

IN THE
Supreme Court of the United States

AARON THOMAS MITCHELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Commerce Clause permits Congress to deem all vehicles “instrumentalities of interstate commerce,” a theory that would authorize federal regulation of virtually any local activity and collapse the Constitution’s division of authority between the national and state governments.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

Petitioner is Aaron Thomas Mitchell, who was Appellant-Defendant in the United States Circuit Court for the Ninth Circuit, *United States v. Mitchell*, No. 25-1795.

Respondent is the United States of America who was Appellee in United States Circuit Court for the Ninth Circuit, *United States v. Mitchell*, No. 25-1795.

RELATED CASES

United States v. Mitchell, No. CR-22-01545-001-TUC-RM (EJM), United States District Court for the District of Arizona. Judgement entered June 23, 2025.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Aaron Mitchell respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals for the Ninth Circuit appears at Appendix A to the petition and is unpublished. (Pet. App. 1a). The opinion of the United States District Court for the District of Arizona appears at Appendix B to the petition and is unpublished. (Pet. App. 10a).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit rendered its decision on March 24, 2026. (Pet. App. 1a). On May 12, 2026, the United States Court of Appeals for the Ninth Circuit denied a Petition for Rehearing En Banc. (Pet. App. 53a). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constit. Art. 1, §8, cl. 3. The Congress shall have Power. . . [t]o regulate Commerce . . . among the several States.

18 U.S.C. §245(b)(2)(B)(b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempt to injure, intimidate or interfere with – (2) any person because of his race, color, religion or national origin and because he is or has been – ***** (B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof; ***** shall be fined under this title, or imprisoned not more than one year, or both; . . . and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap. . . shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death

18 U.S.C. §1201(a)(1), (e) (a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, . . . 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; ***** 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. ***** (d) Whoever attempts to violate subsection (a) shall be punished by imprisonment for not more than twenty years.

STATEMENT OF THE CASE

Aaron Thomas Mitchell was charged in a multi-count indictment with violations of Arizona law. He was also charged federally in a three count Superseding Indictment with violating: (1) 18 U.S.C. § 242 (Deprivation of Rights Under Color of Law); (2) 18 U.S.C. § 1201(a)(1) (Kidnapping of a Minor); and (3) 18 U.S.C. § 1512(b)(3) (False Statements). (Pet. App. 54a). This Petition concerns Count Two, the violation of § 1201(a)(1). The Indictment specifically alleged that Mitchell “willfully used an instrumentality of interstate and foreign commerce, to wit: a vehicle, in committing and in furtherance of the commission of the offense.”

On April 25, 2022, Mitchell—an off duty Customs and Border Protection agent—was driving his personal red hatchback in Douglas, Arizona. He saw 15 year old L.O. sitting on a bench, lowered his passenger side window, asked what she was doing, and requested her “documents.” L.O. approached the vehicle, opened the passenger door, and got inside. She testified that Mitchell wore a vest labeled “police,” carried a pistol, and told her they were going to the police station. Once inside the vehicle, he handcuffed her wrists and ankles.

Mitchell then drove L.O. to an apartment complex in neighboring town Sierra Vista, Arizona, where she testified he sexually assaulted her multiple times. At approximately 2:30 p.m., he drove her back to Douglas and dropped her off at the same location where he had picked her up.

Mitchell admitted picking up L.O., driving her to his apartment to “watch Netflix,” giving her alcohol, and returning her to Douglas at her request. He consistently denied any sexual contact.

It is undisputed that Mitchell’s vehicle did not cross state lines, did not travel on a federal interstate, and he did not use a cell phone to further the offense. He drove his personal vehicle solely on state roads within Cochise County, Arizona.

The jury convicted Mitchell of violating 18 U.S.C. § 245(b)(2)(B) (civil rights deprivation) and 18 U.S.C. § 1201 (kidnapping).

In a unanimous decision, the Ninth Circuit held that the district court properly rejected Mitchell’s as applied Commerce Clause challenge. (Pet. App. 7a). Relying on *Fejes v. FAA*, 98 F.4th 1156 (9th Cir. 2024), and *United States v. Oliver*, 60 F.3d 547 (9th Cir. 1995), the panel concluded that “cars are instrumentalities of interstate commerce,” thereby satisfying § 1201(a)(1)’s jurisdictional element. (Pet. App. 7a). Although the panel acknowledged that the district court’s statement that “vehicles as a class are instrumentalities of interstate commerce” was “potentially” overbroad, it deemed any error harmless. (Pet. App. 7a–8a n.1).

REASONS FOR GRANTING THE PETITION

This case presents the Court with a well-developed conflict between the courts of appeals. The Ninth and Eleventh Circuits have held that cars, as a class, are instrumentalities of interstate commerce under 18 U.S.C. § 1201(a)(1) —thereby extending federal jurisdiction to all kidnapping crimes involving a car, even when the vehicle did not cross state lines and traveled solely on local roads. *See, Fejes v. FAA*, 98 F.4th 1156 (9th Cir. 2024), *United States v. Oliver*, 60 F.3d 547 (9th Cir. 1995), *United States v. Bryan*, 159 F.4th 1274 (11th Cir. 2025); *See also, United States v. Windham*, 53 F.4th 1006, 1013 (6th Cir., 2022)(“When a car or a cell phone is used ‘in

committing or in furtherance of a kidnapping for ransom, reward, or otherwise, the federal kidnapping statute applies.”); *United States v. Frazier*, 129 F.4th 392, (7th Cir., 2025)(“There is no question cars and cellphones are instrumentalities of interstate commerce.”)

In contrast, the Tenth Circuit’s decision in *United States v. Chavarria*, 140 F.4th 1257 (10th Cir. 2025), which addressed materially identical facts as Mitchell’s case held that “[a]n instrumentality must affect interstate commerce in some way to warrant federal interest.” *Id.* at 1261–65, 1268.

The Ninth and Eleventh Circuits conflict with foundational Supreme Court precedent—*Gibbons v. Ogden*, 22 U.S. 1 (1824); *United States v. Lopez*, 514 U.S. 549, 558–59 (1995); and *Perez v. United States*, 402 U.S. 146, 150 (1971)—which limits Congress’s Commerce Clause authority and preserves the distinction between national and local matters. Review is necessary to restore the proper limits of federal jurisdiction and prevent the sweeping practical consequences those Circuits invite. The Ninth and Eleventh Circuits collapse the distinction between interstate instrumentalities and ordinary intrastate vehicles, intruding deeply into traditional state police powers. See *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937); *United States v. Morrison*, 529 U.S. 598, 617-18 (2000). This conflict is ripe for the Court’s immediate resolution.

The issue is exceptionally important. If the mere use of a car in a crime automatically triggers federal jurisdiction, Congress’s Commerce Clause power becomes virtually boundless—an outcome the Constitution does not permit and Congress did not intend when it used the phrase “instrumentality of interstate

commerce” in 18 U.S.C. § 1201(a)(1).

SUPREME COURT PRECEDENT LIMITS INSTRUMENTALITIES TO OBJECTS USED IN INTERSTATE COMMERCE OR INTERSTATE SYSTEMS

In 1824, the Supreme Court defined “commerce” as “the transportation and sale of commodities. It is so considered in all the regulations made by the laws of Congress.” *Gibbons v. Ogden*, 22 U.S. 1 (1824).

As Congress has no power to regulate the internal commerce of any State, none of its regulations can affect so much of the exclusive grant, as restrains vessels which are only used within the States; nor can it give to any man a permission to carry on any steam boat navigation, which, in its beginning, and ending, and course, is entirely confined within the waters of the State. *Id.* at 88-89.

Marshall’s articulation in *Gibbons v. Ogden* confirms that the Commerce Clause reaches far beyond the mere shipment of goods. As the Court explained, “commerce, undoubtedly, is traffic, but it is something more: it is intercourse.” *Id.* at 196. That framing matters. By defining commerce as the full scope of commercial interaction among states and nations, the Court recognized that Congress’s authority extends to all phases of interstate commercial intercourse, not just isolated transactions. And because regulation “is the power to prescribe the rule by which commerce is to be governed,” Congress’s authority necessarily includes the ability to set comprehensive, uniform rules governing that interstate system. *Id.* Critically, Marshall emphasized that this power “is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.” *Id.* That language forecloses any judicially invented narrowing

principle. Once an activity falls within interstate commercial intercourse, Congress may regulate it fully—whether by prohibiting conduct, mandating conduct, or structuring the channels and instrumentalities through which commerce flows.

Thus, under *Gibbons*, the constitutional question is straightforward: if the regulated activity bears on interstate commercial intercourse, Congress’s authority is plenary.

Under *United States v. Lopez* and *Perez v. United States*, Congress may regulate only (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce and persons or things in interstate commerce, and (3) activities that substantially affect interstate commerce. *Lopez*, 514 U.S. at 558–59; *Perez*, 402 U.S. at 150. Courts have consistently used “instrumentalities of interstate commerce” to refer to the second category. *Chavarria*, 140 F.4th at 1262. When Congress amended § 1201(a)(1) in 2006 to include kidnappings involving an “instrumentality of interstate or foreign commerce,” it incorporated this established meaning. See *Id.* at 1263 (citing *Yellen v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 2434, 2445 (2021)).

The Supreme Court has not issued a comprehensive definition of “instrumentalities of interstate commerce,” but the meaning is evident from context and the examples provided in statutes and case law. When Congress uses a term of art drawn from Commerce Clause doctrine, courts must apply the meaning developed in that body of law. See, *Air Wisconsin Airlines Corp. v. Hoeper*, 571 U.S. 237, 248 (2014); *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 342, 111 S.Ct. 807 (1991); *Sekhar v. United States*, 570 U.S. 729, 733 (2013).

Since *Gibbons v. Ogden*, the Supreme Court’s examples of instrumentalities confirm two narrow categories:

1. Objects actually used, operated, or employed in interstate commerce—e.g., aircraft “used, operated, or employed in interstate, overseas, or foreign air commerce” under 18 U.S.C. § 32. *Perez*, 402 U.S. at 150.

2. Interstate systems or networks—e.g., interstate railroads and highways whose intrastate segments are inseparable from interstate transportation. *Lopez*, 514 at 115 citing *Houston, E. & W.T.R. Co. v. United States*, 234 U.S. 342 (1914) and *Southern Ry. Co. v. United States*, 222 U.S. 20, 26–27 (1911); See also, *Overstreet v. North Shore Corp.*, 318 U.S. 125, 129 (1943). Not every road or bridge qualifies—only those actually used for interstate movement, “passing between the various states.” *Overstreet*, 318 U.S. at 129.

VEHICLES ARE NOT PER SE INSTRUMENTALITIES OF INTERSTATE COMMERCE.

It is undisputed that Mitchell used a personal vehicle that did not cross state lines, did not travel on an interstate highway, and was not used in interstate commerce. Section 1201(a)(1), like many federal criminal statutes, contains a jurisdictional element that federalizes otherwise state law conduct only when an “instrumentality of interstate or foreign commerce” is used.

Personal vehicles—hundreds of millions of which never engage in interstate commerce—do not fall within either category. They are not inherently used in interstate transportation like aircraft or interstate railroads, nor are they part of an

interstate system. While Congress may regulate commercial vehicles routinely engaged in interstate transport, that authority does not extend to all private vehicles.

The Tenth Circuit, addressing nearly identical facts as *Mitchell*, held that transporting a victim in an ordinary vehicle on a rural state road does not satisfy § 1201(a)(1)'s jurisdictional element. *Chavarria*, 140 F.4th at 1259. “To be an ‘instrumentality of interstate commerce,’ subject to Congress's Category 2 authority, an object must be more than just a means to an end. It must be a means to the end of commerce.” *Id.* at 1268. The court warned that treating any use of a vehicle as sufficient “would transform any crime that uses a vehicle into a federal matter.” *Id.* After a thorough Commerce Clause analysis and other circuit case law, it held that “[a]n instrumentality must affect interstate commerce in some way to warrant federal interest.” *Id.* at 1261–65, 1268.

In *Oliver*, the Ninth Circuit held that “cars are themselves instrumentalities of interstate commerce, which Congress may protect.” 60 F.3d at 550. It did so without analysis, merely citing a district court case. *Id.*

The federal carjacking statute, 18 U.S.C. § 2119, confirms that Congress does not view all vehicles as per se instrumentalities of interstate commerce. The statute applies only to vehicles “transported, shipped, or received in interstate or foreign commerce,” reflecting Congress’s recognition that its authority is limited. Congress supported § 2119 with extensive findings showing that carjacking and related auto theft offenses formed an illicit interstate market with substantial effects on interstate commerce—precisely the type of showing required under the third *Lopez* category. See *United States v. Bishop*, 66 F.3d 569, 578 (3d Cir. 1995). By conditioning federal

jurisdiction on a vehicle's movement in interstate commerce, Congress demonstrated that it does not consider all motor vehicles inherently instrumentalities of interstate commerce.

Congress' view that motor vehicles are not inherently, automatically, or per se instrumentalities of interstate commerce is also seen in the structure of Chapter 2 of Title 18 which demonstrates that federal jurisdiction attaches only when a motor vehicle bears a commercial nexus to interstate or foreign commerce, not merely because it exists or moves on a public road. Section 33 which applies to the destruction of motor vehicles or motor vehicle facilities makes that limitation explicit. The statute does not criminalize the destruction of any motor vehicle. It criminalizes the destruction of motor vehicles "used, operated, or employed in interstate or foreign commerce." 18 U.S.C. § 33(a). Congress thus required a functional, real world connection between the vehicle and interstate commerce. A vehicle must be used in commerce, operated in commerce, or employed in commerce. The text forecloses any reading that treats all motor vehicles as inherently commercial or inherently interstate.

Congress reinforced that limitation through the definitional section. Section 31(a)(6) defines "motor vehicle" for purposes of §§ 31–33 as a vehicle "used for commercial purposes on the highways in the transportation of passengers, passengers and property, or property or cargo." This definition does two important things. First, it restricts the category of motor vehicles that fall within federal jurisdiction to those used "for commercial purposes." Congress did not adopt a definition that sweeps in all privately owned cars, motorcycles, or trucks. Instead, it

tied the definition to commercial use—transporting passengers or property for compensation or as part of a commercial enterprise. Second, by requiring commercial use “on the highways in the transportation of passengers [or] property,” Congress tethered federal authority to the channels and instrumentalities of interstate commerce as they actually function, not as they might hypothetically function. A privately owned vehicle used solely for personal errands, local commuting, or recreational driving is not “used for commercial purposes” and therefore does not fall within the statutory definition at all.

These textual limitations matter. They reflect Congress’s recognition that motor vehicles are not inherently interstate instrumentalities. Unlike airplanes, railroads, or pipelines—systems designed for and inseparable from interstate commerce—ordinary motor vehicles are overwhelmingly used for intrastate, personal, and noncommercial activity. Their mere existence on a public road does not transform them into instrumentalities of interstate commerce. Congress’s choice of language in §§ 31 and 33 thus mirrors this Court’s Commerce Clause jurisprudence. When Congress intends to regulate an instrumentality of interstate commerce, it says so expressly. When Congress instead requires that an object “affect” commerce, it uses language requiring a commercial or interstate nexus. Here, Congress chose the latter approach. It required that the vehicle be “used, operated, or employed” in interstate commerce and that it be a vehicle “used for commercial purposes.” Those limitations foreclose any interpretation that treats all motor vehicles as falling within federal power simply because they are capable of interstate travel.

In short, Congress did not federalize all motor vehicles. It federalized only those vehicles whose actual use places them within interstate or foreign commerce. The statutory text itself rejects any theory that motor vehicles are per se instrumentalities of interstate commerce.

That understanding accords with core Commerce Clause principles and the Constitution's division of authority between federal and state governments. The federal government is one of limited powers; the States retain the general police power. *Morrison*, 529 U.S. at 618 n.8. Thus, Congress's commerce authority must be construed "in the light of our dual system of government" and cannot be extended to reach effects on interstate commerce "so indirect and remote" that doing so would erase the line between national and local matters. *Jones & Laughlin Steel*, 301 U.S. at 37; see *Morrison*, 529 U.S. at 617–18.

The consequences of deeming all vehicles per se instrumentalities of interstate commerce underscore the danger. Such a rule would allow Congress to regulate "any aspect of automobiles (and automobile traffic)." *Bishop*, 66 F.3d at 569 (Becker, J., dissenting).

Courts have never treated "vehicles" as a monolithic category that is inherently or automatically an instrumentality of interstate commerce. To the contrary, Supreme Court and circuit precedent make clear that the instrumentality inquiry turns on the vehicle's functional relationship to interstate commerce, not its mere existence as a motorized means of transportation. Personal vehicles used exclusively for local, intrastate activity—commuting, errands, or wholly private travel—do not become instrumentalities of interstate commerce simply by virtue of being capable of

crossing state lines. The Commerce Clause has never been understood to sweep so broadly.

Indeed, the class “vehicles” necessarily includes millions of vehicles that are never used, operated, or employed in interstate commerce in any meaningful sense. They do not transport goods across state borders, they do not carry passengers in interstate channels, and they do not serve as instrumentalities through which interstate commercial intercourse is conducted. Many are never driven on interstate highways at all. Treating the entire category as per se instrumentalities would collapse the distinction—long recognized in Commerce Clause jurisprudence—between instrumentalities of interstate commerce and objects or activities that are purely intrastate and noncommercial.

The Ninth and Eleventh Circuits contrary position would effectively convert every household sedan, pickup truck, or recreational vehicle into a federally regulated instrumentality, regardless of use. That approach is incompatible with the Supreme Court’s insistence that Congress’s authority over instrumentalities is broad but not boundless, and that the Commerce Clause does not permit federal regulation of wholly intrastate, noncommercial conduct merely because the object involved could be used in interstate commerce. The Clause regulates interstate commercial intercourse, not every item that might someday facilitate it.

Accordingly, vehicles as a class cannot be deemed per se instrumentalities of interstate commerce. Only those vehicles that actually affect interstate commerce in some way fall within that category.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 10th day of August, 2026.

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APPENDIX

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NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAR 24 2026

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

AARON THOMAS MITCHELL,

Defendant - Appellant.

No. 25-1795

D.C. No.

4:22-cr-01545-RM-EJM-1

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona

Rosemary Márquez, District Judge, Presiding

Argued and Submitted March 5, 2026
Phoenix, Arizona

Before: HAWKINS, BYBEE, and FRIEDLAND, Circuit Judges.

Defendant-Appellant Aaron Thomas Mitchell appeals his convictions for one count of kidnapping a minor, in violation of 18 U.S.C. § 1201(a)(1) and (g), and one count of deprivation of bodily rights under color of law, in violation of 18 U.S.C. § 242. Defendant raises various challenges to his convictions. We have jurisdiction

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

under 18 U.S.C. § 3231. For the reasons discussed below, we affirm Defendant's convictions.

1. The district court did not abuse its discretion in denying Defendant's motions for mistrial premised on alleged prosecutorial misconduct. *See United States v. Cardenas-Mendoza*, 579 F.3d 1024, 1029 (9th Cir. 2009). For the district court to have abused its discretion, there must have been prosecutorial misconduct, and that misconduct must have been prejudicial to Defendant. *Id.* at 1029–30. Defendant argues that his mistrial requests should have been granted in response to two instances of alleged prosecutorial misconduct: (1) the Government elicited allegedly improper testimony from an expert regarding DNA evidence, and (2) the Government held up an unadmitted detective's badge during redirect examination of the victim. Whether either action actually amounted to misconduct is inconsequential because neither action prejudiced Defendant.

Regarding the DNA evidence testimony, we cannot see that any misconduct occurred. Rather, it appears that Defendant, the Government, and the district court each had a different understanding as to what was admissible. And even if we were to assume that the Government acted in bad faith, “[a] curative instruction may obviate the impact of the government's statements, as juries are assumed to follow the court's instructions.” *Id.* at 1030. The district court gave such an instruction to the jury, instructing that the parties had stipulated that the disputed DNA test swabs

were inconclusive, that they could not be matched to Defendant, and that the jury should take that stipulation “as having been proven.” If anything, that instruction *strengthened* Defendant’s case rather than prejudiced it.

