No. 25-1342

IN THE

Supreme Court of the United States

DERICK IRISHA BROWN,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual Cato Supreme Court Review, and files amicus briefs.

This case interests Cato because it concerns the proper interpretation of the Commerce Clause. Expanding the Commerce Clause to apply to all automobiles undermines the original meaning of the Clause and puts its longstanding limitations on federal jurisdiction in jeopardy. A proper understanding of the scope of the Commerce Clause is central to the double security that our federalist system relies on to preserve the rights of the people.

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[1] Pursuant to Supreme Court Rule 37, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person, other than *amicus curiae* or its counsel, made a monetary contribution intended to fund its preparation or submission. All parties were timely notified of the filing of this brief.

STATEMENT AND SUMMARY OF ARGUMENT

America's Founders warned against congressional overreach. The powers of the federal government were to be "few and defined," but those of the states were to be "numerous and indefinite." THE FEDERALIST No. 45 (James Madison). The federal government was entrusted with the power to "regulate commerce . . . among the several states." U.S. CONST. art. I, § 8, cl. 3. However, that power cannot reach matters that are wholly intrastate. THE FEDERALIST No. 45 (James Madison) ("The powers reserved to the several States will extend to . . . the internal order, improvement, and prosperity of the State."). In the case at hand, the lower courts have improperly allowed federal power to intrude upon state matters.

The federal government indicted Derick Brown under 18 U.S.C. § 1201 for kidnapping and conspiracy to kidnap. Cert. Br. 3. The statute imposes liability on the defendant who "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." App. 2a; 18 U.S.C. § 1201(a)(1). Ms. Brown challenged the use of this Section, arguing that her acts fell outside its jurisdictional limits. The Eleventh Circuit rejected this argument because Ms. Brown used a car and, in its view, "an automobile is *per se* an instrumentality of interstate commerce." App. 4a. This was error. The lower court's *per se* rule pushes the Commerce Clause beyond its limits, and those limits may not be ignored.

"[M]odern-era precedents" affirm that congressional power under the Commerce Clause "is subject to outer limits." *United States v. Lopez*, 514

U.S. 549, 556–57 (1995). The scope of the Commerce Clause was originally intended to be limited and narrow; with respect to the issue at hand, the relevant portion of the Clause was historically understood to apply only to trade among people of different states.

The Clause's narrow scope cannot extend to include automobiles as *per se* instrumentalities of interstate commerce. Automobiles are easily differentiated from other instrumentalities of interstate commerce, such as airplanes, shipping containers, railroad carriers, and telegraphs. That distinction is underscored by an uncontroversial fact of life: Automobiles are regularly used for matters outside the scope of interstate commerce. The improper expansion of the scope of the Clause usurps the role of judges, undermines the rights of the defendant, and grants the federal government license to wade into quintessentially state matters. This Court should grant certiorari to preserve the Constitution's structure and boundaries.

ARGUMENT

I. THE COMMERCE CLAUSE'S TEXT CONSTRAINS ITS SCOPE.

"The Commerce Clause emerged as the Framers' response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation." *Gonzales v. Raich*, 545 U.S. 1, 16 (2005). Its "purpose" was to prevent "the recurrence of the evils" faced by the Confederation: namely, state-imposed barriers to commercial trade. *Hous., E. & W. Tex. R.R. Co. v. United States*, 234 U.S. 342, 350 (1914). The Clause ensured that "[i]nterstate trade was not left to be destroyed or impeded by the rivalries of local governments." *Id.* Its language was therefore originally understood to justify the regulation of *inter*state trade.

A. "Commerce" was originally understood as meaning trade and nothing else.

The Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. At the time of ratification, "commerce" referred only to the activity of *trading* things. *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 112–25 (2001) [hereinafter Barnett, *Commerce*]. That is, "commerce" was not an umbrella term that encompassed other distinct activities, such as manufacturing and agriculture. Rather, manufacturing and agriculture *produced* goods which could then enter commerce.

