No. 17-950

IN THE

# Supreme Court of the United States

**ROSS WILLIAM ULBRICHT,** ***PETITIONER*****,**

**v.**

**UNITED STATES OF AMERICA,** ***RESPONDENT*****.**

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF OF NATIONAL LAWYERS GUILD, AMERICAN CONSERVATIVE UNION FOUNDATION CENTER FOR CRIMINAL JUSTICE REFORM, FREEDOMWORKS, HUMAN RIGHTS DEFENSE CENTER, NANCY GERTNER, NATIONAL COALITION TO PROTECT CIVIL FREEDOMS, PARTNERSHIP FOR CIVIL JUSTICE FUND, AND PEOPLE'S LAW OFFICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER


Prof. Zachary Wolfe
The George Washington University
2100 Foxhall Rd, NW
Ames Hall 218
Washington, DC 20007
zwolfe@gwu.edu
(202) 242-5130

Heidi Boghosian
***Counsel of Record***
A.J. MUSTE MEMORIAL INSTITUTE, INC.
168 Canal Street, 6th Fl
New York, NY 10013
heidiboghosian@gmail.com
(917) 239-4999



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## QUESTIONS PRESENTED

1. Whether the warrantless seizure of an individual's Internet traffic information without probable cause violates the Fourth Amendment.

2. Whether the Sixth Amendment permits judges to find the facts necessary to support an otherwise unreasonable sentence.

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## STATEMENT OF INTEREST[1]

*Amici* are organizations and a former judge committed to defending the constitutional protections afforded by both the Fourth and Sixth Amendments and include the National Lawyers Guild, American Conservative Union Foundation Center for Criminal Justice Reform, Freedom Project, Judge Nancy Gertner (Ret.), the Human Rights Defense Center, National Coalition to Protect Civil Freedoms, the Partnership for Civil Justice Fund, People's Law Office. Many of these organizations have appeared previously as amicus curiae before this Court. Their individual organizational statements are contained in the Appendix following this brief.

## SUMMARY OF ARGUMENT

This Court should accept *certiorari* because of the important concerns related to privacy and judicial fact-finding in a context that suggests bias and hostility to constitutionally protected viewpoints.

First, this case squarely presents the question of privacy interests in Internet browsing history. Whether or not the government may obtain this information without a showing of probable cause is a question of tremendous importance for individual freedom and political activity.

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[1] Rule 37 Statement: All parties received timely notice of *amici*'s intent to file this brief and consented to its filing. No counsel for any party authored any portion of this brief, and *amici* alone funded its preparation and submission.

Second, this case raises important questions of what factors may be legitimately considered by judges at the sentencing phase. Petitioner's sentence was based on judicial fact-finding that the defendant commissioned murders, even though he was never charged with any form of homicide or planning homicide and there were no relevant jury findings. The judge also expressed hostility to Petitioner's philosophy and political views. This Court should not permit punishment based on lower burdens of proof for any crime, much less one as serious as murder-for-hire, and should clarify that punishments may not be enhanced because of ideology.

## ARGUMENT

### I. THIS COURT SHOULD RESOLVE THE QUESTION OF THE PRIVACY INTEREST IN ONLINE ACTIVITY

This society is grappling with the question of what privacy protections should attend modern communications in a free society. "[B]oth empirical research and public opinion polls suggest that the public has higher expectations of privacy than those recognized by the courts in most Fourth Amendment jurisprudence." Christine Scott-Hayward *et al.*, *Does Privacy Require Secrecy? Societal Expectations of Privacy in the Digital Age*, 43 Am. J. Crim. L. 19, 49 (2015).

This Court has taken notice, providing important guidance by revising decades-old principles in light of new technology, *Riley v. California*, 134 S. Ct. 2473 (2014) (warrantless search incident to arrest may not include search of digital information on the arrested person's cell phone), and confronting further

questions of when modern technology fundamentally changes the nature of an intrusion into one that is unreasonable, *Carpenter v. United States*, 137 S. Ct. 2211 (2017) (granting *cert*. to resolve whether the warrantless seizure and search of historical cell phone records revealing the location and movements of a cell phone user over the course of 127 days is permitted by the Fourth Amendment).

