Capital Case

No. 21-7234

IN THE SUPREME COURT OF THE UNITED STATES

DYLANN STORM ROOF,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF

Petitioner presents three questions, each warranting this Court's review of his capital sentence. Respondent's arguments in opposition are unpersuasive. The Court should grant certiorari.

I. Certiorari Is Needed to Resolve an Intractable Split Over Whether Capital Defendants or Counsel Control Mitigation Decisions

Respondent does not contest the important and recurring nature of the question presented: Do capital defendants or their counsel control the decision whether to present mitigating evidence? It does not dispute that lower courts are divided on the question, or that this case is an excellent vehicle in which to resolve the conflict. And respondent does not deny that petitioner's capital penalty phase would have looked completely different if the trial court had answered the question presented differently and allowed him to forgo a mental-health defense without waiving counsel.

Faced with a case meeting all of the Court's criteria for certiorari, respondent attempts to minimize the split in the courts below and to argue the merits of the question presented. But the division is real, and the appeals court in petitioner's case is on the wrong side of it. This Court should grant review.

1. Respondent concedes, as it must, that petitioner's case is in direct and irreconcilable conflict with *State v. Brown*, 330 So. 3d 199 (La. 2021). BIO 22-23. But, it insists, no other case "involves the question presented here." BIO 22. That is wrong. More than two dozen state and federal appeals courts have decided—inconsistently—who has ultimate authority over mitigation decisions, counsel or

client. Pet. 11-13. That is the question presented here, regardless of the procedural postures in which lower courts have delivered their conflicting answers. *See* Pet. i.

Some courts have reached this question while resolving claims that counsel were ineffective for deferring to clients' demands to forgo mitigation. BIO 19. According to respondent, these "decisions do not suggest that counsel *must* accede to such a request," but that is incorrect. BIO 20. Unlike the handful of courts that have analyzed ineffective-assistance-for-failure-to-present-mitigation claims without deciding who controls mitigation decisions, *see* Pet. 13 & n.11, these courts squarely hold that defendants *do* have the right to limit mitigation—and that counsel *must* defer to that choice. *See, e.g.*, *Ramirez v. Stephens*, 641 F. App'x 312, 327 (5th Cir. 2016) ("Ramirez's directions were entitled to be followed, absent evidence that he was not competent to waive mitigation." (cleaned up)); *Wallace v. Davis*, 362 F.3d 914, 920 (7th Cir. 2004) (holding, on question of who controls mitigation, "the accused's will prevails"); *People v. Brown*, 326 P.3d 188, 207 (Cal. 2014) (rejecting argument that "the decision whether to present mitigating evidence is a tactical one for counsel"); *State v. Maestas*, 299 P.3d 892, 959 (Utah 2012) ("Like other decisions that a represented defendant has the right to make, . . . the decision to waive the right to present mitigating evidence is not a mere tactical decision that is best left to counsel; instead, it is a fundamental decision that goes to the very heart of the defense." (footnotes omitted)); *State v. Grooms*, 540 S.E.2d 713, 735 (N.C. 2000) ("When counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions [as whether to present mitigating

evidence], the client's wishes must control." (cleaned up)); *Zagorski v. State*, 983 S.W.2d 654, 658 (Tenn. 1998) ("Counsel must remember that decisions, including whether to forgo a legally available objective because of non-legal factors, are for the client and not the lawyer.").

Equally on point are cases considering the validity of mitigation waivers. BIO 21. They all arise in jurisdictions that necessarily take the majority approach and permit defendants to forgo mitigation. Respondent's contrary suggestion makes no sense, for these courts would have no occasion to review the soundness of mitigation waivers if such waivers weren't allowed in the first place. *See, e.g.*, *Dobbs v. Turpin*, 142 F.3d 1383, 1388 (11th Cir. 1998) ("[T]he decision whether to use mitigating evidence is for the client . . . ."); *State v. Barton*, 844 N.E.2d 307, 315 (Ohio 2006) ("A defendant is entitled to 'great latitude' and may decide what mitigating evidence he wishes to present in the penalty phase."); *Boyd v. State*, 910 So. 2d 167, 189-90 (Fla. 2005) ("[T]he defendant has the right to choose what evidence, if any, the defense will present during the penalty phase."); *St. Clair v. Commonwealth*, 140 S.W.3d 510, 560 (Ky. 2004) ("The defendant is master of his own defense and pilot of the ship, and thus may elect to ignore the advice of his counsel and to waive the presentation of mitigating evidence." (cleaned up)); *see also Snell v. Lockhart*, 14 F.3d 1289, 1303 (8th Cir. 1994) (holding mitigation decisions belong to client) (citing *Singleton v. Lockhart*, 962 F.2d 1315 (8th Cir. 1992)).

