No. 99-97

In the Supreme Court of the United States

DEREK DUANE PAGE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

The interstate domestic violence statute, 18 U.S.C. 2261(a)(2), subjects to criminal punishment "[a] person who causes a spouse or intimate partner to cross a State line * * * by force, coercion, duress, or fraud and, in the course * * * of that conduct, intentionally commits a crime of violence and thereby causes bodily injury to the person's spouse or intimate partner." The questions presented are:

1. Whether "bodily injury" includes the aggravation of pre-existing injuries during interstate travel.

2. Whether threats of violence constitute a "crime of violence."

3. Whether violence that occurs before interstate travel begins that enables the defendant to force his victim to cross state lines is "in the course * * * of that conduct."

4. Whether Section 2261(a)(2) is constitutional under the Commerce Clause.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINIONS BELOW

The order of the equally divided en banc court of appeals and the concurrence and dissents (Pet. App. A1-A52) are reported at 167 F.3d 325. The now-vacated opinion of the panel (Pet. App. D8-D49) is reported at 136 F.3d 481. The opinion of the district court (Pet. App. F1-F9) is unreported.

JURISDICTION

The judgment of the en banc court of appeals was entered on February 23, 1999. The petition for a writ of certiorari was filed on May 21, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted on one count of violating the interstate domestic violence statute, 18 U.S.C. 2261(a)(2). Pet. App. A8. Petitioner was sentenced to 57 months' imprisonment. *Id.* at D12. An equally divided en banc court of appeals affirmed. *Id.* at A1-A52.

1. Carla Scrivens formed a relationship with petitioner and moved into his condominium, in Columbus, Ohio. Their relationship, however, quickly deteriorated. Petitioner demanded that Scrivens stop associating with her friends and family, controlled what she could or could not wear or eat, and once sprayed her with mace and shocked her with a stun gun. After less than three months together, Scrivens told petitioner that she was moving out and ending her relationship with petitioner. Pet. App. A6-A7.

When Scrivens attempted to retrieve her belongings from petitioner's condominium, however, petitioner reacted with violence. He pushed her down, dragged her away from the door, and tried to spray her with mace. He then attacked her with a claw hammer, a pipe wrench, his fists, and a stun gun. During the beating, Scrivens fell into unconsciousness several times, and her feet and legs became so battered that she could not walk. After the beating, petitioner carried Scrivens to his car, placed her inside of it, and threatened her with his stun gun. Petitioner then drove around for approximately four hours, crossing state lines into Pennsylvania. On the way, petitioner passed several local hospitals and ignored Scrivens' pleas that he stop so that she could obtain medical treatment. During that period, Scrivens continued to bleed, and the swelling from her

injuries increased. Petitioner eventually left Scrivens at the emergency room of a hospital in Washington, Pennsylvania, where Scrivens reported the attack and obtained treatment for her numerous injuries. Pet. App. A7-A8.

Petitioner was indicted on one count of kidnaping, in violation of 18 U.S.C. 1201, and one count of interstate domestic violence, in violation of 18 U.S.C. 2261(a)(2). Section 2261(a)(2) provides that "[a] person who causes a spouse or intimate partner to cross a State line * * * by force, coercion, duress, or fraud and, in the course or as a result of that conduct, intentionally commits a crime of violence and thereby causes bodily injury to the person's spouse or intimate partner, shall be punished" under the statute. 18 U.S.C. 2261(a)(2).

Petitioner's first trial ended in a hung jury. Following a second jury trial, petitioner was convicted on the Section 2261 count, but acquitted of kidnaping. Pet. App. A8. Petitioner moved for a judgment of acquittal on the Section 2261 count, arguing that Section 2261(a)(2) does not reach violence that occurs before interstate travel begins. He also argued that a contrary reading of the statute would take it outside Congress's power under the Commerce Clause. *Id.* at F4. The district court denied the motion. *Id.* at F1-F9. The district court interpreted the statute's prohibition on violence occurring "in the course or as a result of that conduct" to include the beating in the condominium. *Id.* at F4-F8. The district court further held that interpreting the statute to reach such cases "in no way contravenes the limits of Congress' regulatory authority under the commerce clause." *Id.* at F9.