In working through these questions, this Court would benefit from considering a fuller array of the types of intrusions made possible when the third-party doctrine, as developed in *Smith v. Maryland*, 442 U.S. 735 (1979), is applied to types of activity that could not have been envisioned by courts in decades past.

The court below held that government collection of information regarding the specific IP addresses that a person visits is "precisely analogous to the capture of telephone numbers at issue in *Smith*." *United States v. Ulbricht*, 858 F.3d 71, 97 (2d Cir. 2017) (citing *Smith v. Maryland*, 442 U.S. 735 (1979)). But this is far from self-evident and has been a subject of debate and concern at this Court, in lower courts, and among the general public.

In this Court, *Riley*, 134 S. Ct. at 2490, specified that one reason a warrant was required for searches of mobile telephones, even in a search incident to arrest, was because "[a]n Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns." This echoes prior concerns and still-open questions about the extent of legal protection for Internet activity that, to many, appears

extremely private. *See, e.g., United States v. Jones*, 565 U.S. 400, 417-18 (2012) (Sotomayor, J., concurring) (reasoning that simple application of the third-party doctrine "is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties" such as "the URLs that they visit" and observing that "I for one doubt that people would accept without complaint the warrantless disclosure to the government of a list of every Web site they had visited in the last week, or month, or year").

The Eleventh Circuit's concern and internal disagreement in *United States v. Davis*, 785 F.3d 498 (11th Cir. 2015), regarding the applicability of *Smith* to web browsing history is instructive. In dissent, Chief Judge Martin was concerned that "blunt application of the third-party doctrine threatens to allow the government access to a staggering amount of information that surely must be protected under the Fourth Amendment" including, specifically, "what websites you access." *Id.* at 535-36 (Martin, C.J., dissenting). The majority acknowledged these concerns, but held that it could not respond to them absent instruction from this Court. *Id*. at 521 ("[a]s judges of an inferior court, we have no business in anticipating future decisions of the Supreme Court. If the third-party doctrine results in an unacceptable 'slippery slope,' the Supreme Court can tell us as much").

Notably, studies reveal that actual expectations of privacy in Internet histories are quite high. Scott-Hayward, *supra* at 54 (public opinion studies revealed that "the expectation of privacy for Internet information was very high. Approximately 85% of respondents felt that law enforcement should never have

access or at least require a level commensurate with probable cause to obtain information about online search, purchase, website visitation histories").

Accordingly, this case presents an opportunity for the Court to address a type of modern activity—web browsing—that has weighed heavily in recent thinking about privacy concerns but has not been resolved. Moreover, as discussed below, the ability to access the Internet without being monitored by the government, absent probable cause, is essential to a modern free society.

### A. Online activity has extraordinary social importance and requires constitutional protection.

In addition to Fourth Amendment concerns, a free and open Internet is essential to the marketplace of ideas, *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), and the government's and lower court's notion that there are no privacy interests to be protected in web browsing history has alarming First Amendment implications. Although the right to receive information is typically discussed in the context of censorship, *see, e.g., Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("right to receive information and ideas"); Editorial, The Right to Receive Ideas, Wash. Post, Apr. 12, 1969; *Board of Education v. Pico*, 457 U.S. 853 (1982); *ACLU v. Reno*, 521 U.S. 844, 874 (1997) (holding that the Communications Decency Act "effectively suppresses a large amount of speech that adults have a constitutional right to receive"), it is a principle of which this Court should be mindful when evaluating the importance of privacy

rights in Internet histories. "We are all familiar with the thought that democracy requires a flourishing 'public life.' Less familiar, but equally essential, is the idea that a self-governing people requires a flourishing personal life." Jed Rubenfeld, *The End of Privacy*, 61 Stan. L. Rev. 101, 128 (2008); *see also* Human Rights Watch, *With Liberty to Monitor All: How Large-Scale US Surveillance is Harming Journalism, Law, and American Democracy*, July 28, 2014.