Contemporaneous dictionaries illustrate that "'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *Lopez*, 514 U.S. at 585–86 (Thomas, J., concurring) (citing 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 361 (4th ed. 1773) (defining commerce as "Intercour[s]e; exchange of one thing for another; interchange of any thing; trade; traffick")); NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (26th ed. 1789) ("trade or traffic"); T. SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1796) ("Exchange of one thing for another; trade, traffick")). And a review of the Framers' debates shows that they understood "commerce" as synonymous with trade:

> In Madison's notes for the Constitutional Convention, the term "commerce" appears thirty-four times in the speeches of the delegates. Eight of these are unambiguous references to commerce with foreign nations which can only consist of trade. In every other instance, the terms "trade" or "exchange" could be substituted for the term "commerce" with the apparent meaning of the statement preserved. In no instance is the term "commerce" clearly used to refer to "any gainful activity" or anything broader than trade.

Barnett, *Commerce*, *supra*, at 114–15 (citations omitted).

Likewise, in *The Federalist Papers*, the term "commerce" appears 63 times; each time, that term appears to refer exclusively to trade and exchange. *Id.* at 116. Even the nationalist Alexander Hamilton distinguished commerce—a national concern—from the "supervision of agriculture and of other concerns of a similar nature"; he considered those latter activities "proper to be provided for by local legislation." THE FEDERALIST No. 17 (Alexander Hamilton).

Furthermore, this narrow conception of "commerce" was evident in speeches made at several state ratification conventions. At the Massachusetts convention, for example, Thomas Dawes distinguished agriculture, commerce, and manufacturing from one another as he expounded on the beneficial effect the Constitution would have on each economic sector. *See* 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE

FEDERAL CONSTITUTION 57 (2d ed. 1836) [hereinafter DEBATES].[2] Dawes's account implies that both he and his audience understood the bright-line distinctions among these sectors as evident and obvious. *See id.* at 57–60. Similar examples recur in the Connecticut, New York, Pennsylvania, and Virginia conventions. *See* Barnett, *Commerce*, *supra*, at 116–22; *see also* Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003) (surveying 1,594 uses of "commerce" in the *Pennsylvania Gazette* from 1728 to 1800 and finding, at the very most, only 31 possible broad uses of "commerce"). Indeed, during the ratification discussions, the terms "trade" and "commerce" were often used interchangeably. *Lopez*, 514 U.S. at 586 (Thomas, J., concurring).[3]

During this Court's first 150 years—until the era of *Wickard v. Filburn*, 317 U.S. 111 (1942)—the Court routinely rejected attempts to expand "commerce" to cover any gainful activity. The decisions of this Court regularly distinguished between the *exchange* of material things of value (namely, commerce) and the *production* of things of value (namely, manufacturing

[2] Indeed, "commerce" was regularly distinguished from "manufacturing" and "agriculture" at these ratifying conventions. Barnett, *Commerce*, *supra*, at 117–19; *see, e.g.*, DEBATES, *supra*, at 188, 245, 261, 336. Contemporary dictionaries reflect the same distinction. Barnett, *Commerce*, *supra*, at 113–14.

[3] James Madison wrote, while discussing the Constitution in 1832, that "Trade and commerce are, in fact, used indiscriminately, both in books and in conversation." Letter from James Madison to Professor Davis—not sent (1832), *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 232, 233 (1865).

and agriculture).[4] *See*, *e.g.*, *Kidd v. Pearson*, 128 U.S. 1, 20 (1888) ("No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce."). In *United States v. E.C. Knight Co.*, Chief Justice Melville Fuller wrote, "Commerce succeeds to manufacture, and is not a part of it. . . . The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce." 156 U.S. 1, 12–13 (1895). The Court continued to emphasize the difference between "commerce" and other gainful activity until the dawn of World War II. As late as 1936, in *Carter v. Carter Coal Co.*, this Court ruled that Congress could not regulate coal production; rather, only the resultant, finished product was a proper object of regulation, so long as it became an article of commerce. 298 U.S. 238, 298 (1936).

Judicial opinions, dictionaries, and history underscore the same conclusion: The Commerce Clause was understood to regulate trade. Adherence to the original public understanding of the Clause requires the recognition of its limited scope.

