Capital Case

No. _____

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. When a competent capital defendant and his counsel disagree on whether to present mitigating evidence depicting him as mentally ill, who gets the final say?

2. Does the Commerce Clause authorize Congress to regulate an intrastate, noneconomic, violent offense based solely on the defendant's pre-offense uses of interstate highways, GPS navigation, the Internet, and the telephone?

3. Should federal courts assess legislation enacted under the Thirteenth Amendment using the same tests that apply to legislation enacted under the Fourteenth and Fifteenth Amendments, where the three Reconstruction Amendments share substantively-identical enforcement provisions?

PARTIES TO THE PROCEEDING

Petitioner is Dylann Storm Roof, defendant-appellant below. The United States of America is the respondent on review.

STATEMENT OF RELATED PROCEEDINGS

United States v. Roof, United States District Court for the District of South Carolina, No. 15-cr-472-RMG (January 23, 2017)

United States v. Roof, United States Court of Appeals for the Fourth Circuit, No. 17-3 (August 25, 2021)

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PETITION FOR WRIT OF CERTIORARI

Dylann Roof respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is available at *United States v. Roof*, 10 F.4th 314 (4th Cir. 2021) (per curiam). App. 1a-94a. The district court's oral and written opinions regarding control of the defense mitigation case are unpublished, and are set forth at pages 95a-126a of the Appendix. The district court's opinion denying Roof's motion to dismiss the indictment is available at *United States v. Roof*, 225 F. Supp. 3d 438 (D.S.C. 2016). App. 127a-150a. The district court's opinion denying Roof's motion for a new trial is available at *United States v. Roof*, 252 F. Supp. 3d 469 (D.S.C. 2017). App. 151a-171a.

JURISDICTION

The court of appeals issued its judgment on August 25, 2021. App. 1a. It denied Roof's timely petition for panel rehearing on September 24, 2021, App. 172a, and denied Roof's timely petition for rehearing en banc on September 27, 2021, App. 174a. On December 15, 2021, this Court extended the deadline to file a petition for writ of certiorari by 60 days, to February 24, 2022. The petition is timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

Relevant statutory and constitutional provisions are reprinted in the Appendix. App. 177a-187a.

INTRODUCTION

Dylann Roof was convicted and sentenced to death in federal court for killing nine African-American parishioners during a Bible study session at their church in Charleston, South Carolina. The Fourth Circuit's affirmance of that result presents three separate questions, each meriting review.

First, certiorari is needed to resolve a deep divide among the lower courts over who—client or lawyer—gets to decide whether mitigation evidence will be introduced at a capital penalty hearing. Roof fired his lawyers and stood alone against the government at his sentencing, presenting no evidence or intelligible argument for his own life, after the district court told him that counsel could introduce evidence depicting him as mentally ill over his objection. But while that is the law in the Fourth Circuit and a handful of other jurisdictions, the vast majority of state and federal courts hold otherwise, leaving this deeply personal choice to a defendant. Had Roof been tried in any one of those majority jurisdictions, he would not have been forced to self-represent at his capital trial to block his own attorneys from presenting evidence he abhorred. Though his crime was undeniably horrible and the government's case in aggravation substantial, Roof had a meaningful non-mental-health mitigation defense that jurors should have heard.

Second, certiorari is warranted to resolve a conflict between the Fourth Circuit's decision in this case and the Court's Commerce Clause jurisprudence. Roof's attack on church parishioners epitomizes the sort of noneconomic, intrastate crime this Court's decisions place at the core of States' police power. The Fourth

Circuit's novel opinion conflicts with that precedent and stretches Congress's Commerce Clause authority beyond any limits, allowing federal prosecution of Roof's intrastate crime based on ubiquitous, pre-offense acts: driving intrastate on interstate highways, using the Internet or telephone, and navigating by GPS.

