No. 20-443

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
DZHOKHAR A. TSARNAEV,
Respondent.

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

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, INC., NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, D.C. 20005

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911

Catherine E. Stetson
Counsel of Record
Matthew J. Higgins
David K. Bastian
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
cate.stetson@hoganlovells.com

David M. Porter
CO-CHAIR, NACDL AMICUS COMMITTEE
801 I Street, 3rd Floor
Sacramento, CA 95814

(Additional counsel listed on inside cover)

Additional counsel:

Jennesa Calvo-Friedman
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

Matthew R. Segal
Ruth A. Bourquin
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS, INC.
211 Congress Street
Boston, MA 02110

Brian W. Stull
Cassandra Stubbs
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
201 W. Main Street, Suite 402
Durham, NC 27701

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES:

TABLE OF AUTHORITIES—Continued

Page(s)

IN THE
Supreme Court of the United States

No. 20-443

UNITED STATES OF AMERICA,
Petitioner,
v.
DZHOKHAR A. TSARNAEV,
Respondent.

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

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, INC., NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST[1]

The **American Civil Liberties Union (ACLU)** is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution. The **ACLU of Massachusetts** is one of its statewide affiliates. The ACLU has

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae*, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

long been committed to due process and fundamentally fair procedures for defendants in all criminal cases, and, as relevant here, has supported the right of capital defendants to present mitigating evidence in order to urge the jury to choose life over death, and to ensure that the jury has the fullest picture possible in making such a life-or-death decision.

The **National Association of Criminal Defense Lawyers (NACDL)** is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The Rutherford Institute is an international nonprofit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute works tire-

lessly to resist tyranny and threats to freedom, ensuring that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed to persons by the Constitution and laws of the United States.

Amici have a strong interest in how courts interpret and apply the Federal Death Penalty Act (FDPA).

SUMMARY OF ARGUMENT

In the sentencing phase of his capital trial, Respondent Dzhokhar Tsarnaev sought to introduce evidence in mitigation that Tamerlan Tsarnaev, his older and only brother, had previously enlisted an accomplice to commit a brutal triple murder and robbery in Waltham, Massachusetts on the ten-year anniversary of September 11, 2001. Tamerlan bound, beat, and slit the throats of three men (one a childhood friend) in the name of jihad. This evidence supported Dzhokhar's core mitigation theory that his older brother was a violent jihadist who influenced him to participate in the Boston Marathon bombings and was more culpable for those crimes. But the district court excluded it.

Respondent explains that this ruling violated his constitutional right to present mitigation evidence. Respondent's Br. 15-16, 30-32. *Amici* agree with that conclusion and write to support Respondent's argument that the district court's ruling also violated Section 3593(c) of the Federal Death Penalty Act (FDPA), and that violation affords an independent ground for affirmance. *Id.* at 16-17, 33 (making a separate argument under the FDPA).

Respondent's brief also explains that the Waltham-murder evidence was not "unreliable," as the Government now argues. *Id.* at 26-30. *Amici* agree with that

as well, and write to further emphasize that Section 3593(c) does not authorize the wholesale exclusion of Waltham evidence on the grounds it could be "distracting" or "confusing," as the Government now also argues. U.S. Br. 18, 38, 44; *see also* Respondent's Br. 30-33 (addressing these arguments).

I. 18 U.S.C. Section 3593(c) allows relevant mitigation evidence to be excluded *only* if it creates a "danger of creating unfair prejudice, confusing the issues, or misleading the jury." None of those grounds applies here, and the trial court's exclusion of the evidence was therefore legal error.

Section 3593(c) sets a low bar for relevancy. Mitigation evidence that Dzhokhar's older brother Tamerlan had previously planned and recruited an accomplice to carry out brutally cruel murders in the name of jihad, and that Dzhokhar knew it, easily clears that bar.

Yet the district court excluded this evidence in part because the court considered it a "waste of time" and likely to be "confusing to the jury." Section 3593(c), however, narrowly cabins a trial court's discretion to exclude mitigation evidence. "Waste of time" is not a valid ground. And the mitigation evidence here was not "confusing." The Government argues that the Waltham evidence would have helped Dzhokhar only if the jury accepted the evidence as true and drew some inferences in Dzhokhar's favor. But whether the relevant Waltham evidence had mitigating value, and how much, was a core jury question—not a basis for exclusion under the FDPA.

The Government also maintains that the Waltham evidence would have created a distracting "mini-

trial." That is not a standalone basis for exclusion under the statute. And for good reason. *Any* presentation of mitigation evidence could be described as prompting a "mini-trial"—consider, for example, competing evidence surrounding the common mitigation theory that a capital defendant suffered an abusive upbringing. Resolving factual disputes core to a mitigation defense at sentencing is not an impermissible "mini-trial"; it is the trial. Moreover, even if the Government's concern were valid, the court erred by *wholly* excluding the Waltham evidence and denying Dzhokhar the opportunity to present this information "in some manner." *Johnson* v. *Texas*, 509 U.S. 350, 372 (1993).

The trial court's "confusion" logic suffers from another, independent error. Under Section 3593(c), excludable evidence must pose a risk of "confusing the *issues*," a danger which—if it existed—could have been eliminated with a limiting instruction to the jury. *Issues* are confused if the jury uses evidence to draw an impermissible inference. The risk of that here was zero. If the jury credited the Waltham evidence, it would have been for the exact—and permissible—purpose for which it was introduced: To show that Dzhokhar acted under Tamerlan's influence when committing the Boston Marathon bombings. Even if somehow there were a risk the jury could use the Waltham evidence for an impermissible reason, a limiting instruction would have addressed it.

II. The trial court's error was not harmless beyond a reasonable doubt. The Waltham-murder evidence showed that Tamerlan was a murderous jihadist with a history of influencing others to participate in brutal

crimes. Without that evidence before the jury, Dzhokhar's core mitigation theory was significantly undermined.