B. "Among the several states" originally meant "among people of different states."

One of the boundaries of constitutional federalism is established by the phrase "among the several States," which was originally understood to mean

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[4] Presumably, this explains the government's express denial in *Wickard* that it was regulating consumption or production. *Wickard*, 317 U.S. at 119 ("[T]he Government argues that the statute regulates neither production nor consumption, but only marketing . . . .").

"among persons of different states." Thus, commerce that takes place entirely within one state does not occur "among the several States" and therefore falls outside Congress's reach. Barnett, *Commerce*, *supra*, at 135.

St. George Tucker, one of the earliest scholars on the Constitution, explained: "The constitution of the United States does not authorize congress to regulate, or in any manner to interfere with, the domestic commerce of any state." "Appendix," *in* 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 250 (1803). Instead, the portion of the Clause at issue here covers trade *among* states. Thus, in The Federalist No. 42, Madison described the Clause as a provision to regulate trade *between* the states and prevent protectionist exactions. Hamilton, in The Federalist No. 11, likewise explained that the Constitution would allow "an unrestrained intercourse between the States."

One of this Court's foundational opinions explained how the phrase "among the several States" limits the domain of commerce that Congress may control. As Chief Justice John Marshall affirmed in *Gibbons v. Ogden*, the enumeration in the Commerce Clause of three distinct commerce powers "presupposes something not enumerated, and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State." 22 U.S. (9 Wheat.) 1, 195 (1824). As this Court explained in 1869, the Commerce Clause had "always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States." *United States v. Dewitt*, 76 U.S. (9 Wall.) 41, 44 (1869) (invalidating a federal statute prohibiting the sale of certain oils).

In short, the Commerce Clause's regulatory ambit is confined not only to trade, but also to trade among states. Activity that takes place wholly within a single state, no matter how "commercial," lies beyond the federal government's reach. The Clause confines this particular sphere of Congress's jurisdiction to conduct that occurs "among the several States."

II. AUTOMOBILES CANNOT BE UNDERSTOOD AS *PER SE* INSTRUMENTALITIES UNDER THE COMMERCE CLAUSE.

The federal government's jurisdiction has inherent limits. "*Federal* crimes require some sort of jurisdictional hook to sort the prohibited activity into one of the government's enumerated and limited powers . . . ." *United States v. Chavarria*, 140 F.4th 1257, 1260 (10th Cir. 2025). These limited powers include the ability to regulate "Commerce with foreign nations, and among the several states, and with the Indian tribes." *Id.*; U.S. CONST. art. I, § 8, cl. 3. Pursuant to this power, this Court has defined "three broad categories of activity that Congress may regulate under its commerce power." *Lopez*, 514 U.S. at 558. These three categories are "the use of the channels of interstate commerce"; "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "those activities having a substantial relation to interstate commerce." *Id.* at 558–59.

The federal indictment aimed at Ms. Brown relied on *Lopez*'s second category. It alleged the use of "a means, facility, or instrumentality of interstate commerce." Cert. Br. 3. That phrase mirrors the net that is cast by 18 U.S.C. § 1201(a)(1), which ensnares the offender who "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." *Id.*; 18 U.S.C. § 1201(a)(1). A valid application of this second category of jurisdiction would require Ms. Brown's car to be an instrumentality of interstate commerce. But for the reasons explained below, it is not.

A. Because automobiles are not predominantly put to the end of interstate commerce, they are not instrumentalities of interstate commerce.

Congress is permitted to regulate "the instrumentalities of interstate commerce," *Lopez*, 514 U.S. at 558, but this Court has not "expressly defined or limited the term." *Chavarria*, 140 F.4th at 1263. However, the Court has provided some instructive examples of instrumentalities of interstate commerce. It has held that cargo shipping containers are "instrumentalities of foreign commerce," *Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 445–46 (1979), assumed in passing that airplanes are instrumentalities, *Perez v. United States*, 402 U.S. 146, 150 (1971), and held that railroad carriers are "instruments of interstate commerce." *Hous., E. & W. Tex. R.R. Co.*, 234 U.S. at 351. It has also counted telegraphs as instrumentalities, reasoning that "it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation." *Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1, 9 (1877).

