No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The decision below sustained against constitutional challenge petitioner's conviction under 18 U.S.C. § 931, for possessing a bulletproof vest that had previously crossed a state line in a lawful transaction to which petitioner was not a party.

The question presented is:

Have the Ninth Circuit and other courts of appeals erred in treating *Scarborough* v. *United States*, 431 U.S. 563 (1977), as recognizing a distinct Commerce Clause authority, beyond the three categories recognized in *United States* v. *Lopez*, 514 U.S. 549, 558-559 (1995), *United States* v. *Morrison* 529 U.S. 598 (2000), and *Gonzales* v. *Raich*, 545 U.S. 1 (2005), such that a federal statute which "cannot be justified as a regulation of the channels of commerce, as a protection of the instrumentalities of commerce, or as a regulation of intrastate activity that substantially affects interstate commerce," *United States* v. *Patton*, 451 F.3d 615, 634 (10th Cir. 2006), may be sustained based on a "minimal nexus" between the activity regulated and interstate commerce.

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The decision of the Ninth Circuit (App., *infra*, 1a-43a) is reported at 565 F.3d 641. The order denying the petition for rehearing (App., *infra*, 56a-61a) is reported at 593 F.3d 1141. The district court's unreported order denying the motion to dismiss the indictment is reproduced in the Appendix, *infra*, 44a-55a.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 2009. Petitioner filed a petition for panel rehearing and rehearing *en banc*, which was denied on February 3, 2010. Justice Kennedy entered an order extending until June 18, 2010 the time to file this petition. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution Article 1, section 8, clause 3 provides, in pertinent part:

> [The Congress shall have power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes;

Section 931(a) of Title 18 of the United States Code provides, in pertinent part:

> [I]t shall be 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 [18 U.S.C. §] 16); or

> (2) an offense under State law that would constitute a crime of violence under paragraph (1) if it occurred within the special maritime and territorial jurisdiction of the United States.

Section 921(a)(35) of Title 18 of the United States Code provides, in pertinent part:

> The term "body armor" means any product sold or offered for sale, in interstate or foreign commerce, as personal protective body covering intended to protect against gunfire, regardless of whether the product is to be worn alone or is sold as a complement to another product or garment.

PETITION FOR A WRIT OF CERTIORARI

STATEMENT

This case concerns the bounds of the power conferred on Congress to "regulate Commerce * * * among the several States." U.S. Const. Art. I, § 8, Cl. 3. In the decision below, a sharply divided Ninth Circuit panel held that 18 U.S.C. § 931, which criminalizes simple possession of a bulletproof vest, is a valid Commerce Clause regulation, based on a definition limiting the prohibition's reach to articles that were, at some time, sold ("or offered for sale") across state lines, see *id.* § 921(a)(35).

In so holding, the court did not conclude that the statute satisfies the three-category test for Commerce Clause validity laid down in *United States* v. *Lopez*, 514 U.S. 549 (1995), *United States* v. *Morrison* 529 U.S. 598 (2000), and *Gonzales* v. *Raich*, 545 U.S. 1 (2005). See *Lopez*, 514 U.S. at 558-559 (Clause allows legislation regulating "[1] the use of the channels of interstate commerce * * * [2] the instrumentalities of interstate commerce, or persons or things in interstate commerce [and 3] activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce."); *Morrison,* 529 U.S. at 608-609 (identifying factors for determining valid "substantial effects" legislation). Nor could it.

Rather, the majority opinion, over strong dissent, effectively recognized a "fourth category" of Commerce Clause power, see App., *infra*, 20a n.2 (Paez, J., dissenting), one ostensibly derived from this Court's statutory construction decision in

Scarborough v. *United States*, 431 U.S. 563 (1977). Three other courts of appeals have upheld § 931 on this same theory. In none of these cases, however, has a judge determined that § 931 passes this Court's three-category test, and seven (all three members of a Tenth Circuit panel and the four dissenters from denial of rehearing here) have concluded that the statute fails it. Other courts have relied on the same understanding of *Scarborough* – as having "blessed," App., *infra*, 16a, a Commerce Clause power to criminalize activities based on a "minimal nexus," 431 U.S. at 577, with interstate commerce – to sustain other federal criminal laws, though frequently over strong objections like those raised by the dissenting judges below.

Review here will enable the Court to make clear – both to the lower courts and to Congress, which continues to enact legislation targeting local criminal activity on the "minimal nexus" theory – that its precedents do not recognize, and the Commerce Clause does not permit, a distinct power, beyond the three categories delineated in *Lopez*, *Morrison*, and *Raich*, authorizing Congress to criminalize local noneconomic activity based on the involvement of an article that at some point crossed a state line.

A. Statutory Framework

In 2002, Congress, responding to two widely reported 1997 incidents in which local police officers were killed in gunfire exchanges with assailants wearing protective gear, enacted the James Guelff and Chris McCurley Body Armor Act, Pub. L. No. 107-273, Div. C, Title I, § 11009(e)(2)(A), 116 Stat. 1821. That law, in addition to providing for federal

assistance to local law enforcement agencies in obtaining bulletproof vests, 42 U.S.C. § 3796*ll*-3(f), added to the U.S. Code a provision, 18 U.S.C. § 931(a), making it a federal offense, punishable by up to three years' imprisonment, for individuals previously convicted on certain state or federal charges to possess an item of "body armor," defined as "any product sold or offered for sale, in interstate or foreign commerce, as personal protective body covering intended to protect against gunfire." *Id.* § 921(a)(35). It does not otherwise address the interstate sale of such items, nor had prior federal legislation done so.

B. Proceedings Below

1. In 2005, Seattle police officers arrested petitioner Cedrick Alderman on suspicion of selling cocaine. That suspicion proved incorrect. The police found no drugs on his person and only a small amount of marijuana in his car, Gov't D.Ct. Sentencing Mem. at 3, with "no evidence that Alderman was distributing [that drug]," *ibid.* They did find, however, that Alderman was wearing a bulletproof vest. Despite the absence of any "evidence linking [his] use of [the] vest to th[e] marijuana," *ibid.*, and notwithstanding that Washington State does not make it a crime to own or wear such protective items, local authorities, aware that Alderman had been convicted in 1999 on state second-degree robbery charges, referred the case to federal prosecutors, who indicted him under § 931. App., *infra*, 4a.