Influence by a co-conspirator is a powerful mitigating factor in any context. It speaks directly to the defendant's role and responsibility in committing his crimes and therefore lies at the center of the jury's sentencing decision. It is all the more significant where, as here, the co-conspirator was the defendant's older sibling. The Waltham evidence was not cumulative, stood at the heart of the mitigation theory, and was central to both the defense and prosecution's closing arguments. The Government cannot show beyond a reasonable doubt that the Waltham evidence would have failed to convince at least one juror to spare Dzhokhar's life.

The First Circuit's decision should be affirmed.

ARGUMENT

I. TAMERLAN'S PREVIOUS JIHADIST MURDERS AND RECRUITMENT OF AN ACCOMPLICE ARE POWERFUL PIECES OF MITIGATION EVIDENCE, AND SECTION 3593(c) PROVIDES NO BASIS TO EXCLUDE THEM.

A. The Waltham Evidence Was Relevant To Whether Dzhokhar Deserved The Death Penalty.

Dzhokhar's counsel at the penalty phase sought to present to the jury evidence that, with an accomplice, Tamerlan bound, beat, and slit the throats of three men, including a close friend of Tamerlan's, in the name of jihad and that Dzhokhar later learned Tam-

erlan had committed this triple homicide. That evidence tended to show Tamerlan instigated the later Marathon bombings and Dzhokhar, who had no history of violence, acted under his influence. That is powerful mitigation evidence and is relevant under Section 3593(c).

Section 3593(c) states that the "defendant may present any information relevant to a mitigating factor," and that "[t]he government may present any information relevant to an aggravating factor for which notice has been provided." Unlike the FDPA's guilt phase, the penalty proceeding invites the prosecution and defense to offer the jury "all possible relevant information about the individual defendant whose fate it must determine." *United States* v. *Fell*, 360 F.3d 135, 144 (2d Cir. 2004) (internal quotation marks omitted); *United States* v. *Lee*, 274 F.3d 485, 494 (8th Cir. 2001) ("Since the need to regulate the scope of testimony is less at the penalty phase than at the guilt phase of trial, parties may present evidence as to any matter relevant to the sentence." (internal quotation marks omitted)); *United States* v. *Jones*, 132 F.3d 232, 242 (5th Cir. 1998) (similar).

Mitigating evidence is relevant if it "tends logically to prove or disprove" a fact that the jury "could reasonably deem to have mitigating value." *Tennard* v. *Dretke*, 542 U.S. 274, 284 (2004) (internal quotation marks omitted). As long as the mitigation evidence "might serve 'as a basis for a sentence less than death,'" it is relevant, and thus presumptively admissible. *Id.* at 287 (quoting *Skipper* v. *South Carolina*, 476 U.S. 1, 5 (1986)).

Capital defendants have an Eighth Amendment right to present "any aspect of [their] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978). For that reason, "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Payne* v. *Tennessee*, 501 U.S. 808, 822 (1991). When Congress enacted the FDPA, and Section 3593(c) in particular, it is presumed to have legislated under this Court's broad definition of mitigation under the Eighth Amendment. *See, e.g.*, *Ryan* v. *Gonzales*, 568 U.S. 57, 66 (2013) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent." (internal quotation marks omitted)). The FDPA thus reflects this constitutional baseline.

Providing the jury with "all possible relevant information about the individual defendant" often benefits the prosecution's case as well. *Jurek* v. *Texas*, 428 U.S. 262, 276 (1976). Prosecutors routinely present evidence of a defendant's unadjudicated crimes to establish aggravating factors in a capital case's sentencing phase, *e.g.*, *United States* v. *Watts*, 519 U.S. 148, 151 (1997); *United States* v. *Lujan*, 603 F.3d 850, 856-857 (10th Cir. 2010)—even though such other-crimes evidence is generally inadmissible at the guilt phase. Fed. R. Evid. 404(b).

Here, the *defense* sought to introduce evidence of uncharged conduct at sentencing—the Waltham murders—and the prosecutors persuaded the trial court to exclude it. The court excluded the Waltham evidence despite an FBI affidavit relying on the confession of Ibragim Todashev, where Todashev admitted that he

was involved with the Waltham murders, that Tamerlan orchestrated the robbery, that Tamerlan initiated and carried out the executions, and that Todashev felt like he did "not have a way out." Pet. App. 67a-69a. The Government had used Todashev's confession to obtain a search warrant, swearing that "there is probable cause to believe that Todashev and Tamerlan planned and carried out the [Waltham] murder[s]." Pet. App. 81a n.47. Todashev's confession was documented in audio recordings, an FBI "302" summary report, and a statement written by him. *Id.* at 66a. That confession was corroborated by a proffer from Dzhokhar's close friend, Dias Kadyrbaev, that Dzhokhar told him in 2012 that he had learned Tamerlan committed the triple murder on the ten-year anniversary of the September 11 World Trade Center attacks, and that it was "jihad." *Id.* at 67a; J.A. 584.

This information easily clears relevancy's low bar at the penalty phase. Dzhokhar Tsarnaev was 19 years old at the time of the Boston Marathon bombings. He had no history of violence. Evidence that his 26-year-old brother, his accomplice in the bombings, previously recruited an accomplice to commit a vicious triple murder he regarded as "jihad" tends to show that Tamerlan planned the Boston Marathon bombings and influenced his younger brother to participate. Moreover, Tamerlan had become radicalized first, *see* J.A. 616 (eight jurors finding this mitigation factor existed), and sent Dzhokhar jihadist propaganda for over a year leading up to the bombings, *see* Respondent's Br. 5, 18 (collecting sources). Evidence that Tamerlan had previously killed for those radical beliefs further suggests that his notions of "jihad" also motivated the Boston Marathon bombings. Pet. App. 76a-78a.