2. A panel of the court of appeals reversed. Pet. App. D8-D49. The panel held that petitioner could not be convicted under Section 2261(a)(2) for violence that

occurred before commencement of interstate travel. *Id.* at D11. The panel concluded that petitioner's threats of violence that resulted in the aggravation of Scrivens' preexisting injuries fell within the ambit of the statute. The panel remanded for a new trial, however, because it concluded that the jury instructions allowed the jury to convict based on violence that had occurred before petitioner and Scrivens began traveling in the car. *Id.* at D19-D22, D27.

Judge Moore filed an opinion concurring in part and dissenting in part. Pet. App. D36-D49. Judge Moore agreed that petitioner could be convicted based on the aggravation of Scrivener's preexisting injuries that occurred during interstate travel. *Id.* at D44-D49. Judge Moore dissented, however, based on her view that petitioner could also be convicted on the basis of the violence that occurred in his condominium. *Id.* at D37-D44.

3. On rehearing en banc, the court of appeals affirmed petitioner's conviction and sentence by an equally divided vote. Pet. App. A1-A52. Judge Moore filed an opinion concurring in the affirmance, in which seven other members of the court joined. *Id.* at A2, A4-A35. She concluded that the "in the course . . . of that conduct" requirement in Section 2261(a)(2) can be satisfied by any violent conduct involved in causing a spouse or intimate partner to cross a state line, not just violent conduct that occurs during interstate travel. *Id.* at A9. Since the beating that occurred in petitioner's condominium "enabled [petitioner] to force Scrivens to travel across state lines," Judge Moore concluded, it "clearly occurred 'in the course' of [petitioner] forcibly 'causing' Scrivens 'to cross a State line.'" *Id.* at A10 (quoting 18 U.S.C. 2261(a)(2)).

Judge Moore concluded that a violation of the statute also occurs when a defendant's threat of violence aggravates injuries that have occurred before interstate travel began. In particular she concluded that "threats" can be a "crime of violence" within the meaning of the statute, and that the "aggravation of preexisting injuries" can constitute "bodily injury" under the statute. Pet. App. A20-A21. Judge Moore concluded that the evidence was sufficient to convict petitioner under that alternate theory, since petitioner's threats "prevented Scrivens from obtaining medical attention and thereby caused her to suffer further injury." *Id.* at A24.

Judge Moore also concluded that Section 2261 is a valid exercise of Congress's powers under the Commerce Clause. Judge Moore noted that this Court has identified three forms of legislation that Congress may enact under the Commerce Clause: (1) legislation that regulates the channels of interstate commerce, (2) legislation that regulates the instrumentalities of interstate commerce, and (3) legislation that regulates intrastate activity that has a substantial effect on interstate commerce. Pet. App. A29. Judge Moore concluded that "[b]ecause the triggering factor of § 2261(a)(2) is the movement of the victim across state lines," the statute "is a valid exercise of Congress's power to regulate the 'use of the channels of interstate commerce.'" *Ibid.* Judge Moore rejected petitioner's argument that, under *United States* v. *Lopez*, 514 U.S. 549 (1995), a criminal statute may validly regulate non-economic activity under the Commerce Clause only if the activity has a "substantial effect" on commerce. Judge Moore concluded that *Lopez* did not extend the "substantial effects" test to Commerce Clause legislation that regulates the channels of interstate commerce. *Id.* at A31-A32.

Judge Kennedy, joined by six other judges, dissented. Pet. App. A2, A36-A43. Judge Kennedy concluded that the requirement that violence occur "in the course . . . of that conduct," could be satisfied by pre-travel violence, but only if the purpose of the violence is to cause interstate travel. *Id.* at A37. Because Judge Kennedy believed that the evidence was insufficient to show that petitioner had beaten Scrivens in order to cause her to cross state lines, Judge Kennedy would not have sustained petitioner's conviction based on his pre-travel conduct. *Id.* at A39-A41.

Judge Kennedy agreed with Judge Moore that the evidence that Scrivens suffered further injuries during interstate travel would support a verdict against petitioner. Pet. App. A42. In her view, however, that theory had not been submitted to the jury. She therefore would have remanded the case for a new trial. *Ibid.* Judge Kennedy also agreed with Judge Moore that the statute is constitutional under the Commerce Clause. *Id.* at A36.