Respondent's fact-bound distinctions of additional cases also fail. BIO 21-22. Each affirmatively holds that capital defendants have the final say over whether to

introduce mitigating evidence. *See, e.g.*, *People v. Amezcua*, 434 P.3d 1121, 1149-50 (Cal. 2019) ("Defendants claim that the decision to present certain mitigating evidence [is an] aspect[] of trial management. As such [it is] controlled by counsel even after defendants made clear their desire to present no penalty phase defense. They are incorrect."); *State v. Johnson*, 401 S.W.3d 1, 7 (Tenn. 2013) ("We hold that a mentally competent defendant may waive the presentation of mitigation evidence during the penalty phase of a capital trial."); *State v. Robert*, 820 N.W.2d 136, 144 (S.D. 2012) ("Robert had a right to waive presentation of mitigating evidence . . . ."); *Wallace v. State*, 893 P.2d 504, 510 (Okla. Crim. App. 1995) ("Appellant does not contest a defendant may waive his right to present mitigating evidence. We agree."). While a handful involve defendants who sought death sentences and waived mitigation entirely, only one jurisdiction parses the right to control mitigation so finely as to permit only an all-or-nothing approach. Pet. 12 n.4 (citing Washington case law). In every other majority-view court, respondent's distinction between partial and complete mitigation waivers is without a difference.

In the end, none of respondent's arguments undermine the existence of an entrenched conflict in the lower courts over whether a defendant has the personal right to waive mitigation. At least twenty-three states and federal circuit courts say he does. Pet. 11-13 & n.4. The Fourth and Tenth Circuits, along with South Carolina and Texas, disagree. Pet. 13 & n.10. Had petitioner been tried in any of the majority jurisdictions, his decision to forgo mental-health mitigation would have been respected; he would not have been forced to represent himself to make that

choice; and his death penalty trial would have looked entirely different. Such arbitrariness should not be tolerated in capital cases. *See Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, Stevens, JJ.). Certiorari is needed to resolve this important and oft-recurring conflict.

2. Unable to refute either the lower-court split or lack of vehicle concerns, respondent focuses largely on a merits analysis, arguing the Fourth Circuit was right to let counsel make mitigation decisions despite petitioner's objections. BIO 13-18. But even if this reasoning had force, certiorari still would be necessary because the vast majority of state and federal courts hold otherwise.

The reasoning is unpersuasive in any event. (Not to mention inconsistent with this Court's prior decisions. *See* Pet. 17-19.) Whether to reveal sensitive, personal details about oneself in open court—like childhood abuse, incest, or mental illness—is a fundamental choice that implicates a defendant's "dignity and autonomy." *McKaskle v. Wiggins*, 465 U.S. 168, 177 (1984). If the accused "wish[es] to avoid, above all else, the opprobrium that comes with admitting" such stigmatizing facts, his decision "must be honored out of that respect for the individual which is the lifeblood of the law." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1507-08 (2018) (internal quotation marks omitted).

Respondent tries to justify the lower courts' refusal to honor petitioner's choice by claiming petitioner's goal was to obtain a life sentence at all costs, but that is incorrect. BIO 15-17. Petitioner clearly and repeatedly told the trial court that he would rather die than present a mental-health defense. App. 106a-111a. In any of

the majority jurisdictions, that choice would have been respected. Because petitioner was tried in the Fourth Circuit, it was not.

Respondent objects that giving defendants the authority to waive mitigation is unworkable, BIO 17, but most state and federal courts *already* allow capital defendants to make these decisions, and the sky has not fallen. What *is* unworkable is the minority position that forces defendants into a Hobson's choice between maintaining personal autonomy and forgoing representation altogether. At least one formerly minority jurisdiction came to just this conclusion, reversed course, and now aligns with the majority. *Brown*, 326 P.3d at 206-08.