Mitigation evidence regarding a co-conspirator's violent past and ability to influence others is relevant because it bears on the circumstances of the crime and the defendant's relative culpability in committing that crime. 18 U.S.C. §§ 3592(a)(3), (8) (mitigating factors); *see also Sumner* v. *Shuman*, 483 U.S. 66, 78-79 (1987). In *Mak* v. *Blodgett*, for example, the trial court excluded as irrelevant penalty-phase evidence that a co-defendant "previously asked others to shoot rivals and the shootings had occurred." 970 F.2d 614, 622-624 & n.13 (9th Cir. 1992) (per curiam). The court of appeals reversed, holding that evidence of the co-defendant's violent behavior spoke to the defendant's comparably lesser "autonomy and control in the crime" and therefore had potential mitigating value. *Id.* In *Cooper* v. *Dugger*, the Florida Supreme Court similarly held that evidence of a co-defendant's "reputation for violence" was relevant mitigation evidence because it could have persuaded the jury that the defendant "was easily led by" the co-defendant and "likely played a follower's role in the commission of the crime." 526 So. 2d 900, 902-903 (Fla. 1988).

The Waltham-murder evidence also makes Dzhokhar's other mitigation evidence "more vivid or real." Christopher B. Mueller & Laird C. Kirkpatrick, 1 Federal Evidence § 4:2 (4th ed. May 2021 update) (defining relevance). The seven-year age gap between the brothers, along with Tamerlan's "domineering" personality, support the theory that Dzhokhar was susceptible to being influenced by Tamerlan. Pet. App. 70a. Those who knew the brothers testified that Dzhokhar followed Tamerlan around "like a puppy" and "went along any time Tamerlan" gave direction. Respondent's Br. 4 (collecting sources). Evidence that

Tamerlan had earlier recruited an accomplice to commit jihad by slitting three men's throats on the anniversary of 9/11—and that his younger brother knew it—greatly heightens the significance of that other mitigation evidence, and ties together his main mitigation theory. *See* Mueller & Kirkpatrick, *supra*, § 4:2.

The Waltham evidence was relevant and was therefore presumptively admissible under Section 3593(c).

B. The Waltham Evidence Does Not Fall Into Any Of Section 3593(c)'s Three Categories For Exclusion.

Section 3593(c)'s "most expansive" standard for allowing mitigating evidence, *Tennard*, 542 U.S. at 284, is bookended by a highly restrictive standard for *excluding* such evidence. The statute allows trial judges to exclude relevant mitigation evidence only if the evidence presents a "danger of creating unfair prejudice, confusing the issues, or misleading the jury," and that danger "outweigh[s]" the evidence's "probative value." 18 U.S.C. § 3593(c).

The Waltham evidence does not fall into any of Section 3593(c)'s bases for exclusion, and the trial court did not even *assert* any of the statute's three exclusion categories. *Amici* agree with Respondent that the Waltham evidence was not excludable as unreliable. *See* Respondent's Br. 26-30. We write to further emphasize that the trial court's stated concerns of "waste of time" and "confusing to the jury," *see* J.A. 650, are not valid reasons for excluding the Waltham evidence under Section 3593(c). *See* Respondent's Br. 30-33.

1. "Waste Of Time" Is Not A Basis For Exclusion Under Section 3593(c).

The trial court ruled that relevant mitigation evidence could be excluded under Section 3593(c) because admitting it would be a "waste of time." J.A. 650; U.S. Br. 13. That was an error. Rule 403 authorizes trial courts to exclude relevant evidence on that basis. Section 3593(c) does not.

Rule 403, which generally governs admissibility during the guilt-innocence phase of a trial, offers six bases to exclude relevant evidence: "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Rule 403's provision for "undue delay, wasting time, or needlessly presenting cumulative evidence" allows trial courts to exclude relevant evidence if presenting it "would be time-consuming and [its] probative worth is limited or slight." Mueller & Kirkpatrick, *supra*, § 4:15. The rationale for this exclusion is "economies of trial and crowded calendars." Andrew K. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. Cal. L. Rev. 220, 243 (1976); Mueller & Kirkpatrick, *supra*, § 4:15 (court's time is a "public commodity"); *United States* v. *Smithers*, 212 F.3d 306, 316 (6th Cir. 2000) (similar).

But Section 3593(c), not Rule 403, governs admissibility during a federal capital sentencing proceeding, and Section 3593(c) is narrower by design. Relevant mitigation evidence may be excluded *only* if there is a "danger of creating unfair prejudice, confusing the issues, or misleading the jury." 18 U.S.C. § 3593(c). Congress left delay, wasted time, and presentation of cumulative evidence off the list.

Section 3593(c) thus calls for the "admission of evidence that might be excludable" under Rule 403. *Fell*, 360 F.3d at 144. By eliminating undue delay and waste of time as bases for exclusion, the statute allows "'the jury [to] have before it all possible relevant information about the individual defendant whose fate it must determine.'" *Id.* (quoting *Jurek*, 428 U.S. at 276). Section 3593(c) thus permits the jury "to consider in some manner all of a defendant's relevant mitigating evidence," even if it takes time do to so. *Johnson*, 509 U.S. at 372. That makes sense, given the life-or-death stakes. *See Abdul-Kabir* v. *Quarterman*, 550 U.S. 233, 246 (2007) (the jury must "be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual"); *see also Sumner*, 483 U.S. at 85 ("[T]he fundamental respect for humanity underlying the Eighth Amendment requires that the defendant be able to present any relevant mitigating evidence that could justify a lesser sentence.").