As for the second incident, even assuming the Government’s attempted use of the badge was improper, nothing indicates the Government’s brief display of a detective’s badge resulted in any actual prejudice here. Contrary to Defendant’s argument, there is no reason to think this act could have caused the jury to believe the badge being shown was *Defendant’s* badge—the Government plainly identified the displayed badge as “a *detective’s*” before the jury, not a Customs and Border Protection officer’s badge, and not Defendant’s. And in any event, any potential prejudice was harmless in light of the overwhelming evidence demonstrating Defendant’s guilt. *See United States v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1190 (9th Cir. 2019).

2. Defendant is not entitled to reversal based on any other alleged prosecutorial misconduct. Defendant identifies various statements from the Government, only some of which he objected to at trial, that he claims deprived him of due process and a fair trial. “We review de novo whether any prosecutorial misconduct occurred . . . [and] then consider the effect of any misconduct to determine whether reversal is warranted.” *United States v. Flores*, 802 F.3d 1028, 1034 (9th Cir. 2015). Even under the least deferential applicable standard, “we must

view ‘the challenged conduct in the entire context of the trial, and reverse only if it appears more probable than not that prosecutorial misconduct materially affected the fairness of the trial.’” *United States v. Dominguez-Caicedo*, 40 F.4th 938, 948 (9th Cir. 2022) (citation omitted).

Defendant raises a slew of challenges to various statements the Government made, but nothing in the record indicates that any of the Government’s actions “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Defendant has not shown that he suffered any prejudice as a result of the challenged conduct, and “[i]n the context of the entire trial, the prosecution’s [purported] misconduct was not likely to have affected the jury’s ability to weigh the evidence fairly.” *Flores*, 802 F.3d at 1037.

3. The district court did not abuse its discretion in denying Defendant’s motion to continue trial beyond August 19, 2024. *See United States v. Walter-Eze*, 869 F.3d 891, 907 (9th Cir. 2017). “A trial court clearly abuses its discretion only if denial of the continuance was arbitrary or unreasonable.” *United States v. Torres–Rodriguez*, 930 F.2d 1375, 1383 (9th Cir. 1991). “The most critical question is whether [Defendant] was prejudiced by the district court’s refusal to grant his request for a continuance. We may not reverse unless the party whose request was denied suffered prejudice.” *United States v. Mejia*, 69 F.3d 309, 316 (9th Cir. 1995).

Defendant asserts that four-and-a-half months was insufficient time for his counsel to prepare for trial, but he provides no clear indication what his counsel would have done with extra time or how the denial of his latest motion to continue—after the district court previously granted ten such motions—caused him prejudice. This case is on all fours with *United States v. Wilkes*, 662 F.3d 524 (9th Cir. 2011), in which we found that a district court did not abuse its discretion where the defendant “failed to establish that actual prejudice resulted from the denial because he has not shown that his verdict would have been different had the district court granted his request for continuance.” *Id.* at 543. And unlike in *Wilkes*, Defendant here has not even gone so far as to identify any specific documents or witnesses “that he contends he could have used to bolster his defense had he been afforded additional time.” *Id.*

4. The district court did not abuse its discretion in admitting evidence related to Defendant’s cell phone internet searches. *See United States v. Dorsey*, 677 F.3d 944, 951 (9th Cir. 2012). Defendant raises three challenges to the admission of web searches found on his cell phone: (1) that the evidence lacked sufficient foundation of authenticity, (2) that the danger of prejudice substantially outweighed its probative value, and (3) that it was improper character evidence. We will reverse only if, “in the context of the entire trial, it is more probable than not that [the

improperly admitted evidence] materially affected the verdict.” *Id.* at 954 (citations omitted). None of Defendant’s challenges is compelling.

As to authenticity, Defendant presented no evidence whatsoever that the police created the challenged searches or otherwise tampered with the phone to incriminate Defendant. Baseless allegations of evidence tampering are insufficient to raise an authenticity challenge under Federal Rule of Evidence 901(a); the district court properly concluded that a reasonable juror could have found that the searches were authentic. Nor did the district court abuse its discretion in refusing to exclude the searches under Federal Rule of Evidence 403 because the probative value of the searches outweighed any potential danger of unfair prejudice. The searches provided a temporal link between Defendant and the commission of the crimes; corroborated the victim’s story that Defendant gave her alcohol and that he attempted to choke her and placed a shirt over her mouth; suggested Defendant intended to commit rape; and suggested Defendant knew the victim was a minor. Finally, the district court did not abuse its discretion because the searches were not used as evidence of “any other crime, wrong, or act . . . to prove a person’s character” to rape under Federal Rule of Evidence 404(b)(1).

5. The district court did not err in rejecting Defendant’s as-applied Commerce Clause challenge to the federal kidnapping statute and denying his motion to dismiss the kidnapping charge. “An as-applied constitutional challenge

to a statute is reviewed de novo.” *United States v. Stackhouse*, 105 F.4th 1193, 1198 (9th Cir. 2024), *cert. denied*, 145 S. Ct. 558 (2024).

Defendant argues that the district court “misapplied” *Stackhouse* because the victim in that case was transported across state lines. But that is incorrect—there were multiple victims in *Stackhouse*, and the kidnapping victim was never transported across state lines. 105 F.4th at 1199. Indeed, we expressly held that “the application of the federal kidnapping statute to *an intrastate kidnapping* is constitutional where the defendant uses a cellphone—an instrumentality of interstate commerce—in furtherance of the offense.” *Id.* at 1196 (emphasis added); *see also United States v. Lopez*, 514 U.S. 549, 558 (1995) (instrumentalities of interstate commerce include “persons or things in interstate commerce, even though the threat may come only from intrastate activities”). Defendant also argues that cars as a class are not necessarily instrumentalities of interstate commerce. But that argument is precluded by our precedent; we have expressly held, on at least two occasions, “that cars are instrumentalities of interstate commerce.” *Fejes v. FAA*, 98 F.4th 1156, 1160 (9th Cir. 2024); *United States v. Oliver*, 60 F.3d 547, 550 (9th Cir. 1995) (“[C]ars are themselves instrumentalities of commerce, which Congress may protect.”).¹ Defendant’s arguments do not overcome these binding and unqualified holdings.

¹ We note that the district court did use some potentially overbroad language in ruling that “*vehicles* as a class are instrumentalities of interstate commerce.” The term “vehicle” could encompass a near limitless class of devices, and we are not aware of

6. The cumulative error doctrine does not warrant reversal of Defendant’s convictions. “[T]he combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal.” *Parle v. Runnels*, 505 F.3d 922, 928 (9th Cir. 2007). “[T]he fundamental question in determining whether the combined effect of trial errors violated a defendant’s due process rights is whether the errors rendered the criminal defense ‘far less persuasive,’ and thereby had a ‘substantial and injurious effect or influence’ on the jury’s verdict.” *Id.* (citations omitted). Defendant argues that the cumulative effect of the alleged “prosecutorial misconduct” and of the “trial errors” each separately prejudiced him and deprived him of a fair trial. Because these arguments appear to overlap, we shall address them together.

As we have already discussed, Defendant has not identified a single incident that resulted in *any* prejudice. And the cumulative effect of many events, each individually resulting in zero prejudice, is still zero prejudice. Nor has Defendant shown that the cumulative effect of the alleged misconduct or trial errors “would

a case extending the Commerce Power to “vehicles” in general. The district court may have intended “vehicles” to mean “cars” in this instance, but regardless, this mischaracterization was harmless in light of our holding that cars, including Defendant’s, *are* instrumentalities of interstate commerce.

have altered the verdict,” particularly in light of the fact that “the government in this case presented ample evidence of [Defendant’s] guilt.” *Wilkes*, 662 F.3d at 543.

AFFIRMED.

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 United States of America,

10 Plaintiff,

11 v.

12 Aaron Thomas Mitchell,

13 Defendant.
14

No. CR-22-01545-001-TUC-RM (EJM)

ORDER

15 On March 4, 2024, Magistrate Judge Eric J. Markovich issued a Report and
16 Recommendation (“R&R”) (Doc. 156) recommending that this Court deny Defendant
17 Aaron Thomas Mitchell’s Motion to Dismiss Count Two of the Indictment (Docs. 108,
18 155). Defendant filed an Objection to the Report and Recommendation (Doc. 165), to
19 which the Government responded (Doc. 172). The Court will deny Defendant’s Motion
20 to Dismiss for the following reasons.

21 **I. Background**

22 Defendant is charged in Count Two of a Superseding Indictment with kidnapping
23 a minor in violation of the federal kidnapping statute, 18 U.S.C. §§ 1201(a)(1) and (g).
24 (Doc. 37 at 2.) As relevant here, the statute provides punishment for “[w]hoever
25 unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and
26 holds for ransom or reward or otherwise any person” when the offender uses “any means,
27 facility, or instrumentality of interstate or foreign commerce in committing or in
28 furtherance of the commission of the offense.” 18 U.S.C. § 1201(a)(1).

Count Two alleges that Defendant kidnapped a minor victim, “M.V.,” and “willfully used an instrumentality of interstate and foreign commerce, to wit: a vehicle, in committing and in furtherance of the commission of the offense.” (*Id.*) Defendant purportedly used his personal vehicle to kidnap M.V. and drive her from Douglas, Arizona, to his residence in Sierra Vista, Arizona. (Doc. 108 at 2.) Defendant allegedly traveled only on state routes, not federal interstate highways. (*Id.*)

Defendant moves to dismiss Count Two, arguing that an ordinary vehicle used in an intrastate kidnapping is not an instrumentality of interstate commerce and is insufficient to establish federal jurisdiction under the Commerce Clause. (Docs. 108, 155.) Judge Markovich issued the pending R&R (Doc. 156), and Defendant’s Objection (Doc. 165) followed.

II. Standard of Review

A district judge must “make a de novo determination of those portions” of a magistrate judge’s “report or specified proposed findings or recommendations to which objection is made.” 28 U.S.C. § 636(b)(1); *see also* Fed. R. Crim. P. 59(b)(3) (“The district judge must consider de novo any objection to the magistrate judge’s recommendation”). Failure to object to the findings and recommendations of the magistrate judge “waives a party’s right to review.” Fed. R. Crim. P. 59(b)(2).

III. Discussion

The R&R recommends that this Court deny Defendant’s Motion to Dismiss Count Two, but grant Defendant leave to renew his Motion following the Government’s presentation of evidence at trial. (Doc. 156 at 2, 30-32.) In arriving at this recommendation, the Magistrate Judge reasons that “cars are not inherently an instrumentality of interstate commerce.” (*Id.* at 29.) Instead, the R&R concludes that a vehicle “can only be an instrumentality of interstate commerce if the evidence at trial establishes that the vehicle at issue was used for an interstate purpose (even if the vehicle did not travel interstate during the commission of the offense) or has some other requisite nexus to interstate commerce.” (*Id.* at 25-26.) Thus, the R&R finds that Count Two

1 states a cognizable offense. (*Id.* at 2.) But it recommends that Defendant be permitted to
2 renew his argument if he believes the evidence presented at trial does not support the
3 interstate commerce element of the offense. (*Id.* at 31.)

4 Defendant concurs with the R&R's finding that where, as here, a kidnapping
5 occurs entirely intrastate, the Government must show that the vehicle had a sufficient
6 nexus to interstate commerce. (Doc. 165 at 3.) However, Defendant asserts that the
7 Court should dismiss Count Two before trial because the Government cannot make this
8 showing. (*Id.*) The Government argues in opposition that Defendant's Motion to
9 Dismiss should be denied because vehicles are instrumentalities of interstate commerce
10 "irrespective of whether they traveled in interstate commerce or were used for an
11 interstate purpose." (Doc. 172 at 2.)

12 After the R&R was filed, the Ninth Circuit concluded in *United States v.*
13 *Stackhouse* that "the Commerce Clause permits Congress to regulate *intrastate*
14 kidnappings in particular where an instrumentality of commerce is used *intrastate*." 105
15 F.4th at 1201-02 (emphasis added). In *Stackhouse*, the defendant was convicted of
16 kidnapping under 18 U.S.C. § 1201 and using a cell phone in furtherance of the crime.
17 *Id.* at 1199. The defendant challenged his conviction on the ground that the Commerce
18 Clause does not permit Congress to regulate intrastate kidnappings where the kidnapping
19 is not economic in nature and no effect on interstate commerce is shown. *Id.* Citing the
20 Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), the Court
21 began its analysis by noting that Congress may regulate three broad categories of
22 activities under its commerce power: (1) "channels of interstate commerce"; (2)
23 "instrumentalities of interstate commerce"; and (3) "activities that substantially affect
24 interstate commerce." *Id.* (quoting *Lopez*, 514 U.S. at 558-59).

25 The Court concluded that because the application of the kidnapping statute fell
26 within the second *Lopez* category, the instrumentalities of interstate commerce, "the
27 government was not required to prove that the kidnapping was economic in nature or had
28 a substantial relation to interstate commerce." *Id.* at 1202. Furthermore, the Court

1 affirmed that “as long as the instrumentality itself is an integral part of an interstate
 2 system, Congress has power...to include intrastate activities within its regulatory
 3 control.” *Id.* at 1201 (internal quotations and citations omitted).

4 *Stackhouse* involved a cell phone, and the Ninth Circuit has yet to analyze the use
 5 of a vehicle in an intrastate kidnapping, but the Ninth Circuit has held in the context of
 6 analyzing the federal carjacking statute that “cars are . . . instrumentalities of commerce,
 7 which Congress may protect.” *United States v. Oliver*, 60 F.3d 547, 550 (9th Cir. 1995).
 8 Furthermore, the Seventh Circuit recently applied reasoning similar to *Stackhouse* to find
 9 that cars, as a class, are instrumentalities of interstate commerce under § 1201(a)(1). In
 10 *United States v. Protho*, the defendant argued that cars must be analyzed individually
 11 under the federal kidnapping statute to determine whether the specific automobile at issue
 12 was used for an interstate purpose. 41 F.4th 812, 828 (7th Cir. 2022), *cert. denied*, 143 S.
 13 Ct. 465 (2022). In upholding the defendant’s conviction, the Seventh Circuit announced
 14 that “we do not agree with [the defendant’s] view that the Commerce Clause asks us to
 15 consider each automobile’s specific use in interstate commerce. Instead, it’s the nature of
 16 the regulated object’s class (here, automobiles) rather than the particular use of one
 17 member of that class ([the defendant’s] Ford Explorer) that matters.” *Id.* The Court then
 18 found that automobiles as a class are instrumentalities of interstate commerce, citing
 19 numerous circuit cases that so hold. *Id.* at 829.

20 The Court applies the reasoning from *Stackhouse* and *Protho* here. Under the
 21 federal kidnapping statute, the Government must prove that the defendant kidnapped a
 22 person and that he used an “instrumentality of interstate or foreign commerce in
 23 committing or in furtherance of the commission of the offense.” 18 U.S.C. § 1201(a)(1).
 24 A car, “as an integral part of an interstate system,” is an instrumentality of interstate
 25 commerce. *See Stackhouse*, 105 F.4th at 1201 (internal quotations omitted); *Oliver*, 60
 26 F.3d at 550 (“cars are themselves instrumentalities of commerce, which Congress may
 27 protect”); *United States v. Cobb*, 144 F.3d 319, 322 (4th Cir. 1998) (automobiles, being
 28 “inherently mobile and indispensable to the interstate movement of persons and goods,”

are instrumentalities of interstate commerce); *United States v. Bishop*, 66 F.3d 569, 590 (3d Cir. 1995) (“motor vehicles are instrumentalities of interstate commerce); *United States v. McHenry*, 97 F.3d 125, 126 (6th Cir. 1996) (same). Thus, the Court finds that a vehicle, even without evidence that it was used in the interstate system, sufficiently satisfies the “use of an instrumentality of interstate commerce” element of the offense.

Because vehicles as a class are instrumentalities of interstate commerce, no inquiry is needed to establish that Defendant’s particular car had a substantial relation to interstate commerce, and the Court rejects the R&R’s finding to the contrary. *See Stackhouse*, 105 F.4th at 1202 (“whether an activity has a substantial effect on interstate commerce” is relevant to “*Lopez*’s third category...not to the ‘instrumentality of commerce’ category” (internal citations omitted)).

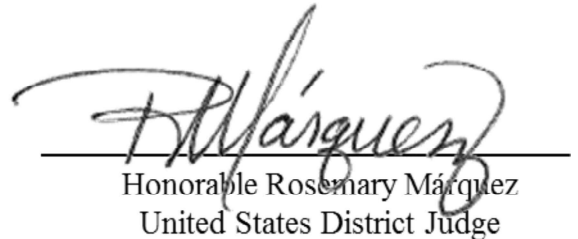
In sum, the Court finds that the application of § 1201(a) to an intrastate kidnapping where the defendant uses a vehicle in furtherance of the offense is a valid exercise of Congress’s authority to regulate the instrumentalities of interstate commerce. Although this Court has applied different reasoning, it accepts the R&R’s recommendation to deny Defendant’s Motion to Dismiss Count Two.

IT IS ORDERED that Defendant’s Objection (Doc. 165) is **overruled**.

IT IS FURTHER ORDERED that the Report and Recommendation (Doc. 156) is **partially accepted**, as modified herein.

IT IS FURTHER ORDERED that Defendant’s Motion to Dismiss Count Two of the Indictment (Doc. 108) is **denied**.

Dated this 2nd day of August, 2024.



Honorable Rosemary Márquez
United States District Judge

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 United States of America,
10 Plaintiff,
11 v.
12 Aaron Thomas Mitchell,
13 Defendant.

No. CR 22-01545-TUC-RM (EJM)

REPORT AND RECOMMENDATION

14 Pending before the Court is a Motion to Dismiss Count Two of the Superseding
15 Indictment which charges the defendant, Aaron Thomas Mitchell, with kidnapping, in
16 violation of 18 U.S.C. § 1201(a)(1). (Doc. 108). The defendant argues that Count Two
17 should be dismissed for lack of jurisdiction. *Id.* at 1. Specifically, the defendant argues
18 that the federal jurisdiction under the Commerce Clause cannot be based on the intrastate
19 use of a motor vehicle during a kidnapping because: (1) there is not a substantial effect on
20 interstate commerce; and (2) a vehicle is not an “instrumentality of interstate commerce.”
21 (Docs. 108 & 155).

22 The government argues jurisdiction under the Commerce Clause for the kidnapping
23 offense is not based on the offense’s effect on interstate commerce. (Doc. 124 at 2-3)
24 Rather, jurisdiction is based on the vehicle being an instrumentality of interstate commerce.
25 *Id.* at 2-4. The government claims that the law is clear that a vehicle is an instrumentality
26 of interstate commerce for purposes of the kidnapping statute. *Id.* As a result, there is
27 federal jurisdiction for this offense.
28

1 The Court concludes that vehicles, as a class, are not an instrumentalities of
 2 interstate commerce for purposes of the kidnapping statute. Rather, a court must view
 3 automobiles individually when deciding their instrumentality status under the kidnapping
 4 statute. As a result, a case-by-case analysis is necessary to make the instrumentality
 5 determination. For the reasons discussed below, that factual analysis cannot be conducted
 6 by the Court in resolving the motion to dismiss; it must await the evidence presented at
 7 trial.

8 However, for purposes of a motion to dismiss, the Court must accept the truth of the
 9 allegations in Count Two in analyzing whether a cognizable offense has been charged. At
 10 this point, the government has not presented all its evidence; it has only provided enough
 11 sufficient for an indictment. Count Two alleges that a vehicle is the instrumentality of
 12 interstate commerce used to commit the kidnapping. Because a vehicle used during a
 13 kidnapping *can* be an instrumentality of interstate commerce based on the facts of a given
 14 case, a cognizable offense has been alleged. As a result, the Court recommends that the
 15 District Court deny the Motion to Dismiss Count Two, but grant the defendant leave to
 16 renew the motion at the close of the government's presentation of evidence at trial.

17 **FACTUAL BACKGROUND**

18 The defendant is charged in a Superseding Indictment with the following offenses:
 19 (1) Deprivation of Rights Under Color of Law, in violation of 18 U.S.C. § 242 (Count
 20 One); (2) Kidnapping of a Minor, in violation of 18 U.S.C. §§ 1201(a)(1) and (g) (Count
 21 Two); and False Statements, in violation of 18 U.S.C. § 1512(b)(3) (Count Three) (Doc.
 22 37). Count One pertains to the defendant's alleged sexual assault of a minor. Count Three
 23 pertains to alleged false statements made by the defendant to law enforcement about his
 24 involvement in the sexual assault and the kidnapping offense charged in Count Two.