It will be self-evident to many that what can be determined from examining only Internet histories is profoundly "private" information. As discussed above, examinations of online activity have been highlighted as the type of intrusion into private matters that is of concern when other types of government searches are being considered by this and lower courts. *Amici* believe that the Court will find that the same interests implicated in searches of a mobile phone also require a warrant based on probable cause before the government may monitor an individual's web history. *Riley*, 134 S. Ct. at 2493 (reflexively relying on "pre-digital analogue[s]" risks "a significant diminution of privacy").

However, the court below mechanically applied nearly forty-year-old precedent, believing that cases considering pen traps of the telephone number dialed was akin to government knowledge of what websites a person visits. *Ulbricht*, 858 F.3d at 97. Something as socially, politically, and personally important as website browsing history requires updated consideration of privacy rights by this Court before the government is given license to search it without probable cause.

By granting *cert*. in this case, the Court would benefit from full and precise briefing on this specific issue and could clarify important rights for the public as well as provide much-needed guidance for the lower courts. *See Davis*, 785 F.3d at 521, 537.

## II. TO ENSURE THAT JUDGES DO NOT UNFAIRLY PUNISH A DEFENDANT IN VIOLATION OF THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION, SENTENCES MUST BE BASED ON FACTS PROVEN AT TRIAL

Judges, when poised to render sentencing, should not engage in fact-finding. This Court held in *Apprendi v. New Jersey* that the Sixth Amendment right to a jury trial—a "constitutional protection[] of surpassing importance"— prohibits judges from enhancing criminal sentences beyond statutory maximums based on facts other than those decided by the jury beyond a reasonable doubt or fact of prior conviction. *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). Antipathy to entrusting the government with sentencing has existed since the nation's founding, preferring the "unanimous vote of 12 of [their] fellow citizens." *Id.* at 498 (Scalia, J., concurring).

The extraordinary harshness of the sentence in this case, based on especially problematic judicial fact-finding, calls for careful scrutiny. Thirty-one-year-old Ross William Ulbricht, a first-time offender, received a much harsher sentence than prosecutors sought based not on charges presented to the jury, but rather on judicially-found "facts"—namely that he ordered several murders-for-hire. C.A. App. 1464-1466. Although Mr. Ulbricht's case was not death-penalty

eligible, his sanction of life without possibility of parole, also referred to as "death-in-prison," is close on the punishment spectrum, and is "severe and degrading, arbitrarily imposed, and ha[s] been condemned by members of the international community." Life Without Parole: America's New Death Penalty? edited by Charles J. Ogletree, Jr., Austin Sarat at 66-67 (2012).[2]

It is worth noting that other Silk Road-related defendants received significantly lighter sentences, ranging from ten years to 16 days, in disregard of the sentencing consideration to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct.[3] 18 U.S. Code Sec. 3553.

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[2] It is likely that this nation's framers could not have anticipated the vast expansion of a life-sentenced prison population. More than 200,000 persons—one out of every seven individuals incarcerated in the United States—are serving life or "virtual life" sentences (named for the proposition that they will realistically never be released), Ashley Nellis, Still Life America's Increasing Use of Life and Long Term Sentences, The Sentencing Project, May 3, 2017, available at https://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/.

[3] Peter Nash, Silk Road moderator, received a sentence of 17 months. *See* Nate Raymond, *Silk Road member Peter Nash avoids further US prison time*, The Sydney Morning Herald, May 27, 2015. Jan Slomp, "biggest" Silk Road drug dealer, received a sentence of 10 years. *See* Jason Meisner, *Biggest dealer on underground Silk Road given 10 years in prison*, Chicago Tribune, May 29, 2015. Steven Sadler, "top" Silk Road drug dealer, received a sentence of 5 years. *See* Levi Pulkkinen, *Bellevue programmer gave up $180k salary to deal drugs on Silk Road*,

The case of Blake Benthall, alleged owner and operator of Silk Road 2.0—one of many dark net markets that proliferated after Ulbricht's sentencing[4]—illustrates the gross disparity. In its press release after Benthall's arrest on November 5, 2014, the FBI noted:

> Silk Road 2.0 was virtually identical to the original Silk Road website in the way it appeared and functioned. In particular, like its predecessor, Silk Road 2.0 operated exclusively on the "Tor" network and required all transactions to be paid for in Bitcoins in order to preserve its users' anonymity and evade detection by law enforcement.