The federal indictment did not allege that Alderman had purchased the vest interstate; that he had traveled across state lines with it; that he

possessed or planned to use it for any improper, let alone violent or criminal purpose; or that he possessed any firearms. On the contrary, the parties stipulated that the vest had crossed state lines years earlier – in a lawful sale by a California firm to a Washington State distributor, which in turn had sold it to Washington prison authorities. *Id.* at 5a-6a, 69a-70a (plea agreement).

2. Alderman moved to dismiss the indictment on various grounds, including that § 931 exceeds Congress's power under the Commerce Clause. The district court denied that motion, relying on Ninth Circuit precedent sustaining other federal possession prohibitions and decisions from other jurisdictions upholding § 931 itself, *Id.* at 46a-50a. The court reasoned that the presence of a "jurisdictional element," *i.e.*, the provision limiting the possession offense to items that had at one time been "sold or offered for sale" in interstate commerce, established § 931's validity and obviated the need to fit the law within the three categories of valid Commerce Clause legislation described in *Lopez*, *Morrison*, and *Raich*. See App., *infra*, 50a. Alderman then pleaded guilty, reserving his right to appeal.

3. A divided panel of the Ninth Circuit rejected Alderman's constitutional challenge and affirmed his conviction.

a. The majority, like the district court, saw no "need," *id.* at 16a, to carefully examine § 931 under the standards set out in this Court's recent Commerce Clause precedents. The court concluded that the constitutional question was instead "controlled by" (App., *infra*, 16a) *Scarborough*, 431 U.S. 563, which had held that a "minimal nexus," *id.*

at 577, *i.e.*, proof that "firearms had at some time traveled in interstate commerce," App., *infra*, 9a (quoting *United States* v. *Cortes*, 299 F.3d 1030, 1036-1037 (9th Cir.2002)), was all that was needed to obtain a conviction under a federal statute (a predecessor of current 18 U.S.C. § 922(g)), prohibiting firearm possession by individuals previously convicted of felonies.

While acknowledging that the Court in *Scarborough* "did not address the statute from a constitutional perspective," App., *infra*, 8a, but had focused instead on what "Congress [had] intended," 431 U.S. at 577, the Ninth Circuit majority described the decision as "implicitly assum[ing] the constitutionality of th[e minimal nexus] requirement." App., *infra*, 9a. Finding the § 921(a)(35) definition to be "nearly identical" to the "jurisdictional hook * * * blessed" in *Scarborough*, *id.* at 16a, the majority concluded that Alderman's constitutional challenge could not succeed.

The majority opinion took note both of tensions between its rationale and the rules laid down in this Court's "more recent decisions," *id.* at 17a, and of "skepticism" in "[o]ther circuits[']" decisions concerning "the continuing vitality of *Scarborough*," *id.* at 11a. But it emphasized that the Tenth Circuit had recently upheld § 931, after expressly recognizing that the law could not be sustained under "any of the *Lopez* categories" – on the ground that "it is supported by the pre-*Lopez* precedent of *Scarborough*," *id.* at 10a (quoting *United States* v. *Patton*, 451 F.3d 615, 634 (10th Cir. 2006)) – and that decisions of the Ninth Circuit and other courts of appeals (including "skeptical" ones) had upheld other statutes on that same basis. See *ibid.* The

majority cited reluctance "to create a circuit split on this issue or to deviate from binding [circuit] precedent," *id.* at 11a, as well as its obligation to follow Supreme Court precedent "'unwaveringly' "[u]ntil the Supreme Court tells us otherwise," *id.* at 17a (quoting *Cortes*, 299 F.3d. at 1037 n.2), as reasons for affirming Alderman's conviction. See *ibid.* ("Any doctrinal inconsistency between *Scarborough* and [*Lopez* and its progeny] * * * is not for this court to remedy.") (quoting *Patton*, 451 F.3d at 636).

b. Dissenting, Judge Paez took a fundamentally different view of the controlling precedent and constitutional principles. Denying that *Scarborough* announced a constitutional rule, let alone established a broad, freestanding "fourth category" of Commerce Clause authority, *id.* at 20a n.2, he emphasized that § 931 could be sustained if, and only if, it met the three-category test. In view of the absence of even a "serious[] conten[tion] that § 931 [could] be justified under either of the first two categories," App., *infra*, 13a n.4 (majority opinion), Judge Paez reasoned, the statute could be upheld only if it passed the test *Morrison* establishes for "substantial effects," legislation, see *id.* at 16a.

Application of the *Morrison* test, Judge Paez then concluded (as had the unanimous Tenth Circuit in *Patton*), settled that § 931 is not valid "substantial effects" legislation. Rather, § 931 fared worse than the statute invalidated in *Morrison* on three of the four factors this Court identified as constitutionally relevant, see App., *infra*, 22a-33a. The § 921(a)(35) requirement that the items possessed be ones that were at some time "sold or offered for sale[] in interstate commerce," Judge Paez concluded, was

not the sort of "jurisdictional element" *Morrison* had recognized might "lend support," 529 U.S. at 612, 613, to a claim of Commerce Clause validity. Judge Paez agreed with the Tenth Circuit that this was, as a practical matter, no "serious[] limit [on] the reach of the statute," App., *infra*, 35a (quoting *Patton*, 451 F.3d. at 633), and that there was "no reason * * * that possession of body armor that satisfies the jurisdictional hook has any greater effect on interstate commerce than possession of any other body armor," *ibid.*