25 Count Two, which is the subject of the instant motion, alleges that: "On or about
 26 April 25, 2022, in the District of Arizona, the defendant AARON THOMAS MITCHELL,
 27 did unlawfully seize, confine, inveigle, kidnap, abduct, and carry away, M.V. The
 28 defendant willfully used an instrumentality of interstate and foreign commerce, to wit: a

1 vehicle, in committing and in furtherance of the commission of the offense. At the time of
 2 the offense M.V. had not attained the age of 18 years, and the defendant had attained such
 3 age; the defendant is not a parent, grandparent, brother, sister, aunt and uncle of M.V.; and
 4 the defendant did not have legal custody of M.V. All in violation of Title 18, United States
 5 Code, Sections 1512(b)(3).” (Doc. 37).¹

6 In his Motion to Dismiss Count Two, the defendant “requests that the Court
 7 reconsider existing legal authority and find that federal jurisdiction via the Commerce
 8 Clause should not be supplied strictly by the nature of the instrumentality or facility used,
 9 but instead by a qualifying nexus, or a separate proof of interstate movement.” (Doc. 108
 10 at 2). The defendant concedes that the Supreme Court has “greatly expanded the power of
 11 Congress to regulate economic activities, even in instances where the connection with
 12 interstate commerce is ‘indirect.’” *Id.* at 3 (citing *NLRB v. Jones & Laughlin Steel Corp.*,
 13 301 U.S. 1 (1937); *United States v. Darby*, 312 U.S. 100 (1941); *Wickard v. Filburn*, 317
 14 U.S. 111 (1942)). However, the defendant points out that the Supreme Court has also
 15 acknowledged that there are limits to the reach of the Commerce Clause. Def.’s Mot. to
 16 Dismiss Count Two (Doc. 108) at 3.

17 The defendant contends that the Federal Kidnapping Act, 18 U.S.C. § 1201, “is not
 18 related to economic activities” and “does not regulate the use of the channels of interstate
 19 commerce or the transportation of a commodity through the channels of commerce.” *Id.*
 20 at 5. In fact, in the case at hand, the government only alleges that the defendant used his
 21 vehicle, an instrumentality of interstate commerce, during a kidnapping. The government
 22 does not allege that the defendant crossed state lines or used interstate highways to
 23 effectuate the kidnapping. The defendant argues that “[w]hile the legal authority is clear,
 24 it is [the defendant’s] position that the government should be required to show that the

25
 26 ¹ As discussed in text *infra*, when the kidnapping statute was first enacted in 1932, federal
 27 jurisdiction was limited to cases where there was interstate travel during the kidnapping. In 2006,
 28 Congress enacted the Adam Walsh Act which, among other things, amended section 1201(a)(1)
 and expanded federal jurisdiction to include kidnappings where “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.”

1 activity in this instance, the use of a motor vehicle to affect an intrastate kidnapping on
2 local roads, without the use of a channel of commerce like an interstate highway,
3 substantially affects interstate commerce.” *Id.* The defendant requests that this Court
4 change the law “to require a case-by-case inquiry to assure the prohibited activity has the
5 ‘requisite nexus to interstate commerce.’” *Id.* (quoting *United States v. Lopez*, 514 U.S.
6 549, 561–62 (1995)).

7 The government’s Response argues that the defendant is asking this Court “to ignore
8 existing precedent holding that a car is an instrumentality of interstate and foreign
9 commerce” and change the law “in order to destroy federal jurisdiction and thereby dismiss
10 the charge.” (Doc. 124 at 2). The government claims that the Ninth Circuit and other
11 circuit courts have repeatedly held that a vehicle is an instrumentality of interstate
12 commerce. *Id.* Moreover, lower federal courts have rejected the argument made by the
13 defendant and held that the use of a vehicle satisfies the jurisdictional element of the federal
14 kidnapping statute. *Id.* at 4–5. As a result, the government contends that “there is no legal
15 support whatsoever for the defendant’s argument that Count Two of the Superseding
16 Indictment should be dismissed.” *Id.* at 5.

17 At oral argument on the Defendant’s Motion to Dismiss Count Two, the Court asked
18 defense counsel if the constitutional challenge to federal jurisdiction for the kidnapping
19 offense was only based on the argument that the government cannot establish that this
20 offense “substantially affects interstate commerce.” More specifically, the Court asked if
21 the defense was also arguing that a vehicle is not an “instrumentality of interstate or foreign
22 commerce,” the jurisdictional basis alleged in Count Two. The Court also asked if the
23 defense was making an “as applied” constitutional challenge to the kidnapping statute, or
24 only a facial challenge to that statute. Defense counsel represented that the defense was
25 making all of these arguments. The Court noted that it did not read the motion as making
26 all of these arguments. However, in its Response, the government argued that the law is
27 clear that a vehicle is an instrumentality of interstate and foreign commerce for purposes
28 of the kidnapping statute. Because the Court did not feel that the government was

1 sandbagged by the arguments identified by the Court, supplemental briefing was ordered
2 to address, in part, case law identified by the Court but not cited by the parties.

3 The supplemental pleadings primarily address why the cases identified by the Court
4 support the parties' respective positions. The Court will address those arguments during
5 its discussion of the relevant cases. However, both parties make evidentiary based
6 arguments that were not contained in the initial pleadings.

7 The government argues that the court must decide as matter of law if a motor vehicle
8 is an instrumentality of interstate commerce for purposes of the kidnapping statute. (Doc.
9 153 at 8–9.) If the court concludes that is the case, the court will give the jury an instruction
10 saying just that. *Id.* The only fact question left for the jury is whether the government has
11 proven beyond a reasonable doubt that the defendant used a motor vehicle to commit or
12 further the commission of the kidnapping. *Id.*

13 In the defendant's supplemental pleading, he asserts that the allegation in Count
14 Two that a vehicle is the instrumentality of interstate commerce used to commit the
15 kidnapping is not surplusage. (Doc. 155 at 5, 10). Specifically, the grand jury found
16 probable cause for the kidnapping offense based only on a vehicle being the instrumentality
17 of interstate commerce used to commit the kidnapping. *Id.* at 5–6. As a result, the
18 government is bound to this theory at trial and cannot present evidence at trial that some
19 other instrumentality of interstate commerce (*e.g.*, a phone) was used to commit the
20 offense. *Id.* at 10. If the government did so, it would be improperly constructively
21 amending Count Two at trial. *Id.*

22 As discussed below, the Court believes that these arguments are more properly
23 raised with the district court at (or before) trial.

24 **DISCUSSION**

25 The Federal Rules of Criminal Procedure require the indictment to “be a plain,
26 concise, and definite written statement of the essential facts constituting the offense
27 charged[.]” Fed. R. Crim. Pro. 7(c)(1); *see also United States v. Davis*, 336 F.3d 920 (9th
28 Cir. 2003). To withstand a motion to dismiss, “the indictment must allege the elements of

1 the offense charged and the facts which inform the defendant of the specific offense with
 2 which he is charged.” *United States v. Livingston*, 725 F.3d 1141, 1145 (9th Cir. 2013).
 3 “It is generally sufficient that an indictment set forth the offense in the words of the statute
 4 itself, as long as those words of themselves fully, directly and expressly, without any
 5 uncertainty or ambiguity, set forth all the elements necessary to constitute the offense
 6 intended to be punished.” *United States v. Mancuso*, 718 F.3d 780, 790 (9th Cir. 2013)
 7 (internal quotations omitted) (*quoting Hamling v. United States*, 418 U.S. 87, 117 (1974)
 8 (citations omitted)); *see also United States v. Alphonso*, 143 F.3d 772, 776 (2d Cir. 1998)
 9 (an indictment need do little more than to track the language of the statute charged and
 10 state the time and place (in approximate terms) of the alleged crime).

11 An indictment that fails to state a cognizable offense must be dismissed. *United*
 12 *States v. Milovanovic*, 678 F.3d 713, 717, 719-720 (9th Cir. 2012). However, a court
 13 cannot dismiss a facially valid indictment because the evidence may be insufficient to
 14 support a conviction. *Costello v. United States*, 350 U.S. 359, 363 (1956). “On a motion
 15 to dismiss an indictment for failure to state an offense, the court must accept the truth of
 16 the allegations in the indictment in analyzing whether a cognizable offense has been
 17 charged.” *United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002).

18 Federal Jurisdiction Under the Commerce Clause

19 In *United States v. Lopez*, 514 U.S. 549, 558 (1995), the Supreme Court identified
 20 three broad categories of activities that Congress may regulate under its commerce power:
 21 (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce,
 22 or persons or things in interstate commerce, even though the threat may come only from
 23 intrastate activities; and (3) activities substantially affecting interstate commerce. *Lopez*
 24 dealt with the constitutionality of the Gun-Free School Zones Act, 18 U.S.C. 922(q)(1)(A),
 25 which prohibited the knowing possession of a firearm within a school zone. 514 U.S. at
 26 551. The Court first held that Section 922(q)(1)(A) was not an attempt by Congress “to
 27 regulate the use of the channels of commerce” or “to regulate and protect instrumentalities
 28 of interstate commerce,” two areas undisputedly situated within Congress’s commerce

1 power. *Id.* at 558-560. As a result, the constitutionality of this statute turned on whether
 2 it satisfied the third category of permissible legislation noted above: “regulation of an
 3 activity that substantially affects interstate commerce.” *Id.* at 559. The Court concluded
 4 that Section 922(q)(1)(A) was unconstitutional because the government failed to
 5 demonstrate that the mere possession of guns in school zones produced the requisite
 6 substantial effect. *Id.* at 567–568.

7 The defendant’s challenges to the constitutionality of the kidnapping statute are
 8 based primarily on *Lopez*. As noted earlier, the defendant first argues that the third *Lopez*
 9 category should control the jurisdictional analysis in the case at hand. The defendant
 10 argues that the government cannot establish that an intrastate kidnapping substantially
 11 affects interstate commerce. As a result, there is not federal jurisdiction for the kidnapping
 12 offense under the Commerce Clause. Alternatively, the defendant argues that if the second
 13 *Lopez* category controls the analysis, the government cannot establish that a vehicle is “an
 14 instrumentality of interstate or foreign commerce” for purposes of the kidnapping statute;
 15 as a result, no federal jurisdiction exists for that offense. The Court addresses these
 16 arguments in turn.

17 *Lopez* Category Three: substantial effect on interstate commerce.

18 Count Two of the Superseding Indictment clearly and unequivocally alleges that
 19 federal jurisdiction is based on the second *Lopez* category -- a vehicle being an
 20 “instrumentality of interstate and foreign commerce.” (Doc. 38). Nevertheless, the
 21 defendant urges that the jurisdictional analysis should be conducted under the third *Lopez*
 22 category: whether there is “a substantial impact on interstate commerce.” For the reasons
 23 discussed below, the Court concludes that the second *Lopez* category – empowering
 24 Congress “to regulate and protect the instrumentalities of interstate commerce, or persons
 25 or things in interstate – controls the Commerce Clause analysis for the kidnapping statute.
 26 Moreover, the Court agrees with the numerous courts who have concluded that Congress
 27 did not exceed its Commerce Clause authority by expanding federal jurisdiction to
 28 kidnappings where an instrumentality of interstate or foreign commerce has been used to

1 commit that offense. However, as discussed *infra*, the more difficult question is whether
 2 a vehicle is an “instrumentality of interstate or foreign commerce” for purposes of the
 3 kidnapping statute.

4 The Ninth Circuit has not addressed the constitutionality of the federal kidnapping
 5 statute or the *Lopez* category pursuant to which the statute must be analyzed. However,
 6 other circuits have conducted their analysis of the constitutionality of the kidnapping
 7 statute under the second *Lopez* category – empowering Congress “to regulate and protect
 8 the instrumentalities of interstate commerce, or persons or things in interstate commerce,
 9 even though the threat may come only from interstate activities.” *United States v. Morgan*,
 10 748 F.3d 1024, 1032 n.9 (10th Cir. 2014) (rejecting as applied challenge to the kidnapping
 11 statute because a cell phone, GPS device, and the Internet are instrumentalities of interstate
 12 commerce); *see also United States v. Chambers*, 681 Fed. App’x 72, 80 (2d Cir. 2017)
 13 (finding that Congress’s enactment of the kidnapping statute did not exceed its Commerce
 14 Clause authority and that a cell phone is an instrumentality of interstate commerce under
 15 that statute).² Those courts conclude that because the kidnapping statute prohibits the use
 16 of instrumentalities of interstate commerce for the harmful act of kidnapping, it is within
 17 Congress’s purview under the Commerce Clause.

18 The courts reach that conclusion for several reasons. First, “[t]he express language
 19 of § 1201 makes it a federal crime to use ‘the mail or any means, facility, or instrumentality
 20 of interstate or foreign commerce’ in committing kidnapping.” *Chambers*, 681 Fed. App’x
 21 at 81 (quoting 18 U.S.C. § 1201). Thus, analyzing the kidnapping statute under *Lopez*
 22

23 ² District courts that have addressed a facial challenge to the kidnapping statute have
 24 likewise found that it is a valid exercise of Congress’s commerce power pursuant to the second
 25 *Lopez* category. *See United States v. Bachicha*, No. 1:19-cr-02328-MLG-1, 2023 WL 8566503
 26 (D.N.M. Dec. 11, 2023); *United States v. Glover*, No. 3:22-cr-00057-HZ, 2023 WL 3304311 (D.
 27 Or. May 7, 2023); *United States v. Davis*, No. 16 CR 570, 2019 WL 447249 (N.D. Ill. Feb. 5,
 28 2019); *United States v. Brown*, No. 13 Cr. 345(LGS), 2014 WL 4473372 (S.D.N.Y. Sept. 10,
 2014); *United States v. Graves*, No. 1:13-cr-417-WSD-JSA, 2014 WL 2589428 (N.D. Ga. June 9,
 2014); *United States v. Ramos*, 12 Cr. 566(LTS), 2013 WL 1932110 (S.D.N.Y. May 8, 2013);
United States v. Taylor, No. 12-0056-WS, 2012 WL 3522528 (S.D. Ala. Aug. 14, 2012); *United*
States v. Jacques, No. 2:08-cr-117, 2011 WL 1706765 (D. Vt. May 4, 2011).

1 category two is logical because the statute explicitly purports to regulate the precise activity
 2 identified in category two. *Id.* “Second, when analyzed under the *Lopez* category two, it
 3 is clear that the kidnapping statute is a valid exercise of Congress’s authority, since ‘[t]he
 4 power of Congress over the instrumentalities of interstate commerce is plenary.’” *Brown*,
 5 2014 WL 4473373 at * 4 (*quoting Cleveland v. United States*, 329 U.S. 14, 19 (1946)).
 6 This plenary power extends to regulation of the channels and instrumentalities of
 7 commerce “to prohibit their use for harmful purposes, even if the targeted harm itself
 8 occurs outside the flow of commerce and is purely local in nature.” *Id.* (*quoting Morgan*,
 9 748 F.3d at 1032 n.7. Moreover, “[n]owhere in *Lopez* or any other case has the Supreme
 10 Court limited Congress’s regulatory authority to prevent the harmful use of an
 11 instrumentality of interstate commerce. Indeed, the *Lopez* Court said “‘Congress is
 12 empowered to regulate and protect the instrumentalities of interstate commerce . . . even
 13 though the threat may come only from intrastate activities.’” *Morgan*, 748 F.3d at 1032.
 14 “In short, because the use of an instrumentality of interstate commerce is an element that
 15 must be proved in every § 1201 case, Congress’s enactment of that statute did not exceed
 16 its Commerce Clause authority.” *Chambers*, 681 Fed. App’x at 81.

17 The Court finds the approach taken in the cases discussed above is well-reasoned
 18 and persuasive. The Court concludes that the Ninth Circuit would take that approach if
 19 presented with the defendant’s constitutional challenge to the kidnapping statute based on
 20 that court’s application of *Lopez* to Commerce Clause challenges to other criminal
 21 offenses. *See United States v. Oliver*, 60 F.3d 547, 550 (9th Cir. 1995) (Commerce Clause
 22 provides jurisdiction for the federal carjacking statute because the statute applies only to
 23 the forcible taking of a car ‘that has been transported, shipped, or received in interstate or
 24 foreign commerce’ and the legislative history reflects that Congress was addressing
 25 economic evils of a interstate nature.); *United States v. Dela Cruz*, 358 F.3d 623, 625 (9th
 26 Cir. 2004) (A telephone is an instrumentality of interstate commerce for purposes of 18
 27 U.S.C. 844(e) when “used in a conventional way, as a means of communication and as part
 28 of an interstate communications network[.]”).

1 Because the kidnapping statute is properly analyzed under the second *Lopez*
 2 category, no further analysis is necessary for the defendant's constitutional challenge to
 3 this statute based on the third *Lopez* category. Accordingly, the Court recommends that
 4 the District Court deny the Motion to Dismiss Count Two of the Superseding Indictment
 5 on this ground.

6 *Lopez* Category Two: instrumentality of interstate commerce.

7 As noted earlier, the Ninth Circuit had not addressed a constitutional challenge to
 8 the kidnapping statute based on a Commerce Clause violation. However, as also noted
 9 earlier, the Ninth Circuit has applied *Lopez* to Commerce Clause challenges to other
 10 criminal offenses. *See Oliver*, 60 F.3d 547 (9th Cir. 1995); *Dela Cruz*, 358 F.3d 623 (9th
 11 Cir. 2004). The Court turns to a discussion of those cases before addressing cases that have
 12 addressed the precise issue at hand – *i.e.*, whether a vehicle used solely intrastate during a
 13 kidnapping is “an instrumentality of interstate or foreign commerce” for purposes of the
 14 kidnapping statute.

15 In *Oliver*, the defendant was charged under the federal carjacking statute, 18 U.S.C.
 16 § 2119. 60 F.3d at 548. That offense only involved alleged intrastate activity. *Id.* at 549.
 17 The defendant argued that Congress exceeded its power under the Commerce Clause in
 18 enacting the carjacking statute because that offense is not sufficiently related to interstate
 19 commerce. *Id.*

20 The Ninth Circuit first noted that it recently rejected that same argument in *United*
 21 *States v. Martinez*, 49 F.3d 1398, 1400–1401 (9th Cir. 1995). *Oliver*, 60 F.3d at 549–50.
 22 The *Oliver* court held that the Supreme Court's recent decision in *Lopez* did not alter its
 23 view. *Id.* at 550. The court explained that in *Lopez* the Supreme Court found that the Gun-
 24 Free Zones Act contained no jurisdictional element which would ensure, through a case-
 25 by-case inquiry, that the firearm in possession affected interstate commerce. *Id.* The
 26 Supreme Court also noted that this statute did not seek to protect an instrumentality of
 27 interstate commerce. *Id.*

28 The Ninth Circuit concluded that, unlike the Gun-Free Zones Act, the carjacking

1 statute has a very different background. *Id.* First, the carjacking statute “applies only to
 2 the forcible taking of a car ‘that has been transported, shipped, or received in interstate or
 3 foreign commerce.’” *Oliver*, 60 F.3d at 550 (*quoting* 18 U.S.C. 2119)). “Second, cars
 4 themselves are instrumentalities of interstate commerce, which Congress may protect.” *Id.*
 5 Finally, “Congress was not silent regarding the effect of carjacking on interstate
 6 commerce.” *Id.* “[C]ongress relied on, among other things, the emergence of carjacking
 7 as a high grow industry that involves taking stolen vehicles to different states to retitle,
 8 exporting vehicles abroad, or selling cars to ‘chop shops’ to distribute various auto parts
 9 for sale.” *Id.* (internal quotations and citations omitted). The court reasoned that the fact
 10 that “Congress was addressing economic evils of an interstate nature differentiate[d] the
 11 carjacking statute from the firearms statute invalidated in *Lopez*.” *Id.*

12 The case at hand is distinguishable from *Oliver* because federal jurisdiction for
 13 carjacking statute hinges on the government proving that the vehicle had “been transported,
 14 shipped, or received in interstate or foreign commerce.” Thus, there is interstate activity
 15 built into the jurisdictional provision of the carjacking statute – a car moving from one state
 16 to another at any point in time, even if not in connection with the carjacking offense. That
 17 is not the case for the kidnapping statute. The carjacking statute is similar to many federal
 18 firearms offenses where jurisdiction is premised on the interstate movement of a firearm
 19 or its parts at any point in time. Again, jurisdiction under the kidnapping statute is much
 20 broader and does not explicitly require interstate movement of persons or objects. *Oliver*
 21 is also distinguishable because there are congressional findings that address the effect of
 22 carjackings on interstate commerce. The legislative history for that statute shows that
 23 Congress was addressing the economic evils that resulted from carjackings. By contrast,
 24 there are no congressional findings for the 2006 amendments to the kidnapping statute
 25 which greatly broadened federal jurisdiction for that offense. As a result, the Court does
 26 not find *Oliver* especially helpful in resolving the jurisdictional issue in the case at hand.