II. Certiorari Is Needed to Address the Conflict Between the Fourth Circuit's Opinion and This Court's Commerce Clause Precedents

Respondent offers no response to, or even mention of, the conflict between the Fourth Circuit's opinion and this Court's commercial Commerce Clause precedents, Pet. 26-28: a conflict independently warranting certiorari. Its arguments address only the separate and independent conflict between the Fourth Circuit's "importance" and "temporal proximity" test and this Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). Pet. 22-26. According to respondent, that conflict does not warrant certiorari because the appellate court opinion is "factbound," the statutes in *Lopez* and *Morrison* can be distinguished, and this case is a poor vehicle to address the constitutional question. BIO 23-29. Each claim is unsound.

1. Respondent attempts to minimize the importance of the Fourth Circuit's opinion by calling it a "factbound determination," rather than a precedential ruling.

BIO 27. But it is an opinion's "reasoning . . . that allows it to have life and effect in the disposition of future cases," *Ramos v. Louisiana*, 140 S. Ct. 1390, 1404 (2020), and appellate panels must follow the reasoning of prior panels. *Payne v. Taslimi*, 998 F.3d 648, 654-55 (4th Cir. 2021). Indeed, the Fourth Circuit treated its "importance" and "temporal proximity" standard as binding in this case. App. 74a, 76a. Absent this Court's intervention, therefore, all federal courts in the Fourth Circuit will be required to follow the opinion's lead by engaging in a roving search of defendants' pre-offense conduct—including any uses of public highways, the Internet, GPS, or the telephone—for evidence that those preliminary acts had some undefined degree of "temporal proximity" to the intrastate offense or subjective "importance" to the defendant. App. 74a, 76a.

Even respondent admits confusion as to how such a test might play out in "future cases." BIO 27-28. It highlights the Fourth Circuit's reliance on petitioner's 13-second intrastate phone call months before the crime and same-day Internet posting of his personal views (neither of which furthered the offense), his pre-offense Internet research, and his intrastate driving on an interstate highway while navigating by GPS. BIO 25; *see* App. 75a. These ubiquitous acts' widely varying degrees of importance and proximity to the offense reveal the endlessly malleable nature of the Fourth Circuit's approach. Indeed, it is hard to imagine a violent crime that would not be preceded by many of the acts the Fourth Circuit's opinion cites. By extending Commerce Clause jurisdiction to a limitless realm of pre-offense

conduct, the Fourth Circuit's standard obliterates any distinction between local and national regulation of violent crime, in conflict with *Lopez* and *Morrison*.

2. Equally unsound is respondent's attempt to distinguish *Lopez* and *Morrison* as addressing statutes without jurisdictional elements. BIO 24. Section 247(b)'s tautological jurisdictional requirement that the offense either be "in" or "affect[]" interstate commerce does nothing to establish that petitioner's intrastate offense was, in fact, "in" interstate commerce here—particularly because Section 247(b)'s "in or affects" language merely duplicates the scope of the Commerce Clause itself. 18 U.S.C. § 247(b); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115-18 (2001); *United States v. Ballinger*, 395 F.3d 1218, 1231-32 (11th Cir. 2005) (en banc). Respondent's argument is entirely circular: it claims petitioner's offense must have been "in" interstate commerce because he was charged with and convicted under a statute that requires as much.

Respondent further tries to distinguish *Lopez* and *Morrison* as cases about *Lopez*'s third prong. BIO 25-26. But all three prongs are subject to *Lopez* and *Morrison's* "first principle[]," *Lopez*, 514 U.S. at 552, that limitless constructions of the Commerce Clause are unconstitutional—and especially so in the area of noneconomic violent crime. *Morrison*, 529 U.S. at 618. Permitting open-ended Commerce Clause regulation of local crime under prongs 1 and 2 based on ubiquitous pre-offense acts—as the Fourth Circuit's standard does—creates a gaping loophole in *Lopez* and *Morrison*, dissolving the local/national distinction at those cases' core. If courts cannot "pile inference upon inference" to connect local

crimes to interstate commerce under *Lopez*'s third prong, *Lopez*, 514 U.S. at 567, they must be equally prohibited from picking and choosing among commonplace antecedent uses of highways, the Internet, or the telephone to reach the same result under prongs 1 and 2. Indeed, this Court rejected such "nebulous" limits on prongs 1 and 2 in the commercial regulation context in *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 198 (1974), which applies even more forcefully in the wholly noncommercial criminal context here. Pet. 27-28.

