No. 20-443

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

DZHOKHAR A. TSARNAEV,

Respondent.

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

BRIEF FOR PROFESSOR MICHAEL J.Z. MANNHEIMER AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Michael J. Zydney Mannheimer is Professor of Law at Salmon P. Chase College of Law, Northern Kentucky University,[2] where he teaches courses in, inter alia, criminal law and procedure and the death penalty. Amicus has a particular scholarly interest in the original understanding of the Cruel and Unusual Punishments Clause of the Eighth Amendment, as demonstrated by his works (in reverse chronological order): *Eighth Amendment Federalism*, in *The Eighth Amendment and Its Future in a New Age of Punishment* (William Berry & Meghan Ryan, eds.) (Cambridge U. Press 2020); Harmelin*'s Faulty Originalism*, 14 Nev. L.J. 522 (2014); *Cruel and Unusual Federal Punishments*, 98 Iowa L. Rev. 69 (2012); *Self-Government, the Federal Death Penalty, and the Unusual Case of Michael Jacques*, 36 Vt. L. Rev. 131 (2011); *Proportionality and Federalism: A Response to Professor Stinneford*, 97 Va. L. Rev. in Brief 51 (2011); and *When the Federal Death Penalty Is "Cruel and Unusual,"* 74 U. Cin. L. Rev. 819 (2006).

He also has a related scholarly interest in the imposition of the federal death penalty in non-death-

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[1] This brief is submitted in accordance with Fed. R. App. P. 29(a). No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae or counsel, made a monetary contribution to the preparation or submission of this brief.

[2] The views expressed herein are those of the individual amicus, not of any institutions or groups with which he is affiliated.

penalty States, as demonstrated by his works: *The Unusual Case of Anthony Chebatoris: The "New Deal for Crime" and the Federal Death Penalty in Non-Death States*, 70 Syracuse L. Rev. 851 (2020); and *The Coming Federalism Battle in the War over the Death Penalty*, 70 Ark. L. Rev. 309 (2017). As a result of his research, amicus has concluded that, whatever else it might proscribe, the core, irreducible meaning of the Cruel and Unusual Punishments Clause is that the United States may not inflict upon an individual a punishment more severe than the harshest punishment authorized by the law of the State where the crime occurred.

SUMMARY OF ARGUMENT

In 1783, faced with a request by the Articles of Confederation Congress for unanimous consent by the States to implement a new impost on goods, Massachusetts assented. But it did so only with conditions. One condition was that, in enforcing the proposed impost within Massachusetts, the central government must not impose upon a violator of the impost law any "punishments which are either cruel or unusual *in this Commonwealth*." Georgia, New Hampshire, and South Carolina set the same condition, substituting "State" for "Commonwealth." Thus, a scant six years before the Bill of Rights was proposed by Congress and submitted to the States, we see a precursor to the Eighth Amendment in these state impost ratifications, which used language nearly identical to that which would appear in the Eighth Amendment. And that language was State-specific; the measure of what punishments qualified as "cruel or unusual" was to be determined on a State-by-State basis, according to

what qualified as "cruel or unusual" punishment in each State.

When the Eighth Amendment was drafted only a few years later, the State-specific understanding of this phrase remained. Coupled with the word "cruel," unusual meant "harsher than is permitted by the law of long usage and custom," i.e., the common law. And, of course, the common law differed in each State. More importantly, the framers and ratifiers of the Eighth Amendment understood that the common law differed by State.

This State-specific understanding of the term "cruel and unusual punishments" follows directly from the goals of the Anti-Federalists in demanding a bill of rights. The Anti-Federalists initially opposed ratification of the Constitution because they feared that the outsized power of the proposed new federal government would lead to both the annihilation of the States as sovereign entities and the destruction of individual rights. These two fears were intertwined: If the new central government were to create a parallel and plenary system of laws, it would render the States irrelevant and permit the central government to sidestep the common-law rights Americans had fought and died for only a few years before. These common-law rights had been enshrined in state constitutions and laws, but because the proposed federal government would be acting on the citizens directly, it would not be bound to observe those rights.

The Anti-Federalists' solution was to constrain the new federal government in the same ways that the States constrained themselves. This meant, in

some instances, calibrating federal rights to state norms, thereby preserving state power and individual rights simultaneously by retaining the primacy of the States in protecting common-law rights. This is how the Cruel and Unusual Punishments Clause was to operate, protecting the common-law right against punishments unknown to the law by positing state law as the reference point, the benchmark of "unusualness." "Cruel and unusual" meant "harsher than is permitted in the particular jurisdiction." With this understanding in place, moderate Anti-Federalists gave their assent to ratification and a Nation was born.