District courts have ample inherent authority to prevent a never-ending sentencing phase in capital cases. The FDPA "dispenses" with the standard rules of evidence, but it does not "divest[ ] the trial judge of his or her traditional authority to control the mode and order of the interrogation of witnesses and the presentation of evidence." *United States* v. *Purkey*, 428 F.3d 738, 759-760 (8th Cir. 2005). Trial courts thus retain their "inherent" authorities, including their "right to place reasonable limitations on the time allotted to any given trial." *In re Baldwin*, 700 F.3d 122, 129 (3d Cir. 2012) (quoting *Deus* v. *Allstate Ins. Co.*, 15 F.3d 506, 520 (5th Cir. 1994)). Moreover, Sec-

tion 3593(c) allows trial courts to "consider cumulativeness" at the sentencing phase, on the theory that massive amounts of cumulative evidence could unfairly prejudice the opposing party. *United States* v. *Sampson*, 486 F.3d 13, 43 (1st Cir. 2007); *see also United States* v. *Bolden*, 545 F.3d 609, 626 (8th Cir. 2008).

In sum, trial courts may enforce reasonable limits on the presentation of the mitigation evidence it admits, regulate how such evidence is presented, or exclude mitigation evidence that is so cumulative it unfairly prejudices the opposing party. But that is not what the district court did here. Section 3593(c) does not authorize trial courts to *altogether* exclude relevant mitigation evidence to avoid a "waste of time." The district court's contrary interpretation of Section 3593(c) was error.

2. The Waltham Evidence Created No Danger Of "Confusing The Issues."

The trial court offered a second reason for excluding the evidence: It predicted that it would have been "confusing to the jury." J.A. 650. That, too, was error.

a. To begin with, as Respondent explains, mitigating evidence is not "'confusing' just because it is contested." Respondent's Br. 32. The Government contends the Waltham evidence will confuse the jurors by forcing them to "decide exactly who did what in the Waltham apartment." *Id.*; *see also* U.S. Br. 42. But jurors regularly weigh competing evidence at the sentencing phase.

The Government offers several arguments challenging the Waltham evidence, for example: that the evidence was undermined by witness "credibility" problems, U.S. Br. 45; that even if true, the evidence is too

"attenuated" for the jury to infer that Tamerlan exercised influence over Dzhokhar, *id.* at 40; and, alternatively, that from the Waltham evidence, the jury could actually infer that Tamerlan did *not* have control over Dzhokhar, *id.* at 42.

These various attempts to discount the value of Dzhokhar's mitigating evidence all raise questions for the jury—not bases for exclusion. The jury "may not * * * be precluded from considering any relevant mitigating evidence." *Skipper*, 476 U.S. at 4 (internal quotation marks omitted) (discussing *Lockett*, 438 U.S. at 604)). And the jury must decide "whether the evidence is actually found to be mitigating." *Ex parte Slaton*, 680 So. 2d 909, 924 (Ala. 1996) (internal quotation marks omitted); *see also United States* v. *Higgs*, 353 F.3d 281, 327 (4th Cir. 2003) (jury must "be allowed to *consider* evidence that is proffered as mitigating," and it is up to the jury to find if that mitigator exists).[2]

That principle applies in force to the Government's contention that Todashev's testimony lacks "veracity" and was offered out of self-interest. U.S. Br. 42. Witness credibility is paradigmatically a jury issue. *United States* v. *Aquart*, 912 F.3d 1, 34 (2d Cir. 2018) (at Section 3593 penalty phase, holding that "witness credibility" must be left "exclusively for determination

[2] The Government also over-complicates the jury's task. The jury's job would have been to determine if the Waltham evidence, as presented, is mitigating, not to determine every detail about "what really happened during the Waltham crimes." U.S. Br. 42. Regardless of Tamerlan's specific actions, the jury could find that he was the driving force in the triple murder and committed the crime for jihad and then use those facts to infer that Dzhokhar acted under Tamerlan's influence—his core mitigation theory.

by the jury" (internal quotation marks and ellipsis omitted)). The same is true of the Government's argument that the Waltham evidence is too "attenuated" to have mitigating value. *Compare* U.S. Br. 40 *with, e.g.*, *People* v. *Sims*, 853 P.2d 992, 1028 (Cal. 1993) (allowing prosecutor to argue that defendant's "bad childhood" did not have any "mitigating effect" in view of other facts in the case).

In fact, the defense and prosecution regularly ask the jury to draw opposing inferences from the same facts—just as the Government could here. *See* U.S. Br. 42. A defendant's antisocial personality disorder, for instance, could show that the defendant may not be as culpable for his crimes (mitigating) or that the defendant may continue to be dangerous in the future (aggravating). *See Ledford* v. *Warden, Ga. Diagnostic Prison*, 975 F.3d 1145, 1159 & n.8 (11th Cir. 2020). Evidence of mental disability or childhood abuse is similarly a "two-edged sword" because it "may diminish [the defendant's] blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." *Abdul-Kabir*, 550 U.S. at 255 (internal quotation marks omitted). Defense counsel might point to a defendant's youth as a mitigating factor; the prosecutor might equally argue that the defendant's "youth was aggravating rather than mitigating." *Roper* v. *Simmons*, 543 U.S. 551, 573 (2005).

Section 3593 resolves this by setting a low bar for relevancy and rebuttal evidence, leaving it to the jurors—not the judge—to decide whether on balance defendant's evidence is truly mitigating and how much weight to afford it. *See* 18 U.S.C. § 3593(c). The Government's brief sets forth what would have been its

jury arguments that the Waltham evidence had little mitigating value. Those arguments do not demonstrate a risk of confusing the issues, and the trial court erred by wholly excluding the Waltham-murder evidence on that ground.

b. The Government further defends the trial court's "confusion" logic by arguing that allowing *any* evidence of the Waltham murders would have created a distracting "detour," or "mini-trial," on an "ancillary matter." U.S. Br. 45; *see also id.* at 18, 40, 43, 44. But at the sentencing phase, the Waltham murders were anything but ancillary. And regardless of the label, the trial court's excluding *all* information on the topic was error.

