regardless of which preposition Congress employed, the government’s interpretation of the statute turns much of Title 18 into surplusage. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”) (citation and internal quotation marks omitted).

We do not need to win this battle; we just need a draw. If the statute is ambiguous, the canon of constitutional avoidance counsels in favor of our interpretation, because the government’s interpretation raises, at the very least, serious constitutional

doubts. *See Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018) (“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.”). Under the government’s interpretation, virtually every kidnapping in the country would be a federal offense, because it is a rare kidnapper who does not use an automobile. *Cf. Jones v. United States*, 529 U.S. 848, 859 (2000) (concluding for similar reasons that the federal arson statute “is not soundly read to make virtually every arson in the country a federal offense”).

B. The Commerce Clause does not authorize Congress to regulate every car and truck in the country on the theory that automobiles are always instrumentalities of interstate commerce.

Derick Brown’s Toyota was not engaged in “Commerce ... among the several States.” It was not engaged in commerce at all. The indictment does not allege that it ever left Alabama. Her Toyota is typical in this respect. It is a matter of common experience that while some automobiles (such as moving vans) are instrumentalities of interstate commerce, most are not. The text of the Commerce Clause offers no support for the government’s theory.

Nor does the Commerce Clause’s original meaning offer any support for the government. Horses were sometimes used for interstate commerce in 1789, but the Founders certainly did not think that Congress could regulate all matters having to do with horses. “As an original matter, the Commerce Clause au-

thorizes Congress only to regulate the buying and selling of goods and services trafficked across state lines.” *United States v. Hemani*, 146 S. Ct. 1677, 1695 (2026) (Thomas, J., concurring). Derick Brown’s Toyota was not engaged in any such traffic.

The Court’s precedents drifted away from the Commerce’s Clause’s text and original meaning in the mid-twentieth century, but not nearly as far as the government urges in this case. The Court has never held that automobiles are per se instrumentalities of interstate commerce. Rather, the Court has reserved that status for items whose ordinary and predominant use is for interstate commerce, including shipping containers, *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445-46 (1979); airplanes, *Perez v. United States*, 402 U.S. 146, 150 (1971); and trains, *Houston, East & West Texas Ry. Co. v. United States*, 234 U.S. 342, 351 (1914).

Automobiles are different. “The regulation of air and rail travel is simply not a valid analogy. Such federal regulation is proper since both airplanes and trains are, nearly exclusively, used as instrumentalities of interstate commerce.” *Bishop*, 66 F.3d at 598 (Becker, J., concurring in part and dissenting in part). Not so with automobiles, which are only *sometimes* used as instrumentalities of interstate commerce. “The fact that automobiles *can* be used as instrumentalities of interstate commerce does not grant to Congress plenary authority to regulate the use and operation of every individual’s automobile.” *Id.* at 599 (emphasis added).

The government errs in suggesting that because highways are channels of interstate commerce, and because automobiles drive on highways, automobiles

must be instrumentalities of interstate commerce. BIO 9. The fallacy here is the assumption that everything in a channel of interstate commerce must be an instrumentality of interstate commerce. Many highways (all but limited-access highways) are also used by cyclists and pedestrians. In southern California, for example, the Mulholland Highway and the Pacific Coast Highway are both famous cycling routes, while the iconic U.S. Route 66 attracts crowds of pedestrians along several stretches, especially near the ocean. Yet no one would classify bicycles or shoes as instrumentalities of interstate commerce.

The cases the government cites as support for its mistaken suggestion all involve planes and trains, so this is another example of Judge Becker's point that planes and trains are poor analogies to automobiles. Planes are instrumentalities of interstate commerce, but not because they fly in airspace, a channel of interstate commerce. It is because planes are nearly always *used* in interstate commerce. Again, automobiles are different.

The government's suggestion is erroneous for a second reason as well. It conflates two of the three categories of regulation under Congress's commerce power—the “channels of interstate commerce” and the “instrumentalities of interstate commerce.” *Gonzalez v. Raich*, 545 U.S. 1, 16 (2005). (The third category is “activities that substantially affect interstate commerce.” *Id.* at 17.) This case, all along, has been an “instrumentalities” case, not a “channels” case. The indictment alleged that Derick Brown's Toyota was an instrumentality of interstate commerce, not that she used a channel of interstate commerce.

The government also errs in insinuating that we have forfeited this argument because we did not make it in the lower courts. BIO 10. *Claims* are forfeitable; *arguments* are not. “Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.” *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). As the government acknowledges, BIO 3-4, we are making the same claim we made in both lower courts—that this prosecution lies outside of Congress’s Commerce Clause authority, because Derick Brown’s automobile was not an instrumentality of interstate commerce.

The most troubling thing about the government’s position, however, is that it lacks any limiting principle. Congress’s power under the Commerce Clause must be “subject to outer limits.” *United States v. Lopez*, 514 U.S. 549, 557 (1995). Otherwise, it would be indistinguishable from the police power reserved to the states. But the government’s theory has no outer limits. The government declares that every car and truck in the country is always an instrumentality of interstate commerce, and that the Commerce Clause therefore empowers Congress to regulate all matters involving cars and trucks. This claim would obviously have astonished the Founders, but it would even have astonished the mid-twentieth century Justices who decided cases like *Wickard v. Filburn*, 317 U.S. 111 (1942). Even they never went that far.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

TOBIE J. SMITH
Criminal Defense Clinic
University of Alabama
School of Law
101 Paul W. Bryant
Drive, East
Tuscaloosa, AL 35487

STUART BANNER
Counsel of Record
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-8506
banner@law.ucla.edu