Nearly two centuries later, the Massachusetts Supreme Judicial Court invalidated the State's death penalty statute on state constitutional grounds. *See Commonwealth v. Colon-Cruz*, 470 N.E.2d 116, 124-29 (Mass. 1984). Although the statute could have been re-written to cure the constitutional deficiencies, efforts to revive the death penalty in Massachusetts over the past thirty-seven years have repeatedly failed.[3] The people of Massachusetts have effectively turned their face against the death penalty, believing it to be an inappropriate method of punishment within their Commonwealth. Just like the Commonwealth's conditional assent to the 1783 confederal impost, the Anti-Federalists' assent to ratification on condition that a bill of rights be adopted preserves the

[3] *See*, *e.g.*, Dan Ring, *House rejects death penalty*, The Republican Newsroom (Nov. 8, 2007), https://tinyurl.com/v5nadew5; The Associated Press, *Bill to Restore Death Penalty Fails in Boston*, New York Times 16 (Nov. 16, 2005).

Commonwealth's authority to set the outer bounds of punishment for crimes committed entirely within its borders. The core, irreducible meaning of the Eighth Amendment is that this judgment is the Commonwealth's to make.

The federal government may not impose capital punishment in this case because the death penalty, in the most fundamental, literal meaning of the words, is "cruel and unusual punishment" in Massachusetts.

ARGUMENT

The Eighth Amendment Bars The Imposition Of The Federal Death Penalty On Respondent For A Crime Committed Entirely Within A State That Does Not Authorize Capital Punishment For Any Offense.

Imposition of the federal death penalty for a crime committed wholly within a non-death-penalty State has been exceedingly rare, and prior to 2002, it was virtually unheard of. § A. This longstanding practice accords with the original understanding of the Cruel and Unusual Punishments Clause, which forbade the federal government from inflicting punishments more severe than the laws of each respective State. § B. The arguments marshalled against a State-specific view of the Cruel and Unusual Punishments Clause can all be easily refuted. § C. Because the court of appeals did not address this argument, this Court should direct that it do so on remand. § D.

A. The federal government has virtually never imposed the death penalty for crimes committed in States that do not authorize capital punishment.

Over the course of our Nation's history, the federal government has almost never imposed the death penalty for crimes committed in non-death-penalty States. Amicus, who has been researching this subject since 2005, has identified only a single instance in the 213-year-long period from 1789 to 2002 in which the federal government imposed a death sentence for an offense committed within a State that did not also authorize capital punishment for the same offense. The outlier was Anthony Chebatoris, sentenced to death in 1937 and executed the following year for a botched bank robbery in Michigan in which a bystander was killed. This occurred at the height of nationalistic fervor over the New Deal, when principles of federalism were overwhelmed by the rising tide of federal power amidst the Nation's desperate attempt to claw its way out of the Great Depression. Remarkably, Chebatoris never appealed his conviction or sentence. *See generally* Mannheimer, *The Unusual Case of Anthony Chebatoris, supra.*

It was not until 2002 when a second federal defendant was again sentenced to death for a crime occurring in a non-death-State. *See Man Gets Death for Killing Rape Accuser*, Chicago Tribune (Mar. 17, 2002); Mannheimer, *The Coming Federalism Battle in the War over the Death Penalty, supra*, at 343. By that time, the DOJ's interest in avoiding geographic disparities in imposition of the federal death penalty had led it to take several actions that made it more likely

for the federal government to seek the death penalty over the contrary recommendation of local U.S. Attorneys. *See* Mannheimer, *When the Federal Death Penalty Is "Cruel and Unusual," supra*, at 826-28.

And by that time, four decades after the Eighth Amendment had been incorporated against the States, *see Robinson v. California*, 370 U.S. 660, 666-67 (1962), the federalism-based constraint in the Cruel and Unusual Punishments Clause had long lain dormant. Given the lack of historical precedent for imposing the death penalty in States that do not authorize capital punishment, it was only when the federal government began imposing it in these circumstances that scholars began to question its constitutionality. *See generally* Mannheimer, *When the Federal Death Penalty Is "Cruel and Unusual," supra*; Sean M. Morton, *Comment, Death Isn't Welcome Here: Evaluating the Federal Death Penalty in the Context of a State Constitutional Objection to Capital Punishment*, 64 Alb. L. Rev. 1435 (2001).

The virtually complete "lack of historical precedent" for capital punishment in these circumstances is a "telling indication of a severe constitutional problem." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505-06 (2010). The federal government's decision to all but completely forego a constitutionally questionable practice for the first two centuries of its existence casts significant doubt on its constitutionality. *See Luis v. United States*, 136 S. Ct. 1083, 1099 (2016) (Thomas, J., concurring in the judgment). The original understanding of the Cruel and Unusual Punishments Clause demonstrates that this doubt is well-founded.

