No. 09-1555

In the Supreme Court of the United States

CEDRICK B. ALDERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 931, which prohibits a person convicted of a felony crime of violence from purchasing, owning, or possessing body armor sold or offered for sale in interstate or foreign commerce, is a permissible exercise of congressional power under the Commerce Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 565 F.3d 641. The opinion of the district court (Pet. App. 44a-55a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 2009. A petition for rehearing was denied on February 3, 2010 (Pet. App. 56a-61a). On April 20, 2010, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including June 18, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Washington, petitioner was convicted of possessing body armor sold or offered for sale in interstate commerce after having been convicted of a felony crime of violence, in violation of 18 U.S.C. 931. He was sentenced to 18 months of imprisonment, to be followed by one year of supervised release. The court of appeals affirmed. Pet. App. 1a-43a.

1. In July 1999, petitioner was convicted in Washington state court of robbery in the second degree, a crime punishable by imprisonment for more than one year. Pet. App. 4a & n.1, 69a-70a.

In October 2005, an informant told Seattle police officers that he had purchased drugs from petitioner. Based on that tip, the officers attempted to make a controlled purchase of cocaine from petitioner. As petitioner walked toward the meeting point for the purchase, the officers arrested him and discovered that he was wearing a bulletproof vest. They did not find any drugs on his person but later discovered a small amount of marijuana in the trunk of his car. Pet. App. 4a, 69a; Gov't C.A. Br. 4-6.

2. On June 7, 2006, a federal grand jury in the Western District of Washington returned an indictment charging petitioner with possessing body armor sold and offered for sale in interstate commerce after having been convicted of a felony crime of violence (namely, robbery), in violation of 18 U.S.C. 931. C.A. E.R. 58-59. Section 931 makes it "unlawful for a person to purchase, own, or possess body armor, if that person has been convicted of a felony that is * * * (1) a crime of violence (as defined in section 16); or (2) an offense under State law that would constitute a crime of violence under para-

graph (1) if it occurred within the special maritime and territorial jurisdiction of the United States." 18 U.S.C. 931(a). The term "body armor" is defined, in relevant part, as "any product sold or offered for sale, in interstate or foreign commerce, as personal protective body covering intended to protect against gunfire." 18 U.S.C. 921(a)(35).

Petitioner moved to dismiss the indictment on the ground that Section 931 exceeds Congress's power under the Commerce Clause. The district court denied the motion. Pet. App. 44a-50a. Petitioner subsequently entered a conditional plea of guilty, reserving the right to appeal the district court's denial of his motion to dismiss the indictment. *Id.* at 5a, 63a. Petitioner acknowledged in the plea agreement that, before he possessed it, the bulletproof vest was manufactured in California and sold to a distributor in Washington, who in turn sold it to the Washington State Department of Corrections. *Id.* at 69a; see *id.* at 5a-6a.

The district court ultimately sentenced petitioner to 18 months of imprisonment, to be followed by one year of supervised release. Pet. App. 78a-79a.

3. A divided panel of the court of appeals affirmed. Pet. App. 1a-43a.

a. The majority rejected petitioner's claim that Section 931 exceeds Congress's power under the Commerce Clause. Pet. App. 1a-17a. It recognized that this Court's case law "delineate[s] three general categories of regulation in which Congress is authorized to engage under its commerce power": "(1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities having a substantial relation to interstate commerce," *i.e.*, "*intra*state[] activities that nonetheless have substantial *inter*state

effects." *Id.* at 12a-14a (quoting *Gonzales* v. *Raich*, 545 U.S. 1, 16 (2005); *United States* v. *Robertson*, 514 U.S. 669, 671 (1995); *United States* v. *Lopez*, 514 U.S. 549, 558-559 (1995); *United States* v. *Jones*, 231 F.3d 508, 514 (9th Cir. 2000)) (internal quotation marks and ellipsis omitted). Finding "the first two categories * * * not particularly applicable here," the majority turned to the third category and noted that, under *United States* v. *Morrison*, 529 U.S. 598 (2000), two of the factors "for determining whether a regulated activity substantially affects interstate commerce" are (a) "whether the statute contains any express jurisdictional element" "limit-[ing] the reach of a particular statute to a discrete set of cases that substantially affect interstate commerce," Pet. App. 13a-14a (quoting *Morrison*, 529 U.S. at 611-612; *United States* v. *McCoy*, 323 F.3d 1114, 1124 (9th Cir. 2003)) (internal quotation marks omitted); and (b) "congressional findings" on the subject, *id.* at 16a.