Press Release, U.S. Attorney's Office Southern District of New York, *Operator of Silk Road 2.0 Website Charged in Manhattan Federal Court,* Nov. 6, 2014

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SeattlePI.com (March 19, 2015, 12:38PM), http://www.seattlepi.com/seattlenews/article/Bellevue-programmer-gave-up-180k-salary-to-deal-6144142.php). Jason Hagen, Silk Road "global meth dealer," received a sentence of 3 years. *See* Bryan Denson, *Global meth dealer from Vancouver gets lighter sentence because of U.S. agents' 'Silk Road' corruption*, The Oregonian/OregonLive (Nov. 5, 2015, 3:15PM), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2015/11/global_silk_road_meth_dealer_f.html). Brian Farrell, "key assistant" to Silk Road 2.0's owner/operator Blake Benthall, received a sentence of 8 years. *See* Nate Raymond, *An alleged staff member of Silk Road 2.0 was sentenced to 8 years in prison*, BusinessInsider.com (Jun. 4, 2016, 4:42AM), http://www.businessinsider.com/r-key-player-in-silk-road-successor-site-gets-eight-years-in-us-prison-2016-6).

[4]Andy Greenberg, *The Silk Road Creator's Life Sentence Actually Boosted Dark Web Drug Sales*, (May 23, 2017, 10:00AM), https://www.wired.com/2017/05/silk-road-creators-life-sentence-actually-boosted-dark-web-drug-sales/.

(available at https://www.fbi.gov/contact-us/field-offices/newyork/news/press-releases/operator-of-silk-road-2.0-website-charged-in-manhattan-federal-court).

U.S. Attorney Preet Bharara also acknowledged Benthall was running "a nearly identical criminal enterprise" to Silk Road. *Id*. Yet, Benthall spent a mere 16 days in prison while Petitioner is serving a life sentence. Federal Bureau of Prisons, Find An Inmate [Blake Benthall, Register No. 20045-111, released Nov. 21, 2014], https://www.bop.gov/inmateloc/, (last visited Jan. 27, 2018).

While judicial fact-finding was historically initiated to afford judges a vehicle for lowering sentences, it has evolved to do the opposite. Paul F. Kirgis, *Sentencing Facts After Booker*, 39 Ga. L. Rev. 895 (2005). It also taints the criminal justice process as a whole in that "fact discretion not only creates leeway for the expression of judicial biases, it also undermines the appeals process and adversarial litigation. Although these mechanisms are sometimes believed to put a beneficial check on trial courts, under fact discretion they lose their effectiveness." Nicola Gennaioli and Andrei Shleifer, *Judicial Fact Discretion*, 37 J. Legal Stud. 1, 4 (2008).

It is not problematic that the judge considered background information beyond the conviction, but it is of concern that new, uncharged offenses were brought up at sentencing and informed the ultimate sentence, in violation of the Sixth Amendment. "The challenge arises in line-drawing to permit suitable judicial discretion while cabining the ability of judges to punish

uncharged and acquitted conduct." Nila Bala, *Judicial Fact-Finding in the Wake of* Alleyne, 39 N.Y.U. Rev. L. & Soc. Change 1 (2015). The Sixth Amendment jury right provides that an individual should not be punished for an uncharged offense because that person has been convicted of another crime. *United States v. Booker* interprets the Sixth Amendment as requiring that any fact used to impose a sentence longer than the longest sentence be supported by the jury finding or guilty plea must be proved to a jury or admitted by the defendant. 543 U.S. 220, 133 (2005).