B. The original understanding of the Eighth Amendment bars the execution of Respondent.

The Eighth Amendment to the U.S. Constitution provides that "cruel and unusual punishments [shall not] be inflicted." U.S. Const., amend VIII. In this federal prosecution, the Eighth Amendment applies directly, unmediated by the Fourteenth Amendment.

There is a widespread view that the original understanding of the Cruel and Unusual Punishments Clause was that it forbade the federal government from inflicting punishments more severe than those permitted at common law for the same offense. The framers and ratifiers of the Amendment also understood that the common law varied among the different English-speaking jurisdictions. Thus, it was understood at the founding that the Cruel and Unusual Punishments Clause might apply differently in different States, forbidding the federal government from inflicting a punishment unauthorized by the law in one State, while allowing it to inflict the same punishment in a different State. Therefore, based on the original understanding of the Clause, the federal government may not inflict capital punishment for a crime committed entirely within a State that does not authorize that punishment.[4]

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[4] Respondent raised this claim in the district court. *See* Motion to Preserve Constitutional Challenges to the Federal Death Penalty Act at 3-4 (May 7, 2014), Dkt. 291. Moreover, because the protections of our federal structure embedded in the Bill of Rights can be invoked by individuals harmed by the breach of

1. Scholars agree that the original understanding of the Cruel and Unusual Punishments Clause—which, of course, applied only to the federal government until 1868—was that the common law of punishment would constitute the baseline for the "unusualness" of federal punishments. That is, cruel and unusual punishments in 1791 were generally understood to be those harsher than those authorized by the common law. *See* Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 Harv. J. L. & Pub. Pol'y 119, 136 (2004); John Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. L. Rev. 1739, 1767-68 (2008). And the founding generation shared Blackstone's understanding of the common law as "an amalgam of cases, statutes, commentary, custom, and fundamental principles." David A. Sklansky, *The Fourth Amendment and Common Law*, 100 Colum. L. Rev. 1739, 1795 (2000).

Of course, the new federal government in 1791 had no common law, or at least no common law of crime, an understanding this Court confirmed in *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 32-33 (1812). *See Harmelin v. Michigan*, 501 U.S. 957, 975 (1991) (plurality). The benchmark for the Cruel and Unusual Punishments Clause had to be the common law of punishment of the States.

But the common-law limits of punishment, like the common law more generally, differed by State.

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those protections, even if the States themselves do not protest, Respondent has standing to assert this claim. *See Bond v. United States*, 564 U.S. 211, 222 (2011).

More importantly, the framers and ratifiers of the Eighth Amendment understood that the common law of punishment differed by State. Indeed, in rejecting the possibility of a general federal common law of crime, this Court in *Hudson* noted that the common law "var[ies] in every state in the Union." 11 U.S. at 33. *Hudson* merely reiterated the framing-era understanding expressed by Justice Samuel Chase, who wrote in 1798 that:

> [H]e who shall travel through the different States, will soon discover … that there is … a great and essential diversity; in the subjects to which the common law is applied, as well as in the extent of its application. The common law, therefore, of one State, is not the common law of another ….

United States v. Worrall, 2 U.S. (2 Dall.) 384, 394 (C.C.D. Pa. 1798). James Madison echoed these words two years later, recognizing that before the Revolution, the common law had been "the separate law of each colony within its respective limits," not "a law pervading and operating through the whole, as one society." *Madison's Report on the Virginia Resolutions*, reprinted in *The Virginia and Kentucky Resolutions of 1798 and '99*, at 31 (Jonathan Elliot ed., 1832). *See also* 8 Annals of Cong. 2137 (July 1798) (Rep. Gallatin) ("[E]ach State ha[s] a common law, in its general principles the same, but in many particulars differing from each other."). The Cruel and Unusual Punishments Clause was to take as its benchmark for unusualness the common law of punishment, which differed by State.

Granted, there were different understandings of the common law at the time of the framing which roughly corresponded to political leanings. *See* Mannheimer, *Eighth Amendment Federalism, supra*, at 49. Federalists—Madison's later views notwithstanding—generally tended to view the common law as declaratory, monolithic, and untethered to sovereignty. *Id.* But this view was not the one that won out in *Hudson*. Rather, *Hudson* reflected the view of the common law as instrumental, variegated, and tied to sovereignty. *See* Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 Colum. L. Rev. 731, 774 (2010) (observing that in the early days of the Republic "the instrumental (rather than the declaratory) nature of the common law increasingly began to take hold in legal thinking"). Importantly, the Anti-Federalists propounded this instrumental view of the common law. And because of the Anti-Federalists' dominant role in adopting the Bill of Rights, we should give primacy to their views when construing its provisions.

