No. 09-1555

In the Supreme Court of the United States

CEDRICK BERNARD ALDERMAN,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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The government says almost nothing about the central question raised by petitioner's federal conviction: whether, as the courts below decided, *Scarborough* v. *United States*, 431 U.S. 563 (1977), announced a rule of constitutional law empowering Congress to criminalize simple possession and other intrastate activities based on the involvement of an item that at some prior time crossed a state line. See Pet. App. 16a (holding statute's constitutionality "controlled by the Court's analysis in *Scarborough*").

The reasons for such reticence are evident. It is clear (1) that the *Scarborough* Court did not announce a rule of constitutional law, (2) that the contrary, erroneous understanding is widely entrenched and is in every way significant, and (3) that only this Court can set things right. See Pet. 13-16, 30-32. The government's tack is exceedingly strange nonetheless. Every court of appeals to have considered § 931, including the Ninth Circuit below, see Pet. App. 8a-10a, has treated its constitutionality as governed by the "minimal nexus" Commerce power ascribed to *Scarborough*. None has sustained the law under any of the three established categories of Commerce Clause power. And the most thorough and influential opinion, the Tenth Circuit's unanimous decision in *United* States v. *Patton*, concluded, as did the dissenting judges below, that the statute could not be sustained under *Lopez*, *Morrison*, and *Raich*. See 451 F.3d 615, 620-634 (10th Cir. 2006).

The only reason advanced for refusing review (apart from a desultory "vehicle" argument) is a

claim that the provision could be upheld under proper Commerce Clause analysis, without recourse to *Scarborough*'s spurious "fourth category." But what the government actually presents is less an argument than a series of *ipse dixit* assertions of constitutionality. The government repeatedly describes § 931, which proscribes non-economic, intrastate activity, as "*direct*" regulation of interstate commerce. See, *e.g.*, Br. in Opp. 7, 9, 11. It further insists that § 931 may be understood—and upheld—as "necessary and proper" to broad market regulation legislation Congress did not enact, but *might have*. And the government offers that the provision fits within the second *Lopez* category, authorizing regulation of things "in interstate commerce," 514 U.S. 549, 558 (1995), an argument the Ninth Circuit majority dismissed as "[un]serious." Pet. App. 13a n.4.

These assertions do nothing to show that this Court's intervention is unwarranted. Indeed, they betray a conception of federal power that is no less untethered from precedent, far-reaching, and indifferent to the distinction between what is local and what is national than the one the dissenting judges below found "exceptionally troublesome." Pet. App. 58a (O'Scannlain, J., dissenting from denial of rehearing en banc).

For no substantial reason (and none remotely related to interstate commerce), this law displaces the contrary policy choices of those numerous States, including petitioner's, which extend to previously convicted persons the same right to self-protection they do to other citizens. Because the lower courts mistakenly believe they are bound by *Scarborough* to

uphold this incursion on state sovereignty, see *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), *only* this Court can correct this error. Review is warranted.

I. THE DECISION BELOW RESTS ON A SERIOUS, PREVALENT, AND IMPORTANT CONSTITUTIONAL ERROR, WHICH ONLY THIS COURT CAN CORRECT

The government's effort to address the constitutionality of § 931 and whether certiorari is warranted here without discussing the *Scarborough* "rule" is Hamlet without the Prince.

1. The premise that this Court's 1977 decision recognized a "minimal nexus" power under the Commerce Clause is central to every appellate decision sustaining § 931 and to many others involving other federal criminal statutes. Indeed, *Scarborough* has been understood to provide license for dispensing with otherwise-controlling Commerce Clause analysis—and for affirming individual convictions that would be unconstitutional under *Lopez*, *Morrison*, and *Raich*. See, *e.g.*, *Patton*, 451 F.3d at 636; cf. *United States* v. *Rawls*, 85 F.3d 240, 243 (5th Cir. 1996) (Garwood, J., specially concurring).