At this point, Judge Paez's analysis departed from that of the *Patton* court, which had concluded that *Scarborough* established an independent basis for sustaining § 931. That decision, he explained, had resolved "only a question of statutory interpretation about the predecessor * * * to § 922(g)." *Id.* at 39a. The panel majority's concerns about arrogating this Court's "prerogative of overruling its own decision[s]," *id.* at 41a, he continued, were therefore misplaced because *Scarborough* neither "has direct application to," nor "directly controls" the constitutional issue Alderman's § 931 conviction raised. *Id.* at 41a-42a (citation and internal quotation marks omitted).

c. Over the dissent of four judges, the Ninth Circuit denied en banc rehearing. App., *infra*, 56a (O'Scannlain, Paez, Bybee, and Bea, JJ., dissenting). After endorsing Judge Paez's conclusion as to § 931's unconstitutionality, Judge O'Scannlain emphasized the broad significance of the majority's contrary decision. *Id.* at 58a. Treating *Scarborough* as having settled Congress's authority to reach intrastate noneconomic activity based on a minimal nexus, he explained, effectively rendered

"superfluous" the limitations recognized in *Lopez*. *Ibid.* The rule, he continued, would improperly relieve Congress of its responsibility to consider "whether the prohibited conduct has a 'substantial relation to interstate commerce,'" App., *infra*, 59a (quoting *Lopez*, 514 U.S. at 559), and would have an especially serious impact in the area of criminal law, given Congress's demonstrated readiness to make "a federal case out of * * * crimes [historically] punished only by the states," *ibid.* (internal quotation marks and citation omitted).

REASONS FOR GRANTING THE PETITION

This Court's review is needed to correct a pervasive, important and basic error concerning Congress's power under the Commerce Clause. The decision below sustained § 931 not because it satisfied the three-category test of *Lopez*, *Morrison*, and *Raich*, but rather on the basis that this Court's decision in *Scarborough* codified an additional category of congressional power, authorizing regulation of any activity, including intrastate noneconomic activity, that has a "minimal nexus" to interstate commerce, *i.e.*, involving an article that at some point in time crossed state lines.

That understanding of the governing constitutional rule is not unique to the Ninth Circuit decision in this case. Every court to uphold § 931 has done so without applying *Lopez*, *Morrison*, and *Raich*, and decisions of other courts of appeals have sustained numerous other federal criminal statutes against Commerce Clause challenge on the basis that *Scarborough* "controls" the constitutional question.

But *Scarborough* does no such thing. *Scarborough* does not supply a basis for foregoing the three-category *Lopez* analysis, let alone a source of additional authority for statutes that fail it; it is not "directly controlling" constitutional law. Indeed, it is not constitutional law at all. The widespread and mistaken belief among the lower courts that *Scarborough* establishes a rule of law that treats as constitutionally sufficient a "minimal" interstate commerce nexus, as evinced by the presence of a perfunctory "jurisdictional element," is fundamentally at odds with the Court's Commerce Clause doctrine. As Judge O'Scannlain recognized, the rule embraced below goes well beyond simply adding an extra "category" of Commerce authority to the three the Court has long recognized. It provides a roadmap for circumventing the constitutional limits the three-category test is meant to enforce and for legislation that ignores the core distinction between what is local and what is national.

The federal criminal law under which petitioner was convicted supplies a textbook illustration of the dangers against which this Court's precedents and the Commerce Clause guard. The "problem" § 931 addresses is a quintessentially local one, and the federal possession prohibition accomplishes nothing States could not do through their own criminal law, while nullifying policy choices of those States which, for plainly understandable reasons, do not treat simple possession of protective articles as criminal.

This Court's review is especially necessary for a further reason. The question raised here not only continues to yield confused and erroneous lower court decisions, but even courts that have recognized the error of the Ninth Circuit's rule have concluded

they are powerless to apply the correct constitutional standard – and are constrained to affirm convictions under statutes that fail the *Lopez* test – "unless and until" *this Court* settles that *Scarborough* is not a barrier to their doing so.

This case provides an unusually clear opportunity for settling this important question, precisely because it concerns a statute that could *only* be sustained if *Scarborough* (and not *Lopez*, *Morrison*, and *Raich*) supplies the controlling rule of Commerce Clause law. Because § 931 is a stand-alone provision, there is no prospect, as there is in cases involving other federal statutory possession prohibitions, of its being defended or upheld on alternative grounds, *e.g.*, as an essential component of a larger, comprehensive regulatory scheme.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE

The Ninth Circuit, like the three other courts of appeals to have upheld the statute, did not sustain § 931 based on the Commerce Clause framework established in *Lopez*, *Morrison* and *Raich*. The majority opinion below terminated its discussion of these principles on the ground that *Scarborough* (and its circuit progeny) obviated the "need" to "engage in the careful parsing of post-*Lopez* case law that would otherwise be required," App., *infra*, 16a. Two circuits have held that the three-category inquiry could be dispensed with altogether, *United States* v. *Harkness,* 305 Fed. Appx. 578, 582 (11th Cir. 2008) (circuit precedent upholding § 922(g) eliminated the "need [to] decide whether [§ 931] fits into any of [*Lopez*'s] three categories"); *United States*

v. *Scott*, 245 Fed. Appx. 391, 393 (5th Cir. 2007) (same); and the Tenth Circuit upheld the statute after concluding that "§ 931 *cannot* be justified as a regulation of the channels of commerce, as a protection of the instrumentalities of commerce, or as a regulation of intrastate activity that substantially affects interstate commerce." *Patton*, 451 F.3d at 634 (McConnell, J.) (emphasis added).

Thus, every court of appeals to sustain section 931 has treated *Lopez*, *Morrison*, and *Raich* as "[in]applicable," App., *infra*, 50a, on the basis that this Court's decision in *Scarborough* established an alternative test for sustaining statutes – one that "controls" here, *id.* at 16a.

That understanding of *Scarborough* (which goes well beyond § 931 cases, see p. 31, *infra*) is wrong on its own terms, and it has yielded a rule of Commerce Clause power that is irreconcilable with this Court's precedents.