27 However, the Ninth Circuit has rejected a Commerce Clause challenge to a statute
 28 that is more comparable to the federal kidnapping statute. *See Dela Cruz*, 358 F.3d 623,

1 625 (9th Cir. 2004). The defendant in that case was charged with a violation of 18 U.S.C.
 2 844(e), which prohibits “*through the use of the mail, telephone, telegraph, or other*
 3 *instrument of interstate or foreign commerce*” to make a threat or convey false information
 4 concerning an attempt to kill, injure, or intimidate any individual or unlawfully damage or
 5 destroy any building, vehicle or other real or personal property by means of fire or an
 6 explosive. 18 U.S.C. § 844(e). The defendant argued that “his particular calls must have
 7 substantially affected interstate commerce [(*Lopez* category three)] in order to be reached
 8 by 844(e).” *Dela Cruz*, 358 F.3d at 625.

9 The Ninth Circuit first noted that the defendant’s argument was based on an
 10 erroneous reading of *Lopez* and the Supreme Court’s “discussion of when conduct must
 11 have substantial effects on interstate commerce in order to be reached under the commerce
 12 power.” *Id.* The *Dela Cruz* court applied the second *Lopez* category because a phone was
 13 alleged to be an instrumentality of interstate commerce; as a result, “no substantial effects
 14 inquiry [was] needed.” *Id.* The Court rejected the defendant’s argument that Section
 15 844(e) “requires the government to show that he used the particular phone from which he
 16 made the calls for interstate purposes.” *Id.* The court held that “[w]here a telephone is
 17 used in a conventional way, as a means of communication and as part of an interstate
 18 communications network, it is an instrumentality of interstate commerce.” *Id.*³

19 This Court finds that *Dela Cruz* is distinguishable from and not controlling on the
 20 issue in the case at hand. The *Dela Cruz* court’s conclusion that a telephone is an
 21 instrumentality of interstate commerce was based on the inherent nature of that
 22 instrumentality – *i.e.*, a phone can only function in a conventional way because it is part of
 23 an interstate communications network. As discussed in detail below, the same is true for
 24 cell phones, the internet, and GPS devices; but that is not the case for motor vehicles.

25
 26 ³ As discussed in text *infra*, the reasoning of the *Dela Cruz* has been applied by other courts
 27 in concluding that a cellphone is an “instrumentality of interstate or foreign commerce” for
 28 purposes of the kidnapping statute. See *Morgan*, 748 F.3d at 1031 (cellular phones, Global
 Positioning System, and the internet are “instrumentalities of interstate or foreign commerce”
 under the kidnapping statute); *Chambers*, 681 Fed. App’x at 81 (federal jurisdiction for the
 kidnapping offense existed because a cell phone is an “instrumentality of interstate commerce”).

1 In *United States v. Glover*, which involved a kidnapping charge where a cell phone
 2 and vehicle were alleged to have been used during the commission of the offense, the
 3 district court relied heavily on *Dela Cruz* in rejecting the defendant's Commerce Clause
 4 challenges. 2023 WL 3304311 (D. Or. May 7, 2023). The court found that the kidnapping
 5 statute was comparable to the bomb statute in *Dela Cruz*. *Glover*, 2023 WL 3304311, at
 6 *10. The court first concluded that, contrary to the defendant's contention, *Dela Cruz*
 7 "establishes that the Ninth Circuit does not require a statute to be aimed at an
 8 instrumentality of interstate commerce to be constitutional under *Lopez* category two." *Id.*
 9 at *10. The *Glover* court also rejected the defendant's arguments that the government must
 10 "prove either that the instrumentality was actually used in interstate commerce" or "that
 11 'use' of an instrumentality of interstate commerce should be read to require 'an active
 12 employment of that instrumentality in interstate commerce.'" *Id.* at *10. The court
 13 reasoned that the defendant's interpretation was "inconsistent with *Dela Cruz*'s conclusion
 14 that a phone is an instrumentality of interstate commerce whether or not the defendant used
 15 it in interstate commerce and that the government need not prove use in interstate
 16 commerce." *Id.* at *11. The court also found that the defendant's argument was
 17 inconsistent with the text of the kidnapping statute which provides several jurisdictional
 18 bases, including using "an instrumentality of interstate commerce." The court held that the
 19 only reasonable interpretation of the kidnapping statute is that the instrumentality must be
 20 of the kind that is commonly used in interstate commerce, and not that it "was actually
 21 used in interstate commerce." *Id.* As a result, the court concluded that "the federal
 22 kidnapping statute was within Congress's power to enact" and was not unconstitutional as
 23 applied to the defendant. *Id.*

24 Here, the government relies on *Glover* to support its argument that a vehicle used
 25 during an intrastate kidnapping is an instrumentality of interstate commerce. The Court
 26 disagrees that *Glover* supports the government's argument. The *Glover* court's focus was
 27 on whether a cell phone used during the kidnapping was an instrumentality of interstate
 28 commerce. Indeed, the court relied almost exclusively on *Dela Cruz* where the

1 instrumentality was also a phone. The *Glover* court only mentions vehicles in three
2 instances and provides no analysis of why they are instrumentalities of interstate commerce
3 for purposes of the kidnapping statute. The first is when the court noted that the defendant
4 did not dispute “that vehicles and cell phones are instrumentalities of interstate commerce.”
5 *Id.* at *10. As a result, the court did not need to resolve or even address that issue, which
6 is the precise issue in the case at hand. The second is where the court held that that the
7 government “need not prove that *either* instrumentality was actually used in interstate
8 commerce.” *Id.* (emphasis added). Again, that is not the issue the Court is faced with here.
9 The third is when the court stated that:

10 Defendant correctly points out that “cars and phones are ubiquitous in
11 modern life.” Under the expansive interpretation of the second *Lopez*
12 category the Government advances, many crimes that have been traditionally
13 handled by the states may fall under the purview of federal jurisdiction,
14 which raises concerns in our federal system. However, this Court is bound
by the Ninth Circuit’s interpretation of *Lopez*, which is in line with the
Government’s position.

15 *Id.* at *11.

16 Given the minimal discussion about motor vehicles generally and the absence of
17 any discussion of why a vehicle is an instrumentality of interstate commerce, the Court
18 does not find *Glover* as helpful as the government contends. Relatedly, as discussed earlier,
19 the Court disagrees with *Glover* that the Ninth Circuit’s decision in *Dela Cruz* compels the
20 conclusion that vehicles are instrumentalities of interstate commerce for purposes of the
21 kidnapping statute.

22 The Court turns to cases not initially cited by either party that address whether a
23 vehicle is an instrumentality of interstate commerce for purposes of the kidnapping statute.
24 *See United States v. Protho*, 41 F.4th 812 (7th Cir. 2022); *United States v. Bachicha*, No.
25 1:19-cr-02328-MLG-1, 2023 WL 8566503 (D.N.M. Dec. 11, 2023); *United States v.*
26 *Chavarria*, No. 22-cr-1724-KG, 2023 WL 3815203 (D.N.M. June 5, 2023). While helpful
27 generally, these courts reach different conclusions and the courts who reach the same
28 conclusion use different reasoning.

1 In *Protho*, the defendant agreed “that automobiles are generally treated as
 2 instrumentalities of interstate commerce.” 41 F.4th at 828. The defendant’s argument was
 3 that “courts must view automobiles individually – rather than a class – when deciding their
 4 instrumentality status” for purpose of the kidnapping statute. *Id.* Stated another way, the
 5 evidence must show that the specific automobile at issue was, at some point, used for an
 6 interstate purpose. *Id.*

7 The Seventh Circuit disagreed with the defendant’s position that the Commerce
 8 Clause requires a court to consider each automobiles specific use in interstate commerce.
 9 *Id.* “Instead, it’s the nature of the regulated object’s class (here, automobiles) rather than
 10 the particular use of one member of that class . . . that matters.” *Id.* However, the court
 11 went on to note that even if the defendant’s argument was correct, the automobile used for
 12 the kidnapping was used in interstate commerce. *Id.* The defendant drove the automobile
 13 across state lines several times on the day of the kidnapping and regularly drove the
 14 automobile between the state where he lived and the state where he worked. *Id.* As a
 15 result, there was no doubt that the defendant’s automobile was used in interstate commerce.

16 At first blush, *Protho* seems to support the government’s argument in the case at
 17 hand. However, in this Court’s view, the Seventh Circuit did not adequately explain why
 18 it concluded that it is the nature of the regulated object’s use – automobiles as a class – that
 19 matters. The court primarily relied on another Seventh Circuit opinion addressing the
 20 federal murder-for-hire statute, 18 U.S.C. § 1958(a), which reached the same conclusion.
 21 *See United States v. Mandel*, 647 F.3d 710 (7th Cir. 2011).⁴ However, *Mandel* is

22
 23 ⁴ In *United States v. Windham*, 53 F.4th 1006, 1012 (6th Cir. 2022), the Sixth Circuit agreed
 24 with *Protho* that in interpreting the federal kidnapping statute, it was helpful to consider other
 25 federal statutes concerning crimes that are “crime traditionally regulated by states.” The defendant
 26 in *Windham* plead guilty to a kidnapping offense but then argued on appeal that the factual basis
 27 for his guilty plea was insufficient because it did not establish that he used the cell phone or
 28 automobile to conduct interstate activity. *Windham*, 53 F.4th at 1011. The court noted that it has
 previously and “unambiguously held that cars and phones are instrumentalities of interstate
 commerce” for purposes of the federal murder-for-hire statute and the carjacking statute. *Id.* at
 1013. The court found that the jurisdictional provision of the kidnapping statute was analogous to
 those statutes. *Id.* As a result, the court held that the “intrastate use of a cell phone and automobile
 satisfies § 1201(a)(1)’s interstate commerce requirements.” *Id.* at 1011. This Court’s concerns

1 distinguishable from *Protho* and the case at hand.

2 The court in *Mandel* noted that subsection 1958(b)(2) of the murder-for-hire statute
 3 specifically provides that a “‘facility of interstate or foreign commerce’” includes means
 4 of transportation and communication[.]” 647 F.3d at 720. In fact, the defendant did not
 5 “dispute that an automobile, as a ‘means of transportation,’ constitutes a facility of
 6 interstate commerce for purposes of the federal murder for hire statute.” *Id.* Rather, the
 7 defendant argued that the automobile had to be employed in interstate commerce. *Id.* at
 8 721. The court rejected that argument based on the plain language of the murder-for-hire
 9 statute. The *Mandell* court further noted that “even if the [plain] language of § 1958 was
 10 ambiguous, . . . the statute’s history indicates that Congress sought to punish contract
 11 killings pursuant to its authority to regulate the instrumentalities of interstate commerce.”
 12 *Id.* (internal quotations and citations omitted).⁵ *Id.*

13 In contrast to the murder-for-hire statute, the kidnapping statute does not provide a
 14 general definition of “an instrumentality of interstate commerce” for purposes of that
 15 statute, let alone specifically provide that a means of transportation meets that definition.
 16 Moreover, unlike the murder-for-hire statute, the legislative history for the 2006
 17 amendments to the kidnapping statute is silent on why Congress expanded federal
 18 jurisdiction for that offense. Thus, this Court disagrees with the *Protho* court that *Mandell*
 19 is dispositive of the issue in the case at hand.

20 The *Protho* court also noted that “[n]early all circuits have followed this course
 21 when faced with similar questions, and no circuit has adopted [the defendant’s] proposal”
 22 that automobiles be viewed individually when determining their instrumentality status. 41

23 _____
 24 about relying on these other federal statutes is discussed in text, *infra*.

25 ⁵ With respect to the legislative history, the *Mandel* court pointed out that “when Congress
 26 later amended section 1958 in 2004 to substitute the words ‘facility of’ for ‘facility in,’ any doubt
 27 on this subject was resolved: ‘This amendment makes absolutely clear that 1958 establishes
 28 federal jurisdiction wherever any ‘facility of interstate commerce’ is used in the commission of a
 murder for hire offense, regardless of whether the use is interstate in nature . . . or purely intrastate
 in nature” 647 F.3d at 721.

1 F.3d at 829 (*citing United States v. Bishop*, 66 F.3d 569 (3d Cir. 1995); *United States v.*
 2 *Cobb*, 144 F.3d 319 (4th Cir. 1998); *United States v. McHenry*, 97 F.3d 125 (6th Cir. 1996);
 3 *United States v. Robinson*, 62 F.3d 234 (8th Cir. 1995); *Oliver*, 60 F.3d at 550). However,
 4 all but one of those courts were addressing the carjacking statute.⁶ “Unlike the carjacking
 5 statute, the kidnapping statute is meant to protect people, not an instrumentality of interstate
 6 commerce such as cars.” *Windham*, 53 F.4th at 1012. Moreover, as discussed earlier,
 7 Congress made findings about the economic effect that carjackings have on interstate
 8 commerce. Once again, Congress was silent about the effects of kidnapping on interstate
 9 commerce when it amended the kidnapping statute in 2006 to expand federal jurisdiction
 10 for that offense. Congress’s silence on that point was dispositive on the jurisdictional issue
 11 for the court in *United States v. Chavarria*, No. 22-cr-1724-KG, 2023 WL 3815203, at *4
 12 (D.N.M. June 5, 2023).

13 In *Chavarria*, the defendant was charged with a kidnapping resulting in death. 2023
 14 WL 3815203, at *1. The defendant allegedly used a vehicle offense during the commission
 15 of the offense, but the offense involved solely intrastate activity. *Id.* The indictment
 16 alleged that federal jurisdiction was based on a vehicle being “a means, facility, and
 17 instrumentality of interstate commerce.” *Id.* The defendant did not dispute that the federal
 18 kidnapping statute applies to instrumentalities of interstate commerce or that the second
 19 *Lopez* category applied to his challenge to the kidnapping count. *Id.* at *2–3.

20 In his motion to dismiss the kidnapping offense, the defendant argued that “a vehicle
 21 is not an instrumentality of interstate commerce when use for intrastate non-economic
 22 violent crime such as kidnapping.” *Id.* The defendant also argued that the Commerce
 23 Clause can be used to regulate instrumentalities of interstate commerce only if
 24 congressional hearings “determine that the activity in question has a substantial effect on
 25 interstate commerce.” *Chavarria*, 2023 WL 3815203, at *2–3. The defendant noted that

26
 27 ⁶ The *Prothro* court also cites to *Morgan* where, as already discussed, the Seventh
 28 Circuit held that cellphones, the internet, and GPS devices are instrumentalities of interstate
 commerce for purposes of the kidnapping statute. As discussed in text *infra*, the nexus that
 those instrumentalities have to interstate commerce is quite different than vehicles as a
 class.

1 “there are no congressional findings that the use of a vehicle to commit a crime just by
2 itself brings the matter under [the] ambit of the Commerce Clause.” *Id.*

3 The district court dismissed the kidnapping charge primarily based on the lack of
4 Congressional findings on the economic evils of using a vehicle during an intrastate
5 kidnapping. *Id.* at *4. The court began its analysis by pointing out that although *Lopez*
6 was specifically addressing the third category activity that Congress may regulate under its
7 commerce power, some aspects of the decision are instructive to the second category. *Id.*
8 “For example, when determining which category applied to the question presented, the
9 Court categorized the second category of Congress’ commerce authority as regulations ‘by
10 which Congress has sought to protect an instrumentality of interstate commerce or a thing
11 in interstate commerce.’” *Id.* (quoting *Lopez*, 514 U.S. at 559). The *Chavarria* court then
12 noted that a vehicle “is not what Congress sought to protect when enacting the kidnapping
13 statute. The way the [Supreme] Court characterizes this second category suggests that
14 vehicles are not an instrumentality of interstate commerce in connection with the
15 kidnapping statute, by which Congress sought to protect human kidnapping victims.”
16 *Chavarria*, 2023 WL 3815203, at *4.

17 The court turned to a discussion of *Morgan*, where “the Tenth Circuit was presented
18 with an as-applied Commerce Clause challenge in a federal kidnapping case[.]” *Id.* The
19 defendants in *Morgan* used cell phones, a GPS device, and vehicles during the commission
20 of the kidnapping. *Id.* The *Chavarria* court found “it relevant that despite all defendants
21 utilizing a vehicle during the kidnapping, the Tenth Circuit does not list vehicles among
22 the means, facilities, or instrumentalities of interstate or foreign commerce used by
23 defendants.” *Id.* In fact, there was no “other relevant discussion of the vehicle” in *Morgan*.
24 *Id.* The dearth of discussion about vehicles indicated to the *Chavarria* court that “vehicles
25 without more are not instrumentalities of interstate commerce.” *Chavarria*, 2023 WL
26 3815203, at *4.

27 The district court then turned to *United States v. Morrison*, 529 U.S. 598, 617
28 (2000), even though the Supreme Court was once again applying the third Commerce

1 Clause category. *Id.* at *5. The district court concluded that the Supreme Court’s reasoning
 2 for declaring the criminal statute unconstitutional in that case also applied to the kidnapping
 3 statute analyzed under category two. *Id.* First, the kidnapping statute regulates a non-
 4 economic violent crime. *Id.* And the Supreme Court has noted that ““thus far in our
 5 Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity
 6 only where that activity is economic in nature.”” *Id.* (quoting *Morrison*, 529 U.S. at 613).
 7 Second, “there is no explicit reflection either of Congress[’s] intent for application of the
 8 federal kidnapping statute whenever there is use of a vehicle, nor any jurisdictional element
 9 requiring an explicit connection between the use of the vehicle and interstate commerce.”
 10 *Chavarria*, 2023 WL 3815203, at *5. The district court noted that “there are no
 11 congressional findings regarding the impact of a vehicle involved in kidnapping on
 12 interstate commerce and it appears the United States has made such conclusion of law as
 13 part of its Superseding Indictment when it defined the vehicle as an instrumentality of
 14 interstate commerce.” *Id.* Third, the Supreme Court has rejected “the argument that
 15 Congress may regulate noneconomic, violent criminal conduct based solely on that
 16 conduct’s aggregate effect on interstate commerce.”” *Id.* (quoting *Morrison*, 529 U.S. at
 17 617.)

18 The district court concluded that “Congress has not indicated an intent to assert
 19 Commerce Clause authority and bring under federal jurisdiction non-economic criminal
 20 kidnapping entirely occurring intrastate simply because of the use of a common vehicle.”
 21 *Id.* at *8. The court held that it would be improper to extend “federal jurisdiction under
 22 the Commerce Clause because of a use of a vehicle without explicit congressional intent
 23 to regulate non-economic criminal behavior and with no jurisdictional or case-by-case
 24 inquiry.” *Id.*

25 This Court agrees with *Chavarria* that, unlike the federal carjacking statute, the
 26 Commerce Clause analysis is greatly complicated by Congress’s silence about why federal
 27 jurisdiction for kidnapping was expanded by the Adam Walsh Act in 2006. However, it is
 28 hard to reconcile *Chavarria*’s reliance on the Tenth Circuit’s decision in *Morgan* with

1 *Chavarria*'s laser focus on the absence of congressional findings for the kidnapping statute.
 2 As discussed earlier, in *Morgan* the Tenth Circuit held that cell phones, GPS devices, and
 3 the Internet are instrumentalities of interstate commerce. The Tenth Circuit did so
 4 notwithstanding Congress's silence on the impact that these devices used in a kidnapping
 5 have on interstate commerce. That result is arguably inconsistent with the reasoning of
 6 *Chavarria*. Perhaps the *Chavarria* court viewed these electronic devices, whose signals
 7 undoubtedly cross state lines, inherently different than vehicles. As discussed below, this
 8 Court is certainly of that view.