Third, certiorari is needed to harmonize a significant and growing tension between the tests for evaluating Congress's authority to enact legislation under the three Reconstruction Amendments. Though the Thirteenth, Fourteenth, and Fifteenth Amendments have identical enforcement clauses, the Fourth Circuit applied an outdated test to affirm Congress's power to criminalize hate crimes under the Thirteenth Amendment, instead of the stricter standards this Court's recent decisions require when reviewing Fourteenth and Fifteenth Amendment-based legislation. Other lower courts have recognized this dissonance, but say they are bound to apply the anomalous Thirteenth Amendment test absent direct guidance from this Court. Review is necessary to unify the standards for evaluating Congress's enforcement powers under the three Reconstruction Amendments.

STATEMENT OF THE CASE

A. The offense

On June 17, 2015, twenty-one-year-old Dylann Roof attended a Bible study session at the Emanuel African Methodist Episcopal church ("Emanuel") in Charleston, South Carolina. The parishioners welcomed him in, offering him a seat and some literature for the day's discussion. As the session was coming to a close,

Roof pulled out a gun and, tragically, shot and killed nine of the twelve parishioners present. App. 20a.

Roof had expected law enforcement to apprehend him at the scene and had no escape plan; he later told agents he anticipated being surrounded by officers and shooting himself, for which he had saved one magazine of bullets. But when police did not immediately arrive, Roof left the church and drove through the night. He was apprehended the following day, and gave a full confession in which he described the attack as an attempt to agitate race relations in America. App. 20a; Joint Appendix ("JA") 4279-80, 4290-92.

B. Roof is simultaneously prosecuted in state and federal court

The day after the shooting, the State of South Carolina charged Roof with nine counts of murder, three counts of attempted murder, and one weapon-possession count. Soon thereafter, the State noticed its intent to seek the death penalty. App. 21a; Materials Subject to Judicial Notice ("JN") 1-6, 44.

Despite the local prosecution, the federal government brought a concurrent capital case against Roof for obstructing the victims' religious exercise, in violation of 18 U.S.C. § 247(a)(2), (d)(1), (d)(3), causing and attempting to cause bodily injury because of the victims' race, in violation of 18 U.S.C. § 249(a)(1), and using a firearm in connection with those offenses, in violation of 18 U.S.C. § 924(c), (j). App. 21a; JA 49-63. The district court's jurisdiction was based on 18 U.S.C. § 3231.

As the overlapping cases progressed towards trial, the South Carolina Solicitor expressed frustration that the federal case was interfering with the State's vigorous prosecution and disrupting the state trial schedule. She particularly

objected to the federal trial occurring first, believing it would render a state verdict superfluous. Those protestations notwithstanding, Roof's federal trial commenced in December 2016; only after its conclusion was the state prosecution able to move forward. App. 22a; JN 38-39, 47-52, 67-69.[1]

C. Roof argues the federal government lacks constitutional authority to prosecute him for religious obstruction and hate crimes

1. The religious obstruction statute, 18 U.S.C. § 247(a)(2), prohibits using actual or threatened force to obstruct another's religious exercise, and was enacted pursuant to Congress's Commerce Clause power. Roof argued in district court that the Section 247(a)(2) counts exceeded that authority because his offense was noneconomic and intrastate. JA 213-27, 6973-77.

The government responded that the Commerce Clause reached Roof's offense because of his pre-offense uses of interstate channels and instrumentalities. First, in the months leading up to the attack, Roof had searched the Internet for names of African-American churches, and used GPS navigation to make several car trips from Columbia, South Carolina, to Charleston, South Carolina, where he drove by Emanuel. On one trip he spoke with a parishioner in the church parking lot, who told him when the Bible study sessions convened. Second, in February 2015, Roof placed a single, thirteen-second telephone call to the church from his home in Columbia, South Carolina, though no evidence showed he spoke with anyone. Third, that same month, Roof rented a website hosted by a foreign server. Fourth, hours

[1] After the federal court sentenced Roof to death, the State accepted his guilty plea in exchange for a life sentence and waiver of appeal.

before the crime, Roof posted a writing on the website discussing his beliefs about race. (No evidence suggested any of the victims read, or was aware of, that posting.) Finally, Roof drove on the highway from Columbia to Charleston, navigating by GPS, on the day of the attack. App. 20a-21a, 69a; JA 4270-72, 4602-03, 4858-89.