Respondent tries to square the Fourth Circuit's novel decision with *Lopez* and *Morrison* by invoking Congress's authority to "punish interstate travel or use of interstate instrumentalities" and "keep the channels of interstate commerce free from immoral and injurious uses." BIO 26 (internal quotation marks omitted). But Section 247 does not "punish" (or even mention) interstate travel or use of interstate instrumentalities. Instead, it more narrowly defines the offense—which must be "in" interstate commerce under subsection (b)—as obstructing another's religious exercise. 18 U.S.C. § 247(a)(2). The Commerce Clause question is thus whether petitioner's "offense" of obstructing another's religious exercise was itself "in" interstate commerce, not whether Congress has the power to punish travel or instrumentality-use outside that offense. "When Congress seeks to rely on interstate travel as a basis for exercising its authority under the Commerce Clause,

it knows how to do so," *Ballinger*, 395 F.3d at 1243 (Tjoflat, C.J., dissenting), and it did not do so in Section 247.[1]

3. Respondent's improper-vehicle arguments also fail. It claims petitioner's crime was independently subject to Commerce Clause regulation because he committed it using items that previously traveled in interstate commerce: a gun, ammunition, and a pouch. BIO 28. But it relies for this proposition on *Scarborough v. United States*, 431 U.S. 563 (1977), which only permits Congress to regulate *possession* of firearms previously traded interstate, because possession is one link in the interstate firearms market. *Scarborough*'s holding has never been expanded from the regulation of firearm *possession* to regulation of any violent crime committed *using* an interstate-traded firearm—nor does respondent contend it has. Respondent's unprecedented rule would essentially swallow the states' role in regulating intrastate violent crime, permitting federal criminalization of any offense in which the perpetrator wore or used any item that had ever been sold interstate. The panel rightly dismissed this claim. App. 76a n.48.

Respondent also suggests petitioner's death sentence would be unaffected by reversal of the religious obstruction counts. BIO 28-29. But respondent cannot prove

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[1] Respondent cites *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964), and *Brooks v. United States*, 267 U.S. 432, 436-37 (1925), but neither approves congressional regulation of intrastate crime as a means of protecting interstate channels from "immoral and injurious uses." BIO 26. *Heart of Atlanta Motel* addresses prong 3 regulation of commercial enterprises, 379 U.S. at 258, while *Brooks* addresses interstate activity itself, *i.e.*, transporting stolen cars between states, 267 U.S. at 438-39.

the Commerce Clause error's harmlessness beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967); 18 U.S.C. § 3595(c)(2). Vacating the Section 247(a)(2) counts would invalidate half of the eighteen capital convictions supporting petitioner's death sentence, as well as half of the predicate crimes of violence for the remaining Section 924(c) convictions. Respondent cannot prove that the jury would have sentenced petitioner to death based on the remaining charges alone; if anything, the verdict form suggests otherwise. JA 6806 (imposing death "for all the capital counts" together). In any event, it should be up to the Fourth Circuit to determine the effect of the constitutional error in the first instance.

III. Certiorari Is Needed to Harmonize the Scope of Congress's Authority Under the Three Reconstruction Amendments

Respondent does not dispute that current law gives Congress greater powers under the Thirteenth Amendment than under either the Fourteenth or Fifteenth, despite the three amendments' nearly identical enforcement provisions. BIO 32. Yet it insists review is unwarranted for three reasons: *first*, Thirteenth Amendment legislation does not trigger the same federalism concerns as legislation passed under the Fourteenth and Fifteenth Amendments; *second*, the HCPA satisfies the more stringent "congruent and proportional" and "current needs" tests applied under the Fourteenth and Fifteenth Amendments; and *third*, principles of *stare decisis* caution against review. Each contention is misplaced.