2. The Anti-Federalists initially opposed ratification of the Constitution, but they came around to supporting it on the condition that it include a bill of rights. Thus, while the Constitution was a victory for the Federalists, the Bill of Rights was a triumph for the Anti-Federalists. Andrew S. Oldham, *The Anti-Federalists: Past as Prologue*, 12 N.Y.U. J.L. & Liberty 451, 454-55 (2019) ("[W]e owe our first 10 constitutional amendments to the Anti-Federalists."). Ratification of the Constitution was achieved in several States—including Massachusetts, New York, and Virginia—only by narrow margins, and only after Federalists pledged to effectuate the adoption of a bill of rights. This pledge attracted the votes of a

sufficient number of moderate Anti-Federalists to achieve ratification. For example, in New York the final vote on ratification was 30-27 in favor, a narrow victory achieved only after Anti-Federalist leader Melancton Smith announced his support on condition that a bill of rights be added, taking eleven of his supporters with him. See Mannheimer, *Eighth Amendment Federalism*, *supra*, at 51-52. Absent this promise of a bill of rights, the Nation we know today might not exist.

Because the Bill of Rights was the price paid by the Federalists to the Anti-Federalists for their reluctant acquiescence to union, "Anti-Federalist political thought is essential to understanding the meaning of the Bill of Rights." Saul A. Cornell, *The Changing Historical Fortunes of the Anti-Federalists* 84 Nw. U. L. Rev. 39, 67 (1989). Just as this Court's *Marks* rule seeks to identify the reasoning of the Members of the Court necessary to form a majority for the judgment in a case, *see Marks v. United States*, 430 U.S. 188, 193 (1977), we should interpret the Bill of Rights consistently with the views of those of the founding generation whose support was necessary to forge the new Nation. That explains why this Court and its individual Justices have often looked to the views of the Anti-Federalists when construing the Bill of Rights. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 598-99 (2008) (Second Amendment); *Crawford v. Washington*, 541 U.S. 36, 48-49 (2004) (Confrontation Clause); *Blakely v. Washington*, 542 U.S. 296, 306 (2004) (Jury Trial Clause); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 584 (1983) (Free Press Clause); *Timbs v. Indiana*, 139 S. Ct. 682, 695-96 (2019) (Thomas, J., concurring in

the judgment) (Excessive Fines Clause); *Maryland v. King*, 569 U.S. 435, 467 (2013) (Scalia, J., joined by Ginsburg, Sotomayor, and Kagan, JJ., dissenting) (Fourth Amendment); *United States v. Hubbell*, 530 U.S. 27, 53 (2000) (Thomas, J., joined by Scalia, J., concurring) (Self-Incrimination Clause); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 365-66 (1995) (Thomas J., concurring in the judgment) (Free Speech Clause). *See also Gerics v. Trevino*, 974 F.3d 798, 805 n.5 (6th Cir. 2020) ("Although the Anti-Federalists obviously did not prevail on the ultimate question of whether the Constitution should be adopted, they did prevail on the question of whether there ought to be a bill of rights. So we look to their work for evidence on the original meaning of the Bill of Rights." (citation omitted)).

3. Due regard for Anti-Federalist views of common-law rights at the founding requires "a state-oriented approach to the Bill of Rights." Robert C. Palmer, *Liberties as Constitutional Provisions 1776-1791*, in *Liberty and Community: Constitution and Rights in the Early American Republic* 55, 105 (Robert C. Palmer & William E. Nelson eds. 1987). The history behind the adoption of the Bill of Rights demonstrates a desire by the Anti-Federalists to preserve state sovereignty and state autonomy.

In particular, the criminal procedure protections of the Bill limited federal power and preserved state power in the criminal justice sphere. The Bill of Rights did so both by dictating the procedures by which federal crimes would be tried and by limiting the punishments that could be meted out for those crimes. It accomplished these goals, in some respects,

by tying federal power to the norms of the respective States.

The Anti-Federalists predicted that the broad powers granted to the federal government would allow Congress to create a system of criminal law parallel to those of the States.[5] They feared that such a parallel system of criminal law would effectively displace state criminal law. This caused them grave concern for two inter-related reasons.

First, as Melancton Smith put it at the New York ratifying convention, they believed that the powers given to the federal government would cause "[t]he state governments [to] soon dwindle into insignificance." Speech by Melancton Smith (June 25, 1788), reprinted in 6 *The Complete Anti-Federalist* 164, 167 (Herbert J. Storing ed. 1981). Second, if federal criminal law were to displace state criminal law, the criminal procedure protections in state bills of rights would be useless. Thus, Virginia Anti-Federalist George Mason began his *Objections to the Constitution of Government formed by the Convention* (1787), reprinted in 2 *The Complete Anti-Federalist*, *supra* at 11, by observing: "There is no Declaration of Rights; and the Laws of the general Government being paramount to the Laws and Constitutions of the several

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[5] These predictions have, of course, come to fruition. *See*, *e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 15-22 (2005) (construing Constitution to permit federal criminalization of intrastate possession of marijuana for personal use).