2. As the government implicitly recognizes, this pervasive understanding is plainly untenable. *Scarborough* did not purport to settle a constitutional question, see Pet. 13-15, and the power the lower courts have held it to have established—to regulate all activity involving an item that once crossed state lines—is contrary to bedrock Commerce Clause principles. A "minimal

nexus" standard, *Scarborough*, 431 U.S. at 577, cannot be reconciled with the central requirement of a "substantial relation," *Lopez*, 514 U.S. at 558-559. And *Morrison* settled that the very thing lower courts treat under *Scarborough* as conclusive of a statute's Commerce Clause validity is but one potentially supportive "consideration." 529 U.S. at 611-612. Compare *Patton*, 451 F.3d at 632-633 (holding 18 U.S.C. § 921(a)(35) jurisdictional element inadequate under *Morrison*) with *id.* at 635 (upholding conviction under *Scarborough*).

3. Nor can the magnitude and importance of this error be gainsaid. The federal power claimed is the authority to regulate anything—from possession of french fries, see C.A. Oral Arg. 23:30, to local theft of "a Hershey kiss," *United States* v. *Bishop*, 66 F.3d 569, 596 (3d Cir. 1995) (Becker, J., dissenting)—based on the fortuity that the article previously crossed a state line.

The problem with the rule is not simply its permissiveness, but that its only "limitation" bears no relation to the reasons for the Commerce power grant. See Pet. 25-26. The rule's broad power has proved indispensable for the enactment of "symbolic" federal legislation like this provision, which accomplishes little, but fosters an impression of lawmaker responsiveness to constituent concern about "crime at the local level." 42 U.S.C. § 3796*ll*-3(b)(2).

4. Finally, as the government does not dispute, this error is intractable. The rule embraced below has been subject to harsh judicial criticism, see, *e.g.*, *Patton*, 451 F.3d at 636 (McConnell, J.); *United*

States v. *Kuban*, 94 F.3d 971, 976-978 (5th Cir. 1996) (DeMoss, J, dissenting); *United States* v. *Chesney*, 86 F.3d 564, 574-575 (6th Cir. 1996) (Batchelder, J., concurring). But even skeptical jurists have concluded that the matter, involving interpretation of this Court's precedents, is for this Court alone to resolve.[1]

II. THE GOVERNMENT'S ASSERTIONS OF CONSTITUTIONALITY ONLY CONFIRM THE NEED FOR REVIEW

In place of any defense of the central premise of the decisions in its favor (or any denial of the importance of the question presented), the

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[1]The government labors to acquit the court below of the "alleg[ation]," Br. in Opp. 11, that it treated *Scarborough* as binding constitutional law. While the need for review here does not depend on any particular parsing of opinion language, this revisionist account is especially implausible. To be sure, the opinion *referenced* "the controlling four-factor test for determining whether a regulated activity 'substantially affects' interstate commerce," Pet. App. 14a (quoting *United States* v. *McCoy*, 323 F.3d 1114, 1119 (9th Cir. 2003)). But the *only* "[o]ne of these considerations" it actually *discussed* was "whether the statute contains an[] 'express jurisdictional element.'" *Ibid.* (quoting *Morrison*, 529 U.S. at 611).

The opinion's reasoning, moreover, is not opaque. It expressly endorsed *Patton*'s holding that *Scarborough* establishes that

> Congress could *constitutionally* regulate the possession of [articles] *solely* because they had previously moved across state lines. Thus, "[b]ecause [a] bulletproof vest moved across state lines at some point in its existence, Congress may regulate it under *Scarborough*.

Pet. App. 10a (quoting *Patton*, 451 F.3d at 634) (emphasis added).

government offers a series of claims that § 931 is mine-run Commerce Clause legislation well within the categories described in *Lopez*, *Morrison*, and *Raich*. These casual assertions are directly contrary to conclusions reached on careful consideration by the unanimous Tenth Circuit and the dissent in this case (and, with respect to the second category, to that of the majority below as well). Furthermore, they imply a Commerce power no less broad than the discredited "fourth category."

1. The government repeatedly describes § 931 as "direct" regulation. See Br. in Opp. 7 ("Section 931 directly regulates the interstate market in body armor."); *id.* at 11 ("Section 931 directly regulates things in interstate commerce."); *id.* at 9 (provision "involves direct regulation of the interstate market"). But "merely saying something is so does not make it so." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1769 n.7 (2010).

If such words are to retain meaning, a federal law proscribing simple intrastate possession (enacted to curb local crime) cannot be described—or upheld—as a "direct regulation of interstate commerce." Cf. Br. in Opp. 10 (asserting that this law is "markedly different" from ones invalidated in *Lopez* and *Morrison*, because those did not "regulate[] economic activity").