A. *Scarborough* Is No Authority For Dispensing With This Court's Three-Category Commerce Clause Test

Although the opinion below framed its decision as reflecting a choice to follow the more specific of two potentially applicable constitutional rules, see *App., infra*, 16a-17a, *Scarborough* was not a constitutional decision at all. It "did not engage in *any* analysis of the authority of Congress to enact laws under the Commerce Clause" and "was exclusively [a decision] of statutory construction." *United States* v. *Bishop*, 66 F.3d 569, 594-595 (3d Cir. 1995) (Becker, J., concurring in part and dissenting in part) (emphasis original).

The *Scarborough* opinion begins by identifying "the issue" presented: "whether proof that [a] possessed firearm previously traveled in interstate commerce is sufficient to satisfy the *statutorily required* nexus," 431 U.S. at 564 (emphasis added), and the Court's analysis focused on determining, based on the statute's legislative history, what Congress had "intended" and "sought" to accomplish. *Id.* at 577. Nowhere did the Court decide what Congress *could* do, consistently with the limitations of its delegated Commerce authority. See *United States* v. *Bass*, 404 U.S. 336, 339 n.4 (1971) (declining to "reach the question whether, upon appropriate findings, Congress can constitutionally punish the 'mere possession' of firearms").

This Court's opinions often caution against reading decisions as having "implicitly" resolved constitutional issues not addressed and provide ample illustration of the hazards of doing so. See, *e.g.*, *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1818 (2009) (noting that prior holding relied on by lower court "drew no constitutional line"); *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 73 (1996) (same). The Court has held unconstitutional statutes that had been the subject of earlier interpretative decisions. Compare, *e.g.*, *United States* v. *Booker*, 543 U.S. 220 (2005) (holding that longer sentences mandated by sentencing guidelines violated Sixth Amendment) with *Williams* v. *United States*, 503 U.S. 193, 200 (1992) (affirming defendant's guideline sentence); cf. *Witte* v. *United States*, 515 U.S. 389, 401-402 (1995) (rejecting, in Double Jeopardy Clause case, "suggestion that the Sentencing Guidelines somehow change the constitutional analysis"). Indeed, even questions of

subject matter jurisdiction, which are in some sense necessarily determined in each federal case, "have no precedential effect," when they were not examined in the earlier decision. *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 91-92 (1998).

But the decision below did not merely venture an observation that *Scarborough* was decided on the "implicit[] assum[ption]," App., *infra*, 9a, that the "minimal nexus" standard in the statute was constitutionally sufficient. The majority held the assumption so "directly control[ling]" of the constitutional question here as to not require – and arguably not *permit* – application of the precedents that would otherwise govern. See also App., *infra*, 50a (district court's conclusion that "*Lopez* and *Morrison* are not applicable to this case"); see generally *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls.").

An implicit assumption is plainly insufficient basis to dispense with the analysis required under the *Lopez* line of decisions, which *did* explicitly and comprehensively interpret the Constitution. This Court "is not bound by its prior assumptions," *Lopez* v. *Monterey County*, 525 U.S. 266, 281 (1999), and lower courts should not rely on "silence on a matter of constitutional significance as any indication, much less a 'clear' indication, that the Court has, in effect, already passed upon a constitutional question," *United States* v. *Chesney*, 86 F.3d 564, 581 (6th Cir. 1996) (Batchelder, J., concurring).

And as Judge Paez explained, even if *Scarborough* could be treated as affecting the analysis of the constitutionality of a later version of the statute at issue in that case, but see *United States* v. *Kuban*, 94 F.3d 971, 977 n.3 (5th Cir. 1996) (DeMoss, J., dissenting) (concluding that 18 U.S.C. § 922(g) is different enough from precursor that *Scarborough* is not binding), its "holding" would still not "directly control[] the outcome" of a case involving an entirely *different* statute, App., *infra*, 42a (citation omitted). Given the salient differences between firearms and protective body covering and their respective regulatory regimes, § 931 is an especially implausible candidate for mechanically extending the *Scarborough* "rule." See *United* States v. *Luna*, 165 F.3d 316, 320 n.16 (5th Cir. 1999) (concluding that prior circuit decision upholding § 922(g) was not binding in case concerning § 922(j) and deciding constitutionality under "the factors set out in *Lopez*," "[i]n light of the uncertainty surrounding * * * *Scarborough*").[1]

The approach taken by the majority below essentially replicates the one rejected in *Jones* v. *United States*, 529 U.S. 848 (2000). There, the Government advanced a broad reading of the Court's prior decision in *Russell* v. *United States*, 471 U.S. 858 (1985), as embodying a tacit "constitutional judgment," Br. for United States, No. 99-5739 at 34

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[1] See Marcus Green, *Guns, Drugs, and Federalism: Rethinking Commerce-Enabled Regulation of Mere Possession*, 72 Fordham L. Rev. 2543, 2587-88 (2004) (concluding that federal possession prohibitions necessary to effectuate broader regulatory schemes, but not stand-alone ones, could be sustained under *Lopez*).

(Feb. 7, 2000), that the Commerce Clause authorized a federal prosecution for an arson against a residence that received energy from out-of-state sources. The Court rejected the Government's construction (and its reading of precedent) because, by rendering "traditionally local criminal conduct * * * a matter for federal enforcement," it would raise "grave and doubtful constitutional questions." 529 U.S. at 857-858. See *id.* at 859 (confining federal statute's reach to only arsons committed against "property currently used" commercially).

B. The "Minimal Nexus" Commerce Power Upheld Below Is Irreconcilable With The "Substantial Relationship" Required Under This Court's Precedents

Although there is in fact no "conflict," App., *infra*, 11a, between what this Court *held* in *Scarborough* and in its decisions enforcing the Commerce Clause, the same cannot be said for the lower court's *understanding* of *Scarborough*. A rule that Congress's interstate Commerce Clause power allows it to regulate entirely local, noneconomic activity so long as it involves an article that at some time crossed state lines *is* in fundamental conflict with this Court's controlling cases, and with the constitutional principles on which they rest.