The district court rejected Roof's Commerce Clause challenge, agreeing with the government that Roof's offense was "in" interstate commerce because of his pre-offense acts: researching online, posting his motives using a foreign server, calling the church, and navigating to the church by GPS on interstate highways within South Carolina. The court also ruled the offense "in" interstate commerce because Roof used an interstate-traded gun, ammunition, and tactical pouch during the attack. App. 145a-146a, 155a-156a.

2. Roof separately challenged the government's authority to prosecute him for hate crimes under 18 U.S.C. § 249(a)(1). Section 249(a)(1) prohibits willfully injuring another person on the basis of race, color, religion, or national origin, and was enacted pursuant to Congress's Thirteenth Amendment authority to enforce that amendment's ban on slavery. Roof argued in district court that Section 249(a)(1) exceeded Congress's power by targeting conduct insufficiently related to slavery. He urged the court to evaluate the statute using stringent tests this Court applies to legislation passed under sister constitutional provisions, the Fourteenth and Fifteenth Amendments. JA 227-32.

The district court rejected this argument too, holding Section 249(a)(1) a valid exercise of Congress's Thirteenth Amendment power. App. 140a. Instead of

the stricter tests Roof advocated, the court held it was bound to apply the lenient rational basis test of *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). App. 135a.

D. Roof waives counsel to prevent a penalty-phase mental-health defense

Shortly before trial, upon learning that his court-appointed counsel planned to present penalty-phase evidence depicting him as autistic and psychotic, Roof stopped cooperating with them and sought the court's assistance. Roof explained that he hoped to avoid a death sentence, but cared more about not being labeled mentally ill, which he considered a fate worse than death. In Roof's view, he was *not* autistic or psychotic, and an admission otherwise would discredit the political motivations for his act and subject him to possible harm. App. 21a-27a, 35a-36a, 97a-119a.

Roof asked the court if he could instruct his attorneys to not present a mental-health defense, but the judge ruled that counsel alone had the authority to select mitigation evidence. Left with no other option for preventing jurors from being told that he was mentally ill, Roof reluctantly moved to discharge his attorneys and represent himself. The court found Roof competent to stand trial and self-represent, and granted his motion. App. 26a, 36a-38a, 50a-51a, 106a, 112a, 121a-126a.

Roof served as his own counsel through most of his capital jury selection, but repeatedly asked if his former (now-standby) counsel could speak on his behalf during the proceedings. The court rejected those requests. After struggling through the process on his own for several days, Roof asked the court to reappoint his

attorneys for the final day of jury selection and the guilt-innocence phase of trial—a motion the court granted. App. 37a-38a.

But Roof continued to insist on representing himself at the penalty phase unless counsel agreed to not depict him as mentally ill. His attorneys refused to do so, saying it was in Roof's best interest to assert a mental-health defense. And so, after the jury convicted Roof on all counts, he renewed his request to self-represent at the penalty phase, and the court granted his motion. App. 26a, 28a, 36a, 38a.

Penalty proceedings lasted four days, during which the government called twenty-five witnesses. In response, Roof presented no evidence, cross-examined no witnesses, failed to object to improper testimony, and made no coherent argument for a life sentence. After deliberating for a few hours, the jury sentenced Roof to die. JA 5793-94, 6583-84, 6712-13, 6775-83, 6810-42.

E. The Fourth Circuit affirms Roof's convictions and death sentence

Roof appealed his convictions and sentence to the United States Court of Appeals for the Fourth Circuit, which affirmed in full. App. 2a-94a.