States, the Declaration of Rights in the separate States are no Security."

These two fears were often expressed together, as by Pennsylvania Anti-Federalist Centinel, when he wrote that the federal government would "annihilate the particular [State] governments," leading to the destruction of individual rights because "the security of the personal rights of the people by the state constitutions [would be] superseded." Letter of Centinel to the People of Pennsylvania, reprinted in 2 *The Complete Anti-Federalist*, *supra,* at 143, 152.

Accordingly, the Anti-Federalists saw the Constitution as a threat to both State power and individual rights simultaneously. Indeed, for the Anti-Federalists, "substantive rights … were intimately intertwined with structural considerations." Akhil R. Amar, *The Bill of Rights: Creation and Reconstruction* 128 (1998). In other words, "states' rights and individual rights were not antithetical in Anti-Federalist constitutionalism, but intimately bound together." Saul A. Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America*, 1788-1828, at 6 (1999); *see also* Palmer, *supra*, at 108 ("Preservation of state authority and liberty restrictions on the federal government can never be distinct ….").

And the Anti-Federalists considered the greatest protection for human liberty in the realm of criminal justice to be the constraints that the States placed on themselves. *See* Mannheimer, *Cruel and Unusual Federal Punishments, supra*, at 107-08. They demanded that a bill of rights be added to the Constitution, a bill that would, in large part, express the

intertwined nature of individual rights and State sovereignty by tying the limits of federal power to state norms.

Nowhere is this clearer than in George Mason's *Objections*, which are particularly significant because they were "the first salvo in the paper war over ratification," Robert A. Rutland, *Framing and Ratifying the First Ten Amendments*, in *The Framing and Ratification of the Constitution* 305, 305 (L. Levy & D. Mahoney eds. 1987), and because they were second only to those of Elbridge Gerry in their influence over other Anti-Federalists, *see* Cornell, *The Other Founders*, *supra*, at 29. In his *Objections*, Mason explained the need to include a provision preventing the federal government from imposing "unusual" punishments:

> Under their own Construction of the general Clause at the End of the enumerated powers [i.e., the Necessary and Proper Clause] the Congress may grant Monopolies in Trade and Commerce, constitute new Crimes, *inflict unusual and severe Punishments*, and extend their Power as far as they shall think proper; so that the State Legislatures have no Security for the Powers now presumed to remain to them; or the People for their Rights.

George Mason, *Objections to the Constitution*, *supra*, at 13 (emphasis added).

This passage is short but telling. First, it demonstrates the intertwined nature of state power and individual rights according to Anti-Federalist ideology.

Mason expresses concern about Congress's ability to "grant Monopolies in Trade and Commerce" in virtually the same breath as he expresses fear about its potential to "inflict unusual and severe Punishments." Second, Mason's concern that Congress might create "new Crimes" and "inflict unusual and severe Punishments" tells us that the Anti-Federalists feared the threat posed by the proposed federal government to the States' virtual monopoly on criminal justice.

Perhaps most importantly, Mason's fear that "State Legislatures [will] have no Security for the Powers now presumed to remain to them," follows closely on the heels of his concern regarding three potential incursions on those powers by Congress under the new Constitution: the "grant[ing of] Monopolies in Trade and Commerce," the creation of "new Crimes," and the "inflict[ion of] unusual and severe Punishments." But Mason could not have meant that the State legislatures should retain the power, not only to create crimes and grant monopolies, but also to "inflict unusual and severe Punishments." This passage makes sense only if Mason believed that State legislatures must be permitted to retain, among "the Powers [then] presumed to remain to them," the power to set the outer bounds of criminal punishment within each State, and that the "unusual and severe Punishments" that he feared were those that were more severe than what each State had authorized within its borders. *See* Mannheimer, *Eighth Amendment Federalism*, *supra*, at 53-54. This objection was the seed from which the Cruel and Unusual Punishments Clause sprang.

While the Anti-Federalists espoused divergent views on some issues, see Herbert J. Storing, *What the Anti-Federalists Were* For, in 1 *The Complete Anti-Federalist*, *supra*, at 5, the common denominator was their fear that the Constitution's grant of vast federal power would lead to the annihilation of the States as sovereign, autonomous entities, coupled with their demand for a bill of rights to allay those fears. That so much of the Bill of Rights addresses the federal criminal process demonstrates that the Anti-Federalists placed a high priority on ensuring "the continuing prerogative of the States to set their own parameters of crime and punishment." Mannheimer, *Cruel and Unusual Federal Punishments*, *supra*, at 105. The Anti-Federalists feared the return of a powerful central government using its criminal justice authority, unfettered by common-law rules, to punish dissenters. They sought to eliminate any comparative advantage the new federal government might have in meting out criminal punishment by holding them to the same constraints that the States imposed on themselves. *See* Michael J.Z. Mannheimer, *Three-Dimensional Dual Sovereignty: Observations on the Shortcomings of* Gamble *v.* United States, 53 Tex. Tech. L. Rev. 67, 77-78 (2020).