The very description *Scarborough* used — "*minimal* nexus" – is plainly incompatible with the imperative to find a "*substantial* relation to interstate commerce," *Lopez* 514 U.S. at 559 (emphasis added); see *ibid.* (disavowing prior opinions' indications that an "effect" on interstate commerce, rather than a "substantial" one, would suffice). The premise of the claimed power, that

shipment of an article across state lines years earlier "enables" present-day in-state possession, is of a piece with the "but-for reasoning," *Morrison*, 529 U.S. at 613, this Court has rejected as impermissible. See *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring) (observing that all "conduct in this interdependent world of ours has an ultimate commercial origin or consequence").

The lower court's test treats as constitutionally *dispositive* a consideration that *Morrison* described as only a potentially "support[ive]" factor in the "substantial effects" analysis: the presence of a "jurisdictional" requirement. See 529 U.S. at 612. Indeed, the opinion in *Patton* supplies a dramatic illustration of this divergence: ***the very same*** § 921 "jurisdictional hook" the Tenth Circuit recognized to be plainly deficient under *Morrison*, see 451 F.3d at 633, was held to conclusively establish the statute's validity under (that court's understanding of) *Scarborough*. *Id.* at 635 ("Because Mr. Patton's bulletproof vest moved across state lines at some point in its existence, Congress may regulate it under *Scarborough*.").

And what is true for the third, "substantial effects" category is equally true with respect to the first two. If the Constitution vests Congress with plenary power over local activities involving items (or persons) that *ever* crossed state lines, there would be no need for legislators (or reviewing courts) to pay careful attention to the "channels" or "instrumentalities" of interstate commerce. See, *e.g.*, *Southern. R. Co.* v. *United States,* 222 U.S. 20 (1911); see generally *Perez* v. *United States*, 402 U.S. 146, 150 (1970) (explaining that the Constitution authorizes Congress to punish interstate "shipment

of stolen goods" to keep "channels" free of misuse and to prohibit "destruction of an aircraft" and "thefts from interstate shipments," in order "to protect[] * * * instrumentalities [of] * * * and things in commerce") (citing, respectively, 18 U.S.C. §§ 2312-2315, 32, and 659).

In sum, the problem with the rule applied by the panel majority is not merely that it installs a fourth category of permissible federal regulation alongside the three long recognized by this Court, but that the new category effectively renders the others "superfluous," App., *infra*, 59a (O'Scannlain, J., dissenting). Indeed, as explained *infra*, it frustrates the purpose that Commerce Clause jurisprudence — and the enumerated power itself – are meant to serve: to maintain the distinction between what is national and what is local.

C. Section 931 Is Plainly Invalid Under The Governing Constitutional Standards

Neither the government nor the panel majority below "seriously contend[ed] that § 931 can be justified under either of the first two categories." App., *infra*, 13a n.4. Since it "is not directed at the movement of body armor through the channels of interstate commerce," the majority explained, § 931 is not valid first category legislation. *Ibid.* (quoting *Patton*, 451 F.3d at 621). And the statute "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 instrumentalities of interstate commerce." *Ibid.* (quoting *Patton*, 451 F.3d at 622). See also *Lopez*, 514 U.S. at 559 (explaining, for similar reasons, why

Gun-Free School Zones Act provision could not be defended under either category).

Therefore, any claim that § 931 is proper Commerce Clause legislation depends on "an analysis" of the third category, "whether the regulated activity 'substantially affects' interstate commerce," *Lopez* 514 U.S. at 559. But as the dissenting judges below (and the Tenth Circuit opinion in *Patton*) demonstrated, the provision plainly fails the four-factor test set forth in *Morrison*.

First, and most important, like the federal laws held beyond the Commerce power in *Lopez* and *Morrison*, § 931 is a "criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise." 514 U.S. at 561. See *Morrison*, 529 U.S. at 611 ("[I]n those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effect on interstate commerce, the activity in question has been some sort of economic endeavor.").

Moreover, the noneconomic, intrastate activity § 931 seeks to address is more "attenuated" from interstate commerce, 529 U.S. at 612, than what *Lopez* and *Morrison* held to be beyond the reach of the interstate Commerce power. Those decisions flatly rejected efforts to establish "substantial effects" based on the economic "costs of crime" the statutes might prevent, see 514 U.S. at 563; 529 U.S. at 612-613, and the relevant "effect" here would be, qualitatively and quantitatively, much weaker. See *Patton*, 451 F.3d at 629 (noting that, "[u]nlike carrying a firearm in the vicinity of a school, wearing body armor is not an inherently threatening act");

see also H.R. Rep. No. 193, pt. 1, 107th Cong, 1st Sess. 7 (2001) (reporting government estimate that § 931 would be applied in fewer than ten cases annually nationwide).

Nor does this case implicate the authority, acknowledged in *Lopez* and relied on in *Raich*, to regulate intrastate activity as a necessary incident of Congress's regulation of the interstate market. Section 931 stands on the "the opposite end of the regulatory spectrum" from the "lengthy and detailed * * * [and] comprehensive" statutes, 545 U.S. at 24, *Raich* and *Wickard* v. *Filburn*, 317 U.S. 111 (1942), upheld. There is no concern here about "undercut[ting] * * * a larger regulation of economic activity," *Lopez*, 514 U.S. at 561. Section 931 is a "stand-alone" provision, App., *infra*, 26a, which addresses simple possession in a manner "unrelated to any broader attempt" to regulate commerce. *Patton*, 451 F.3d at 627. Compare *Wickard*, 317 U.S. at 129 (leaving local activity unregulated would have a "substantial effect in defeating and obstructing [the] purpose" of national law); *United States* v. *Darby*, 312 U.S. 100, 118 (1941) (similar).