### A. Jurors' historic role as a check against unbridled judicial power has diminished, to the detriment of the rule of law.

This case makes evident how the American jury's role—as "populist protector" and a check against tyranny—has become but a "shadow of its former self," with sentencing practices vesting increasing power in judges despite the constitutional mandate that the jury be central to reaching a judgment. Akhil R. Amar, The Bill of Rights: Creation & Reconstruction 83 (1998).

This nation's Framers and Founders feared the vagaries of judicial discretion. Roger Roots, *The Rise and Fall of the American Jury*, 8 Seton Hall Cir. Rev. 1, 3 (2011). They were explicit that trial by jury was necessary to thwart and obstruct judges, not merely prosecutors with weak cases. Elbridge Gerry insisted that jury trials were necessary to guard against corrupt judges. *Id*. Alexander Hamilton echoed this concern when he wrote, "The strongest argument in [trial by jury's] favour is, that it is a security against

corruption." *Id*. John Adams said that it was a juror's duty to "find the verdict according to his own best understanding, judgment and conscience, though in direct opposition to the direction of the court." 2 John Adams's Works, 254, 255 (1771).

This Court has long reaffirmed the Founders' contention that juries' role is paramount to the execution of justice: "The jury system postulates a conscious duty of participation in the machinery of justice.... One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse." *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922).

In the late 20th century, criminal sentencing changed in two significant ways that diminished juries' power: (1) New statutory schemes provided for different penalties for a single crime depending on the existence of aggravating circumstances, and (2) judges were afforded discretion to set sentences within board penalty ranges (indeterminate sentencing). Paul F. Kirgis, *Sentencing Facts After Booker*, 39 Ga. L. Rev. 895 (2005).

"With respect to the second type of innovation, courts and commentators seem to have failed to recognize the potential for incursion into the jury's traditional bailiwick." That can be attributed to the fact that these reforms were designed to reduce, not increase, sentences, making them flexible so that offenders could be released when rehabilitated. *Id.* at 909.

With the introduction of the Sentencing Guidelines in 1986, and statutory sentencing schemes in many states, the issue that had until then been latent—judicial fact-finding in sentencing—rose to the fore.

The guidelines were designed to minimize judicial discretion—thought to be too lenient—and amounted to a retribution model replacing the former rehabilitation model of punishment. Judicial fact-finding no longer worked in favor of the defendant. In early cases, challenging judicial fact-finding under the Guidelines and state counterparts, this Court did not signal that it would find any constitutional problems with the new sentencing framework.

While there have been efforts to reform sentencing practices over the past four decades, this Court should consider the instant case in light of the values informing this nation's founding. Judge Marvin Frankel persuasively explicated modern considerations that augment reasons the founders might have been concerned with judicial fact-finding: factors such as class, education, and race influence judges. He wrote: "The almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law." Marvin E. Frankel, Criminal Sentences: Law Without Order. New York: Hill and Wang, 1972.

The right to have a sentence based on proven facts remains a central concern today, and this case presents an opportunity for the Court to clarify the limits of judicial fact-finding at sentencing. *See gen'ly*, Robin Steinberg, *Heeding Gideon's Call in the Twenty-First*

*Century: Holistic Defense and the New Public Defense Paradigm*, 70 Wash. & Lee L. Rev. 961, 963 (2013).

### B. Sentencing must be limited to facts admitted by the defendant or supported by jury findings.

Significantly for the instant case, this Court precluded judges from enhancing criminal sentences based on facts other than those decided by the jury or admitted by the defendant in part out of a concern that "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority." *Blakely v. Washington*, 542 U.S. 296, 303 (2004), *quoting* 1 J. Bishop, Criminal Procedure § 87, p 55 (2d ed. 1872); *see also* Stephanos Bibas, *Judicial Fact-Finding at Sentencing, Faculty Scholarship*, U. Penn. Law School, 252, 2008).