1. While Roof's appeal was pending, this Court held in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), that counsel's admission of factual guilt over a defendant's objection violates the latter's Sixth Amendment right to be master of his own defense. Roof argued that he too was denied this autonomy right when the district court, without the benefit of *McCoy*, ruled that counsel could present a penalty-phase mental-health case over his objection. In support, Roof pointed to numerous pre- and post-*McCoy* decisions where courts vested defendants—not counsel—with the choice to present mitigation evidence at the penalty phase, or mental-health

defenses at trial. Because Roof did not need to discharge his attorneys to preclude mental-health mitigation, he asked the appeals court to find that his waiver of counsel—premised on the trial court's incorrect statement of the law—was invalid.

The Fourth Circuit rejected Roof's claim, deeming "the presentation of mental health mitigation evidence a classic tactical decision left to counsel even when the client disagrees." App. 40a (cleaned up). Though the court recognized that a defendant's interest in not being labeled mentally ill is "very important," it disagreed that *McCoy* had any relevance to Roof's case or that Roof had the right to decide whether to depict himself as mentally ill at the penalty phase of his trial. App. 40a-41a.

2. The Fourth Circuit also rejected Roof's Commerce Clause challenge to the religious obstruction counts. Though it thought the question "close," it held that Roof's pre-offense Internet use—researching churches and posting his ideology online—rendered the religious obstruction offense "in interstate commerce." App. 74a.[2] The court acknowledged that the Internet use was not a "key component" of the offense and did not occur "during the [offense's] commission." App. 73a-74a. But it nevertheless considered that use a "sufficient tie to the Commerce Clause" because of two factors: its "temporal proximity" to the offense and subjective "importance" to Roof. App. 74a. Alternatively, the court held that Roof's other pre-offense uses of interstate channels and instrumentalities—placing a telephone call

[2] The appeals court limited its analysis to whether Roof's religious obstruction was "in" interstate commerce, because the government expressly waived any claim that the offense "affected" interstate commerce. App. 73a.

to Emanuel four months before the offense, driving to Emanuel on interstate highways within South Carolina, and navigating by GPS—were sufficient when combined with his online acts. App. 75a.[3]

3. The Fourth Circuit likewise rejected Roof's Thirteenth Amendment challenge, upholding the hate crimes convictions under the rational basis test this Court set forth in *Jones*, 392 U.S. 409, and declining "to extend Fourteenth and Fifteenth Amendment caselaw to the Thirteenth Amendment," as Roof had urged. App. 79a-80a. Under *Jones*'s rational basis test, the Fourth Circuit held that Congress rationally found racially-motivated violence to be a badge and incident of slavery. App. 80a. Because Section 249(a)(1) addressed such violence, the Fourth Circuit held it was "appropriate legislation" and a valid exercise of Congress's Thirteenth Amendment enforcement power. *Id.*

REASONS FOR GRANTING THE WRIT

I. The Court should grant review to resolve a deep and persistent split in the lower courts over a capital defendant's authority to limit mitigation

The lower courts are intractably divided over whether defendants have the right to limit the presentation of mitigating evidence at capital penalty proceedings. An overwhelming majority hold that the choice to forgo mitigation is a fundamental

[3] The Fourth Circuit did not address the district court's separate conclusion that the crime was "in" interstate commerce due to Roof's use of an interstate-traded gun, ammunition, and tactical pouch. App. 75a n.46. But it suggested that the government's proffered cases in support of that conclusion, which permit Commerce Clause jurisdiction over a gun's movement through interstate commerce, were inapposite. App. 76a n.48.

decision reserved for competent defendants, not a strategic call for counsel to make. In direct conflict with these courts, a small minority, including the Fourth Circuit, entrust decisions about mitigating evidence to counsel alone. A third bloc has not taken a position, but—consistent with the majority view—holds that counsel are not ineffective when they defer to their clients' wishes to limit mitigation. These divisions persist despite this Court's emphasis in *McCoy* on the ample autonomy represented capital defendants retain over their defense.

This case presents an ideal opportunity to resolve the lower-court confusion, which presently risks the denial of defendants' constitutional rights and the integrity of capital verdicts. Without guidance from this Court, judges and attorneys face unanswerable practical and ethical dilemmas when defendants insist on waiving all or part of their mitigation cases. Indeed, in some jurisdictions, *governing state and federal authority are at odds* on how lawfully to proceed. It is vital that this Court grant certiorari and resolve the disagreement in the lower courts.