Judge Ryan filed a separate dissenting opinion. Pet. App. A44-A45. Judge Ryan concluded that petitioner's conduct was not encompassed by Section 2261(a)(2), because the violence occurred before petitioner forced the victim to cross a state line. *Id.* at A44. In addition, he would not have affirmed petitioner's conviction based on the aggravation of Scrivens' preexisting injuries because, in his view, that theory of culpability was not presented to the jury. *Id.* at A45. He concluded, however, that the statute is "plainly constitutional." *Ibid.*

Judge Wellford, who joined in Judge Kennedy's opinion, Pet. App. A2 n.2, also filed a separate dissenting opinion. *Id.* at A46-A52. In Judge Wellford's view, the statute only covers cases where the defendant forces a

spouse or intimate partner to cross state lines, and injury or abuse occurs during the course of or as a result of interstate travel. *Id.* at A47. In addition, Judge Wellford concluded that "threats" do not constitute a "crime of violence" within the meaning of the statute, and that "aggravation of injuries" is not a "bodily injury" within the meaning of the statute. *Id.* at A46. Judge Wellford also expressed "skepticism" about the statute's constitutionality. *Id.* at A50-A52.

ARGUMENT

1. Petitioner contends (Pet. 6-16) that the Court should grant review to decide three questions relating to the meaning of Section 2261(a)(2): (1) whether "bodily injury" includes the aggravation of preexisting injuries; (2) whether threats of violence constitute a "crime of violence"; and (3) whether "in the course or as a result of that conduct" refers only to violence that occurs during interstate travel. Review of those issues is unwarranted for three reasons.

First, the court of appeals did not authoritatively resolve any of those three questions. The panel opinion has been vacated, and the equally divided decision of the en banc court has no precedential force. Cf. *Neil* v. *Biggers*, 409 U.S. 188, 192 (1972) (decision of equally divided Supreme Court is not "entitled to precedential weight"). Since none of the opinions issued in this case will have binding effect even within the Sixth Circuit, this case is inappropriate for further review by this Court.

Second, besides the court below, only one other court of appeals has even addressed the issues raised by petitioner, and that decision supports petitioner's conviction here. In *United States* v. *Helem*, 186 F.3d 449, 455 (1999), the Fourth Circuit held that "physical vio-

lence that occurs before interstate travel begins can satisfy the 'in the course or as a result of that conduct' requirement of 18 U.S.C. § 2261(a)(2)." The Fourth Circuit also appeared to accept Judge Moore's conclusion that the statute is violated when a defendant forces a victim to travel across state lines under a threat of violence and thereby exacerbates the victim's preexisting injuries. *Id.* at 454-455. The Fourth Circuit did not resolve that issue, however, because that theory was not presented to the jury. *Id.* at 455. Because only one other court of appeals has addressed the issues raised by petitioner, because that court resolved only one of the questions, and because it resolved that question adversely to petitioner, review of the statutory questions raised by petitioner would be premature.

Third, petitioner's positions on the merits of the statutory issues are incorrect. Petitioner contends (Pet. 8) that threats of violence cannot constitute a "crime of violence" under the statute. Under the terms of the statute, however, a "crime of violence" includes "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 16(a). Here, petitioner "threatened to use a stun gun against Scrivens in order to obtain her cooperation in being transported across state lines. * * * Moreover, while they traveled interstate, [petitioner] threatened to push Scrivens out of the car and leave her on the side of the road where no one would ever find her." Pet. App. A21-A22. As Judge Moore concluded, such threats of physical force constitute a "crime of violence" under Section 2261(a)(2).

Petitioner also errs in contending (Pet. 7-8) that the aggravation of preexisting injuries cannot constitute "bodily injury" within the meaning of Section

2261(a)(2). The statute defines "bodily injury" as "any act, except one done in self-defense, that results in physical injury or sexual abuse." 18 U.S.C. 2266. That definition does not draw any distinction between the infliction of physical injuries by an initial beating and the inflicting of physical injuries by the denial of needed medical care resulting in aggravated injury. In this case, the evidence demonstrated that petitioner's conduct caused Scrivens to lose blood and to experience great pain. Pet. App. A26. As Judge Moore stated (*id.* at A28), "[b]y any definition, the painful swelling and loss of blood that Scrivens suffered as a result of being unable to seek prompt medical attention constituted 'bodily injury.'" *Id.* at A28.