First, evidence that Tamerlan previously recruited an accomplice to commit a triple homicide in the name of jihad, and that Dzhokhar knew about it, was not a minor matter. These facts directly support Dzhokhar's central mitigation theory and are critical to the sentencing phase. *Parish* v. *City of Elkhart*, 702 F.3d 997, 1001 (7th Cir. 2012) ("The mini-trials of which the defendants complain * * * are merely the necessary engagements on the critical issues of the trial."); *Laney* v. *Celotex Corp.*, 901 F.2d 1319, 1320-21 (6th Cir. 1990) (evidence does not "confus[e] * * * the issues" when it speaks to a "fundamental question" in the case).

Indeed, Section 3593(c) *anticipates* factual disputes relating to mitigating and aggravating factors. Jeffrey L. Kirchmeier, *Beyond Compare? A Codefendant's Prison Sentence as a Mitigating Factor in Death Penalty Cases*, 71 Fla. L. Rev. 1017, 1064 (2019). The jury must weigh competing evidence when, for example, the defendant seeks to establish a history of child

abuse as a mitigating factor. *E.g.*, *Morton* v. *State*, 789 So. 2d 324, 332 (Fla. 2001) (per curiam) (undercutting defendant's child-abuse evidence with prosecution's evidence that defendant's mother later remarried a "stable" father figure). The jury weighs competing evidence when the prosecution seeks to prove that the defendant committed other unadjudicated crimes to support an aggravating factor. *See United States* v. *Corley*, 519 F.3d 716, 724-725 (7th Cir. 2008) (to determine if capital defendant committed previous unadjudicated crimes, jury must "weigh" the prosecution witness's "testimony" against defendant's "testimony"). And the jury must do so when either the prosecution or defense introduces mental-health evidence to establish an aggravating or mitigating factor. *See Sampson*, 486 F.3d at 50 (admitting opposing mitigating and aggravating mental-health evidence that was "freighted with contradictions," recognizing it provided "grist for the jury's mill").

Competing evidence pertaining to mitigating and aggravating factors is part of Section 3593(c)'s design: Additional relevant information makes the statute's sentencing phase more individualized and "less arbitrary." Kirchmeier, *supra*, at 1064; *see also Fell*, 360 F.3d at 143 ("[I]n order to achieve such 'heightened reliability,' *more* evidence, not less, should be admitted on the presence or absence of aggravating and mitigating factors." (citing *Gregg* v. *Georgia*, 428 U.S. 153, 203-204 (1976)). Section 3593(c) provides no basis to exclude Dzhokhar's most powerful mitigation evidence, even if the evidence takes time to present and opens the door to rebuttal evidence.

Second, concerns over a mini-trial are unfounded. Competing evidence over the Waltham murders

would not have significantly drawn out the sentencing phase. *See Thompson* v. *City of Chicago*, 722 F.3d 963, 974 (7th Cir. 2013) (trial court abused discretion in excluding other-acts evidence because it would entail a "mini-trial"; the excluded testimony would "take a 'half day' at most"). Dzhokhar's proposed evidentiary submission would have taken little time. Todashev and Tamerlan, the individuals at the center of the Waltham murders, were not alive to testify. And the Government has identified no alternative suspects or witnesses. Pet. App. 87a. There is simply no basis to believe that a "mini-trial" confusing the issues would have ensued.

Even if heaps of competing Waltham evidence did exist, the trial court could—and should—have allowed the jury to consider *some* of it. *United States* v. *Jones*, 554 F. App'x 460, 468-469 (6th Cir. 2014) (although seven witnesses testifying at sentencing about "prior acts" may have been too much, the trial court erred by "excluding all testimony" on the matter); *Kassel* v. *Gannett Co.*, 875 F.2d 935, 952 (1st Cir. 1989) (reversing Rule 403 ruling because "the exclusion ordered by the district court was *total*"); *see also Torres-Arroyo* v. *Rullan*, 436 F.3d 1, 8 (1st Cir. 2006) (encouraging a remedy "less drastic" than "excluding the evidence entirely"). Moreover, the trial court could have admitted any or all of the Waltham evidence and then guarded against any risk of confusion by instructing the jury to "consider" the Waltham evidence solely for the mitigating factors it was introduced to establish. *See Lujan*, 603 F.3d at 860; *see also Lee*, 274 F.3d at 494; *infra* 20-24.

What the trial court could *not* do under Section 3593(c) is exclude all evidence whatsoever of the Waltham murders—by far the most compelling evidence showing Tamerlan was a psychotically violent man who had previously committed jihad and that Dzhokhar acted under his older brother's influence. Dzhokhar was entitled to present that mitigating evidence "in some manner," and the trial court erred in depriving him of that opportunity. *Johnson*, 509 U.S. at 372.

c. The Government and district court's "confusion" logic suffers from another independent error. To be excluded under Section 3593(c), evidence must "confuse the *issues*." And the Waltham evidence presents no *issue* that the jury would be confused about—especially if given a proper limiting instruction.

Section 3593(c)'s "confusing the issues" language is borrowed from Rule 403. In matters of evidence, "confusing the issues" means the "confounding of separate issues, mistaking improper for proper ones, or focusing on a wrong issue." Paul F. Rothstein, Federal Rules of Evidence, Rule 403 (3d ed. May 2021 update).

To confuse the *issues*, there must be a risk the jury will use that evidence for an impermissible reason—i.e., to make "some illegitimate inference." Kenneth W. Graham, Jr., 22A Federal Practice & Procedure Evidence § 5216.1 (Wright & Miller) (2d ed. Apr. 2021 update) (jury confuses the issues when it uses evidence to make "impermissible" inferences about a defendant's character); *see also, e.g.*, *United States* v. *Elysee*, 993 F.3d 1309, 1344, 1345 (11th Cir. 2021) (third-party hearsay confession introduced to show "conduct of" investigating officers would "confus[e] the

issues" if the jury "impermissibly" used it to infer defendant's "guilt or innocence").[3]

The danger of "confusing the issues" is greatest where the evidence is tangentially relevant to one of the questions, crimes, elements, or defenses before the jury but more naturally and directly relates to questions, crimes, elements, or defenses *not* before the jury. For example, in a strict-liability statutory rape case, testimony that a victim "lied about her age" is relevant as impeachment evidence (properly before the jury), but likely more probative of a mistake-of-fact defense (*not* properly before the jury); the evidence would therefore "confus[e]" the jury "of the issues and available defenses" it must decide. *United States* v. *Wardlow*, 830 F.3d 817, 822 (8th Cir. 2016).[4]

---

[3] Section 3593(c)'s "misleading the jury" exclusion also is irrelevant to the arguments that evidence is "confusing" or "distracting." U.S. Br. 38, 44. That exclusion applies where a piece of evidence is "seductively," and unduly, "persuasive," Dolan, *supra*, at 242, as with certain "scientific and technical evidence." Wright & Miller, *supra*, § 5217.1. It has no role to play where jurors are simply required "to sort through conflicting evidence." U.S. Br. 44.