A. State and federal courts are intractably divided over whether capital defendants have the right to limit mitigation

There is a deep divide in the lower courts over whether the choice to limit mitigation is a fundamental decision left to defendants or a tactical call that counsel alone make.

1. At least twenty-three jurisdictions recognize a competent capital defendant's right to limit mitigation.[4] They honor defendants' decisions to forgo

[4] *Ramirez v. Stephens*, 641 F. App'x 312, 326-27 (5th Cir. 2016); *Blystone v. Horn*, 664 F.3d 397, 422 n.21 (3d Cir. 2011); *Tyler v. Mitchell*, 416 F.3d 500, 504 (6th Cir. 2005); *Wallace v. Davis*, 362 F.3d 914, 919-20 (7th Cir. 2004); *Dobbs v.*

specific mitigating evidence of, for example, a difficult childhood,[5] abuse,[6] incest,[7] and mental illness,[8] and to waive mitigation entirely.[9] Recently, in a case procedurally on all fours with Roof's, the Louisiana Supreme Court vacated a death sentence because the trial court incorrectly ruled the defendant could not prevent his attorneys from presenting mitigating evidence, making his decision to waive

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Turpin, 142 F.3d 1383, 1388 (11th Cir. 1998); *Singleton v. Lockhart*, 962 F.2d 1315, 1321-22 (8th Cir. 1992); *State v. Brown*, 330 So. 3d 199, 217-30 (La. 2021); *People v. Brown*, 326 P.3d 188, 204-11 (Cal. 2014); *Cooke v. State*, 97 A.3d 513, 537-38 (Del. 2014); *State v. Maestas*, 299 P.3d 892, 958-62 (Utah 2012); *State v. Robert*, 820 N.W.2d 136, 143-44 (S.D. 2012); *Commonwealth v. Puksar*, 951 A.2d 267, 287-93 (Pa. 2008); *Brawner v. State*, 947 So. 2d 254, 263-64 (Miss. 2006); *State v. Barton*, 844 N.E.2d 307, 314-15 (Ohio 2006); *Boyd v. State*, 910 So. 2d 167, 188-90 (Fla. 2005); *St. Clair v. Commonwealth*, 140 S.W.3d 510, 560-61 (Ky. 2004); *Zagorski v. State*, 983 S.W.2d 654, 655-61 (Tenn. 1998); *State v. White*, 508 S.E.2d 253, 271-73 (N.C. 1998); *People v. Steidl*, 685 N.E.2d 1335, 1343-44 (Ill. 1997); *State v. Roscoe*, 910 P.2d 635, 649-51 (Ariz. 1996); *Wallace v. State*, 893 P.2d 504, 510-13 (Okla. Crim. App. 1995); *Morrison v. State*, 373 S.E.2d 506, 508-09 (Ga. 1988); *Shaw v. State*, 207 So. 3d 79, 114-17 (Ala. Crim. App. 2014); *see also Wertz v. State*, 434 S.W.3d 895, 906 n.1 (Ark. 2014) (suggesting in dicta defendant may waive mitigation); *id.* at 909-14 (Fulkerson, S.J., concurring and dissenting in part) (two Justices would so hold); *State v. Thomas*, 625 S.W.2d 115, 123-24 (Mo. 1981) (describing capital defendant's broad control of defense decisions); *Trimble v. State*, 693 S.W.2d 267, 279 (Mo. Ct. App. 1985) (reading *Thomas* to require deference to defendant's mitigation decisions). One State recognizes a limited right to control mitigation decisions. *State v. Cross*, 132 P.3d 80, 95 (Wash. 2006) ("A competent defendant may forbid counsel to put on a mitigation case if his goal is to have the death penalty imposed," but "[o]nce he has decided the goal [is a life sentence], the strategy is largely in the hands of his attorneys."), *abrogated on other grounds by State v. Gregory*, 427 P.3d 621 (2018).