Petitioner similarly errs in contending (Pet. 8-9) that violence that occurs before interstate travel begins cannot satisfy the "in the course or as a result of that conduct" requirement in Section 2261(a)(2). In relevant part, the statute subjects to criminal punishment "[a] person who causes a spouse or intimate partner to cross a State line * * * by force, coercion, duress, or fraud and, in the course * * * of that conduct, intentionally commits a crime of violence and thereby causes bodily injury to the person's spouse or intimate partner." 18 U.S.C. 2261(a)(2). As Judge Moore explained (Pet. App. A9-A10), the words "that conduct" are most naturally read to refer to any conduct that "causes a spouse or intimate partner to cross a State line," and violence that occurs before interstate travel begins can be instrumental in causing that result. In particular, when, as here, pre-travel conduct enables the defendant to force his victim across state lines, the "in the course * * * of that conduct" requirement is satisfied.

The difference between the language of Section 2261(a)(2) and the language in neighboring provisions

confirms the conclusion that Section 2261(a)(2) can encompass pre-travel violence. Sections 2261(a)(1) (interstate domestic violence), 2261A (interstate stalking), and 2262(a)(1)(B) (interstate violation of a protective order), expressly limit coverage to violence or harassment that occurs either "subsequent[]" to interstate travel, or "in the course or as a result of such travel." 18 U.S.C. 2261(a)(1), 2261A, 2262(a)(1)(B) (Supp. III 1997). In contrast, Sections 2261(a)(2) and 2262(a)(2) specifically address violations that involve forcing another person to travel, and both of those Sections refer to "that conduct." 18 U.S.C. 2261(a)(2), 2262(a)(2). As both Judge Moore (Pet. App. A14-A15) and the Fourth Circuit concluded (*Helem*, 186 F.3d at 454-455), that difference in statutory language shows that Congress did not intend to limit the reach of the latter statutes to conduct that occurs during or after interstate travel.

In sum, petitioner's statutory arguments were not authoritatively resolved by the court below, have been considered by only one other court of appeals which rejected them in pertinent part, and are without merit. In the absence of a circuit conflict, petitioner's statutory arguments do not warrant review.

2. Petitioner also seeks (Pet. 16-24) review of the constitutionality of Section 2261(a)(2) under the Commerce Clause. That issue does not warrant review.

a. Contrary to petitioner's contention (Pet. 20), *United States* v. *Lopez*, 514 U.S. 549 (1995), does not cast doubt on the constitutionality of Section 2261. In *Lopez*, the Court struck down the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q), which made it a federal crime to possess a firearm within 1000 feet of a school. *Lopez*, 514 U.S. at 551. The *Lopez* Court identified three broad categories of activity that Congress may regulate under its commerce power: (1) the

channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come from intrastate activities; and (3) intrastate activities that substantially affect interstate commerce. *Id.* at 559. Since Section 922(q) did not regulate the channels or instrumentalities of interstate commerce, the *Lopez* Court considered whether the statute could be upheld under the third category as a regulation of an activity that substantially affects interstate commerce. The Court concluded that Section 922(q) exceeded Congress's power because it regulated purely intrastate, non-economic activity—possession of a firearm near a school—and did not contain a jurisdictional element requiring a nexus to interstate commerce in each case. *Id.* at 561-562.

Unlike the statute at issue in *Lopez*, Section 2261(a)(2) regulates *inter*state activity. An element of the Section 2261(a)(2) offense is the transportation of the victim across state lines. Accordingly, Section 2261(a)(2) "falls into the first [*Lopez*] category" and "is a valid exercise of Congress's power to regulate the 'use of the channels of interstate commerce.'" Pet. App. A29; see *United States* v. *Bailey*, 112 F.3d 758, 766 (4th Cir.) (rejecting Commerce Clause challenge to Section 2261(a)(2) because "[t]he statute requires the crossing of a state line, thus placing the transaction squarely in interstate commerce"), cert. denied, 118 S. Ct. 240 (1997); *United States* v. *Gluzman*, 953 F. Supp. 84, 89 (S.D.N.Y. 1997) (rejecting constitutional challenge to Section 2261(a)(1)), because "[u]nlike the statute at issue in *Lopez*, section 2261 does not regulate purely local activity, but, instead, is an exercise of Congress' power under the first category of cases articulated by the *Lopez* Court—the authority to regulate the use of

channels of commerce"), aff'd, 154 F.3d 49, 50 (2d Cir. 1998) (adopting the holding and analysis of the district court's opinion), cert. denied, 119 S. Ct. 1257 (1999).