[4] *See also United States* v. *Hite*, 769 F.3d 1154, 1171 (D.C. Cir. 2014) ("prior testimony" confused the issues because it "presented a risk of suggesting to the jury that travel is one of the elements of the crime at issue"); *United States* v. *Spence*, 721 F.3d 1224, 1229 (10th Cir. 2013) (evidence "confuse[s] the issues" where it is a "back-door approach" to support a defense the district court disallowed); *United States* v. *Myers*, 524 F. App'x 479, 482 (11th Cir. 2013) (per curiam) (evidence of defendant's tax-protestor beliefs confuses the issues where he was charged with obstruction of justice, not tax crimes); *R.J. Reynolds Tobacco* v. *Cigarettes Cheaper!*, 462 F.3d 690, 698 (7th Cir. 2006) (evidence confuses the issues if it takes the "jurors' attentions" away from "the statutory requirements and defenses").

In that way, this basis for exclusion "speaks most appropriately to the doctrine of limited admissibility" because the jury is "asked to consider evidence for purposes other than the natural ones." Dolan, *supra*, at 240-241.

In *Lujan*, for example, the defense argued that evidence proffered by the government that the defendant had previously committed separate, unadjudicated violent murders would confuse the issues. 603 F.3d at 859-860. Rather than entirely excluding the government's evidence of these prior crimes, the court issued a limiting instruction to the jury that this evidence could be considered only as to the aggravating factor of "future dangerousness," for which it was introduced—not as "an independent aggravating factor." *Id.* at 860.

Similarly here, the trial court could have instructed the jury to consider the Waltham-murder evidence only with respect to Dzhokhar's "susceptibility to Tamerlan's influence, and his having acted under Tamerlan's influence," mitigating factors the jury was specifically asked to find. Pet. App. 77a. The verdict sheet asked the jurors to determine if Dzhokhar had established, as mitigating factors, that "Tamerlan planned, led, and directed the Marathon bombing," that Dzhokhar "acted under the influence of his older brother," or that Dzhokhar "would not have committed the crimes but for [h]is older brother Tamerlan." J.A. 614. A jury instruction cabining the Waltham-murder evidence would have ensured the evidence was used to answer those questions and no others. *See Lujan*, 603 F.3d at 859-860. And it would have prevented the court from "cut[ting] off in an absolute

manner the presentation of mitigating evidence." *Johnson*, 509 U.S. at 361.

In the proceedings below, the Government also argued that the jury would use the Waltham evidence to impermissibly find Tamerlan was a "more reprehensible person" than Dzhokhar based on other criminal acts. J.A. 978; *see also* J.A. 668. "[O]ther act evidence," however "always poses the problem of distinguishing impermissible uses of the evidence (character/propensity) from legitimate uses." Wright & Miller, *supra*, § 5216.1. At the *sentencing phase*, courts address that danger with limiting instructions. *See Lujan*, 603 F.3d at 860; *see also Lee*, 274 F.3d at 494; *supra* 8 (explaining that the prosecution routinely introduces other-acts evidence at sentencing); *cf. Corley*, 519 F.3d at 725 (rejecting argument to exclude prior-acts evidence because it "would apply to all instances in which unadjudicated offenses are raised in the penalty phase of a capital case").

Such an instruction would eliminate any prospect that the jury would impermissibly look to Tamerlan's general character to find that Dzhokhar did not deserve death, rather than (permissibly) examining whether Tamerlan exercised significant influence over his younger brother. That risk was essentially non-existent to begin with. Tamerlan was not Dzhokhar's co-defendant. He was not even alive during the trial. *Dzhokhar* was being sentenced, and if the jury credited the Waltham evidence, it would have been to draw conclusions about *Dzhokhar's* culpability for committing his crimes, his role in the offense, and the influence Tamerlan exercised over him.

The Government acknowledges, after all, that Tamerlan's influence over Dzhokhar was "the heart of the

mitigation case." J.A. 857. Dzhokhar sought and offered the Waltham-murder evidence to support that mitigation theory, J.A. 567, 581, 642, and the Government's opening brief underscores just how closely the Waltham-murder evidence is tied to it. Indeed, before this Court, the Government never contends that the Waltham evidence speaks to Tamerlan's general character or other, different issues—only that the Waltham murders are too "attenuated" to bear on whether Tamerlan influenced Dzhokhar to commit the Boston Marathon bombings, or, alternatively, that the evidence actually "undercut[s]" Dzhokhar's chief mitigation theory. U.S. Br. 40, 42.

Even if there somehow were a danger the jury would use the Waltham evidence impermissibly, the trial court could have eliminated that danger with the proper jury instruction.

II. SECTION 3595(a)'S HARMLESS ERROR STANDARD IS DEMANDING, AND THE GOVERNMENT FAILS TO MEET IT HERE.

An error is harmless if it "would have had no effect upon the jury's deliberations." *Skipper*, 476 U.S. at 8. That standard is exceedingly difficult to meet when the trial court erroneously excludes relevant, non-cumulative mitigation evidence. The Government has not come close to satisfying it.