[5] *Wallace*, 362 F.3d at 919; *Zagorski*, 983 S.W.2d at 657.

[6] *Shaw*, 207 So. 3d at 114.

[7] *Maestas*, 299 P.3d at 909.

[8] *Wallace*, 362 F.3d at 919; *State v. Johnson*, 401 S.W.3d 1, 10 (Tenn. 2013); *Roscoe*, 910 P.2d at 649.

[9] *Robert*, 820 N.W.2d at 143-44; *State v. Hausner*, 280 P.3d 604, 628-30 (Ariz. 2012); *Grim v. State*, 971 So. 2d 85, 99-101 (Fla. 2007); *State v. Grooms*, 540 S.E.2d 713, 734-35 (N.C. 2000).

counsel unknowing, unintelligent, and involuntary. *State v. Brown*, 330 So. 3d 199, 217-30 (La. 2021). If Roof had been tried in any one of these jurisdictions, he would have had the autonomy to reject his attorneys' preferred mitigation defense, and would not have been forced to self-represent.

2. In direct conflict with this precedent, a small minority of courts, including the Fourth Circuit, hold that decisions about mitigating evidence are strategic choices that counsel alone make.[10] Because Roof was tried in a minority jurisdiction, he was denied any authority over his penalty-phase mitigation defense unless and until he waived counsel.

3. A third group of state and federal courts have not taken a position on whether defendants have the fundamental right to limit mitigating evidence, but hold that defense counsel are not ineffective for deferring to their clients' decisions to forgo mitigation.[11] Had Roof been tried in one of these jurisdictions, it is not clear how the trial court would have resolved his conflict with his attorneys—but counsel could have acquiesced to Roof's wishes without risking ineffectiveness.

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[10] App. 38a-41a; *Brecheen v. Reynolds*, 41 F.3d 1343, 1368-69 (10th Cir. 1994); *State v. Winkler*, 698 S.E.2d 596, 603 (S.C. 2010); *King v. State*, 631 S.W.2d 486, 501 & n.29 (Tex. Crim. App. 1982); *cf. Cross*, 132 P.3d at 95 (holding defendant chooses whether to present mitigation, but attorney controls evidentiary strategy); *State v. Koedatich*, 548 A.2d 939, 992-97 (N.J. 1988) (holding ethical canons allocate mitigation decisions to defendant, but judge may require independent presentation of mitigation to ensure reliability of capital sentencing).

[11] *Williams v. Woodford*, 384 F.3d 567, 621-23 (9th Cir. 2004); *Kirksey v. State*, 923 P.2d 1102, 1111-13 & n.8 (Nev. 1996); *see United States v. Wellington*, 417 F.3d 284, 288-89 (2d Cir. 2005) (holding counsel who comply with client decisions are not ineffective; citing mitigation-dispute cases in support). *But see Sanders v. Davis*, 23 F.4th 966, 987-91 (9th Cir. 2022) (suggesting decision may belong to defendant).

4. These divisions in the lower courts persist despite this Court's emphasis in *McCoy* on the significant Sixth Amendment autonomy a represented capital defendant retains. For while *McCoy* clarified the strength of a represented defendant's right to be master of his own *trial* defense, it did not resolve whether and how that right applies at capital *sentencing*. Indeed, the lower courts have taken inconsistent positions on *McCoy*'s impact on capital mitigation decision-making specifically,[12] and on the more general question of *McCoy*'s application to disputes that don't involve an admission of guilt.[13] Further guidance is needed.

B. This case is an ideal vehicle for the Court to resolve the recurring and important question presented

Whether counsel may override a capital defendant's choice to forgo available mitigation is a recurring question of national importance, and this case presents an ideal vehicle for its resolution.