What can we learn from these examples? They all suggest that "something [must] actually be put to the *end* of interstate commerce to be an *instrumentality* of interstate commerce." *Chavarria*, 140 F.4th at 1265 (citing *Gibbons*, 22 U.S. at 194). Dictionary definitions underscore this point: A thing's "instrumentality" is just its "means" or "agency." *Instrumentality*, MERRIAM-WEBSTER'S DESK DICTIONARY (1995) ("means, agency"). The definition was the same when the word "instrumentality" was added to § 1201's jurisdictional provision in 2006. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 213, 120 Stat. 587, 616–17; *Instrumentality*, WEBSTER'S DICTIONARY & THESAURUS (2006) ("Instrumentality" means "agency"). An instrumentality is simply a small or subordinate thing that, by its nature, is supposed to accomplish the end or goal of a larger or hierarchically superior thing.

Shipping containers, railroad carriers, telegraphs, and airplanes are all means to support, and are predominantly used for, interstate commerce. But automobiles flunk this test. They are not predominantly used for interstate commerce; people regularly drive from one place to another for non-commercial reasons. And even when automobiles *are* used for commerce, their use is regularly confined to "that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." *Gibbons,* 22

U.S. at 194. In any event, the spectrum of reasons for the use of automobiles extends far beyond "the *end* of interstate commerce." *See Chavarria*, 140 F.4th at 1265 (citing *Gibbons*, 22 U.S. at 194). Indeed, the average U.S. driving trip is twenty-five minutes long, and the average number of miles driven daily is 29.1. *American Driving Survey: 2023*, AAA FOUND. FOR TRAFFIC SAFETY, at 4 (2024).[5] These distances are narrower than the width of our Nation's smallest state.[6] It is not just a matter of common experience that many car trips are entirely unconnected to commerce; it is also an uncontroversial statement of fact.[7] In short, any inference that the automobile is, as such, an instrumentality of interstate commerce is mistaken.

Indeed, this case provides a pointed example of a car that was not "put to the *end* of interstate commerce." *See Chavarria*, 140 F.4th at 1265 (citing *Gibbons*, 22 U.S. at 194). Ms. Brown's car did not leave Alabama, it did not cross any state lines, and it was not used for commerce. Cert. Br. 3. A car trip that was neither interstate nor commercial cannot qualify as interstate commerce. And because cars are not *predominantly* used for trips that are both commercial

[5] Available at https://tinyurl.com/58hjrzcm.

[6] *See What Is the Smallest State in the U.S. by Area?*, BRITANNICA (Apr. 23, 2026), https://tinyurl.com/2ms4k5a5; *Historical Information*, R.I. GOV'T, https://tinyurl.com/3j59tu58 (Rhode Island is 37 miles wide).

[7] *American Driving Survey:* 2023, *supra*, at 13 (22.5% of driving trips are work-related, 6.1% of driving trips are school-related, and 19.6% of driving trips are related to socializing or pleasure).

and interstate, they are not *per se* instrumentalities of interstate commerce.

B. If automobiles were held to be *per se* instrumentalities of interstate commerce, it would erode the rule of law.

"'Per se' means by itself, and without innuendo," *Kleier Advert., Inc. v. Premier Pontiac, Inc.*, 921 F.2d 1036, 1044 (10th Cir. 1990) (citation omitted), or "inherently; simply as such; in its own nature without reference to its relation." *Per Se*, BLACK'S LAW DICTIONARY (6th ed. 1990). The lower court held that "an automobile is *per se* an instrumentality of interstate commerce." App. 4a. This was a mistake for three reasons.

First, the lower court's decision, and other similar opinions, threatens to improperly expand federal jurisdiction. As this Court has recognized, there are good reasons to avoid transforming "traditionally local criminal conduct" into "a matter for federal enforcement." *Jones v. United States*, 529 U.S. 848, 858 (2000) (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)). The reasoning of the decision below would do exactly that, allowing Congress to regulate countless examples of conduct that are devoid of any connection to interstate commerce. If the lower court's ruling stands, it will "vastly broaden federal power . . . to embrace 'regulation of such quintessentially state law matters as traffic rules and licensing drivers.'" *United States v. Bryan*, 159 F.4th 1274, 1302 (11th Cir. 2025) (Calvert, J., concurring in part and dissenting in part) (quoting *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1250 (11th Cir. 2008)).[8]

Second, *per se* rules "insulate a statute from judicial scrutiny." *See United States v. Bishop*, 66 F.3d 569, 585 (3d Cir. 1995). *Per se* rules preemptively decide matters and prescribe the law in a way that limits the proper exercise of the judicial power on a case-by-case basis. Unless *per se* rules are used sparingly, they risk eroding the proper role of the court: to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Courts are well equipped to determine whether an automobile was used as an instrumentality of interstate commerce in any particular case, and they should be allowed to do so.