The majority pointed out that Section 931, "[u]nlike the statutes at issue in *Lopez* and *Morrison*, * * * is limited by an express jurisdictional" requirement that the regulated body armor was at some point "sold or offered for sale, in interstate or foreign commerce." Pet. App. 14a (quoting 18 U.S.C. 921(a)(35)). And it reasoned that *Scarborough* v. *United States*, 431 U.S. 563 (1977), "blessed" "a nearly identical jurisdictional hook" under which the statute barring felons from possessing firearms applied to firearms that "had at some time traveled in interstate commerce." Pet. App. 9a, 16a (quoting *Scarborough*, 431 U.S. at 577; *United States* v. *Cortes*, 299 F.3d 1030, 1036-1037 (9th Cir. 2002), cert. denied, 537 U.S. 1224 (2003)) (internal quotation marks omitted). The majority further emphasized that when Congress enacted Section 931, Congress "found that

'crime at the local level is exacerbated by the interstate movement of body armor and other assault gear' and 'existing Federal controls over [interstate] traffic [in body armor] do not adequately enable the States to control this traffic within their own borders.'" *Id.* at 7a (quoting H.R. Rep. No. 193, 107th Cong., 1st Sess. Pt. 1, at 2, (2001)) (alterations in original).

Especially in light of *Scarborough* and Section 931's "jurisdictional hook," the majority reasoned that it did not need to further "pars[e]" *Lopez* and *Morrison*, which did not "overrule[]" *Scarborough*. Pet. App. 12a, 16a; see *id.* at 13a ("while we generally analyze cases in the framework of the[] three categories * * * described in *Lopez*," "we are not obligated to 'jam[] a square peg into a round hole'—especially when that peg has already had a suitable spot of its own carved out by the Court" in *Scarborough*) (quoting *United States* v. *Clark*, 435 F.3d 1100, 1103 (9th Cir. 2006), cert. denied, 549 U.S. 1343 (2007)) (second pair of brackets in original). The majority concluded that "[t]he congressional findings, the nature of the body armor statute, and the express requirement of a sale in interstate commerce, considered in combination, provide[d] a sufficient nexus to and effect on interstate commerce to uphold" Section 931. *Id.* at 11a-12a.

b. Judge Paez dissented. Pet. App. 18a-43a. He would have held that Section 931 could not be sustained as a regulation of (1) the channels of commerce (*id.* at 20a & n.2); (2) the instrumentalities of commerce (*ibid.*); or (3) intrastate activities that substantially affect interstate commerce (*id.* at 21a-43a). In particular, Judge Paez believed that Section 921(a)(35)'s jurisdictional requirement that the regulated body armor have been sold or offered for sale in interstate commerce could not

save Section 931, because, in his view, "virtually every possession" of body armor would meet that requirement. *Id.* at 36a; see *id.* at 32a-39a. And he argued that *Scarborough* was inapposite, because it "decided only a question of statutory interpretation," not a question about Congress's authority under the Commerce Clause. *Id.* at 39a; see *id.* at 39a-43a.

4. Petitioner filed a petition for panel rehearing or rehearing en banc. The panel denied rehearing, although Judge Paez would have granted it. Pet. App. 56a-57a. The court of appeals likewise denied rehearing en banc. *Id.* at 57a. Judge O'Scannlain, joined by three other judges, dissented from the denial of rehearing en banc. *Id.* at 57a-61a.

5. Petitioner completed his term of imprisonment and was released on September 5, 2008, while his appeal was pending. See Federal Bureau of Prisons, Dep't of Justice, *Inmate Locator*, http://www.bop.gov/iloc2/LocateInmate.jsp (last visited Sept. 14, 2010). Petitioner's one-year term of supervised release commenced on the day of his release from prison, see 18 U.S.C. 3624(e), and we are advised by the Probation Office for the Western District of Washington that petitioner completed his term of supervised release on September 4, 2009, while the petition for rehearing or rehearing en banc was pending.

ARGUMENT

Petitioner renews his contention (Pet. 10-34) that 18 U.S.C. 931 exceeds Congress's power under the Commerce Clause and is therefore invalid. That claim lacks merit and does not warrant this Court's review.