Although *Morrison* noted that there would be instances in which legislative "findings" might help establish a measure's validity, *e.g.*, by calling attention to a "substantial effect" that otherwise might not be "visible to the naked eye," 529 U.S. at 612 (quoting *Lopez*, 514 U.S. at 563), neither the decision below nor any other upholding § 931 indicated that this is such a case. On the contrary, the panel opinion barely mentioned the boilerplate "findings" accompanying § 931, and the government

below agreed these are "meager," see C.A. Oral Arg. at 30:50,[2] as indeed they are when compared to those held *in*sufficient in *Morrison*. See 529 U.S. at 628 (Souter, J., dissenting) (describing "the mountain of data assembled by Congress"). See *Patton*, 451 F.3d at 632 ("Far from establishing a substantial effect on interstate commerce, these findings raise concerns about federal intrusion.").[3]

Nor, as Judges McConnell's and Paez's opinions explain, is this an instance where an otherwise problematic statute is brought within constitutional bounds by the presence of "a jurisdictional element." *Morrison* made clear that jurisdictional language "is not a talisman that wards off constitutional challenges," *Patton*, 451 F.3d at 632, but rather potential evidence of Congress's effort to tailor legislation to a "discrete [sub]set" of local activities

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[2] The Ninth Circuit oral argument is available at http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000000878).

[3] The sparse findings here principally attest to Congress's concern with local violent crime. See, *e.g.*, 42 U.S.C. § 3796*ll*-3(b)(4),(5). And even ones that might seem germane, *e.g.*, that "interstate movement of body armor" "exacerbate[s] * * * crime at the local level" (and that "existing [f]ederal controls" had proven "[in]adequate"), *id.* § 3796*ll*-3(b)(3), are undercut by the reality that § 931 "does nothing" to regulate such movement, App., *infra*, 31a (Paez, J., dissenting), and that there was no "existing" federal law on the subject prior to the 2002 enactment. See *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1769 n.7 (2010) (observing that "merely saying something is so does not make it so," citing *Morrison,* 529 U.S. at 614).

that implicate distinct interstate commerce concerns. See 529 U.S. at 611.

Here, Congress did not require that the articles be used in interstate activity, let alone commercially, see *Jones*, 529 U.S. at 859, or limit the statute to defendants who obtain them interstate, cf. *Tot* v. *United States*, 319 U.S. 463, 466 (1943), or even to those who use them in ways that have pronounced interstate economic effects. It ostensibly "limited" the reach of § 931 only by the definition making the possession prohibition applicable to items ever "sold or offered for sale, in interstate or foreign commerce." But "a jurisdictional hook that restricts a statute to items that bear a 'trace of interstate commerce' is no restriction at all," *Patton*, 451 F.3d at 633 (quoting *Jones*, 529 U.S. at 857).

II. THIS CASE INVOLVES AN ISSUE OF FUNDAMENTAL AND FAR-REACHING IMPORTANCE

The question petitioner's case raises, whether the Constitution allows Congress to enact a federal statute that could not pass the three-category test, so "long as it includes a mere recital purporting to limit its reach to goods sold or offered for sale in interstate commerce," App., *infra*, 59a (O'Scannlain, J., dissenting), is of large legal and practical significance.

As explained above, to accept such a power is less to supplement the Court's three-category test than to repeal it. Precisely because every activity has some "minimal nexus" to interstate commerce, attention to "substantial relation[ships]" (and to "channels" or "instrumentalities") would be "superfluous." But

there is more at stake than "doctrinal []consistency," App., *infra*, 17a. In treating *Scarborough* as establishing a "minimal nexus" category of permissible legislation, decisions like the one below defy the central aim of Commerce Clause jurisprudence – and of the constitutional enumeration itself: to uphold "the distinction between what is national and what is local." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

It "is difficult to perceive any limitation on federal power" the lower court's rule would impose, *Lopez*, 514 U.S. at 564. A "minimal nexus" power would entitle Congress to regulate and criminally punish any person's local possession or use of any article, based on the fact that the item (or one component part) traveled across state lines, even if – as here — it did so years earlier in a lawful transaction in which the person was not involved. See *Bishop*, 66 F.3d at 596 (Becker, J., dissenting) ("the majority's logic would permit a federal law outlawing the theft of a Hershey kiss from a corner store in Youngstown, Ohio, by a neighborhood juvenile on the basis that the candy once traveled * * * to the store from Hershey, Pennsylvania"). But see *Jones*, 529 U.S. at 857 (recognizing "grave" constitutional problems if federal arson statute were read so that "hardly a building in the land would fall outside [its] * * * domain").[4]

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[4] At oral argument below, the government did not dispute the substance of Judge Becker's observation: it expressly acknowledged that its understanding of the Commerce power would allow Congress to make

The defect of the rule is not simply that it is too permissive, but also that it makes a statute's validity dependent on a circumstance wholly unsuited to distinguishing "between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-618. The Tenth Circuit judges in *Patton* were not alone in recognizing that possession of items "that satisf[y] the jurisdictional hook has [no] greater effect on interstate commerce," than does any other, 451 F.3d at 633; a three-judge Fifth Circuit panel expressed similar perplexity at how "mere possession * * * in any meaningful way concerns interstate commerce simply because the [article] had, perhaps decades previously * * * fortuitously traveled in interstate commerce," *United States* v. *Rawls*, 85 F.3d 240, 243 (5th Cir. 1996) (Garwood, Wiener, and E. Garza, JJ., specially concurring). See Green, 72 Fordham L. Rev. at 2590 (noting "absurd[ity]" of efforts "to articulate * * * theories that subsequent possession or use of a commodity – such as committing a battery with a

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"possession of french fries" a federal offense "simply by saying [they are] sold in interstate commerce." C.A. Oral Arg. at 23:30.