It is instructive to recall Justice Scalia's words regarding Mr. Blakely's enhanced sentence and the stakes involved:

> The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to the unanimous suffrage of twelve of his equals and neighbours, rather than a lone employee of the State.

*Blakely*, slip op. at 313 (internal quotation marks and citation omitted).

> As our system has implicitly recognized for centuries, juries are simply the best actors to decide fact questions. Fact questions involved speculative judgments about unknown events. In order to allow the parties and the legal system to put disputes behind them, adjudication must result in final determinations about the matters contested by the parties. Only the jury, with its veiled, democratic decision-making structure, has the societal imprimatur to render acceptable final decisions on matters that are inherently unknowable.

Paul F. Kirgis, The Right to a Jury Decision on Sentencing Facts after Booker: What the Seventh Amendment Can Teach the Sixth, 39 Ga. L. Rev.897, 905 (2005).

The district court judge in this case failed to set forth a reasoned basis for considering several alleged drug-related deaths as relevant facts to be considered in determining Mr. Ulbricht's sentence. *See Rita v. United States*, 551 U.S. 338, 356 (2007). Judge Forrest based her sentence on unestablished facts that Mr. Ulbricht's actions "somehow related to" alleged drug overdose fatalities. C.A. App. 1472-1480. This was despite a report by Board-certified forensic pathologist defense expert, Mark L. Taff, M.D., that found insufficient information to attribute any of the deaths to drugs purchased from Silk Road vendors. C.A. App. 904. The government did not rebut Dr. Taff's report,

and nothing in the jury verdict resolved this contested fact.

### C. Judicial fact-finding in this context is particularly troublesome and *certiorari* presents an appropriate vehicle to address this issue.

#### *1. Confusion and fear, related to misunderstood technology, and highly prejudicial murders-for-hire and drug-related fatalities, impermissibly tainted sentencing*

The sentence was based on judicial findings related to allegations of serious crimes that not only were never found by a jury but were not even among the charges leveled at trial. During closing argument, the U.S. attorney explicitly advised the jury: "[T]o be clear, the defendant has not been charged for these attempted murders here. You're not required to make any findings about them. And the government does not contend that those murders actually occurred." Trial Tr. 2159:25-2160:3, Feb. 3, 2015.

Thus, these "found" murders-for-hire and other harms are best understood as anxious imaginings of the darker intentions that "must" lurk behind the commonly misunderstood Silk Road technologies, namely anonymizing software, crypto-currency, and the so-called Dark Web. Despite widespread and growing use of Tor and Bitcoin, United States law enforcement's framing of surveillance and cryptography shapes how the mainstream sees it. Privacy and national security are depicted as being in conflict, with emerging communications technology an asset to

privacy and a setback to security. Encryption is portrayed as especially threatening because law enforcement techniques have not kept apace. "It is a brilliant discourse of fear: fear of crime; fear of losing our parents' protection; even fear of the dark." Phillip Rogaway, The Moral Character of Cryptographic Work (Dec. 2015) Department of Computer Science, University of California, Davis, essay written to accompany an invited talk (the 2015 IACR Distinguished Lecture) given at Asiacrypt 2015 on December 2, 2015, in Auckland, New Zealand, http://web.cs.ucdavis.edu/~rogaway/papers/moral-fn.pdf (last visited Jan. 25, 2018).

It is tempting to believe the sweeping generalizations that the Dark Web is solely a terrain of lawlessness, with Bitcoin and Tor serving as criminals' saddle and spurs. Law Enforcement Struggles to Police "Dark Web," IACPCybercenter.com, http://www.iacpcybercenter.org/news/law-enforcement-struggles-police-dark-web/ (last visited Jan. 27, 2018). Two years after the trial, these three areas remain widely misunderstood, and shrouded in mystery and sensationalism, despite the fact that many legitimate users abound: journalists, dissidents, and the military. Lee Matthews, *What Is Tor, And Why You Should Use It To Protect Your Privacy*, Forbes.com (Jan. 27, 2017, 2:30PM), https://www.forbes.com/sites-/leemathews/2017/01/27/what-is-tor-and-why-do-people-use-it/#1d2614b7d752.