9 However, the Court does not agree with *Chavarria* that *Morgan*'s failure to address
 10 the vehicles used in that case means that "the Tenth Circuit excluded vehicles from the
 11 instrumentalities of interstate commerce[.]" *Chavarria*, 2023 WL 3815203, at *6. The
 12 indictment in *Morgan* alleged (and the jury instructions stated) that the electronic devices
 13 referred to above were the instrumentalities of interstate commerce that provided federal
 14 jurisdiction for the kidnapping offense. 748 F.3d at 1031-1032. For whatever reason, the
 15 government in that case chose not to allege that the vehicles were instrumentalities of
 16 interstate commerce. As a result, the *Morgan* court simply never had to address that issue.

17 Another district court in the District of New Mexico disagreed with *Chavarria*'s
 18 reasoning and reached the opposite conclusion. *United States v. Bachicha*, No. 1:19-cr-
 19 02328-MLG-1, 2023 WL 8566503 (D.N.M. Dec. 11, 2023). As in *Chavirra*, the
 20 kidnapping offense in *Bachicha* allegedly "took place within New Mexico's boundaries:
 21 the alleged victims were not transported outside the state." 2023 WL 8566503, at *1. The
 22 government asserted that jurisdiction existed because the defendant "allegedly used a
 23 motor vehicle during the commission of the offense, which it identifie[d] as a means,
 24 facility, or instrumentality of interstate commerce." *Id.* The defendant moved to dismiss
 25 the kidnapping offense arguing that in enacting the 2006 amendment to the kidnapping
 26 statute, Congress "did not define the term 'instrumentality of interstate commerce' to
 27 include a motor vehicle." *Id.*

28 The district court denied the motion for the following reasons. The court pointed to

1 the definition of “instrumentality” in the dictionary – “the fact or function of serving to
 2 bring about a result or accomplish a purpose” – and reasoned that a motor vehicle
 3 “comport[ed] with this ordinary meaning in that it functions to accomplish a purpose (*e.g.*,
 4 kidnapping for the primary purpose of committing sexual assault).” *Id.* The court believed
 5 its “conclusion [was] strengthened when considering Congress’s use of the antecedent
 6 ‘any’ before ‘instrumentality,’ which the court construed expansively. *Id.* With that
 7 understanding, the court reasoned that “it makes sense that Congress intended for
 8 ‘instrumentality’ to serve as an expansive catch-all encompassing –for example – both
 9 tangible objects, like cell phones and GPS devices, as well as intangibles like the internet.
 10 . . . It follows then that an expansive interpretation of the wording ‘any instrumentality’
 11 includes motor vehicles.” *Bachicha*, 2023 WL 8566503, at *1 (internal citations omitted).

12 The court also found that its conclusion was supported “when considering
 13 Congress’s extensive authority to regulate interstate commerce”; more specifically, the
 14 three broad categories of activity identified in *Lopez* that Congress may regulate under its
 15 commerce power. *Id.* at *2. The court concluded that “[g]iven the language in both the
 16 indictment and the statute, the second type of congressional authority is implicated.” *Id.*
 17 The court reasoned that “[e]ven though the kidnappings occurred entirely within the
 18 boundaries of New Mexico, they were facilitated by the use of a regulated instrumentality
 19 of interstate commerce: a motor vehicle. Thus, ‘[f]ederal prosecution for such conduct
 20 comports with the Commerce Clause’ under the second category.” *Id.* (*quoting Morgan*,
 21 748 F.3d at 1032).

22 The court went on to note that “most other cases addressing analogous
 23 circumstances concur that Congress possesses this authority and accordingly those courts
 24 have held that motor vehicles constitute instrumentalities of interstate commerce.” *Id.*
 25 (citations omitted). Although these cases were decided under the federal carjacking
 26 statute, the court did not see a “compelling reason to interpret that statutory language
 27 differently than the language of the kidnapping statute.” 2023 WL 8566503, at *2.

28 The court noted that it was aware that *Chavarria* interpreted the Tenth Circuit’s

1 decision in *Morgan* “as foreclosing the possibility that motor vehicles are an
 2 instrumentality of interstate commerce.” *Id.* However, the *Bachicha* court did not read
 3 *Morgan* so narrowly “because the precise question presented here was not before the
 4 *Morgan* court: the indictment and tendered jury instructions” in that case reflect that the
 5 “federal jurisdictional hook rested on the defendants’ use of a cell phone, the Internet, and
 6 a GPS device in furtherance of the kidnapping plot – *not* a motor vehicle.” *Id.* (emphasis
 7 in original). Thus, the district court concluded that the “Tenth Circuit did not reach the
 8 issue, and its decision does not exclude the possibility that vehicles are instrumentalities of
 9 interstate commerce.” *Id.*

10 As discussed above, the Court agrees with *Bachicha* that *Morgan* does not foreclose
 11 the possibility that a motor vehicle is an instrumentality of interstate commerce under the
 12 kidnapping statute. The Court also agrees that the Supreme Court in *Lopez* made clear that
 13 Congress can regulate instrumentalities of interstate commerce under its commerce power.
 14 However, the Court is not persuaded by *Bachicha*’s reasoning that a motor vehicle is *per*
 15 *se* an instrumentality of interstate commerce under the kidnapping statute.

16 The Court does not believe that the dictionary’s definition of “instrumentality” –
 17 “the fact or function of serving to bring about a result or accomplish a purpose” -- adds
 18 much to the Commerce Clause analysis. There is no doubt that a motor vehicle comports
 19 with the ordinary meaning of “instrumentality” in terms of it being used to accomplish a
 20 purpose, here, a kidnapping. Given the ordinary meaning of “instrumentality”, a defendant
 21 would be hard-pressed to succeed on a Commerce Clause challenge because an object used
 22 to commit an offense is not an “instrumentality.” In fact, the Court has not found a case
 23 where a defendant made that argument. But the ordinary meaning of an “instrumentality”
 24 can include many tangible and intangible objects that are not within Congress’s Commerce
 25 Power. Congress only has the power under the Commerce Clause to regulate “an
 26 instrumentality of interstate commerce,” not a mere “instrumentality.”

27 The Court also does not understand how the Commerce Clause analysis is impacted
 28 by the fact that Congress used the antecedent “any” before “instrumentality,” and therefore

1 intended “instrumentality” to be an expansive “catch-all.” As discussed above, the
 2 definition and ordinary meaning of “instrumentality” is already broad. The addition of the
 3 antecedent “any,” or even “all,” does not broaden the definition or ordinary meaning of
 4 this already broad term. But even if the *Bachicha* is correct, once again, the breadth of the
 5 tangible and intangible objects that meet the definition of an instrumentality does not mean
 6 that every instrumentality falls within Congress’s commerce clause power. For example,
 7 a bicycle used in a kidnapping could be an “instrumentality” under the ordinary meaning
 8 of that term. However, that is only the beginning of the jurisdictional analysis under the
 9 Commerce Clause. The instrumentality must have the requisite nexus to interstate
 10 commerce. The rub is how that nexus is established under the Commerce Clause.

11 Congressional findings are clearly the best evidence of the interstate nexus because
 12 they have repeatedly been used show that the enactment of a federal statute was within
 13 Congress’s commerce power. The carjacking and murder for hire statutes are the best
 14 examples. Although the government does not make this argument, the Court disagrees
 15 with *Protho* and *Windham* that it is helpful to compare the jurisdictional provisions of the
 16 carjacking or the murder-for-hire statutes to the kidnapping statute. In fact, the Court
 17 believes it is not appropriate to do so because the jurisdictional provisions are not
 18 comparable given the language used in these other statutes.

19 Relatedly, the Court rejects any notion that the legislative history for either the
 20 carjacking statute or the murder for hire statute is relevant to the Commerce Clause analysis
 21 for kidnapping statute. The congressional findings for the carjacking and murder of hire
 22 statutes are specific to the effect that each offense has on interstate commerce. As a result,
 23 those findings are not relevant to the kidnapping statute. Congress’s commerce power is
 24 undoubtedly broad, but Congress’s power to enact (or amend) a federal statute under its
 25 commerce power is dependent on the prohibited activity’s effect on interstate commerce,
 26 and not the activity prohibited by an unrelated statute. Stated another way, the Commerce
 27 Clause analysis is statute specific, as is the legislative history and congressional findings
 28 that address the prohibited activity’s effect on interstate commerce.

1 Unlike the 2006 amendments to the kidnapping statute, there is legislative history
 2 for when the kidnapping statute was first enacted in 1932. The Supreme Court noted that
 3 this statute was drawn against a backdrop of organized violence and an epidemic of
 4 kidnappings. *Chatwin v. United States*, 326 U.S. 455, 462–63 (1946). Law enforcement,
 5 who had no uniform intercommunication and whose authority was restricted to their own
 6 jurisdiction, found themselves laughed at by criminals who had no such limitations or
 7 restrictions. *Chatwin*, 326 U.S. at 462–63. As a result, a person would be kidnapped in
 8 one state and whisked into another by captors who knew that law enforcement in the
 9 jurisdiction where the crime was committed did not have authority in the neighboring state.
 10 *Id.* The federal kidnapping statute was designed for these situations where victims were
 11 transported across state lines. *Id.*

12 In *United States v. Toledo*, 985 F.2d 1462, 1467 (10th Cir. 1993), a pre-Adam Walsh
 13 Act case, the Tenth Circuit noted that the Supreme Court’s discussion in *Chatwin* “suggests
 14 that the concern of Congress in enacting the federal kidnapping statute was not to regulate
 15 comprehensively an activity that it perceived as having an adverse effect on interstate
 16 commerce or to protect the instrumentalities of interstate commerce. Rather, Congress was
 17 attempting to address the misuse of interstate commerce by kidnappers to frustrate the
 18 efforts of state police.”

19 Prior to the passage of the Adam Walsh Act in 2006, “federal law prohibited
 20 kidnapping only where the victim was transported across state line[s]. With the passage of
 21 the Act, however, jurisdiction was expanded to include kidnappings where ‘the offender
 22 travels in interstate or foreign commerce or uses the mail or any means, facility, or
 23 instrumentality of interstate or foreign commerce in committing or in furtherance of the
 24 commission of the offense.’” *United States v. Frazier*, No. 3:17-cr-00130, 2023 WL
 25 4930187 (M.D. Tenn. Aug. 2, 2023) (*quoting* 18 U.S.C. 1201(a)(1)).⁷ But, once again,

26
 27 ⁷ The Court notes that Congress’s concern in 1932 about law enforcement lacking “uniform
 28 intercommunication” was certainly eliminated well before the 2006 amendments simply by
 advances in technology. To be sure, advances in technology have made cell phones, the internet,
 and GPS devices instrumentalities of interstate commerce. But the same is not true for motor

1 there are no congressional findings or legislative history for the 2006 amendments that
2 address the need to broaden federal jurisdiction for kidnappings, let alone the impact of a
3 vehicle involved in kidnapping on interstate commerce.

4 This Court views the congressional silence as problematic given that Congress's
5 concern in enacting the kidnapping statute in 1932 was not to protect the instrumentalities
6 of interstate activity or even regulate an activity that had an adverse effect on interstate
7 commerce. On their face, the 2006 amendments to the jurisdictional provision of 18 U.S.C.
8 1201(a)(1) do exactly that; but there is no mention in the legislative history for why those
9 protections were needed when "instrumentalities of interstate activity" are used during a
10 kidnapping, let alone an intrastate kidnapping. As a result, it is difficult for courts to
11 determine whether the expansion of federal jurisdiction for kidnapping offenses is within
12 Congress's commerce power.

13 As discussed above, this Court has concerns about the reasoning of each court that
14 has addressed whether a vehicle used in an intrastate kidnapping is an instrumentality of
15 interstate commerce under the kidnapping statute. Those concerns undoubtedly stem from
16 Congress's silence on the 2006 amendments to the kidnapping statute. Courts are left to
17 divine Congress's intent in a vacuum for a violent offense that was traditionally reposed in
18 the States. The result is the conflicting conclusions of the courts discussed above each of
19 which employ a different Commerce Clause analysis.

20 The Court believes that the proper analysis of whether a motor vehicle is an
21 instrumentality of interstate commerce under the kidnapping statute is the defendant's
22 argument that the Seventh Circuit rejected in *Prothro*. That is, a court must view
23 automobiles individually, rather than as a class, when deciding their instrumentality status
24 under the kidnapping statute. Stated another way, a motor vehicle used during a
25 kidnapping can only be an instrumentality of interstate commerce if the evidence at trial
26 establishes that the vehicle at issue was used for an interstate purpose (even if the vehicle

27 vehicles which existed in 1932 (although less prevalent than today) when the kidnapping statute
28 was enacted. Indeed, motor vehicles were likely the primary means of transportation used in 1932
to "whisk" a kidnapping victim from one state to another.

1 did not travel interstate during the commission of the offense) or has some other requisite
 2 nexus to interstate commerce.⁸ This conclusion ensures there is a case-by-case Commerce
 3 Clause analysis for a kidnapping offense where jurisdiction is based on the use of a vehicle
 4 during the commission of that offense. Such an analysis is necessary given the
 5 congressional silence when the kidnapping statute was amended in 2006 to greatly expand
 6 federal jurisdiction for that offense. That analysis is also necessary because the use and
 7 regulation of vehicles differ from other modes of transportation, such as a common carrier.

8 The Supreme Court in the *Shreveport Rate Cases*, 234 U.S. 342 (1914) “upheld a
 9 federal law that prohibited the use of an instrumentality of interstate commerce – a railroad
 10 – to charge discriminatory intrastate rail rates.” *Morgan*, 748 F.3d at 1032. Even in 1914,
 11 railroad companies were easily analyzed as a class under the Commerce Clause because
 12 tracks were laid across state lines and a railroad company is a commercial venture. A person
 13 who takes a train uses an instrumentality of interstate commerce regardless of whether the
 14 person intends only to travel within one state. The same is true for a commercial airline or
 15 a bus company that has interstate routes even if the passenger is only travelling intrastate
 16 during the commission of an offense. That is not the case for automobiles, which simply
 17 *can* (or *did*) travel interstate. Additionally, railroad and airline traffic are commercial in
 18 character, whereas motor vehicles are not generally used for commercial purposes.
 19 Moreover, railroads and airlines are heavily regulated by the federal government. Motor
 20 vehicles are primarily regulated by the states, at least with respect to traffic rules, licensing
 21 drivers, as well as registration and insurance requirements. For these reasons, unlike a
 22 common carrier, motor vehicles are not inherently an instrumentality of interstate
 23 commerce, and therefore, cannot as a class under the Commerce Clause.

24 The Court’s reasoning finds support in *Garcia v. Vanguard Car Rental USA, Inc.*,

25
 26 ⁸ Federal jurisdiction for carjacking statute, an economic crime and within Congress’s
 27 commerce power, hinges on the vehicle being transported, shipped, or received in interstate or
 28 foreign commerce. The government must prove that jurisdictional element at trial. Perhaps that
 showing is sufficient for jurisdiction under the kidnapping statute as well.

1 540 F.3d 1242, 1249–50 (11th Cir. 2008). In that case, the Eleventh Circuit expressed
 2 concern that “if a car’s status as an instrumentality of interstate commerce were by itself
 3 sufficient to support the exercise of the commerce power, there would be no limit to the
 4 aspects of automobile use that Congress could regulate.”⁹ *Mandel*, 647 F.3d at 710. The
 5 Eleventh Circuit “declined to sustain the Graves Amendment, 49 U.S.C. 30106,” which
 6 shielded rental and leasing firms for vicarious liability for injuries to persons or property
 7 arising from a customer’s use of lent vehicles, “as a valid regulation of instrumentalities of
 8 interstate commerce.” *Garcia*, 540 F.3d at 149-1250. The *Garcia* court held that “[i]f cars
 9 are always instrumentalities of interstate commerce . . . Congress would have plenary
 10 power not only over the commercial rental market, but over many aspects of automobile
 11 use” including “quintessentially state law matters as traffic rules and licensing drivers.” *Id.*
 12 at 1250.¹⁰

13 The concern about the federal government expanding into subject matters that were
 14 traditionally reserved to the states was also addressed by the Supreme Court in *Morrison*.
 15 The Supreme Court made clear that Congress may not “regulate noneconomic, violent
 16 criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.
 17 *Morrison*, 529 U.S. at 617. “That is because ‘[t]he regulation and punishment of intrastate
 18 violence that is not directed at the instrumentalities, channels, or goods involved in
 19 interstate commerce has always been the province of the States.’” *Windham*, 53 F.4th at
 20 1011 (quoting *Morrison*, 529 U.S. at 618)). In holding that Congress exceeded its
 21

22 ⁹ In his dissent in *Bishop*, 66 F.3d at 598 (where the Third Circuit upheld a Commerce
 23 Clause challenge to the federal carjacking statute), Circuit Judge Becker noted that whereas rail,
 24 plane, and commercial truck traffic is almost always commercial in character, the use of private
 25 automobiles is often neither interstate nor commercial. The mere fact that private cars *can* be used
 26 in interstate commerce thus was insufficient, in Judge Becker’s view, to justify the exercise of the
 27 commerce power. *Id.*

28 ¹⁰ The *Garcia* court ultimately upheld the Graves Amendment under the third *Lopez*
 category: activities that substantially affect interstate commerce. In its supplemental pleading, the
 government presents the alternative argument that the kidnapping statute also falls within
 Congress’s commerce power under the third *Lopez* category. That argument has been rejected by
 many other courts and there is no evidence before this Court to support that argument.

1 commerce power in enacting the Violence Against Women Act, the Court noted that “it
 2 could ‘think of no better example of the police power, which the Founders denied the
 3 National Government and reposed in the States, than the suppression of violent crime and
 4 vindication of the victims.’” *Id.* (quoting *Morrison*, 529 U.S. at 618)). The same is true
 5 for the kidnapping statute, a crime traditionally reposed in the states, especially in the
 6 absence of congressional findings that address how federal regulation of intrastate
 7 kidnappings is directed at instrumentalities of interstate commerce.

8 For the reasons discussed above, the Court concludes that motor vehicles cannot be
 9 analyzed as a class under the commerce clause for purposes of the kidnapping statute. A
 10 motor vehicle’s connection to interstate commerce is fact specific, and therefore, an
 11 individual case-by-case analysis must be conducted to determine the instrumentality status
 12 of a motor vehicle used in a kidnapping. In the context of this motion to dismiss, the Court
 13 does not have sufficient facts to make the instrumentality determination. The only fact
 14 presented to the Court in connection with the instant motion is that a vehicle was used to
 15 commit an intrastate the kidnapping. That fact alone does not make the vehicle an
 16 instrumentality of interstate commerce. The government must present evidence at trial to
 17 establish that the motor vehicle used during the kidnapping is an instrumentality of
 18 interstate commerce.¹¹

19
 20 ¹¹ As discussed in text *infra*, the Court’s conclusion that a case-by-case Commerce Clause
 21 analysis is necessary is also consistent with district court cases that reject facial challenges to the
 22 kidnapping statute made in a motion to dismiss and conclude that an “as applied” challenge is
 23 properly addressed after there is a full development of the facts at trial. *See United States v. Ramos*,
 24 No. 12 Cr. 556(LTS), 2013 WL 1932110, at *3–4 (S.D.N.Y. May 8, 2013) (Defendant’s as applied
 25 challenge that the use of the vehicle “was too attenuated from the alleged kidnapping to create a
 26 nexus to interstate commerce” can be renewed following the government’s presentation of its case
 27 at trial.); *United States v. Davis*, No. 16 CR 570, 2019 WL 447249, at *3 (N.D. Ill. Feb. 5, 2019)
 28 (Defendant can file a motion for acquittal at trial to support his argument that use of a telephone
 “does not support the interstate commerce element of the [kidnapping] offense.”); *United States v.*
Brown, No. 13 Cr. 345(LGS), 2014 WL 4473372, at *4 (S.D.N.Y. Sept. 10, 2014) (Defendant’s
 argument that the kidnapping statute as applied in his case is unconstitutional because the use of
 the instrumentality (which the government did not specify in the indictment) is solely intrastate or
 incidental to the offense is not properly addressed in a motion to dismiss because it challenges the
 sufficiency of the evidence.).