To prove harmless error, the Government is required to demonstrate beyond a reasonable doubt that every single member of the jury would have sentenced Dzhokhar to death even had they heard that his older brother previously recruited an accomplice and slit the throats of three men to further jihad, and that Dzhokhar knew about it. 18 U.S.C. § 3593(e). That

would have to be shown in one of two ways: (1) the Waltham-murder evidence did not make it more likely that jurors would accept that Dzhokhar acted under Tamerlan's direction; or (2) that even if the jurors would have determined that the Waltham evidence shows Dzhokhar did act under Tamerlan's influence, that finding still would not have increased the likelihood that even a single juror would weigh the mitigating factors heavily enough to spare Dzhokhar's life. *See, e.g.*, *United States* v. *McCullah*, 76 F.3d 1087, 1102 (10th Cir. 1996) ("[W]e cannot say beyond a reasonable doubt that [the trial court's error] may not have influenced the jury in their findings of aggravating and mitigating factors, as well as affecting the weighing process itself.").

The Government fails to make either showing.

A. The Government Fails To Show Beyond A Reasonable Doubt That The Jury Was Just As Likely To Disbelieve Dzhokhar's Core Mitigation Theory If It Had Seen The Waltham Evidence.

Had it seen the Waltham evidence, the jury would have been far more likely to believe Dzhokhar's argument that he acted under his older brother's influence.

Dzhokhar sought to convince the jury that "Tamerlan planned, led, and directed the Marathon bombing" and that Dzhokhar "would not have committed the crimes but for [h]is older brother Tamerlan." J.A. 614. He attempted to introduce evidence showing Tamerlan "recruited" Todashev to participate in a robbery on September 11, 2011. Pet. App. 65a. While Todashev waited outside of the apartment, Tamerlan slashed his victims' throats. *Id*. Tamerlan then directed Todashev back inside to help remove evidence of his

murders. *Id.* at 66a. Todashev felt like "he did not have a way out" from doing what Tamerlan wanted. *Id.* at 86a. Thereafter, Dzhokhar learned that Tamerlan had committed those three murders to further his vision of jihad. *Id.* at 67a. This evidence powerfully showed "how and why Tamerlan inspired fear and influenced another to commit unspeakable crimes." *Id.* at 86a.

But the jury saw none of it. Instead, to show that Tamerlan masterminded the Marathon bombings and enlisted Dzhokhar into participating, the defense was left to cite evidence that Tamerlan was argumentative at his mosque, called the Imam a "hypocrite" twice, was angered by a store selling halal turkey on Thanksgiving, and may have abused his girlfriend. *Id.* at 71a. Without the Waltham murders, the jury had precious little to connect Tamerlan's abrasive, and at times abusive, personality with the recruitment of others to commit religiously-inspired murder. It heard *no* evidence that Tamerlan had murdered before, did so in the name of jihad, and successfully recruited an accomplice.

Even *without* the powerful mitigation evidence excluded below, three jurors found that Dzhokhar "acted under the influence of his older brother" and "would not have committed the crimes but for [h]is older brother Tamerlan." J.A. 614. Nine did not. If those nine jurors had heard the Waltham evidence, one or more may have found otherwise; and the three that did find Tamerlan to have influenced Dzhokhar might have assigned it more significance in the overall weighing of factors.

B. The Government Fails To Show Beyond A Reasonable Doubt That The Jury Would Have Sentenced Dzhokhar To Death Even If It Believed Dzhokhar Acted Under Tamerlan's Influence.

If more jurors found that Dzhokhar acted under Tamerlan's influence, it is possible—if not probable—that at least one of them would have relied on that information to spare his life. As this Court has explained, "the discretion" that a jury has to choose life or death can make proving harmlessness "more difficult." *Satterwhite* v. *Texas*, 486 U.S. 249, 258 (1988). Accordingly, this Court has always been "exceedingly cautious to ensure that a person found guilty of a capital offense is given every opportunity to present potentially mitigating evidence" to the jury. *Dutton* v. *Brown*, 812 F.2d 593, 602 (10th Cir. 1987) (en banc). Here, Tamerlan's influence over Dzhokhar was the cornerstone of his mitigation case and the exact type of evidence a juror might use to vote against the death penalty—even for a heinous crime.

First, whether a capital defendant acted under another's influence is a powerfully mitigating factor in any context. "Dominated parties bear less responsibility for what they do, even when the external pressure on their actions falls below the threshold of duress as a legal defense." George P. Fletcher, *Domination in Wrongdoing*, 76 B.U. L. Rev. 347, 348 (1996). That diminished responsibility ties directly into the defendant's "culpability," and therefore can be critical in persuading a jury that the defendant's life should be spared. *Saffle* v. *Parks*, 494 U.S. 484, 492-493 (1990) ("the appropriateness of the death penalty" is "a moral inquiry into the culpability of the defendant"

(internal quotation marks omitted)). Juries must be permitted to assess "whether any circumstance existed at the time of the murder that may have lessened [the defendant's] responsibility for his acts." *Sumner*, 483 U.S. at 78.

Juries have often spared the lives of defendants whose personal culpability does not match that of their domineering co-conspirators—even in notorious crimes. *See, e.g.*, *United States* v. *Moussaoui*, 591 F.3d 263, 266, 301-302 (4th Cir. 2010) (declining to sentence co-conspirator in 9/11 terrorist attacks to death); *United States* v. *Nichols*, 169 F.3d 1255, 1277 (10th Cir. 1999) (affirming trial court's life sentence for co-conspirator in Oklahoma City bombing, despite death sentence for Timothy McVeigh). Because it is "impossible" to know how the jury would have weighed evidence of the Waltham murders, the Government fails to carry its burden. *Satterwhite*, 486 U.S. at 260; *State* v. *Howard*, 369 S.E.2d 132, 138 (S.C. 1988) (excluding defendant's confession which showed he was "dominat[ed]" by co-defendant was reversible error); *Dutton*, 812 F.2d at 601 & n.8 (exclusion of testimony from defendant's mother that defendant was "immature" and a "follower" not harmless).