*2. Constitutionally irrelevant victim impact statements factored into sentencing bias*

Such misunderstandings or confusion about technology were augmented by impact witness statements at sentencing by parents of alleged Silk Road consumers who suffered fatalities. C.A. App. 1472-1496. Victim impact testimony may be prejudicial in that it diverts attention away from the facts that must be scrutinized, such as the circumstances surrounding the crime and the defendant's background and character. Bryan Myers and Edith Greene, *The Prejudicial Nature of Victim Impact Statements: Implications for Capital Sentencing Policy*, 10 Psych. Pub. Pol. & L. 492 (2004).

Victim impact testimony creates "the risk that a…sentence will be based on considerations that are 'constitutionally impermissible or totally irrelevant to the sentencing process" by focusing on the character of the victim and his or her experience, rather than that of the offender. *Booth v. Maryland*, 482 U.S. 496, 502 (1987) (citing *Zant v. Stephens*, 462 U.S. 862, 885 (1983)).

This Court has noted that it would be difficult—if not impossible—to provide a fair opportunity to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant." *Id.* at 506. The information may be so emotion-laden that jurors and judges become more persuaded by how they feel about the testimony than by the relevant case facts. There are few more emotionally-charged and compelling witnesses than grieving parents. And no testimony is more prejudicial and irrelevant. Moreover,

the testimony in this instance concerns events for which Mr. Ulbricht was not found criminally culpable.

Even the appellate court panel found certain testimony related to uncharged crimes inappropriate, with Judge Gerald Lynch concerned that testimony from parents of alleged Silk Road customers who died "put an extraordinary thumb on the scale that shouldn't be there…. Does this [testimony] create an enormous emotional overload for something that's effectively present in every heroin case?" Lynch asked. "Why does this guy get a life sentence?" He went on to call the sentence "quite a leap." Oral Argument at 27:00-29:18, *U.S. v. Ulbricht*, 858 F.3d 71 (2d Cir. 2016), *available at* http://www.ca2.uscourts.gov/decisions/isysquery/7fc49c36-9780-412b-9fa0-2310e6e29d90/181-190/list/.

Judge Forrest also pointed to evidence not charged at trial that "Dread Pirate Roberts," or "DPR," paid to have several persons murdered. Not one murder was carried out, nor was Ulbricht charged in connection with the alleged plots. Yet at the sentencing hearing the trial judge asserted, "I find there is ample and unambiguous evidence that [Ulbricht] commissioned...murders to protect his commercial enterprise." C.A. App. 1464-1465.

In sum, a lack of understanding of the technology-related issues, coupled with uncharged crimes of murder-for-hire and emotion-laden witness impact testimony from grieving family members, were used at sentencing to turn Petitioner into a composite of everything we have to fear about the Dark Web. Failure to allow explanations of cryptocurrency, the Dark

Web, and Tor virtually ensured that the judge's own biases would go unchecked.

### D. Judicial Expressions Of Hostility To Petitioner's Ideology Undermines First Amendment Values And Public Perception Of Fairness.

The fact that Mr. Ulbricht at one time opposed United States drug laws is not relevant to his sentence, although it appeared to weigh heavily in the judge's thinking during sentencing. The Court should accept *cert*. in this case to clarify that sentences based on judicial dislike of ideology cannot be tolerated.

The defendant's ideological speech was related to a five-decades-old government "war on drugs in the United States [that] has been a failure that has ruined lives, filled prisons and cost a fortune." George P. Shultz and Pedro Aspedec, *The Failed War on Drugs*, New York Times, Op Ed, Dec. 31, 2017.

When discussing Mr. Ulbricht's character, the trial court voiced disapproval of his political and philosophical views. Alluding to anonymous comments on the Silk Road site, the judge said, "[T]here are posts that discuss the laws as the oppressor and that each transaction is a victory over the oppressor. This is deeply troubling and terribly misguided and also very dangerous." A 1516. Before pronouncing Mr. Ulbricht's sentence, the district court also expressed concern that "the reasons that you started Silk Road were philosophical and I don't know that it is a philosophy left behind." A 1534.