1. In enacting Section 931, Congress made specific findings about the dangers posed by unrestricted pos-

session of body armor, as well as the role played by interstate trafficking in exacerbating those dangers:

> Congress finds that—
>
> (1) nationally, police officers and ordinary citizens are facing increased danger as criminals use more deadly weaponry, body armor, and other sophisticated assault gear;
>
> (2) crime at the local level is exacerbated by the interstate movement of body armor and other assault gear;
>
> (3) there is a traffic in body armor moving in or otherwise affecting interstate commerce, and existing Federal controls over such traffic do not adequately enable the States to control this traffic within their own borders through the exercise of their police power;
>
> (4) recent incidents * * * demonstrate the serious threat to community safety posed by criminals who wear body armor during the commission of a violent crime;
>
> * * * * *
>
> (8) Congress has the power, under the interstate commerce clause and other provisions of the Constitution of the United States, to enact legislation to regulate interstate commerce that affects the integrity and safety of our communities.

21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, Div. C, Tit. I, § 11009(b), 116 Stat. 1819-1820.

Section 931 directly regulates the interstate market in body armor by eliminating a dangerous and harmful

segment of that market, namely purchases or other acquisitions by violent felons. Such regulation of interstate markets is squarely within Congress's authority "[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; see, *e.g.*, *Gonzales* v. *Raich*, 545 U.S. 1, 25 (2005) ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.") (citation and internal quotation marks omitted).

As this Court reaffirmed in *Raich*, "Congress can regulate purely intrastate activity that is not itself 'commercial,' * * * if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." 545 U.S. at 18. If Section 931's prohibition were limited to interstate transfers, it would often be difficult to establish the precise circumstances under which a particular violent felon acquired his body armor. That difficulty would be especially acute in cases involving (as this one does) transactions outside traditional retail channels, such as street-level and other informal transactions, or transactions using nominal or straw purchasers. See Pet. App. 6a (noting that the vest petitioner possessed was manufactured in California, was sold to a distributor in Washington, and was subsequently sold to the Washington State Department of Corrections, and that "[n]othing in the record reveals how the vest left the Department of Corrections" and ended up with petitioner).

Given those enforcement difficulties, Congress could rationally conclude that a ban on possession and ownership by violent felons is a necessary and proper means of achieving its objectives. See *Raich*, 545 U.S. at 22;

see also *id.* at 26 ("Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.").[1] In addition, and as the court of appeals emphasized (Pet. App. 9a, 12a-16a), the statutory scheme includes an express jurisdictional element that requires the government to prove that the type of body armor at issue has at some point been "sold or offered for sale, in interstate or foreign commerce." 18 U.S.C. 921(a)(35). The statute thus ensures, through a case-by-case inquiry, that a direct nexus exists between the prohibited conduct and the interstate market being regulated. See, *e.g.*, *United States* v. *Lopez*, 514 U.S. 549, 561-562 (1995).

2. Contrary to petitioner's contentions (Pet. 12-33), the conclusion that Section 931 is a constitutional exercise of Congress's authority is not inconsistent with this Court's decisions in *Lopez* and in *United States* v. *Morrison*, 529 U.S. 598 (2000).

a. Section 931 both involves direct regulation of the interstate market and contains a jurisdictional element requiring case-by-case proof of a nexus to interstate

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[1] Congress might have established a broader regulatory regime that, *e.g.*, required sellers to create and retain documentation of all sales, so as to make it easier for law enforcement personnel to prove specific purchases; established mechanisms for sellers to determine whether the true purchaser had been convicted of a violent felony; prohibited sales to violent felons; or extended Section 931's prohibitions to all felons. Contrary to Judge Paez's suggestion in dissent (Pet. App. 24a-26a), however, Congress's decision to employ a narrower approach does not cast doubt on Section 931's constitutional status. Rather, Congress could reasonably decline to impose the additional costs that broader regulation would entail and choose instead to focus its regulatory efforts on those participants in the body armor market who present the greatest dangers.

commerce. In those respects Section 931 is markedly different from the statutes at issue in *Lopez* and *Morrison*, which neither regulated economic activity nor contained jurisdictional elements. See *Lopez*, 514 U.S. at 561-562; *Morrison*, 529 U.S. at 613; see also *Raich*, 545 U.S. at 23 ("The Act [in *Lopez*] did not regulate any economic activity and did not contain any requirement that the possession of a gun have any connection to past interstate activity or a predictable impact on future commercial activity."); *id.* at 26 ("Because the [Controlled Substances Act, 21 U.S.C. 801 *et seq.*] is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality.").

b. Nor is there merit to petitioner's contention (Pet. 19-23) that Section 931 falls outside the three general categories of permissible Commerce Clause legislation described by the Court in *Lopez* and subsequent cases. As the Court explained in *Raich*:

> First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce.