The Government contends that because the brothers' crimes were so "horrific," there is "no reasonable prospect" that evidence Dzhokhar acted under Tamerlan's influence "would have changed the jury's determination." U.S. Br. 47. But "egregiousness of the crime is only one of several factors that render a punishment condign—culpability, rehabilitative potential, and the need for deterrence also are relevant." *Glossip* v. *Gross*, 576 U.S. 863, 896 (2015) (Scalia, J., concurring). As this Court has explained, "[c]apital

punishment must be limited to those offenders who commit a narrow category of the most serious crimes *and* whose extreme culpability makes them the most deserving of execution." *Roper*, 543 U.S. at 568 (internal quotation marks omitted and emphasis added). The Government ignores the second half of that sentence.

Second, the Waltham evidence and the inferences that could be drawn from it were particularly significant in this case. Compare it, for example, with the evidence found to have been wrongly excluded in *Skipper* v. *South Carolina*, 476 U.S. 1 (1986). In *Skipper*, the capital defendant was barred from presenting testimony from jailers and regular visitors attesting to his good behavior while awaiting trial. *Id.* at 3. That testimony was mitigating; it tended to show that the petitioner "could lead a useful life behind bars if sentenced to life imprisonment." *Id.* at 7. This Court held that the trial court's exclusion of the jailers' testimony was not harmless: The evidence from jailers and other visitors of the defendant's good conduct was not cumulative, because a jury would "quite naturally" give testimony from disinterested witnesses "much greater weight" than similar testimony from the defendant himself. *Id.* at 8. And the prosecutor "himself, in closing argument, made much of the dangers petitioner would pose if sentenced to prison." *Id.*; *see also McCullah*, 76 F.3d at 1102 (finding error not harmless where "[t]here was no [similar] evidence" and inadmissible statements were "prominently featured" by the prosecution).

Both circumstances relevant in *Skipper* are present here. The Waltham-murder evidence was not cumulative. *No* other evidence presented to the jury

showed that Tamerlan was a domineering murderer, capable of inducing accomplices into participating in terrible crimes. *See Skipper*, 476 U.S. at 8; *Sowell* v. *Anderson*, 663 F.3d 783, 795 (6th Cir. 2011) (where "additional mitigating evidence differs in strength and in subject matter from the evidence the [sentencing] panel heard," it is not cumulative). And the Waltham-murder evidence supported Dzhokhar's chief mitigation theory, which the prosecution repeatedly attacked in closing arguments. *See Skipper*, 476 U.S. at 8; *see also United States* v. *Whitten*, 610 F.3d 168, 201 (2d Cir. 2010) (error not harmless beyond a reasonable doubt given the "government's emphasis on these arguments during summation").

The Government itself acknowledged that Tamerlan's coercive power over Dzhokhar was "the heart of the mitigation case." J.A. 857. The prosecution accordingly devoted a significant portion of closing arguments to refuting that mitigation theory and trying to convince the jury of Dzhokhar's independence from Tamerlan. *See, e.g.*, J.A. 816 ("Tamerlan Tsarnaev was not [Dzhokhar's] master"); J.A. 860-861 (Dzhokhar "was able to make up his own mind"); J.A. 861 (Dzhokhar, like Tamerlan, was "emotionally strong"); J.A. 862 (Dzhokhar was "strong and strong-willed"); *cf. Chapman* v. *California*, 386 U.S. 18, 25-26 (1967) (error not harmless beyond a reasonable doubt where prosecutor referred to lack of testimony with "machine-gun repetition"). The prosecutor dismissed what he characterized as "testimony that Tamerlan was bossy," arguing that it was simply "the way a lot of older siblings are with their younger siblings." J.A. 864. And toward the end of his closing, the prosecutor again acknowledged that the "centerpiece of [Dzho-

khar's] mitigation case" is whether "Tamerlan coerced, dominated and controlled" Dzhokhar. J.A. 871. He then asserted that Respondent has "the burden of proving" that mitigating factor, and asked, "Did they meet that burden?" *Id.*

The jury might have come to a very different conclusion had it learned that Tamerlan had previously enlisted an accomplice to commit a religiously-inspired, grisly triple-murder on the tenth anniversary of 9/11. After all, with nothing more to go on than the general evidence of Tamerlan's abrasive and occasionally abusive character, *three* jurors found that Dzhokhar "acted under the influence of his older brother," and "would not have committed the crimes but for [h]is older brother." J.A. 614. Moreover, the jury returned a life sentence for the great majority of Dzhokhar's death-eligible crimes. Respondent's Br. 9-10.

For those jurors already receptive to Dzhokhar's mitigation theory, it is impossible to conclude, *beyond a reasonable doubt*, that evidence of Tamerlan coercing another person to participate in homicide would not have persuaded at least one juror to vote against a death sentence. Similarly, it is not possible to conclude, beyond any reasonable doubt, that *not one* of the other jurors would have viewed the Waltham evidence as a reason Dzhokhar did not deserve to die.

The Government has not carried its burden to prove beyond a reasonable doubt that the exclusion of the Waltham-murder evidence was harmless error.

CONCLUSION

For these reasons, and those in Respondent's brief, this Court should affirm.

Respectfully submitted,

Catherine E. Stetson
Counsel of Record
Matthew J. Higgins
David K. Bastian
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
cate.stetson@hoganlovells.com

David M. Porter
CO-CHAIR, NACDL AMICUS COMMITTEE
801 I Street, 3rd Floor
Sacramento, CA 95814

Brian W. Stull
Cassandra Stubbs
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
201 W. Main Street, Suite 402
Durham, NC 27701

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, D.C. 20005

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911

Jennesa Calvo-Friedman
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

Matthew R. Segal
Ruth A. Bourquin
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS, INC.
211 Congress Street
Boston, MA 02110

Counsel for Amici Curiae

AUGUST 2021