The Bill of Rights thus was conceived as a barrier to federal action in a few discrete areas when that action conflicts with the norms of a State. One of those areas is criminal punishment: The Cruel and Unusual Punishments Clause sets the outer limits of the federal power to punish based on the constraints that individual States place on their own power to punish. Where a form of punishment, such as the death penalty, is unauthorized by the laws of a State, it would

constitute "cruel and unusual punishment" for the federal government to impose that punishment for a crime committed within that State.

4. This State-specific understanding of the term "cruel and unusual" is all but confirmed by language contained in several States' conditional ratifications of a proposed confederal impost regulation in the 1780s, discussed *supra* 2-3.

In 1783, the Articles of Confederation Congress recommended that it be vested with the power to levy duties on certain imports, a recommendation that required unanimous consent of the States to become operative. 24 Journals of the Cont'l Cong., 1774-1789, at 256, 256-59 (Gaillard Hunt ed., 1922). In ratifying this proposed impost power, four of the thirteen States—Georgia, Massachusetts, New Hampshire, and South Carolina—did so only on condition that punishments for customs violations never exceed that which could be imposed under state law. Each forbade Congress from "inflict[ing] punishments which are either cruel or unusual *in this State*" (or in Massachusetts, "*in this commonwealth*"). *The Resolutions of Congress of the 18th of April, 1783: Recommending the States To Invest Congress with the Power To Levy an Impost, for the Use of the States* at 48 (Ga.), 10 (Mass.), 7 (N.H.), 44 (S.C.) (emphasis added); *see* Mannheimer, *Eighth Amendment Federalism*, *supra*, at 43-44.

Accordingly, less than a decade before the Cruel and Unusual Punishments Clause was adopted, virtually identical language was used to ensure that state punishments marked the outer boundary for

punishment to be meted out by the central government.[6]

* * *

In sum, the original understanding of the Cruel and Unusual Punishments Clause is that which was contemplated by the Anti-Federalists: The Clause prevents the federal government from inflicting punishments unauthorized by state law. Furthermore, the Anti-Federalists understood that whether a punishment was "cruel and unusual" would necessarily vary by State. Whatever change was wrought by incorporation of the Eighth Amendment against the States, its original constraint on the federal government has not changed. Accordingly, the death sentence imposed upon Respondent for a crime committed entirely within Massachusetts—which has barred capital punishment for thirty-seven years—constitutes "cruel and unusual punishment" in violation of the Eighth Amendment.

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[6] It is theoretically possible that these provisions were intended only to prevent truly horrific punishments from being meted out. For this interpretation to work, however, one would have to accept that these four States were concerned that the confederal government would punish by crucifying, flaying alive, draw-and-quartering, burning at the stake, or breaking on the wheel those found to be smuggling molasses. *See* Mannheimer, Harmelin*'s Faulty Originalism, supra*, at 539-40. That seems hard to believe.

C. The arguments marshalled against a State-specific view of the Cruel and Unusual Punishments Clause are easily refuted.

The few district courts and one circuit court that have rejected a State-specific reading of the Cruel and Unusual Punishments Clause have cited a number of reasons for doing so. Each of these arguments is easily refuted.

The Equality Argument. One argument that has been offered against a State-specific reading of the Cruel and Unusual Punishments Clause is that it treats similarly situated people differently: A federal defendant in Texas is treated unfavorably as compared with a federal defendant in Massachusetts. *See, e.g.*, *United States v. Aquart*, 912 F.3d 1, 68 (2d Cir. 2018).

But like equality arguments more generally, this claim hinges on how the relevant class of similarly situated persons is defined. A parent who says that she treats all her children equally is not claiming that her fifteen-year-old and two-year-old have the same bedtime. The equality argument loads the dice by implicitly assuming that the relevant class is "all persons who commit a federally death-eligible offense." The Eighth Amendment requires that we define the relevant class instead as "all persons who commit a federally death-eligible offense in a State that authorizes capital punishment." The federal defendant in Texas is treated differently than the one in Massachusetts because the former falls into the relevant class while the latter does not. That two people are treated

differently—like the teenager and the toddler—does not necessarily mean they are not treated equally.