545 U.S. at 16-17 (internal citations omitted); see *Lopez*, 514 U.S. at 558-559. Section 931 falls within both the second and the third of those categories of Commerce Clause legislation.

In exercising its authority to "regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce," *ibid.*, Congress

may address the harmful consequences associated with particular classes of goods and transactions. See, *e.g.*, *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 256 (1964); *United States* v. *Darby*, 312 U.S. 100, 112-115 (1941). Section 931 directly regulates things in interstate commerce—body armor—by addressing a particular, harmful segment of the interstate market in body armor: acquisitions by violent felons of body armor that has been sold or offered for sale in interstate commerce.

Section 931 also regulates activities that substantially affect interstate commerce. Given the enforcement difficulty in proving specific purchases, Congress had a rational basis for concluding that banning possession and ownership of body armor by violent felons was an appropriate means of achieving its regulatory goals. See *Raich*, 545 U.S. at 22; *id.* at 26 ("Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.").

c. Relatedly, petitioner argues that review is necessary to correct the mistaken view, allegedly endorsed by the court of appeals below, that *Scarborough* v. *United States*, 431 U.S. 563 (1977), "installs a fourth category" of Commerce Clause legislation "treat[ing] as constitutionally sufficient a 'minimal' interstate commerce nexus." Pet. 11, 19; see Pet. 10-19, 23-32.

As an initial matter, it is not clear that the court of appeals adopted any such view. To be sure, the court of appeals quoted circuit precedent for the proposition that the three categories of Commerce Clause legislation that this Court has identified "have never been deemed exclusive or mandatory" and "are a guide, not a straitjacket." Pet. App. 13a (quoting *United States* v. *Clark*,

435 F.3d 1100, 1116 (9th Cir. 2006), cert. denied, 549 U.S. 1343 (2007)). The court of appeals further reasoned (*id.* at 16a) that *Scarborough*'s "bless[ing]" of "a nearly identical jurisdictional hook" to the one in Section 921(a)(35) made a "careful parsing of post-*Lopez* case law" unnecessary. But the court of appeals nevertheless analyzed the body armor statute under the three traditionally recognized categories of Commerce Clause legislation and noted that, under the "controlling * * * test" in *Morrison*, 529 U.S. at 609-612, the statute's "jurisdictional hook" and supporting "congressional findings" were relevant to "whether [the] regulated activity substantially affects interstate commerce" under the third category. Pet. App. 14a, 16a (citation and internal quotation marks omitted). In short, the court of appeals' reliance on *Scarborough* can reasonably be read as part and parcel of a conclusion that, in light of Section 921(a)(35)'s jurisdictional requirement, the body armor statute is a constitutional exercise of commerce power under the third category.

Reliance on *Scarborough* to that effect is fully consistent with *Lopez*. The Court in *Lopez* expressly distinguished the statute at issue in *Scarborough*, which banned possession of firearms by convicted felons, because that statute included a jurisdictional element, whereas the statute at issue in *Lopez* "ha[d] no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." 514 U.S. at 562; see *Raich*, 545 U.S. at 23 (noting that the statute in *Lopez* lacked "any requirement that the possession of a gun have any connection to past interstate activity or a predictable impact on future commercial activity"). Since this Court's decision in *Lopez*,

the courts of appeals have continued to rely on *Scarborough* in upholding the constitutionality of Section 931 and other similar statutes, and this Court has repeatedly denied review in those cases. See *United States* v. *Patton*, 451 F.3d 615, 634-636 (10th Cir. 2006) (rejecting Commerce Clause challenge to Section 931 in light of *Scarborough*), cert. denied, 549 U.S. 1213 (2007) (denying review of the same question presented here); *United States* v. *Scott*, 245 Fed. Appx. 391, 393 (5th Cir. 2007) (per curiam) (citing *Patton* in rejecting Commerce Clause challenge to Section 931), cert. denied, 552 U.S. 1203 (2008).[2] There is no reason for a different result in this case.