1 Finally, the Court turns to the government's argument that the determination of
 2 whether a vehicle is an instrumentality of interstate commerce for purposes of the
 3 kidnapping statute is a question of law for the court to decide. The government asserts that
 4 if the trial court determines that vehicles are instrumentalities of interstate commerce as a
 5 matter of law, the court will instruct the jury accordingly. The jury will then decide the
 6 factual issue of whether the defendant used a vehicle to commit or during the commission
 7 of the kidnapping.

8 Although the Court expressed skepticism at oral argument that the government was
 9 correct, cases from other circuits support its position. *See Morgan*, 748 F.3d at 1034
 10 (district court correctly instructed the jury that cell phones, GPS devices and the internet
 11 are instrumentalities of interstate commerce; to hold otherwise would allow one jury to
 12 find that these devices are instrumentalities of interstate commerce and another jury to find
 13 they are not); *Protho*, 41 F.4th at 828 (noting that the district court instructed the jury that
 14 the defendant used an instrumentality of interstate commerce if he used an automobile in
 15 committing or in furtherance of the commission of the offense). However, this Court's
 16 conclusion that a case-by-case factual analysis is necessary to determine the instrumentality
 17 status of a vehicle for purpose of the kidnapping applies regardless of whether the judge or
 18 jury makes that determination.¹²

19 Simply stated, even if the instrumentality status of a vehicle is a question of law,
 20 additional facts are required for the trial court to make that legal determination. As already
 21 discussed at length, unlike cell phones, the internet, GPS devices, and common carriers,
 22 cars are not inherently an instrumentality of interstate commerce.¹³ As a result, the

23
 24 ¹² The *Morgan* court concluded that if instrumentality status was a question fact, it would
 25 allow one jury to find that these devices are instrumentalities of interstate commerce and another
 26 jury to find they are not. 748 F.3d at 1034. That is certainly a concern if instrumentalities are
 analyzed as a class; but it is far less of a concern if instrumentality status is determined based on
 the facts of each case.

27 ¹³ The Court notes that any case where cell phones, GPS devices, or the Internet are used
 28 during the commission of an offense, the government undoubtedly presents evidence at trial about
 how those devices work – e.g., signals are transmitted via wires or satellites between states and
 foreign counties – to support the trial court's legal conclusion that these devices are

determination of whether the motor vehicle used during the kidnapping is an instrumentality of interstate commerce cannot be made in the context of a motion to dismiss.

CONCLUSION

The Court concludes that motor vehicles cannot be analyzed as a class in determining their instrumentality status for purposes of the kidnapping statute. Stated another way, a vehicle is not *per se* “an instrumentality of interstate commerce” for an intrastate kidnapping offense simply because motor vehicles *can* travel between states. However, there is no doubt that a motor vehicle can, based on the facts of a given case, qualify as an instrumentality of interstate or foreign commerce under the federal kidnapping statute. For that reason, the defendant has failed in his facial constitutional challenge to the kidnapping offense.

“A facial challenge to a legislative act must meet the high bar of establishing ‘that no set of circumstances exists under which the Act would be valid. The fact that the [relevant statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid[.]’ *United States v. Ramos*, No. 12 Cr. 556(LTS), 2013 WL 1932110 (S.D.N.Y. May 8, 2013) (*quoting United States v. Salerno*, 481 U.S. 739, 745 (1987)). Because a motor vehicle can qualify as an instrumentality of interstate commerce for purpose of the kidnapping statute, the defendant cannot meet the high bar of establishing that no set of circumstances exist under which the statute would be valid.

For purposes of a motion to dismiss, the Court must accept the truth of the allegations in the indictment in analyzing whether a cognizable offense has been charged. *Boren*, 278 F.3d at 914. As a result, Count Two’s jurisdictional allegation that an instrumentality of interstate commerce, *i.e.*, a vehicle, was used to commit the kidnapping offense is facially valid. Because Count Two states a cognizable offense, it is

instrumentalities of interstate commerce as a matter of law. It seems logical that the government should be required to offer evidence at trial to support the trial court’s legal conclusion that a vehicle used during the kidnapping is an instrumentality of interstate commerce.

1 recommended that the District Court deny the defendant's instant motion based on the
2 facial challenge to the kidnapping statute.

3 The Court also rejects the defendant's "as applied" constitutional challenge to the
4 kidnapping statute because the defendant is challenging the sufficiency of the evidence
5 establishing jurisdiction. "A motion to dismiss is not the appropriate vehicle to address
6 factual issues." *United States v. Davis*, No. 16 CR 570, 2019 WL 447249, at *3 (N.D. Ill.
7 Feb. 5, 2019). "There is no such thing as a motion for summary judgment in a criminal
8 case." *Brown*, 2014 WL 4473373, at *4 (*quoting Russell v. United States*, 369 U.S. 749,
9 791 (1962)). The Government has not presented all of its evidence; it has only provided
10 enough sufficient for an indictment." *Davis*, 2019 WL 447249, at *3. Thus, an "as
11 applied" challenge is premature and "must await trial and a full development of the facts."
12 *Ramos*, 2013 WL 1932110, at *3.¹⁴ If the defendant believes that the evidence presented
13 at trial does not support the interstate commerce element on the kidnapping offense, he can
14 file a motion for acquittal under Fed. R. Crim. Pro. 29. *Davis*, 2019 WL 447249, at *3.¹⁵
15 Accordingly, the Court recommends that the District Court deny to the Motion to Dismiss
16 Count Two "without prejudice to renewal of the 'as-applied' challenge following the
17 Government's presentation of its case." *Ramos*, 2013 WL 1932110, at *4.

21
22 ¹⁴ A jury found the defendant in *Ramos* guilty of the kidnapping offense. *United States v.*
23 *Ramos*, 622 Fed. App'x 29 (2d Cir. 2015). On appeal, the defendant argued that the evidence
24 was insufficient to support the jury's finding beyond a reasonable doubt that a telephone was used
25 in furtherance of the kidnapping. *Ramos*, 622 Fed. App'x at 29. The Second Circuit rejected that
26 argument because the evidence at trial was sufficient to allow a reasonable fact finder to conclude
27 that the defendant used a telephone during the kidnapping. *Id.* at 30. Specifically, the victim
28 testified that he was thrown in the back of the car and during the car ride, it "sounded like he was
on the phone[.]" *Id.* Based on that testimony, "combined with the cell-site map and cell logs,"
a reasonable juror could conclude that the defendant used a phone during the kidnapping. *Id.*

¹⁵ The defendant's argument that the government cannot offer evidence at trial about a
different instrumentality being used during the commission of the kidnapping should be raised
with the district court if the government intends to do so. That issue is not before this Court.

RECOMMENDATION

For the reasons discussed above, it is recommended that the District Court deny the defendant's Motion to Dismiss Count Two of the Superseding Indictment, but grant the defendant leave to renew the motion at the close of the government's case at trial.

Pursuant to 28 U.S.C. §636(b) and Rule 59(b)(2) of the Federal Rules of Criminal Procedure, any party may serve and file written objections within fourteen (14) days after being served with a copy of this Report and Recommendation. No reply shall be filed unless leave is granted from the District Court. If objections are filed, the parties should use the following case number: **CR 22-01545-TUC-RM**.

Failure to file timely objections to any factual or legal determination of the Magistrate Judge in accordance with Fed. R. Crim. P. 59 may result in waiver of the right of review.

Dated this 1st day of March, 2024.

A handwritten signature in black ink, appearing to read "Eric J. Markovich", written over a horizontal line.

Eric J. Markovich
United States Magistrate Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

United States of America

v.

Aaron Thomas Mitchell

***AMENDED JUDGMENT IN A CRIMINAL CASE**

CR-22-01545-001-TUC-RM (EJM)

Stephanie Kathryn Bond (CJA) and Laura Elizabeth
Udall (CJA)

Attorneys for the Defendant

USM#: 13040-510

***AMENDED TO INCLUDE RESTITUTION.**

THERE WAS A VERDICT OF guilty on August 30, 2024, as to Count 1 and Count 2 of the Superseding Indictment.

ACCORDINGLY, THE COURT HAS ADJUDICATED THE DEFENDANT GUILTY OF THE FOLLOWING OFFENSES:

- Violating 18 U.S.C. § 242: Deprivation of Rights Under Color of Law, a Class A felony offense, as charged in Count 1 of the Superseding Indictment; and,
- Violating 18 U.S.C. § 1201(a)(1) and 18 U.S.C. § 1201(g): Kidnapping of a Minor, a Class A felony offense, as charged in Count 2 of the Superseding Indictment.

IT IS THE JUDGMENT OF THE COURT the defendant be committed to the custody of the Bureau of Prisons for a term of **TWENTY-SEVEN (27) YEARS** on both counts to run concurrently. The defendant will receive credit for time served. Upon release from imprisonment, the defendant will be placed on supervised release for a term of **LIFE** on both counts to run concurrently.

IT IS ORDERED DISMISSING the Indictment on motion of the government. Count 3 of the Superseding Indictment was previously dismissed on October 3, 2024.

CRIMINAL MONETARY PENALTIES

The defendant shall pay to the Clerk the following total criminal monetary penalties:

SPECIAL ASSESSMENT: \$200.00 **FINE:** WAIVED **RESTITUTION:** \$2,767.00

The defendant shall pay a special assessment of \$200.00 which shall be due immediately.

The Court **FINDS** the defendant does not have the ability to pay a fine and **ORDERS** the fine waived.

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IT IS FURTHER ORDERED the defendant pay restitution to Alondra Linares in the amount of \$1,756.00; the victim, L.O. in the amount of \$490.00; and L.O.'s school in the amount of \$521.00, for a total amount of \$2,767.00.

If incarcerated, payment of criminal monetary penalties is due during imprisonment at a rate of not less than \$25 per quarter and payment shall be made through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, Attention: Finance, Suite 130, 401 West Washington Street, SPC 1, Phoenix, Arizona 85003-2118. Payments should be credited to the various monetary penalties imposed by the Court in the priority established under 18 U.S.C. §3612(c). The total special assessment of \$200.00 shall be paid pursuant to 18 U.S.C. §3013 for Count 1 and Count 2 of the Superseding Indictment.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVRTA assessment, (9) penalties, (10) costs, including cost of prosecution and court costs.

Any unpaid balance shall become a condition of supervision and shall be paid within 90 days prior to the expiration of supervision. Until all restitutions, fines, special assessments, and costs are fully paid, the defendant shall immediately notify the Clerk, U.S. District Court, of any change in name and address. The Court hereby waives the imposition of interest and penalties on any unpaid balances.

SUPERVISED RELEASE

IT IS ORDERED while on supervised release, the defendant must comply with the mandatory and standard conditions of supervision adopted by this Court, in General Order 17-18. Of particular importance, the defendant must not commit another federal, state, or local crime during the term of supervision and the defendant must abstain from the use of illicit substances. Within 72 hours of release from the custody of the Bureau of Prisons the defendant must report in person to the probation office in the district to which the defendant is released. The defendant must comply with the following conditions:

MANDATORY CONDITIONS

- 1) You must not commit another federal, state, or local crime.
- 2) You must not unlawfully possess a controlled substance. The use or possession of marijuana, even with a physician's certification, is not permitted.
- 3) You must refrain from any unlawful use of a controlled substance. The use or possession of marijuana, even with a physician's certification, is not permitted. Unless suspended by the Court, you must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter as determined by the Court.

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STANDARD CONDITIONS

- 1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of sentencing or your release from imprisonment unless the probation officer instructs you to report to a different probation office or within a different time frame.
- 2) After initially reporting to the probation office, you will receive instructions from the Court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
- 3) You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the Court or the probation officer.
- 4) You must answer truthfully the questions asked by your probation officer.
- 5) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 6) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
- 7) You must work full time (at least 30 hours per week) at a lawful type of employment unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 8) You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- 9) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
- 10) You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

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USA vs. Aaron Thomas Mitchell

- 11) You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the Court.
- 12) If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
- 13) You must follow the instructions of the probation officer related to the conditions of supervision.

SPECIAL CONDITIONS

The following special conditions are in addition to the conditions of supervised release or supersede any related standard conditions:

- 1) You must submit your person, property, house, residence, vehicle, papers, or office to searches to be conducted by a probation officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition.
- 2) You must cooperate in the collection of DNA as directed by the probation officer.
- 3) You must reside at and participate in a residential reentry center, a residential substance abuse treatment program, a sober-living environment, or any combination thereof as approved and directed by the probation officer for up to 180 days unless discharged earlier by the probation officer. You must follow all rules and regulations. You must contribute to programming costs in an amount determined by the probation officer.
- 4) You must attend and participate in a sex offender treatment program and sex offense specific evaluations as approved by the probation officer. You must abide by the policies and procedures of all the treatment and evaluation providers. You must contribute to the cost of such treatment and assessment not to exceed an amount determined to be reasonable by the probation officer based on ability to pay.
- 5) You must attend and participate in periodic polygraph examinations as a means to determine compliance with conditions of supervision and the requirements of your therapeutic program as directed by the probation officer. No violation proceeding will arise solely on the result of the polygraph test. A valid Fifth Amendment refusal to answer a question during a polygraph examination will not be used as a basis for a violation proceeding. You must contribute to the cost of such polygraph examination not to exceed an amount determined to be reasonable by the probation officer based on ability to pay.

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- 6) You must reside in a residence approved, in advance, by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least ten (10) days before the change to allow the probation officer sufficient time to evaluate the proposed change. Any changes in the residence must then be preapproved by the probation officer. If, however, notifying the probation officer in advance, or obtaining preapproval, is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of the change or expected change.
- 7) You must not knowingly possess, view, or otherwise use material depicting sexually explicit conduct involving children, as defined by 18 USC § 2256(2), and material depicting sexually explicit conduct involving adults defined as explicit sexually stimulating depictions of adult sexual conduct that are deemed inappropriate by your probation officer. This condition does not prohibit you from possessing, viewing, or using materials necessary to litigation in which you are a party (such as statutes, caselaw, or court documents related to the litigation, but not including the image or images that gave rise to your conviction unless specifically allowed by court order), or from creating and possessing journals or writings required as part of any mandated sex-offender treatment but you must notify the probation officer within 72 hours of possessing, viewing, or using any such litigation materials, journals, or writings.
- 8) You must register as a sex offender in compliance with all federal, state, tribal, or other local laws or as ordered by the Court. Failure to comply with registration laws may result in new criminal charges.
- 9) You must submit your laptop and desktop computers, cell phones, tablets, and other communications and data storage device or devices or media, including thumb drives, CDs, and DVDs, to searches at any time with or without a warrant. A probation officer may conduct a search pursuant to this condition only in the lawful discharge of the officer's supervision functions or when reasonable suspicion exists that there is a violation of a condition of supervision and that the computer, device, or media contains evidence of this violation. Failure to submit to a search may be grounds for revocation of release. You must consent to and cooperate with the seizure and removal of any hardware, software, and/or data storage media for further analysis by law enforcement or the probation officer. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. You must warn any other people who use these computers, cell phones, tablets, and other communications and data storage device or devices or media that the devices may be subject to search and seizure pursuant to this condition.
- 10) You must not knowingly have contact with children who you know are under the age of 18, excluding your own children, without prior written permission from the probation officer. Contact includes, but is not limited to, direct physical or verbal contact, letters, communications devices, audio or visual devices, visits, or communication through a third party

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- 11) You must not directly or indirectly contact the victim nor the victim's family of the instant offenses without prior written permission. This also includes victims disclosed in treatment, assessment, and/or any other victim identified by the probation officer. Indirect contact includes, but is not limited to, letters, communication devices, audio or visual devices, communication through a third party, and /or your presence at any location the victim may be known to frequent. You must immediately report any contact to the probation officer.
- 12) You are restricted from engaging in any occupation, business, volunteer activity, or profession where it is reasonably foreseeable you will be alone with children under the age of 18 without prior written permission of the probation officer. Acceptable employment shall include a verifiable work location, and the probation officer must be granted access to your work site.

The Court may change the conditions of supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of supervised release.

THE DEFENDANT IS ADVISED OF THE RIGHT TO APPEAL BY FILING A NOTICE OF APPEAL IN WRITING WITHING 14 DAYS OF ENTRY OF JUDGMENT.

The Court **ORDERS** commitment to the custody of the Bureau of Prisons and recommends the defendant be placed in an institution in or near the U.S. Penitentiary Coleman II facility in Coleman, Florida, to facilitate familial visitation.

Date of Imposition of Sentence: **March 13, 2025**

Amended this 23rd day of June, 2025.



Honorable Rosemary Márquez
United States District Judge

RETURN

I have executed this Judgment as follows:

defendant delivered on _____ to _____ at _____, the institution
designated by the Bureau of Prisons with a certified copy of this judgment in a Criminal case.

United States Marshal

By:

Deputy Marshal

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 12 2026

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

AARON THOMAS MITCHELL,

Defendant - Appellant.

No. 25-1795

D.C. No.

4:22-cr-01545-RM-EJM-1

ORDER

Before: HAWKINS, BYBEE, and FRIEDLAND, Circuit Judges.

Judge Friedland voted to deny the petition for rehearing en banc, and Judges Hawkins and Bybee recommended denying the petition for rehearing en banc.

The full court was advised of the petition, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

Appellant's petition for rehearing en banc and for expedited order vacating panel decision, filed April 3, 2026 (Dkt. 51), is DENIED.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FILED
2022 NOV 30 PM 3:25
CLERK US DISTRICT COURT
DISTRICT OF ARIZONA

WCTM CASE

United States of America,
Plaintiff,

vs.

Aaron Thomas Mitchell,
Defendant.

CR 22-01545-TUC-RM (EJM)

**SUPERSEDING
INDICTMENT**

Violations:

18 U.S.C. § 242
(Deprivation of Rights Under Color of
Law)
(Count 1)

18 U.S.C. §§ 1201(a)(1) and (g)
(Kidnapping of a Minor)
(Count 2)

18 U.S.C. § 1512
(False Statements)
(Count 3)

THE GRAND JURY CHARGES:

COUNT 1

On or about April 25, 2022, in the District of Arizona, the defendant, AARON THOMAS MITCHELL, while acting under the color of law as a Customs and Border

1 Protection officer, willfully deprived a minor victim (M.V.) of M.V.'s fundamental right
2 to bodily integrity, secured and protected by the constitution and laws of the United States,
3 to include using his penis to penetrate the vulva and anus of M.V. without her consent. The
4 defendant's conduct included aggravated sexual abuse and kidnapping, and resulted in
5 bodily injury to M.V.

6 All in violation of Title 18, United State Code, Section 242.

7 **COUNT 2**

8 On or about April 25, 2022, in the District of Arizona, the defendant, AARON
9 THOMAS MITCHELL, did unlawfully seize, confine, inveigle, kidnap, abduct, and carry
10 away, M.V. The defendant willfully used an instrumentality of interstate and foreign
11 commerce, to wit: a vehicle, in committing and in furtherance of the commission of the
12 offense. At the time of the offense M.V. had not attained the age of 18 years, and the
13 defendant had attained such age; the defendant is not a parent, grandparent, brother, sister,
14 aunt and uncle of M.V.; and the defendant did not have legal custody of M.V.

15 All in violation of Title 18, United State Code, Sections 1201(a)(1) and (g).

16 **COUNT 3**

17 On or about April 26, 2022, in the District of Arizona, the defendant, AARON
18 THOMAS MITCHELL, knowingly engaged in misleading conduct toward another person
19 and persons, specifically, officers from the Douglas Police Department (DPD) with the
20 intent to hinder, delay, and prevent the communication to a law enforcement officer and
21 judge of the United States of information relating to the commission and possible
22 commission of a federal offense as charged in Counts One and Two, in a statement he
23
24

25 ///

26 ///

27 ///

1 provided in connection with the DPD investigation of the sexual assault of M.V. that
2 occurred on or about April 25, 2022.