Indeed, there is no basis for confining the "line-crossing"-based power to articles of property. Local activity could likewise be regulated and punished based on the involvement of a *person* who (for unrelated and legitimate reasons) traveled across state lines at some earlier time. Cf. *Carr* v. *United States*, __ U.S. __, 2010 WL 2160783, *16 (June 1, 2010) (Alito, J., dissenting) (noting agreement with majority that individual's crossing of state lines prior to committing offense "has little if any effect on [the convicting State's] ability * * * to enforce [its sex offender registration] laws").

weapon that had traveled interstate – somehow necessarily affects interstate commerce"); Diane McGimsey, *The Commerce Clause And Federalism After* Lopez *and* Morrison*: The Case For Closing The Jurisdictional-Element Loophole*, 90 Cal. L. Rev. 1675, 1711 (2002) (discussing cases establishing that federal carjacking statute applies differently in Iowa, where no automobiles are manufactured, than in Michigan, Ohio, and Kentucky, where prosecutors are sometimes unable to prove a line-crossing).

The consequences of blurring the historic distinction between the national and the local are serious. Expansive federal legislation "forecloses the States from experimenting and exercising their own judgment," *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring), and it "obscures * * * political responsibility," *id.* at 577. See *ibid.* (describing this erosion of accountability as "more dangerous even than devolving too much authority to the remote central power").

And as Judge O'Scannlain underscored, those dangers are especially acute in the area of criminal law, "where States historically have been sovereign," *Lopez*, 514 U.S. at 564, but where "the political safeguards of federalism," see *Garcia* v. *San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 550-554 & n.11 (1985), are rarely effectual – and rewards for taking "tough" action are large and immediate. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 532 (2001) (noting legislators' tendency "to create new crimes not to solve the problem, but to give voters the sense that they are doing something about it" and explaining that such "symbolic criminalization" is "especially common in the federal system").

Although new federal criminal laws rarely have any "appreciable effect on the categories of violent crime that most concern Americans," Am. Bar Ass'n Task Force on Federalization of Criminal Law, *The Federalization of Criminal Law* 18 (1998), they continue to be added to the U.S. Code at an "explosive" rate: Congress has now enacted "over 4,000 offenses, * * * a one-third increase since 1980," John S. Baker, Jr., Federalist Soc'y for Law & Pub. Policy Studies, *Measuring the Explosive Growth of Federal Crime Legislation* 3 (2004) – many (including § 931) since Chief Justice Rehnquist warned that this development "threatens to change entirely the nature of our federal system," *The 1998 Year-End Report of the Federal Judiciary*, 11 Fed. Sentencing Rep. 134, 135 (1998).

But there is no need here to resort to hypotheticals or generalities to perceive the dangers of the Commerce Clause rule embraced below. Section 931 itself is a concrete example. See *Morrison* v. *Olsen*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) ("[T]his wolf comes as a wolf.").

The subject matter of the statute is one in which States have in fact been "perform[ing] their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring). Washington is among the large number of States that do not treat body armor possession as criminal, see *Patton*, 451 F.3d at 631 n.7 (finding, as of 2006, 19 States with no laws regulating body armor) – although its legislature has in recent years considered proposals on the subject. See, *e.g.*, H.B. 1922, 61st Leg., 2009 Reg. Sess. (not enacted).

Many of these prohibit the *use* of body armor in committing certain crimes, but not its mere possession. See, *e.g.*, Del. Code Ann. tit. 11, § 1449 (2010); Fla. Stat. Ann. § 775.0846 (2008); Ind. Code Ann. § 35-47-5-13 (2004); Mich. Comp. Laws Ann. § 750.227f(1) (2004).[5] Other States, in contrast, have enacted measures that, like § 931, punish simple possession of a bulletproof vest by those with certain criminal histories. See, *e.g.*, Ark. Code Ann. § 5-79-101 (2005); Conn. Gen. Stat. Ann. § 53a-217d (2007); Wis. Stat. Ann. § 941.291 (2005).

To the extent Washington's resolution expresses a policy judgment – *e.g.*, that "[m]uch of the time, wearing body armor is an act of self-defense, which reduces rather than increases crime," *Patton*, 451 F.3d at 629 – it is one the federal statute has heedlessly placed out of bounds. See *Jones*, 529 U.S. at 859 (Stevens, J., concurring) (noting harm in federal law's "displac[ing] a policy choice made by the State").

On the other hand, no federal legislation is needed to enable a State with a different view of body armor possession to secure the "benefits" § 931 offers: "If a State * * * determines that harsh criminal sanctions are necessary and wise * * *, the reserved powers of the States are sufficient to enact those measures." *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring); see *United States* v. *Ryber*, 103 F.3d 273, 287 (3d Cir. 1996) (Alito, J., dissenting) (observing that the Commerce Clause does not

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[5] Illinois law reaches only individuals who wear body armor while committing a crime *with* a deadly weapon. 720 Ill. Comp. Stat. Ann. 5/33F-2 (2010).

disable States from prohibiting machine gun possession, "as all of the jurisdictions within our circuit have done").

Indeed, the facts of petitioner's case (and those of the other § 931 decisions) attest to the stark absence of any "national" or multi-state dimension to this "problem" or its solution. Alderman's vest came to the attention of local police in the course of their investigating (but not substantiating) a potential violation of local criminal laws. His case was referred to federal authorities not because of the presence of any distinct federal interest, but rather on account of the absence of any state law basis for prosecuting him. And the federal prosecutors expressly disclaimed any nexus between the protective vest and *any* other crime, let alone a violent offense or one with an interstate character – or any interstate activity, commercial or other, by petitioner.[6]

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[6] Accord *Patton*, 451 F.3d at 619 (defendant arrested by Wichita police officers "investigat[ing] a domestic disturbance call," who "found no weapons in Mr. Patton's possession but did discover that he was wearing a bulletproof vest"); *United States* v. *Shelton*, 279 F. Supp. 2d 1054, 1055 (E.D. Mo. 2003) ("[P]olice officer [who] responded to a 911 call regarding a disturbance at a Walgreen retail drug store * * * arrested defendant * * * and observed that [he] was wearing a bullet-proof vest.").