d. In light of the foregoing, and contrary to petitioner's contention (Pet. 23-25), the court of appeals did not obliterate the distinction between what is national and what is local by adopting a Commerce Clause test solely dependent upon the recitation of a jurisdictional element. As noted, the court of appeals expressly con-

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[2] See, *e.g.*, *United States* v. *Santiago*, 238 F.3d 213, 215-217 (2d Cir.) (per curiam) (rejecting Commerce Clause challenge to 18 U.S.C. 922(g)(1), which bars convicted felons from possessing firearms and ammunition that have traveled in interstate or foreign commerce), cert. denied, 532 U.S. 1046 (2001); *United States* v. *Singletary*, 268 F.3d 196, 200-205 (3d Cir. 2001) (same), cert. denied, 535 U.S. 976 (2002); *United States* v. *Gresham*, 118 F.3d 258, 264-265 n.11 (5th Cir. 1997) (same), cert. denied, 522 U.S. 1052 (1998); *United States* v. *Chesney*, 86 F.3d 564, 568-572 (6th Cir. 1996) (same), cert. denied, 520 U.S. 1282 (1997); *United States* v. *Bradford*, 78 F.3d 1216, 1222-1223 (7th Cir.) (same), cert. denied, 517 U.S. 1174 (1996); *United States* v. *Shelton*, 66 F.3d 991, 992 (8th Cir. 1995) (per curiam) (same), cert. denied, 517 U.S. 1125 (1996), and 517 U.S. 922 (1997) ; *United States* v. *Cortes*, 299 F.3d 1030, 1036-1037 (9th Cir. 2002) (rejecting Commerce Clause challenge to 18 U.S.C. 2119, which prohibits "carjacking" of vehicles that have traveled in interstate or foreign commerce), cert. denied, 537 U.S. 1224 (2003).

cluded that "[t]he congressional findings, the nature of the body armor statute, and the express requirement of sale in interstate commerce, *considered in combination*, provide a sufficient nexus to and effect on interstate commerce to uphold" Section 931. Pet. App. 11a-12a (emphasis added). Section 931's reach is limited to acquisitions of body armor proven to be sold or offered for sale in interstate commerce. Further, the statute reaches only violent felons, whom Congress rationally concluded represent a dangerous subset of the market in interstate body armor. Finally, the statute extends to intrastate possession as a necessary part of Congress's effort to regulate violent felons' participation in the interstate body armor market. Thus, far from sanctioning federal regulation of any person's possession of any thing any part of which ever traveled across state lines (Pet. 24), the court of appeals carefully rested its analysis on limiting factors approved in *Lopez*, *Morrison*, and *Raich*.

e. Even if, as petitioner suggests (Pet. 11-13, 30-32), the court below or other courts had effectively recognized a fourth category of Commerce Clause legislation in the body armor context or in other contexts, review would nonetheless be unwarranted here. As discussed (pp. 10-11, *supra*), Section 931 in any event falls within the second and third categories described in *Lopez*, especially as applied to petitioner, whose bulletproof vest was sold (not just offered for sale) in interstate commerce. See Pet. App. 5a-6a, 69a.

3. Finally, review would be unwarranted because even a decision favorable to petitioner would have little or no practical effect on petitioner. As noted (p. 6, *supra*), petitioner's terms of imprisonment and supervised release ended while his case was pending in the court of

appeals. Although completion of a criminal sentence does not ordinarily cause a challenge to the underlying conviction to be moot (see *Spencer* v. *Kemna*, 523 U.S. 1, 9-12 (1998)), prudential considerations counsel against granting a writ of certiorari to review a constitutional issue that, however decided, will have no practical impact on the party raising it. Cf. *Padilla* v. *Hanft*, 547 U.S. 1062, 1063 (2006) (Kennedy, J., concurring in denial of a writ of certiorari) (noting that, "[w]hatever the ultimate merits of the parties' mootness arguments, there are strong prudential considerations disfavoring the exercise of the Court's certiorari power" where, even if the Court were to rule in the petitioner's favor, it would not affect his custodial status).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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