3 All in violation of Title 18, United State Code, Sections 1512(b)(3).
4
5
6

7 A TRUE BILL

8 / s /

9
10 FOREPERSON OF THE GRAND JURY
Dated: November 30, 2022

11
12 GARY M. RESTAINO
United States Attorney
District of Arizona
13

14 / s /

15 CARIN C. DURYEE
Assistant U.S. Attorney
16

17
18 KRISTEN CLARKE
Assistant Attorney General
Civil Rights Division, U.S. Department of Justice
19

20 / s /

21 MARLA N. DUNCAN
Trial Attorney
Criminal Section, Civil Rights Division
22
23

24 REDACTED FOR
PUBLIC DISCLOSURE
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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

United States of America	4:22-CR-01545-RM-EJM
vs.	
Aaron Thomas Mitchell,	February 7, 2024
Defendant.	9:38 a.m.
	Tucson, Arizona

OFFICIAL TRANSCRIPT OF PROCEEDINGS
HEARING ON MOTION TO DISMISS
BEFORE THE HONORABLE ERIC J. MARKOVICH
UNITED STATES MAGISTRATE JUDGE

PROCEEDINGS WERE DIGITALLY RECORDED
TRANSCRIBED BY: ERICA R. McQUILLEN
405 West Congress, Suite 1500
Tucson, Arizona 85701
(520) 205-4267

1 A P P E A R A N C E S

2 For the Government:

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4 United States Attorney's Office
405 West Congress
Tucson, Arizona 85701

5 MarLa Duncan
6 United States Department of Justice
Civil Rights Division
7 150 M Street
Washington, D.C. 20002

8
9 For the Defendant:

10 Benjamin Daniel Singerman
11 Federal Public Defender's Office
407 West Congress
Suite 501
12 Tucson, Arizona 85701

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1 P R O C E E D I N G S

2 THE CLERK: In Criminal Matter CR-22-1545, United
3 States of America vs. Aaron Thomas Mitchell, on for a motion
4 hearing. Counsel, please state your appearances.

5 MS. DURYEE: Good morning, Your Honor. Carin Duryee
6 and MarLa Duncan for the United States.

7 THE COURT: Good morning to you both.

8 MS. DUNCAN: Good morning, Your Honor.

9 MR. SINGERMAN: Good morning. Ben Singerman for
10 Aaron Mitchell. Mr. Mitchell is not here this morning. He
11 called my office yesterday and said that he was under the
12 weather, but for purposes of today's hearing, he was willing
13 to waive his appearance.

14 THE COURT: Okay. Thank you.

15 Yeah, I was notified of that, so thank you. I'm not
16 sure the Government cares, but do you have any objection to
17 Mr. Mitchell not being here?

18 MS. DURYEE: No, Your Honor.

19 THE COURT: Okay. Okay. So we're on for a motion
20 to dismiss Count 2 of the superseding indictment. I have some
21 questions, although I feel like some of them I need to tread
22 carefully on because they may be trial issues, but why don't I
23 hear from you all, and then maybe you'll actually answer my
24 questions, and then I can follow up.

25 So Mr. Singerman? And you're free to stay there if

1 you want. You're free to stay seated, if you want to. It's
2 up to you.

3 MR. SINGERMAN: All right. Thank you, Your Honor.
4 I guess I will. Thank you.

5 So Your Honor, our argument is that the kidnapping
6 statute, as amended in 2006 by the Adam Walsh Act, overreached
7 with its jurisdictional expansion in a way that rendered that
8 part of the statute unconstitutional. Traditionally, federal
9 kidnapping -- the federal kidnapping statute required the
10 kidnapper to cross state lines with the victim. That was
11 amended in 2016 by the Adam Walsh Act, which said that
12 basically any kidnapping that involves use of an
13 instrumentality of interstate commerce in committing or in
14 furtherance of the commission of the offense was also federal.

15 You know, and traditionally, an intrastate
16 kidnapping would have been a state crime, and in fact, like in
17 this case, Mr. Mitchell is facing charges arising out of the
18 same allegations in Cochise County, and one of those charges
19 is kidnapping under, you know, Arizona law.

20 With respect to the federal charge, what we are
21 submitting is that, when Congress amended the kidnapping
22 statute, they did not have any congressional findings linking
23 that expansion in jurisdiction to economic activity, and in
24 the Morrison decision, which is the 2000 Supreme Court
25 decision about the Violence Against Women Act, the Supreme

1 Court held that Congress could not regulate noneconomic
2 violent criminal conduct strictly because of the conduct's
3 aggregate impact on interstate commerce. And they said,
4 quote, that the regulation and punishment of intrastate
5 violence that is not directed at the instrumentalities,
6 channels, or goods involved in interstate commerce has always
7 been the province of the states, unquote, not of the Federal
8 Government.

9 Here is the distinction between our case and the
10 Oliver decision from 1995, which the Government, and we as
11 well, cite to. That case -- and that case from 1995 is the
12 only Ninth Circuit case that I'm aware of that -- or that the
13 Government cites to that holds that a car is an
14 instrumentality of interstate commerce. It came out before
15 Morrison, so it did not have the benefit of the Supreme
16 Court's guidance in Morrison, and it was specifically
17 addressing carjacking.

18 Now, carjacking is a crime that is directed
19 specifically at an instrumentality of interstate commerce.
20 It's right there in the name. Carjacking is robbery of or
21 i.e. violence directed against a car. So even conceding that
22 a car or a vehicle is an instrumentality of interstate
23 commerce, as the Ninth held in Oliver, Congress could not add
24 the jurisdictional element to kidnapping in the way that it
25 did because kidnapping is not a crime directed against an

1 instrumentality of interstate commerce the way that carjacking
2 is.

3 Kidnapping is directed against a person and can take
4 place with no vehicle present at all, whereas carjacking
5 inherently involves a car. You can't carjack someone who
6 doesn't have a vehicle, but you can kidnap someone who doesn't
7 have -- without a vehicle being involved at all. The presence
8 of the car is incidental to the kidnapping offense.

9 So Congress overreached here, and there's no Ninth
10 Circuit case law on that because the 1995 decision is
11 preamendment. It deals with carjacking, which is violence
12 directed at an instrumentality of interstate commerce whereas
13 kidnapping is not.

14 Now, that really -- the Morrison decision is
15 directed at the -- primarily at the third prong that the
16 Supreme Court identified in Lopez. There are three broad
17 prongs or categories of activity that Congress can regulate
18 under its commerce power, and that third clause being the
19 power to regulate activities that have a substantial relation
20 to interstate commerce.

21 This statute also I guess possibly or purportedly
22 also would potentially fall under the second prong, which says
23 that Congress is empowered to regulate and protect the
24 instrumentalities of interstate commerce or persons or things
25 in interstate commerce. And when you look at Lopez, the way

1 that the comments are, it's defining instrumentalities of
2 interstate commerce as persons or things in interstate
3 commerce. Even though -- this is the Supreme Court going
4 on -- the threat may come only from intrastate activities, and
5 then the Supreme Court cites to three cases which are
6 examples.

7 It cites to the Shreveport Rate Cases, a 1914 case,
8 that held that Congress had the power to control the rate on
9 the intrastate -- on an intrastate leg of an interstate
10 carrier. Basically this was a railroad, an interstate
11 railroad, and Congress was controlling the rate through --
12 from Dallas to Marshall, which is a section of rail line
13 that's completely within the borders of Texas. And the Court
14 said that's okay because -- because it's -- the railroad is an
15 interstate railroad. It's a thing in interstate commerce even
16 if the portion that Congress is regulating is only within --
17 is only within the borders of the state.

18 Second case is very similar, it's also one of the
19 early railroad cases, that they cite to there. It's the
20 Southern Railroad Company v. United States, 1911. This has to
21 do with whether Congress can put in safety regulations for
22 vehicles that were interstate railroad vehicles but were being
23 used in intrastate commerce in that particular case.

24 And the third case is a much more recent case from
25 the -- that is interpreting 18 U.S.C. 32, more recent compared

1 to -- compared to those first two cases, which are like the
2 early 20th century. I think Perez is from the 70s, I want to
3 say. And it's talking about the statute that basically makes
4 it illegal to blow up an airplane, and I guess the idea is
5 that -- or you know, to destroy an airplane, or thefts from
6 interstate shipments.

7 You know, again, these are things that are in
8 interstate commerce. Really, I mean, they're talking about
9 the second prong but the -- the application of the third
10 prong, which is it's having an effect on interstate commerce,
11 is obvious, whereas here, it's just too attenuated. There is
12 no impact on interstate commerce.

13 THE COURT: Well, let me -- let me ask you,
14 because --

15 MR. SINGERMAN: Sure.

16 THE COURT: -- this is where I've gotten -- I've
17 gone round and round, and I've actually spent quite a bit of
18 time writing already, because when I first got the motion, I
19 was like, oh, this is a loser, but as I -- no offense. I just
20 felt like the commerce --

21 MR. SINGERMAN: None taken.

22 THE COURT: But as I've gotten more into it, it's
23 become, maybe because I'm a geek, pretty interesting in terms
24 of the commerce clause issue. I'm not even sure Oliver -- and
25 I'll obviously hear from the Government. I'm not even sure

1 Oliver was dealing with an instrumentality. I know they say a
2 car is an instrumentality of interstate commerce, but the
3 carjacking statute, the jurisdictional hook is that the car
4 has been transported, shipped, or received in interstate or
5 foreign commerce, kind of like the gun statutes, where, you
6 know, everything -- all felon in possession or gun offenses in
7 Arizona are going to have jurisdiction because guns aren't
8 manufactured here. They're shipped from one state or foreign
9 country to Arizona, like cars that are made abroad or -- I
10 don't know if there are any car plants in Arizona.

11 So I'm not really sure Oliver was dealing with an
12 instrumentality of an interstate commerce per se. I mean, it
13 may have been, but there was an additional jurisdictional hook
14 that's not present in the kidnapping statute. And there were
15 certainly congressional findings about the carjacking statute
16 that are noted in Oliver, and they impacted that decision.

17 There were none in Lopez, there were none in
18 Morrison, with respect to those statutes, and there are
19 none -- and I've looked -- for the kidnapping statute,
20 specifically the Adam Walsh Act. I went back through and I --
21 or, well, went through, and I really couldn't find any. I'm
22 not saying they don't exist. I just wasn't cited to any, and
23 I couldn't find them on my own, which the latter point might
24 not say much.

25 But I'm trying to figure out, so you're saying the

1 analysis should be under the Lopez category three as opposed
2 to two? Because I -- I was -- that struck me as -- I think
3 that's why I kind of thought it was not really going to go
4 anywhere because the statute -- the statute doesn't even say
5 substantial -- I mean, it doesn't -- doesn't mention any
6 effect on interstate commerce. It's -- the jurisdictional
7 hook, among other things, is what's alleged here, an
8 instrumentality of interstate commerce.

9 MR. SINGERMAN: Well, I'm saying that either way,
10 even that -- either that the car is not an instrumentality of
11 interstate commerce or that, to the extent that it -- I'm
12 saying that it's not an instrumentality of interstate commerce
13 for purposes of the second prong, or in the alternative, if it
14 is, that it's not having an effect under the third prong.

15 THE COURT: Okay. But that's not how I read the
16 motion --

17 MR. SINGERMAN: Okay.

18 THE COURT: -- because the motion was almost like,
19 hey, we're asking you to ignore -- change the law,
20 essentially, and you know, we realize that there's this law
21 out there that a car can be an instrumentality of interstate
22 commerce, but we want you to look at it under category three.

23 And the Ninth Circuit hasn't addressed the third
24 Lopez category or the second -- I'm confusing my categories.
25 Well, let me put it this way. The Tenth Circuit in a case

1 called Morgan, 748 F.3d 1024, the Second Circuit, and this is
2 an unpublished case, but it's Chambers, 7 -- 681 F. App'x 72,
3 they basically reject this -- and many district courts have
4 rejected the notion that the kidnapping statute should be
5 under -- analyzed under the third Lopez category. So I
6 just -- I mean, the Ninth Circuit hasn't weighed in on it, but
7 that's -- you know, that's a tough argument.

8 So I just didn't see this argument that the
9 second -- jurisdiction fails under the second Lopez category
10 as well. Now, in fairness, the Government kind of seems to
11 respond to that argument, even though I didn't think it was
12 explicitly made. So I just need to flesh out -- and if the
13 Government feels that they haven't adequately briefed that
14 because you're just raising the second Lopez category, we can
15 go back and do a little more briefing, but -- so again, just
16 make clear for me what we're focusing on.

17 MR. SINGERMAN: I am focusing on both prongs, and to
18 the extent that you -- that everyone would benefit from
19 additional briefing on the second prong, I'm happy to do that.
20 You know, when I'm looking at the Lopez decision and the
21 second prong, they're, you know, defining instrumentalities of
22 interstate commerce, you know, as the power to regulate
23 persons and things in interstate commerce and giving several
24 examples, I think all of those examples are clearly
25 distinguishable from, in kind, from the very attenuated

1 relationship that the car has to the allegations in this
2 offense, and therefore, Congress should not -- you know, just
3 because Congress has the power to regulate cars as
4 instrumentalities of interstate commerce doesn't -- it's just
5 too attenuated to kidnapping here.

6 I can -- I can brief that at greater length, if the
7 Court wants.

8 THE COURT: Okay. Well, let me -- the Government
9 also relies or at least cites to this Dela Cruz case, which
10 this Court -- District Court case and Glover relies heavily
11 on. And Dela Cruz was dealing with, like, making a bomb
12 threat, I think, using a phone, and the defense in that case,
13 like you guys, said, hey, we need -- you know, you need to
14 organize -- you need to analyze this under the third Lopez
15 category, and the Court says, no, because a telephone's an
16 instrumentality of interstate commerce, so what they say is no
17 substantial effects inquiry is needed.

18 And what the Court ultimately says is that, yeah, a
19 phone's an instrumentality of interstate commerce, which I
20 guess, you know, I'm sure you would -- well, let me -- how do
21 you -- how do you distinguish a phone from a car?

22 The Government's basically -- I think the
23 Government's basically saying, like, you know, they're
24 essentially, you know, pretty equivalent, the Ninth Circuit
25 would find that, if they haven't already in Oliver.

1 MR. SINGERMAN: What I would focus on is, you know,
2 the -- is that the -- how is it fully distinguishable from a
3 car? The --

4 THE COURT: Well, what comes to my mind is that
5 phones are -- I mean, you know, phone lines are going
6 everywhere. I mean, they're crossing state lines and so
7 forth. Same with a train. You have train tracks running
8 through all these different states. Airlines have, you know,
9 even if a flight is going to be intrastate from Tucson to
10 Phoenix, you know, there's -- planes travel interstate. A car
11 doesn't necessarily have to travel interstate.

12 And again, I'm going to -- you know, I have some
13 questions for the Government on that point, but let -- let me
14 -- I don't mean to put you on the spot. I'll just let you
15 continue on with --

16 MR. SINGERMAN: Well, no, I think that that -- I
17 think that that is, you know, my point here. The car -- the
18 allegations -- there is no allegation in this case that
19 Mr. Mitchell crossed state lines or even used interstate
20 highways, you know, interstate roads in terms of his route
21 here, so he basically -- the allegation is that he drove from
22 Douglas to Sierra Vista and back.

23 So they're -- and they're -- and again, the -- you
24 know, the difference with -- I think that that -- that is --
25 you know, when you use a phone, especially nowadays, right,

1 your cell phone is connecting to, you know, I don't know, a
2 cell phone tower that's going to a satellite, I think, like --

3 THE COURT: Outer space commerce.

4 MR. SINGERMAN: Outer space, right. Even if I were
5 to call you here in this room, I think that my -- using my
6 phone, my voice through the phone would probably, yeah, would
7 probably go to a satellite in outer space that would be added
8 to Arizona in terms of -- before it was beamed back down to
9 you, you know, sitting just 10 feet away from me, whereas, you
10 know, with the car, you know, it's -- we know, you know, with
11 more certainty, you know, whether it's traveled in interstate
12 or intrastate.

13 THE COURT: Okay. The other thing I'll just bring
14 up, and then I'll hear from the Government and then obviously
15 come back, but when I looked at some District Court cases --
16 and I don't know if I have the cites readily handy, but when
17 there's a motion to dismiss, Courts -- I mean, there is
18 generally like two challenges brought, a facial challenge to
19 the statute and then an as-applied challenge, you know, as
20 applied to the facts in the case, and what some District
21 Courts have said is that no one -- at least I haven't found
22 any cases where a defendant has succeeded on a facial
23 challenge to the kidnapping statute.

24 But to the extent there's an as-applied challenge,
25 for some of the reasons that you're saying about, you know,

1 the car being purely interstate, what the Courts say is, you
2 know, the Government doesn't have to show all their cards at
3 this point. You have to accept the allegations in the
4 indictment as true, that being that an instrumentality of
5 interstate commerce was used to commit the offense. In fact,
6 the Government didn't even have to stick in vehicle in the
7 indictment. They could have merely, in my view, just tracked
8 the language of the statute and said an instrumentality of
9 interstate commerce. Could be a car. Could be a phone.

10 Sorry. We need to take a short recess. I
11 apologize. I knew it would happen.

12 (Off the record from 9:59 a.m. to 10:07 a.m.)

13 THE COURT: Okay. Are we back on the record,
14 Lindsay?

15 THE CLERK: Yes.

16 THE COURT: So I'd just follow up on the as-applied
17 challenge point. What the Courts basically say is that that's
18 going to be an issue at trial, whether the Government's proven
19 that an interstate -- instrumentality of interstate commerce
20 has been used such that you could either argue to the jury
21 that, hey, you haven't proven that or make a Rule 29 motion
22 for that reason. But in this case, I'm not -- you know, I
23 didn't -- it's just a motion to dismiss. It's not
24 distinguishing between a facial and an as-applied challenge.

25 Okay. So let me hear from the Government.

1 MS. DURYEE: Your Honor, I think the Court asked
2 some good questions, and one of those is about the phone, the
3 difference. And I think that there really isn't a big
4 distinction, because while cell phones, yes, connect outside
5 of the state where you make the phone call, we also still have
6 land lines, and you don't see that distinction being made in
7 the Dela Cruz case.

8 And you do see the distinction that -- over and over
9 again you see this -- you know, it doesn't necessarily have to
10 -- it can be fully intrastate conduct that is -- that is at
11 issue and still fit the category of something that Congress
12 can regulate.

13 So one of the big differences between the statute
14 that was analyzed in the Lopez case and the kidnapping statute
15 is that the statute in the Lopez case did not have this clear
16 hook of use of an instrumentality. So we do have that in this
17 -- in this case, in this statute. So that's a distinction
18 that I think is relevant.

19 And as the Court found in Dela Cruz and then in the
20 District Court decision interpreting that as well, I mean,
21 there's really no question that it does not have to, in the
22 particular instance, involve actual intra -- I'm sorry --
23 interstate commerce so long as it is something that can be
24 regulated by Congress.

25 And with respect to that -- and as I said, you know,

1 we do have a clear use of instrumentality type of statute
2 here, which Lopez was not looking at, but I think that the
3 second prong and the third prong might both be analyzed in
4 this sense, but the second prong, where you're talking about
5 protecting persons or things in interstate commerce, even
6 though the threat may come from only intrastate activities,
7 that's what we have here. You know, this wouldn't have
8 happened without a car. The car was absolutely necessary here
9 for the commission of this crime.

10 And I think there's also, in terms of the third
11 prong, there's an argument that, because vehicles are heavily
12 dependent on fuel, that there is a substantial -- there is a
13 substantial impact, then, on commerce. So there's I think
14 more than one way to get to the same conclusion, but overall,
15 there really just isn't anything unique to this fact pattern
16 that should exempt it from the various and uncontradicted
17 holdings that a car is an instrumentality of commerce.

18 THE COURT: But what case holds that?

19 MS. DURYEE: Well, I think I would also say what
20 case doesn't hold that because we don't see anything to the
21 contrary, but --

22 THE COURT: Well, there is one. Let me just give
23 you this cite, and I didn't know if I should go there, but
24 given Mr. Singerman's position that really, you know, the
25 challenge is under either Lopez category -- and I just don't

1 see Lopez category three coming into play at all in this
2 statute because substantial -- I mean, there is no
3 congressional findings that I could find on the kidnapping
4 statute, and I would think for the category three you probably
5 need more of those than even category two.