Nor, for similar reasons, may an individual's possession of an item that crossed a state line years earlier in a transaction involving strangers fairly be described as having a "*direct*" nexus to the "interstate market." Br. in Opp. 9 (emphasis added). To so use that term is to deny there could be such a

thing as an "indirect nexus" or a "minimal" one. See *Scarborough*, 431 U.S. at 570.

2. The government's entire argument that § 931 may be upheld under the governing three-category test is strikingly perfunctory—consisting of a bare assertion that "Section 931 falls within both the second and the third * * * categories," Br. in Opp. 10, followed by one paragraph about each, *id*. at 10-11. This terseness is all the more remarkable in view of the contrary conclusions reached in every opinion to have carefully explored these questions. See *Patton*, 451 F.3d at 621-634; Pet. App. 22a-39a (Paez, J., dissenting).

a. Notably, the *majority* below dispatched the "second category" claim as meritless, Pet. App. 13a n.4; see also *id.* at 20a n.2 (Paez, J., dissenting) (same). As both the Ninth and Tenth Circuits have unanimously concluded, § 931 cannot be defended as "regulating [a] * * * 'thing in' commerce," because it "does not protect body armor while it is moving in interstate shipment [nor] is [it] directed at the use of body armor in ways that threaten or injure the instrumentalities of interstate commerce." Pet. App. 13a n.4 (quoting *Patton*, 451 F.3d at 622); see also *United States* v. *Rybar*, 103 F.3d 273, 290 (3d Cir. 1996) (Alito, J., dissenting) (explaining that articles that "are simply possessed intrastate and are not travelling in interstate commerce may not be regulated" under the second *Lopez* category "unless they are menacing interstate commerce").

The government's utterly unsupported claim that anything that has ever crossed state lines is forever "in interstate commerce" for Commerce Clause

purposes is not an *alternative* to the *Scarborough* "fourth category" rationale. It is a restatement of it.

b. As for the third category, the government points to no "substantial economic effect on interstate commerce," *Wickard* v. *Filburn*, 317 U.S. 111, 125 (1942), at all—or even a legislative "finding" to that effect. Cf. *Morrison*, 529 U.S. at 610. And like the opinion below, the government does not even identify the four considerations *Morrison* held govern evaluation of a "substantial effects" plea, let alone analyze this provision under them. Cf. *Patton*, 451 F.3d at 633-634 (concluding § 931 is deficient on all four, including the "jurisdictional hook").

The government's argument instead invokes this Court's recognition that it is not uncommon to address possession as part of more comprehensive market regulation, Br. in Opp. 8-9 (citing *Raich*, 545 U.S. 1, 26 (2005)), and that Congress may regulate intrastate activity when failure to do so "would undercut [its] regulation of the interstate market," *ibid*. (quoting *Raich*, 545 U.S. at 18).

But these are unavailing for the most basic reason: the ban on possession is not a component of any broader "effort to regulate" the "interstate market" nor does it prevent the undercutting of any comprehensive regime. There simply is no such market regulation beyond this stand-alone criminal prohibition. The law neither evinces concern for the body armor "market" nor regulates or punishes any "transfers." If there indeed are "traffickers" catering to the "dangerous segment" of the "market," the statute supplies no authority for pursuing them. Although possession offenses are sometimes included

within statutes aimed at staunching distribution—power over buyers can be leveraged to identify and prosecute those "up the chain"—it is surely an unusual "anti-trafficking" regime that omits to punish even knowing and willful sales.

To be sure, § 931 does mention "purchases," but to say that the law prohibits possessions as a means of getting at these is to put matters exactly backwards. Rather, as the findings unambiguously attest, it targets possession (of which "acquisition" is a necessary precursor) as an incident of certain *uses*—in crime at the local level.

Bowing to the fact that there is no comprehensive regulation to reinforce, the government claims that what matters is that there *could be one* and proceeds to argue that Congress should not be penalized for a "decision to employ a narrower approach." Br. in Opp. 9 n.1. But the Court has never said that Congress has a free hand to legislate pretextually. And the power to target intrastate possession is not, as this argument presumes, a "lesser" one "included within" the "greater power" to enact effective, comprehensive market regulations. Confining possession prohibitions to those needed to effectuate proper Commerce legislation would, by raising the difficulty of enacting "symbolic" legislation, produce *fewer* incursions.