There is also nothing unusual about the idea that constitutional rules can apply *equally* but *differently* depending on the State. "[G]eographical nonuniformity of constitutional requirements and proscriptions is a mainstay of American constitutionalism." Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 Tex. L. Rev. 1129, 1133 (1999). For instance, the same material might be considered constitutionally protected art in New York while violating federal anti-obscenity laws in Alabama. *Sable Comms. of Cal., Inc. v. FCC*, 492 U.S. 115, 125-26 (1989) ("There is no constitutional barrier … to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others."). The same item regarded as "private property" in Montana, thereby requiring just compensation if taken by the federal government, might not be considered "private property" in Minnesota. *See Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998) ("Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source *such as state law*.'" (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)) (emphasis added)). A criminal defense attorney might render a constitutionally deficient performance in a federal prosecution in one State that would have satisfied the Constitution elsewhere. *Cf. Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (judging counsel's performance in a state case against

"the professional standards that prevailed *in Maryland* in 1989" (emphasis added)). A federal drug defendant may or may not successfully exclude evidence found in her car pursuant to a traffic stop by state police depending on state traffic laws. *See* David A. Harris, *Profiles in Injustice: Why Racial Profiling Cannot Work* 30-31 (2002). The same First, Fourth, Fifth, and Sixth Amendments apply across the country. But the legal implications of these provisions can vary based on the different customs, norms, and positive law of the different States.

Moreover, the federal government often treats persons in different States differently for purposes of criminal prosecution, even when the Constitution does not compel that treatment. Federal criminal statutes that are contingent on state law are legion. *See*, *e.g.*, Assimilative Crimes Act, 18 U.S.C. § 13(a) (criminalizing "any act or omission" on federal land that would be a criminal act or omission in the State in which the federal land is located and subjecting the offender "to a like punishment"); Major Crimes Act, 18 U.S.C. § 1153(b) (punishing certain crimes in Indian country as "defined and punished in accordance with the laws of the State in which such offense was committed"); Johnson Act, 15 U.S.C. § 1172(a) (making it "unlawful knowingly to transport any gambling device" into any State in violation of the laws thereof); Webb-Kenyon Act, 27 U.S.C. § 122 (forbidding "[t]he shipment or transportation … of any … intoxicating liquor of any kind, from one State … into any other State … in violation of any law of such State"). Such disparate treatment by the federal government has never been thought problematic. *See United States v. Yazzie*, 693 F.2d 102, 103-04 (9th Cir. 1982) (rejecting

equal protection challenge to application of the Major Crimes Act where defendant's guilt depended on the State where the crime occurred); *United States v. Vallie*, 284 F.3d 917, 922 (8th Cir. 2002) (similar).

The "Jot-for-Jot" Incorporation Argument. Some could argue that this interpretation of the Cruel and Unusual Punishments Clause cannot be correct because (1) as a principle of federalism, it cannot coherently be applied to the States, but (2) the Court has held that the Bill of Rights applies to the States exactly as it applies to the federal government. *See*, *e.g.*, *United States v. Jacques*, No. 2:08-CR-117, 2011 WL 3881033, at *4 n.2 (D. Vt. Sept. 2, 2011).

This argument, too, misses the mark. This Court adopted the idea of 'jot-for-jot' incorporation to rebut the argument that the Bill of Rights applied to the States only in a "watered-down" way. *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964) (citation omitted). The Court was insistent on applying the same robust constitutional standards in both contexts. *Id.* But jot-for-jot incorporation is completely consistent with applying *additional* protections against the federal government, where these protections cannot coherently apply against the States because they are grounded in federalism. It would be perverse to rely on the notion of jot-for-jot incorporation, designed to ensure that the States observe the same constraints placed upon the federal government, to weaken the constitutional rights one has against federal government.

The "Evolving Standards of Decency" Argument. A third argument rejects reliance on the Eighth Amendment's original meaning on the ground that

this Court has instead interpreted the amendment based on the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality); *see Aquart*, 912 F.3d at 68-69. But just because the "evolving standards" idea provides the test in some cases does not mean that the Court has jettisoned reliance on original understanding. To the contrary, the Court continues to refer to the Eighth Amendment's original meaning in construing its provisions. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1122-24 (2019).

The Court adopted the "evolving standards of decency" concept because, it was thought, the Eighth Amendment's original understanding might not be capacious enough to address some punishment practices that were permitted during the framing period, but that would be considered unacceptably harsh according to today's norms. That is, the "evolving standards" idea *enhances* constitutional protection; it has never been thought to *diminish* the rights that existed at the framing. Just as the more modern notion of a "reasonable expectation of privacy" has been "*added to*, not *substituted for*" the more traditional protections afforded at the framing by the Fourth Amendment, *United States v. Jones*, 565 U.S. 400, 408-09 (2012), the "evolving standards" idea has been "added to, not substituted for" the core, irreducible meaning of the Eighth Amendment: protection against federal over-punishment based on state norms.

The "Frustration of Federal Policy" Argument. A final argument is that this understanding could permit dissident States to frustrate national policy "by

enacting parallel local laws allowing only negligible punishments." *Aquart*, 912 F.3d at 65.