Petitioner contends (Pet. 21-22) that, after *Lopez*, a criminal statute that regulates non-economic activity must substantially affect interstate commerce in order to be a valid exercise of Congress's commerce power, even where that statute contains a jurisdictional element requiring interstate travel. Petitioner's argument is based on a misreading of *Lopez*. The *Lopez* Court found a limitation on congressional power over intrastate activities that are regulated because of their effects on interstate commerce. The Court did not hold that the "substantial effects" test extends to statutes regulating the channels or instrumentalities of interstate commerce. See Pet. App. A31-A32; *Gluzman*, 953 F. Supp. at 89.

No such reading of *Lopez* could be adopted consistent with an unbroken line of this Court's decisions upholding the plenary authority of Congress to regulate the movement of goods or persons across state lines. "[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question." *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 256 (1964) (quoting *Caminetti* v. *United States*, 242 U.S. 470, 491 (1917)); see *United States* v. *Orito*, 413 U.S. 139, 144 (1973). Thus, under the Commerce Clause, Congress has the power to regulate any activity—whether commercial or not—that takes places across state lines. See, *e.g.*, *Scarborough* v. *United States*, 431 U.S. 563, 566-567 (1977) (upholding regulation of interstate transportation of firearms for private use); *Orito*, 413 U.S. at 144 (upholding regulation of interstate transportation of

obscene materials for private use); *Cleveland* v. *United States*, 329 U.S. 14 (1946) (rejecting Commerce Clause challenge to the Mann Act, ch. 395, 36 Stat. 825, which forbade transportation in interstate commerce of any woman or girl for the purpose of prostitution, debauchery, or other immoral purpose); *United States* v. *Hill*, 248 U.S. 420, 423-424 (1919) (upholding regulation of interstate travel with one quart of liquor meant for personal consumption); *Caminetti*, 242 U.S. at 491-492 (upholding statute (the Mann Act) criminalizing the defendant's transportation of a woman across state lines to be his mistress). Indeed, in *United States* v. *Robertson*, 514 U.S. 669 (1995) (per curium), a post-*Lopez* decision, the Court confirmed that "[t]he 'affecting commerce' test was developed * * * to define the extent of Congress' power over purely *intra*state commercial activities that nonetheless have substantial *inter*state effects" and does not apply when the regulated activity itself crosses state lines. *Id.* at 671.

b. Petitioner contends (Pet. 17-21) that the views of the judges in this case (Pet. App. A29 (opinion of Moore, J.), A36 (opinion of Kennedy, J., dissenting), A45 (opinion of Ryan, J., dissenting)), and of the Second Circuit in *Gluzman*, 154 F.3d at 50, that Section 2261 is a valid exercise of Congress's power under the Commerce Clause conflicts with the Fourth Circuit's decision in *Brzonkala* v. *Virginia Polytechnic Inst.*, 169 F.3d 820 (1999) (en banc), cert. granted *sub nom. United States* v. *Morrison*, No. 99-5, and *Brzonkala* v. *Morrison*, No. 99-29 (Sept. 28, 1999). There is, however, no such conflict. In *Brzonkala*, the Fourth Circuit held unconstitutional Title III of the Violence Against Women Act of 1994, 42 U.S.C. 13981, which creates a private cause of action against an individual who commits a gender-based crime of violence. *Brzonkala* does

not involve the constitutionality of Section 2261, and the decision in that case does not call its constitutionality into question.

Section 2261 and Section 13981 raise significantly different issues under the Commerce Clause. Section 2261 expressly regulates "an interstate activity, namely the travel across state lines to commit domestic violence." *Gluzman*, 953 F. Supp. at 89 n.3. Section 13981 is not so limited. Nor does Section 13981 contain a jurisdictional element requiring a nexus to interstate commerce in an individual case. The validity of Section 13981 under the Commerce Clause thus depends on whether Congress permissibly determined that the provision regulates an activity that substantially affects interstate commerce. Indeed, in *United States* v. *Bailey*, *supra*, the Fourth Circuit explicitly held that Section 2261(a)(2) is constitutional under the Commerce Clause, reasoning that "[t]he statute requires the crossing of a state line, thus placing the transaction squarely in interstate commerce." 112 F.3d at 766. The same court's en banc decision in *Brzonkala* did not disturb that ruling. Accordingly, there is no circuit conflict on the constitutionality of Section 2261. For the same reason, there is no reason to hold the present case pending the outcome of the decisions in *United States* v. *Morrison*, No. 99-5, and *Brzonkala* v. *Morrison*, No. 99-29.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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