Third, *per se* rules undermine defendants' constitutional rights. "The underlying problem with over-application of the per se rule is that the rule limits defendants' ability to defend themselves." Alan Grant & Chetan Sanghvi, *The Economic Foundations and the Implications of the Per Se Rule*, 2021 COLUM. BUS. L. REV. 92, 101 (2021). Defendants are more likely to lose their case because the "admissibility of evidence relating to purpose, effect, or potential defenses will be narrowly circumscribed." Paul T. Denis, *Focusing on the Characterization of Per Se Unlawful Horizontal Restraints*, 36 ANTITRUST BULL. 641, 644 (1991).

Cases like this one should be resolved with a proper respect for the constraints that the Framers built into the Constitution. Ms. Brown's automobile should not serve as a vehicle for expansion of the scope of the

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[8] *Gibbons*, 22 U.S. at 195 ("The completely internal commerce of a State, then, may be considered as reserved for the State itself.").

Commerce Clause. This Court should grant certiorari and reverse the lower court's holding that automobiles are *per se* instrumentalities of interstate commerce.

III. THIS CIRCUIT SPLIT DESERVES REPAIR.

Circuit courts are currently split as to whether automobiles are *per se* instrumentalities of interstate commerce under 18 U.S.C. § 1201(a)(1). *Compare Chavarria*, 140 F.4th at 1266, *with United States v. Windham*, 53 F.4th 1006, 1013 (6th Cir. 2022), *and United States v. Protho*, 41 F.4th 812, 828–29 (7th Cir. 2022). This circuit split deserves repair.

The Framers divided power in the Constitution between the national and state governments not only to protect state prerogatives, but also to preserve individual freedom. They recognized that a national government, distant from the people, could do tremendous damage to liberty if not checked. Madison wrote, "In a single republic, all the power surrendered by the people is submitted to the administration of a single government." THE FEDERALIST No. 51 (James Madison). But "[i]n the compound republic of America," he continued, "the power surrendered by the people is first divided between two distinct governments," thereby providing "a double security . . . to the rights of the people." *Id.*

As this Court has recognized, federalism "reduce[s] the risk of tyranny and abuse," *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991), and "secures the freedom of the individual," *Bond v. United States*, 564 U.S. 211, 221 (2011). The states check the powers of the federal government, even as the federal government checks the powers of the states. "In the tension between federal and state power lies the promise of liberty." *Gregory*, 501 U.S. at 459.

The lower court's holding brings the Commerce Clause one step closer to becoming the engine of a general federal police power—a power that the Framers deliberately withheld from the national government. *See Lopez,* 514 U.S. at 566. Such a power would erode the distinction between national and state authority on which our federal system depends. And it would offend the Constitution's structural guarantees of liberty by allowing Congress to regulate multiple new dimensions of American life.

That breakdown of structure is ultimately a breakdown of the rule of law. The rule of law rests on the premise that the law binds the government no less than the governed. When the federal government behaves as if it possesses a general police power and claims the power to regulate new frontiers of American life, federalism's constraints collapse—and with them, the "double security" for liberty that the Framers designed. Thus, when Congress and the courts treat the Commerce Clause as an invitation to regulate any behavior involving an automobile, the enumeration of powers begins to look more and more like a parchment barrier.

CONCLUSION

The Commerce Clause "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectually obliterate the distinction between what is national and what is local." *Lopez*, 514 U.S. at 557 (citation omitted). Expanding the scope of the

Commerce Clause to apply to Ms. Brown's offense solely because her behavior involved an automobile erodes the line between the national and the local. The Court should grant certiorari to reinforce the original meaning of the Commerce Clause and protect the meaningful limitations it imposes on the federal government.

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