6 The case is United States v. Chavarria, 2023 WL
7 3815203. It's out of New Mexico, the District Court, and that
8 case says -- same fact pattern, interstate -- intrastate
9 kidnapping using a vehicle. That Court concludes that a car
10 is not an instrumentality of interstate commerce, and it goes
11 -- it relies on the absence of, unlike the carjacking statute,
12 and I guess similar to Lopez and Morrison, to an extent, you
13 know, the absence of these congressional findings about the
14 economic effect that an intrastate kidnapping can have on
15 interstate commerce. And I'll just -- I'll rattle off a
16 couple things, but you guys can read the case, and maybe we do
17 need some more briefing.

18 So the Court here says -- and it's comparing the
19 case at hand, the interstate kidnapping using a vehicle, to
20 the Morrison case. It says the kidnapping statute, like
21 Morrison, is addressing a violent crime that's noneconomic in
22 nature. Morrison said, "Thus far in our nation's history, our
23 cases have upheld commerce clause regulation of interstate
24 activity only where that activity is economic in nature."

25 In Morrison, I think like in Lopez, the statute at

1 issue did not have a jurisdictional element; however, the
2 Court in Chavarria says, "Similarly, there is no explicit
3 reflection of Congress's intent for the application of the
4 federal kidnapping statute whenever there's use of a vehicle,
5 nor any jurisdictional element requiring an explicit
6 connection between the use of a vehicle in interstate
7 commerce."

8 Then it goes into the lack of congressional
9 findings, and it goes on in terms of kind of the lack of any
10 tie to economic activity. Basically the Court's saying, look,
11 you have -- you have a clear state kidnapping offense that
12 you're finding jurisdiction based on a car when there's
13 nothing to support that Congress was regulating -- using the
14 commerce power to regulate an economic activity.

15 So that's the case -- the one case that I found that
16 does say that. And it's very recent. It's December -- or no,
17 I take it back. It's June 5th, 2023. Actually, in fairness,
18 I didn't find it. My law clerk did.

19 MS. DURYEE: Well, in answer to your question,
20 Judge, we will take a look at that, of course. I mean, I will
21 say, in terms of further briefing, it does appear that Your
22 Honor has found probably everything that could be found on
23 this, so I think what you're maybe asking for is a more
24 refined argument.

25 Obviously the initial motion here was not quite so

1 precise. It, you know, did not distinguish what type of
2 challenge was exactly being made and merely asked -- you know,
3 acknowledged existing precedent in the form of Oliver and
4 Bishop and Ballinger and others where there's just not been a
5 dispute about automobiles being considered an instrumentality.
6 And I'd just ask the Court to, you know, kind of reject that
7 with respect to this statute.

8 But that is not -- I would argue not consistent with
9 the Ninth Circuit's reasoning in Dela Cruz. As the Court
10 noted, phones are the type of instrumentality that could be
11 likened to a car. I mean, most of us drive every day
12 intrastate. And same thing with phone calls. And yet they
13 certainly -- they certainly do affect interstate and foreign
14 commerce.

15 And in this case, with the second prong where
16 there's no doubt that Congress is empowered to regulate and
17 protect the instrumentalities of interstate commerce or
18 persons or things in interstate commerce, that is what we
19 have. We have a car that was fundamental to and used to
20 commit the kidnapping. We have movement of a child in
21 commerce because of that vehicle. And then we have case law,
22 although the only case law directly on point with the statute
23 is a District Court decision, and that is Glover, but that's
24 interpreting the Dela Cruz reasoning by the Ninth Circuit.

25 So I think that everything that is out there

1 supports denying the motion.

2 THE COURT: But let me ask you from kind of -- well,
3 I have a more practical question, but couldn't -- if you kind
4 of extend the argument in this case, couldn't Congress --
5 wouldn't Congress be able to essentially federalize a bunch of
6 state laws by -- for instance, the federal murder statute or
7 the assault statute, couldn't they just throw in there
8 instrumentality of interstate commerce and make all -- you
9 know, make traditional state law offenses federal offenses as
10 well?

11 MS. DURYEE: Perhaps, and I think, you know, one
12 thing that we should consider is the fact that they haven't in
13 all of those cases, and they did here in the kidnapping
14 statute.

15 So I mean, you know, I'm not saying there wouldn't
16 be an argument about that being an overreach in certain cases,
17 but in this case, you know, I agree that there weren't a great
18 deal of specific findings on it, and I would argue that one of
19 the reasons is just because the argument that a car is not an
20 instrumentality is really not a very common argument. I mean,
21 it's -- over and over again, it is agreed and understood that
22 automobiles are clearly, you know, one right turn instead of
23 left and you're on an interstate, you know, maybe even across
24 the border, so there is not really a lot of question about
25 whether they are instrumentalities.

1 And I think that that's exactly why Congress put
2 that jurisdictional hook in this statute that we didn't have
3 in Lopez, which is use of an instrumentality.

4 THE COURT: Let me ask you kind of a more practical
5 question, and I guess you could decline to answer it, in
6 theory, because it's a trial -- I'm just wondering how you're
7 going to -- how are you going to prove this instrumentality of
8 interstate commerce at trial? I mean, you can't just say a
9 car is an instrumentality. I mean, the Court can't take
10 judicial notice of it.

11 I just -- I guess from a practical perspective, I'm
12 trying to figure out how you would prove that at trial. I
13 started thinking that, well, maybe you're going to do like the
14 carjacking statute, show that the car came from another state,
15 and that would be the basis for it.

16 MS. DURYEE: Your Honor, we consider that a legal
17 issue and a question for the Court.

18 THE COURT: No, I don't think so, because I looked
19 at the jury instructions, and you have to prove that an
20 instrumentality of interstate commerce was used. Now, again,
21 I couldn't find any other jury instructions that talk about an
22 instrumentality of interstate commerce, but I -- it's an
23 element of the offense. It's a jurisdictional element. It's
24 just like proving that something occurred on federal land.

25 MS. DURYEE: Well, proving that a car was used is

1 obviously easy.

2 THE COURT: Right, but you have to argue to the jury
3 that a car is -- you should find beyond a reasonable doubt
4 that a car is an instrumentality of interstate commerce.

5 MS. DURYEE: I -- yeah, I understand the Court's
6 point, and I think that the fact that we could show that that
7 car has -- has traveled in interstate commerce and came from
8 outside of the state of Arizona might be relevant, but I also
9 think that there's a legitimate argument that, while the jury
10 has to find that an instrumentality, i.e. a car, was used, I
11 think there may be reasonable debate about whether the jury
12 has to find the instrumentality as opposed to the judge
13 relying on the case law that says this is so.

14 In other words, I have not looked at it the way
15 that Your Honor is looking at it.

16 THE COURT: Well, you know, I just started -- I just
17 want to -- I mean, I just started thinking about how this is
18 going to play out, and it's mostly because of these cases in
19 the as-applied challenges where the Courts say, well, it's too
20 early to talk about that because we have to see what happens
21 at the trial.

22 But I mean, from a jury's perspective, let's all be
23 practical. If you prove these very serious allegations as to
24 the Count 1 and even Count 2, I think the jury's going to have
25 no problem saying, yeah, a car is an instrumentality of

1 interstate commerce, but you know, Judge Márquez, who I think
2 is your trial judge, maybe not so much and say, well, what
3 proof have you given factually that a car is an
4 instrumentality of interstate commerce?

5 And I have to go back and read the cases, but there
6 are some cases that challenge the sufficiency of the evidence,
7 and I'm pretty sure that there's discussion of facts that show
8 why that element was met in those cases, so --

9 MS. DURYEE: Well, Your Honor, I liken this to the
10 Internet, so in the cases that I normally go to trial in, it
11 is using an instrumentality of interstate or foreign commerce,
12 i.e. the Internet or a computer, and there is an instruction
13 based on ample case law that says the Internet is an
14 instrumentality of interstate or foreign commerce, period.
15 That is not left for the jury to decide. That is an
16 instruction based on ample case law.

17 So I submit that we still may -- it's an interesting
18 question, but I still think that there may be reasonable
19 debate about whether the jury finds the instrumentality versus
20 finding, yes, a car was used and being instructed that a car
21 is an instrumentality as a matter of law. Obviously that's
22 something we're going to look more carefully at based on Your
23 Honor's suggestions, but it's not dissimilar at all to the use
24 of a computer or the Internet where the instruction is that
25 the jury may find that it is an instrumentality based on case

1 law.

2 THE COURT: But I imagine in those cases -- I assume
3 the statutes don't have a definition for -- the statutes don't
4 lay out the Internet or computers are instrumentalities.

5 MS. DURYEE: They do lay out computer. Some of them
6 will say, "and use of an instrumentality," you know,
7 "including a computer." They didn't used to but they do now.
8 But I can think of at least one case where we actually, you
9 know, recently had the instruction, this is -- you know, the
10 Internet is a facility or instrumentality of interstate
11 commerce.

12 THE COURT: But I imagine those cases, and correct
13 me if I'm wrong, I mean, you know better than me, but I'm sure
14 you have some witness that's saying that, you know, this is
15 how the Internet works and -- I'm actually probably positive
16 you do, just explaining how these folks got images, if it's
17 child porn and so forth, where it becomes pretty clear how the
18 Internet operates and how it's, you know, clearly a worldwide
19 thing.

20 And that's fine. I mean, based on that, even if the
21 jury has to find, you know, an instrumentality of interstate
22 commerce, you're going to say, well, yeah, there's not much
23 doubt about that, is there, jury, because look at the
24 testimony about how the Internet works. But by contrast, if
25 you just have, you know, this big matzah ball hanging out

1 there, it's a car without anything else, I'm just wondering
2 how, from a practical perspective, you make that argument.
3 And it's not my concern today, although in light of this New
4 Mexico case I cite, maybe it is to some extent.

5 So -- okay. I understand that point. And again, I
6 could be totally wrong on the element thing and how that
7 gets -- what ultimately would happen at a trial.

8 Let me see. I just need to see if I had other
9 questions of the Government.

10 MS. DURYEE: And another -- it's potentially not
11 exactly on point here, but another thing I'm thinking about
12 here is how, in so many cases, it is as simple as showing that
13 the hard drive or the computer or the even the camera was
14 manufactured outside of the -- out of the state and that that
15 is itself sufficient for jurisdiction in the child
16 exploitation cases.

17 So you know, I think that -- I think there is a lot
18 of deference to be given to the -- to Congress, and when they
19 make amendments like this, that it is intentional, and given
20 certain holdings in other contexts, I expect that the Ninth
21 Circuit would, you know, extend and stick with its reasoning
22 in Dela Cruz and all the other cases in holding that a car is
23 like an airplane, like a train, an instrumentality.

24 THE COURT: Yeah, and I'm not -- I'm not going to
25 quarrel with you that a hard drive being -- going from one

1 state to another just in terms of manufacture, but that's kind
2 of similar to a carjacking statute, right, showing that the
3 car at some point, you know, or parts of the car, made their
4 way into Arizona from somewhere else, and that may be enough.

5 But the only thing I'll mention about Glover, and I
6 don't want to swear to this now, but I feel like that case did
7 involve a phone and a phone call in addition to the car. I
8 mean, I -- Glover said what it said, but I felt like there was
9 a phone.

10 MS. DURYEE: Hold on. I have it right here with me.

11 THE COURT: I do too. I just can't find the -- I
12 might be wrong but --

13 MS. DURYEE: There was a cell phone as well as a
14 van.

15 THE COURT: Okay.

16 MS. DURYEE: Although I would actually point out
17 there was a cell phone used in this case as well relevant to
18 the offense itself.

19 THE COURT: Okay. Well, I mean, I think -- I mean,
20 I guess you could, you know, tack the phone on as an
21 instrumentality of interstate commerce, potentially, is why I
22 don't necessarily think you'd be limited by the fact that you
23 stuck vehicle in the indictment. Arguably it's surplusage,
24 but I don't know. Maybe the defendants will make a bill of
25 particulars motion on that point like they did for Count 3.

1 Okay I think that's all the questions I had for the
2 Government at this point.

3 Mr. Singerman, did you want to respond?

4 MR. SINGERMAN: I'd like -- if the Court would give
5 us the opportunity to take a look at that New Mexico case and
6 provide further briefing, I think that would be helpful.

7 THE COURT: Okay. We can get a transcript, but I do
8 want to throw out some cites. And I'll ask Lindsay to order
9 one, and you guys can order it too. But these cases deal with
10 the fact that Lopez category three really is not the right
11 analysis for this kidnapping statute, and it's United States
12 v. Morgan, 748 F.3d 1024. That's a Tenth Circuit case. Oh, I
13 gave you that cite.

14 Chambers is the Second Circuit, 681 F. App'x 72,
15 which is the Second Circuit. Okay. Oliver you have.

16 MS. DURYEE: Your Honor, could you repeat -- I'm
17 sorry. Could you repeat the second case that you just --

18 THE COURT: The Second Circuit case is 681 F. App'x
19 72. So it's not reported.

20 MS. DURYEE: And the name?

21 THE COURT: But those two cases say the kidnapping
22 statute's not properly analyzed under Lopez category three.
23 And then let me see if I can get some of these cases that talk
24 about facial challenges.

25 MS. DURYEE: And I'm also hoping the Court would

1 give us the Chavarria cite again.

2 THE COURT: Yeah. Let me find it. Okay. It's 2023
3 WL 3815203.

4 MS. DURYEE: Thank you.

5 THE COURT: And that's New Mexico. And then these
6 are a couple cases okay. Most of these District Court cases
7 are going to mostly support the Government's argument that a
8 car can be an instrumentality of interstate commerce, at least
9 in purposes of a facial challenge on a motion to dismiss.
10 Okay. So I'll go -- try to go slowly. There is one, Davis,
11 2019 WL 447249. That's a Northern District of Illinois. And
12 you guys may have cited some of these, so I apologize if you
13 have.

14 There's a case called -- I'm just going to spell it,
15 B-a-c-h-i-c-h-a. It's another District of New Mexico case
16 which actually may be in conflict with the other one I just
17 cited. That's 2023 WL 8566503. Southern District of New York
18 case, Brown, 2014 WL 4473372.

19 I think that's it, and I'm by no means suggesting
20 that you guys delve into an extensive discussion of those
21 cases but to the extent they flesh out some of these
22 arguments.

23 Okay. This case I just found interesting, and it's
24 pre the Adam Walsh amendments in 2006. And I don't know if
25 it's relevant, but it actually does provide some legislative

1 history under the original kidnapping statute. That case is
2 U.S. v. Toledo, 985 F.2d 1462. It's a Tenth Circuit case, and
3 what this case says is that the seminal case interpreting the
4 federal kidnapping statute was the Supreme Court case called
5 Chatwin. "After reviewing the legislative history, the Court
6 concluded that the kidnapping statute was drawn in 1932
7 against the backdrop of organized violence. Kidnapping at
8 that time had become an epidemic in the U.S. Law enforcement
9 authorities, lacking coordination, with no uniform system of
10 intercommunication and restricted in authority to activities
11 in their own jurisdiction, found themselves laughed at by
12 criminals bound by no such inhibitions and restrictions.

13 "The procedure was simple. A man would be kidnapped
14 in one state and whisked to another, and still another, his
15 captors knowing full well that the police in the jurisdiction
16 where the crime was committed did not have the authority as
17 far as the state" -- "as to the state where the confinement
18 and concealment was concerned." So the kidnapping -- to
19 assist states, the Kidnapping Act was designed, and it was
20 focused on victims being transported across state lines.

21 The part that was a little interesting or more
22 interesting, it says, "This discussion suggests that the
23 concern of Congress in enacting a federal kidnap statute was
24 not to regulate comprehensively an activity that is perceived
25 as having an adverse effect on interstate commerce or to

1 protect the instrumentalities of interstate commerce; rather,
2 Congress was attempting to address the misuse of interstate
3 commerce by kidnappers to frustrate the efforts of state
4 police."

5 Okay. So this case is saying that, you know,
6 Congress wasn't focused on the instrumentalities of interstate
7 commerce or the effect on interstate commerce when it enacted
8 the federal kidnapping statute, you know, 90 years ago.
9 Obviously that changed with the Adam Walsh Act, okay, and then
10 there is a case -- again, those two cases, other than what I
11 just read to you, that Torres case, in my view, is not a lot
12 of help, but there is a case called Frazier that I just
13 stumbled across. Again, I'm not sure it's super helpful, and
14 there may be other discussion of the Adam Walsh Act in other
15 cases. It's called Frazier, 2023 WL 4930187. And the part I
16 I have highlighted is -- and there were multiple kidnapping
17 charges for multiple defendants, but the case says, "Until the
18 passage of the Adam Walsh Act in '06, federal law prohibited
19 kidnapping only where the victim was transported across state
20 line. With the passage of the Act, however, interstate nexus
21 was expanded to include where the offender travels in
22 interstate or foreign commerce or uses the mail or any means,
23 facility, or instrumentality of interstate or foreign commerce
24 in committing or in furtherance of the commission of the
25 offense."

1 And that, what I just read, led me to try to, like,
2 find out if there were congressional findings about the Adam
3 Walsh Act that were specific to the kidnapping statute or the
4 change to the kidnapping statute and I couldn't.

5 And then the Court goes on to note that cell phones
6 and telephones, even when used interstate, constitute
7 instrumentalities of interstate commerce. Again, it's not our
8 issue necessarily, the cell phone part, at least -- at least
9 what's -- what we're currently talking about.

10 So those are two other cases, and I don't know,
11 maybe you guys will have better luck than I did on getting
12 some more discussion of the Adam Walsh Act and any
13 congressional findings.

14 All right. So I think it's probably best that you
15 just do simultaneous briefs. How long do you all -- are you
16 -- let me ask you, from a practical perspective as well, I
17 guess Judge Márquez called down and asked us to put this
18 motion on, like, quick. Like, I think she wanted it on even
19 before the reply was due.

20 Are you -- are you guys up against a firm trial date
21 in this case?

22 MS. DURYEE: Yes, Your Honor.

23 THE COURT: When is that?

24 MS. DURYEE: March 25th, and we have additional
25 motions on the 20th before Judge Márquez as well.

1 THE COURT: March 20th. Okay. Then I probably
2 should keep the briefing schedule relatively -- I have -- I
3 had a draft R&R ready based on the pleadings, but this oral
4 argument was, unlike -- a lot of cases I don't think oral
5 argument is super helpful, but this one ended up being
6 helpful.

7 Is a week enough time for simultaneous briefs? Do
8 you want two weeks?

9 MS. DURYEE: I would ask --

10 THE COURT: It's just you know how this R&R process
11 takes so long.

12 MS. DURYEE: I would ask for two weeks, Your Honor.

13 MR. SINGERMAN: Yeah, if we're doing simultaneous,
14 we could do two weeks.

15 THE COURT: Okay. Let's say that supplemental
16 simultaneous briefing will be due two weeks from today. All
17 right. Well, I guess I'll talk to Judge Márquez because I
18 don't want you guys to have to continue the trial, but you
19 know it takes a while for objections and responses.

20 Okay. I had another question for the Government,
21 but I don't really think it probably matters at this point.

22 Okay. All right. Well, I guess I'll wait for the
23 supplemental briefing. Hopefully -- well, we'll see. I don't
24 think I'll have another oral argument, but I guess if I have
25 questions I will.

1 Is there anything -- any final words, speak now or
2 forever hold your peace type of stuff?

3 MS. DURYEE: I think we covered it, Your Honor.

4 THE COURT: All right. Okay. Thanks very much.
5 It's an interesting issue. Unfortunately interesting always
6 means a lot of work.

7 MR. SINGERMAN: Thank you, Judge.

8 THE COURT: Take care. Nice to meet you.

9 MS. DUNCAN: Nice to meet you, Your Honor.

10 (Proceedings concluded in this matter at 10:39 a.m.)

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C E R T I F I C A T E

I, Erica R. McQuillen, do hereby certify that the preceding pages of typewritten matter are a true, correct, and complete transcription of the digital recording of proceedings in the above-entitled matter.

Dated this 7th day of February, 2024.

s/Erica R. McQuillen
Erica R. McQuillen, RDR, CRR