Apart from urging the second category, the government supplements the panel opinion below only by suggesting more significance for the "findings" enacted with § 931. (Before the Ninth Circuit, the government acknowledged these to be "meager," see Pet. 22). But these findings repeatedly

confirm Congress's concern with "crime at the local level," "danger [to] police officers and ordinary citizens," and "community safety." 42 U.S.C. § 3796*ll*-3(b)(4),(5); see generally *Morrison*, 529 U.S. at 615 (suppression of violent crime "has always been the prime object of the States' police power").

The only "finding" seemingly helpful to the government's position—that "existing Federal controls over [interstate] traffic [in body armor] do not adequately enable the States to control this traffic within their own borders," 42 U.S.C. § 3796*ll*-3(b)(3)—has the offsetting demerit of being untrue. There were no "federal controls" existing before § 931 was enacted (or others enacted afterward).

And § 931 does not "enable States" to do anything they could not have already done. A State persuaded that local crime is "exacerbated" by the availability of bulletproof vests (from whatever sources) could place restrictions—and impose criminal penalties—on their use, sale, or possession for certain purposes (or by certain classes of persons). Many States, but not Washington, have done so. See Pet. 27-29.

Given that, just like petitioner's, nearly every reported § 931 case involves an individual apprehended by local authorities investigating local crime with no evidence in sight of any federal effort to disrupt "traffic" or do anything beyond passively accepting local prosecutors' referrals, identical state law could accomplish exactly the same result. See *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring) ("If a State * * * determines that harsh criminal sanctions are necessary and wise * * *, the reserved

powers of the States are sufficient."); *Rybar*, 103 F.3d at 287 (Alito, J., dissenting).

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Although the government repeats the Ninth Circuit's complaints about overly rigid categories, it does so not in the service of a plea to permit "Congress * * * to act in terms of economic * * * realities," *North Am. Co.* v. *SEC*, 327 U.S. 686, 705 (1946), but rather the opposite—to *jettison* all consideration of "connection with commercial concerns that are central to the Commerce Clause." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). If the three-category test were supplanted by a less formal one focused directly on whether ostensible commerce legislation addressed something "truly national," § 931 could only fare worse. It does not regulate interstate (or intrastate) economic activity, economic crime, economic effects, or even non-economic interstate effects. It adds nothing to what States can do through their own powers and divests them of substantial policy discretion on a sensitive matter of local public safety "where the best solution is far from clear." *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring).

III. PETITIONER'S CASE IS AN ENTIRELY APPROPRIATE VEHICLE

The government does not dispute that this case has been litigated on clear, stipulated facts; that the single constitutional issue was raised and decided at every level; or that this case presents a more straightforward opportunity to reach the *Scarborough* question than many others. The lone "consideration" the government can muster as

"counseling" against review is the fact that petitioner has served his sentence.

But as the government necessarily concedes, jurisdiction here is beyond doubt, see Br. in Opp. 15 (citing *Spencer* v. *Kemna*, 523 U.S. 1, 9-12 (1998)), and the government makes no suggestion that petitioner will press his claim differently (or less vigorously) than would someone petitioning mid-sentence. Indeed, the premise of the government's argument—that vacating petitioner's conviction will have "no practical impact" for him—is unsubstantiated and plainly wrong. He is subject, by dint of this unconstitutional felony conviction, to a raft of practical as well as legal disabilities, many imposed by the federal government. See generally *Sibron* v. *New York*, 392 U.S. 40, 51-58 (1968).

This case is nothing like *Padilla* v. *Hanft*, 547 U.S. 1062, 1063 (2006) (Kennedy, J., concurring in denial of certiorari), on which the government heavily relies. As Justice Kennedy explained, *Padilla* was no ordinary petition—it would have required the Court to decide sensitive questions about its own power vis-a-vis the Executive in a case in which the government had through voluntary action already afforded the petitioner the principal relief he had sought from the judiciary.

Here, the government not only has prosecuted, convicted, and incarcerated petitioner based on this conviction, but it continues to subject him to disabilities on account of it without even disclaiming the power to impose new ones (or claiming that he may raise the unconstitutionality of this conviction

at any other point, see, *e.g.*, *Daniels* v. *United States*, 532 U.S. 374, 381 & n.1 (2001).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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