The First Amendment guarantees expression of opinions on matters of public concern free from the fear of legal punishment based on the viewpoint expressed. The First Amendment reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

Thus, adding to the concerns discussed in the preceding section that Mr. Ulbricht was sentenced for acts that a jury did not find him responsible for, there is strong reason for concern that he was punished for the political views he held. All this, moreover, flows from intrusion into his private web browsing history without a prior showing of probable cause, as discussed in part I. Each of these concerns, and certainly cumulatively, warrant attention from this Court.

### E. Fact-Finding Should Be Entrusted To Juries, Not Judges.

In *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968), this Court unequivocally affirmed the crucial right to fact-finding by jury:

> Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the

> voice of higher authority.… Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.

In his time-honored work, *Democracy in America*, Alexis De Tocqueville exalts the jury system as one of the most critical political institutions for democratic self-government. Jury service not only educates citizens about the legal system, it also inculcates a sense of their duties as citizens and, optimally, improves their deliberations as citizens. Thus, juries have an important structural and historical role. Jury participation in the criminal justice process is, in itself, an important civic institution. De Tocqueville said that the jury

> places the real direction of society in the hands of the governed…and not the government.… He who punishes the criminal is therefore the real master of society.... All the sovereigns who have chosen to govern by their own authority, and to direct society, instead of obeying its direction, have destroyed or enfeebled the institution of the jury.

Alexis De Tocqueville, *Democracy in America*, 361, 362 (The Century Co. 1898, 1st ed.).

Further, in *The American Jury*—a seminal book in the study of juries' influence in helping the public understand and appreciate the jury as an institution—

the authors' overall observation was that "[w]hether or not one comes to admire the jury system as much as we have, it must rank as a daring effort in human arrangement to work out a solution to the tensions between law and equity and anarchy." Harry Kalven, Jr. and Hans Zeisel, *The American Jury*, 499 (1966).

When civics was taught in American schools, teachers frequently screened the classic play and film *12 Angry Men* (Orion-Nova 1957) to illustrate the criminal justice system. The characters, identified by their juror numbers, are often described as archetypes of human qualities working together in search of truth and justice. The process of collective deliberation and voting tempers individual bias. "[T]he wisdom and insights of *12 Angry Men* find support in empirical studies of the contemporary jury. The value of diversity in promoting vigorous and fruitful discussion and the power of jury deliberation in forcing deeper thinking are both reinforced by social science studies of decision making." Valerie P. Hans, Deliberation and Dissent: 12 Angry Men Versus the Empirical Reality of Juries, (2007), Cornell Law Faculty Publications, Paper 307 at 589.

In the play, jurors number Eleven and Nine have a brief exchange on their collective and personal responsibility:

> ELEVEN: …. We have a responsibility. This is a remarkable thing about democracy. That we are—what is the word?—ah, notified! That we are notified by mail to come down to this place—and decide on the guilt or innocence of a man; of a man we have not

> known before. We have nothing to gain or lose by our verdict. This is one of the reasons why we are strong. We should not make it a personal thing….
>
> NINE: [slowly] Thank you very much.
>
> ELEVEN: [slight surprise] Why do you thank me?
>
> NINE: We forget. It's good to be reminded.

Reginald Rose, Twelve Angry Men, Act III, 44-45 (1955).

## CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Honorable Court to grant *certiorari* in this matter and reverse the decision below.

Respectfully submitted,

Heidi Boghosian
*Counsel of Record for Amici*
A.J. MUSTE MEMORIAL INSTITUTE, INC.
168 Canal Street, 6th Fl
New York, NY 10013
(917) 239-4999

Prof. Zachary Wolfe
The George Washington University
2100 Foxhall Rd, NW
Ames Hall 218
Washington, DC 20007
zwolfe@gwu.edu
(202) 242-5130

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