III. THIS COURT'S INTERVENTION IS NEEDED TO ASSURE PROPER ENFORCEMENT OF THE CONSTUTION IN THE LOWER COURTS

The stark disagreement aired in the majority and dissenting opinions below is not peculiar to this case or to ones involving § 931. On the contrary, the same divisions have arisen in decisions of many courts of appeals adjudicating challenges to the constitutionality of a wide array of other federal criminal statutes. This confusion and disagreement over this basic and ubiquitous question of constitutional law would in itself be reason enough for granting review, all the more so given that the widely prevailing resolution is, for reasons just explained, seriously wrong.

But the need for intervention is especially pressing here, because even courts *recognizing* the error of the Ninth Circuit's approach believe they are powerless absent this Court's intervention, to apply what they (correctly) understand to be the proper constitutional standards.

For example, in *Bishop*, the Third Circuit, over Judge Becker's forceful dissent, treated *Scarborough* as establishing the constitutionality of the federal carjacking statute, 18 U.S.C. § 2119, on the ground that the court was "not at liberty to overrule existing Supreme Court precedent." 66 F.3d at 587-588 & n.28. And the Ninth Circuit in *Cortes* upheld the same statute, noting that the "vitality of *Scarborough* engenders significant debate" but then deciding to "follow" its understanding of *Scarborough* "[u]ntil the Supreme Court tells us otherwise." 299 F.3d at 1036, 1037 n.2. In *Kuban*,

Judge DeMoss described the "minimal nexus" understanding as "in * * * irreconcilable conflict with the rationale" of *Lopez*, 94 F.3d at 976-78 (dissenting opinion), an argument the Fifth Circuit majority recognized to be "powerful," before concluding that *Scarborough* "barr[ed] the way" to an "inferior federal court['s]" testing the statute under *Lopez*, *id.* at 973 n.4, See also *United States* v. *Lemons*, 302 F.3d 769, 773 (7th Cir. 2002) (if *Lopez* calls the jurisdictional hook rationale "into doubt * * * it is for the Supreme Court to so hold"); *United States* v. *McBee*, 295 Fed. Appx. 796, 798 (6th Cir. 2008) ("Unless and until the Supreme Court takes the next step, we are bound to" treat *Scarborough* as binding constitutional law).

And as discussed, the Tenth Circuit in *Patton* believed itself obliged to uphold this statute based on a "minimal nexus" defense, even after identifying and demonstrating the "doctrinal inconsistency" between that understanding and "the three-category approach adopted by the Supreme Court in its recent Commerce Clause cases," 451 F.3d at 636 – and after recognizing the force of the argument that *Scarborough* is not controlling constitutional law, see *id.* at 635. See also *Rawls*, 85 F.3d at 243 (special concurrence) (noting all three panel members' doubts as to statute's constitutionality were that question "*res nova*"); but see *Luna*, 165 F.3d at 320 n.16 (applying *Lopez* test "in light of the uncertainty surrounding * * * *Scarborough*").

Indeed, *Patton* and this case (and the unpublished Fifth and Eleventh Circuit decisions upholding § 931, too) highlight a further reason why review here is a practical necessity. Even leaving aside the disputes about the legal effect of *this*

Court's decisions, lower courts confronting constitutional challenges like this one must also contend with the thicket of binding *circuit* court precedent that has accumulated in the decades since *Scarborough*. Before even applying the *Lopez* test, they must parse earlier opinions and determine whether "similarities" to a statute previously upheld (as "similar" to the one in *Scarborough*) preclude independent constitutional analysis. See 451 F.3d at 636 (explaining that affirmance of defendant's conviction "would still be compelled * * * by prior [Tenth Circuit] decisions which have continued to adhere to *Scarborough*"); *Chesney*, 86 F.3d at 574-575 (Batchelder, J., concurring) (concluding that the "minimal nexus" standard "does not square with" *Lopez*, but that circuit precedent treating *Scarborough* as constitutional law controlled).

These opinions make clear that the one-sidedness of the results reached in these cases may not be taken, as it ordinarily might be, as evidence of clarity, let alone consensus, in lower courts' understanding of the controlling law. On the contrary, the opinions attest to those courts' widespread (but erroneous) belief that this Court's authorization is needed before they may decide these cases under the correct constitutional rules. Cf. *Central Bank of Denver* v. *First Interstate Bank of Denver*, 511 U.S. 164, 192 (1994) (reviewing and reversing decision that had adopted position taken by "all 11 Courts of Appeals to have considered the question").

IV. THIS CASE PROVIDES A CLEAR AND DIRECT OPPORTUNITY TO SETTLE THE COMMERCE CLAUSE QUESTION

Petitioner's case is especially well-suited for addressing the constitutionality of § 931 – and for reviewing (and correcting) the lower courts' erroneous understanding of the Commerce power. The stipulated facts here establish that it involves purely intrastate possession of an article that at some point traveled from California to Washington. Petitioner is not alleged to have himself engaged in interstate commerce or interstate criminal activity (or even intrastate activity with substantial interstate effects).

And the question of whether *Scarborough* should be understood as expanding Congress's Commerce power is more cleanly and squarely presented here than in other cases in which that issue has previously arisen. Each appellate judge to have examined § 931 under the three-category test has concluded it fails. And because § 931 is a "brief, single-subject statute," App., *infra*, 25a (Paez, J., dissenting) (quoting *Raich*, 545 U.S. at 23), there is no prospect here, as there is in cases involving the constitutionality of § 922(g) and other firearm possession offenses, of the law's being defended (or sustained) under unexceptionable Commerce Clause principles, *i.e.*, as part of a comprehensive scheme of regulation – without reaching the question whether *Scarborough* supplies authority for upholding a law that fails the *Lopez* test. See, *e.g.*, *United States* v. *Stewart*, 451 F.3d 1071, 1078 (9th Cir. 2007) (upholding 18 U.S.C. § 922(o), pursuant to *Raich*, as part of Congress's comprehensive regulation of the

interstate firearm market); *Luna*, 165 F.3d at 321 (similar, for 18 U.S.C. § 922(j)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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