1. Respondent asserts that the Thirteenth Amendment does not trigger the same federalism concerns as the Fourteenth and Fifteenth Amendments because the former regulates private conduct while the latter target state action and

impinge on states' autonomy. BIO 32-33.[2] But this claim ignores that the HCPA, like other Thirteenth Amendment legislation, usurps states' traditional police power by criminalizing a broad swath of private conduct historically regulated by the states. Thus, the same autonomy interests and threat of federal overreach that animated the Court's Fourteenth and Fifteenth Amendment decisions are present in the Thirteenth Amendment context. *See* Pet. 38.

In fact, the risk of federal overreach is even more pronounced with the Thirteenth Amendment because *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440, 443 (1968), empowers Congress to "determine what are the badges and the incidents of slavery" and "translate that determination into effective legislation"—that is, to define both the amendment's "ends" and the "means" of achieving them. *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997), by contrast, limits Congress's power under the Fourteenth Amendment to defining only the "means" of legislation, *not* its "ends." The reason, *City of Boerne* explained, is *not* that the Fourteenth Amendment targets state action while the Thirteenth Amendment regulates private conduct. Instead, it is a question of judicial supremacy. "Legislation which alters the meaning of" the constitutional text "cannot be said to be [merely] enforcing" it; rather, such legislation allows Congress to usurp the Court's role as the ultimate

[2] In a similar vein, respondent claims the Court need not harmonize the disparate tests applied to the Reconstruction Amendments because those tests reflect the amendments' "unique history, structure and caselaw." BIO 32 (internal quotation marks omitted). But this ignores that for nearly a century after the Reconstruction Amendments were ratified, courts applied a uniform "necessary and proper" test to their enforcement provisions. *See* Pet. 33-34.

arbiter of the Constitution's meaning. *Id.* at 519. From this, it follows that under *Jones* and its progeny, the constitutional text of the Thirteenth Amendment is reduced from "'superior paramount law, unchangeable by ordinary means,' to ordinary legislation "'alterable when [Congress] shall please to alter it.'" *Id.* at 529 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

2. Respondent is also incorrect in arguing review is unwarranted because the HCPA would satisfy the more stringent tests that apply to legislation under the Fourteenth and Fifteenth Amendments. BIO 34-36. While the merits of that question should be left to the lower courts to address in the first instance, it is clear that the HCPA is neither a "congruen[t] and proportional[]" response to the harms of slavery nor a remedy designed to meet the nation's "current needs." *Shelby County v. Holder*, 570 U.S. 529, 536 (2013); *City of Boerne*, 521 U.S. at 520. This is because the HCPA, by its design and in practice, brings the "complete arsenal of federal authority," *Jones*, 392 U.S. at 417, to bear on a wide range of intrastate conduct that was already illegal (and being robustly prosecuted) under state hate-crime statutes.

Respondent mischaracterizes the HCPA as targeting violence committed "against minorities." BIO 36. But the legislation does not protect only minorities; it criminalizes conduct against *any* person of *any* race, color, religion, or national origin, whether historically subject to slavery or not. Nor does the HCPA purport to address "current needs." Respondent claims the legislation was passed in response to a spike in hate crimes, but fails to note that states were already prosecuting

those offenses under existing laws. BIO 36. Indeed, even courts that affirmed the HCPA as a valid exercise of Congress's Thirteenth Amendment authority did not venture so far as to claim the legislation satisfied any "current needs." *See United States v. Cannon*, 750 F.3d 492, 510 (5th Cir. 2014) (Elrod, J., concurring) ("In passing [the HCPA], Congress focused on past conditions and did not make any findings that current state laws . . . were failing to adequately protect victims from racially-motivated crimes.").

3. Finally, respondent is incorrect that principles of *stare decisis* caution against review.[3] BIO 33-34. As an initial matter, contrary to respondent's suggestion, review would not necessarily result in the overruling of *Jones* and its progeny. Further, as this Court has recognized, *stare decisis* is not "an inexorable command." *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 455 (2015) (internal quotation marks omitted). Because this case raises an important question about separation of powers and Congress's Thirteenth Amendment authority, the Court should grant review.

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[3] Respondent also erroneously points to the absence of a circuit split as a reason not to grant review. BIO 34. But this absence is a product of lower courts' duty to apply this Court's existing precedent. *See* Pet. 37-38. It also ignores the myriad requests for this Court's guidance from appellate judges and constitutional scholars frozen by the judicial gridlock. *See id.*

IV. Conclusion

For the foregoing reasons, the Court should grant certiorari.

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