As an initial matter, because Massachusetts does not authorize capital punishment for any offense, this case presents only the question whether the Eighth Amendment preserves each State's authority to set the outer bounds of punishment for *any* crime. The courts need not decide whether it more broadly forbids the federal government from punishing specific crimes more harshly than the State does *for the same crime*.

To the extent that the Court is concerned that a State-specific interpretation of the Eighth Amendment in this case would open the door to broader consequences, some observations are in order. First, even if the Amendment preserves state authority to determine the outer bounds of punishment for specific crimes, there must be some limits on that authority. For instance, a State should not be able to defeat federal policy by singling out for special treatment crimes that implicate federal interests. If, for example, a State were to punish murder of the President with a $50 fine, but otherwise punish murder with death, the general murder statute would best reflect how the people of the State believe that crime should be punished.

Second, many federal crimes, such as environmental crimes, racketeering, and trafficking in narcotics, transcend state borders. In such multi-State cases, where the interests in a federal prosecution are at their apogee, federal punishment would be limited only by the laws of the State that is harshest in

meting out punishment. A single State would be unable to frustrate federal policy in these circumstances.

Third, to the extent that the "frustration of federal policy" argument contemplates that States will set lower limits on maximum penalties than the federal government does for crimes occurring entirely within the State, it boils down to an assertion that the federal government's judgment about how much punishment is appropriate is always correct and the State's judgment is always wrong. But it is precisely this policy decision that the Eighth Amendment leaves in the hands of the States. Both over-punishment and under-punishment potentially inflict heavy costs on society. The "frustration" argument simply assumes without any evidence that under-punishment by a State is always worse than over-punishment by the federal government.

Finally, it is worth noting that while we have become used to federal prosecution of crimes such as the one committed in this case, we must be careful "not to confuse the familiar with the necessary." *Griffin v. Illinois*, 351 U.S. 12, 20 (1956) (Frankfurter, J., concurring in the judgment). Terrorist attacks occurred in this country long before they were federal crimes. *See, e.g.*, *Ex Parte Spies*, 123 U.S. 131 (1887) (addressing petition for writ of error from the state court convictions of the perpetrators of the Haymarket bombing). The same is true of all four Presidential assassinations—Congress passed legislation making the murder of the President a federal crime only after President Kennedy's assassination. *See* Adam Harris Kurland, *The Travel Act at Fifty: Reflections on the Robert F. Kennedy Justice Department and Modern*

Federal Criminal Law Enforcement at Middle Age, 63 Cath. U. L. Rev. 1, 39 (2013). While there is no constitutional impediment to federal prosecution in a case such as this, the Eighth Amendment preserves the original design of the Constitution by limiting the maximum punishment to that which could have been imposed throughout most of our history: that prescribed by state law.

D. Because the court of appeals did not address this argument, the Court should direct it to do so on remand.

Despite the foregoing, the Court should refrain from deciding this issue in the first instance. First and foremost, the court of appeals did not address it. Moreover, only one circuit court of appeals and a smattering of district courts have addressed the argument, so there has been insufficient percolation through the lower courts to justify a decision here.[7] Indeed, Judge Calabresi acknowledged in *Aquart* that the Second Circuit's majority opinion there was simply an "interesting first take on claims not perfectly elaborated"—indeed, based on supplemental briefing submitted after oral argument—and that academics had only recently begun exploring this issue. 912 F.3d at 72 (Calabresi, J., concurring in part and concurring in the result). And, of course, this Court

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[7] *See Aquart*, 912 F.3d at 65-69; *United States v. Andrews*, Cr. No. 1:12CR100-1, 2015 WL 1191146, at *7 (N.D. W. Va. Mar. 16, 2015); *Jacques*, 2011 WL 3881033, at *2-6; *United States v. McCluskey*, No. 10-2734 JCH, 2012 WL 13076173, at *10-11 (D. N.M. Sept. 24, 2021); *United States v. Johnson*, 900 F. Supp. 2d 949, 961-63 (N.D. Iowa 2012).

generally does not decide an issue raised here solely by an amicus curiae. Because this is "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), the appropriate disposition is to remand to the Court of Appeals for a determination of this issue.

CONCLUSION

Capital punishment has been a deeply divisive issue in this country for centuries. Reasonable people can differ over its efficacy and its morality. Views on capital punishment are strongly held and deeply affected by the moral and religious views of one's community. The framers and ratifiers of the Eighth Amendment understood that capital punishment is a local issue. The specter of a large, powerful, central government executing offenders against the wishes of a State was precisely what the Cruel and Unusual Punishments Clause was designed to prevent.

For the reasons stated above, the case should be remanded to the Court of Appeals for a determination of this issue.

Respectfully submitted,

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