1. Resolving the question presented is critically important because its regular recurrence—with no settled answer—puts in jeopardy both defendants' constitutional rights and the integrity of verdicts in our justice system's most

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[12] *Compare Brown*, 330 So. 3d at 228 (*McCoy* requires counsel to defer to defendant on mitigation decisions), *and People v. Amezcua*, 434 P.3d 1121, 1149-50 (Cal. 2019) (same), *with* App. 40a-41a (*McCoy* does not alter circuit precedent allocating mitigation decisions to counsel).

[13] *Compare United States v. Read*, 918 F.3d 712, 719-21 (9th Cir. 2019) (*McCoy* compels respecting right to preclude insanity defense), *and State v. Horn*, 251 So. 3d 1069, 1075 (La. 2018) ("*McCoy* is broadly written and focuses on a defendant's autonomy to choose the objective of his defense"), *with United States v. Wilson*, 960 F.3d 136, 143-44 (3d Cir. 2020) (*McCoy* doesn't give defendants control over whether to admit elements of offense other than factual guilt), *and United States v. Rosemond*, 958 F.3d 111, 123 (2d Cir. 2020) ("*McCoy* is limited to a defendant's right to maintain his innocence of the charged crimes.").

serious and high-stakes cases. Without hyperbole, the issue is one of life or death. When defendants are denied the autonomy to reject mitigating evidence, they frequently turn to self-representation, compromising the reliability of capital proceedings.[14]

And without this Court's direct guidance, judges and lawyers are forced to navigate ethical and practical minefields every time a capital defendant insists on waiving all or part of his mitigation case. The problem is particularly acute in jurisdictions where controlling state and federal precedent conflict, leaving no clear path to protect a defendant's rights and ensure the integrity of the verdict. *Compare State v. Maestas*, 299 P.3d 892, 959 (Utah 2012) (holding defendant controls "fundamental" decision about what mitigating evidence to present), *and Wallace v. State*, 893 P.2d 504, 510-13 (Okla. Crim. App. 1995) (similar), *with Brecheen v. Reynolds*, 41 F.3d 1343, 1368-69 (10th Cir. 1994) (holding defendant does *not* have "fundamental right" to make this choice); *see also Ramirez v. Stephens*, 641 F. App'x 312, 326-27 (5th Cir. 2016) (decision for defendant); *King v. State*, 631 S.W.2d 486, 501 & n.29 (Tex. Crim. App. 1982) (decision for counsel).

[14] *See*, *e.g.*, *Godinez v. Moran*, 509 U.S. 389, 392 (1993); *Brown*, 330 So. 3d at 218-21; App. 35a-38a; *cf. Maestas*, 299 P.3d at 955-57 (defendant sought to self-represent to prevent mitigation but withdrew request after judge instructed counsel to abide by defendant's wishes). The California Supreme Court recognized this concern as one reason to overrule its own precedent that previously denied defendants the autonomy to limit mitigation. *Brown*, 326 P.3d at 206-08 (explaining that giving counsel authority over mitigation decisions "would be detrimental to the attorney-client relationship and might lead defendants to imprudently seek self-representation").

2. This case is an ideal vehicle to resolve the lower-court confusion and decide who controls capital mitigation decisions. It presents the question on direct appeal, where de novo review applies, and does so cleanly. The conflict between Roof and his attorneys over whether to present mental-health mitigation, the trial judge's ruling that Roof could not limit the mitigation presentation unless he waived counsel, and Roof's choice to self-represent for no reason other than to achieve that result, are all undisputed. Roof timely asserted his right to control mitigation decisions in the district and appeals courts, and both expressly rejected his claim.

This case also powerfully demonstrates why it is so important that lower courts get the answer to the question presented right. Had Roof been tried in a jurisdiction that leaves mitigation decisions in a defendant's hands, he would not have waived counsel, and his trial would have looked entirely different. Instead of the spectacle of a mentally-impaired high-school-dropout representing himself in capital proceedings and doing—in the government's own words—"nothing to try to mitigate" his case,[15] the penalty phase would have been a true adversary hearing where experienced attorneys presented substantial non-mental-health mitigation,[16]

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[15] JA 6715.

[16] Counsel had prepared a strong non-mental-health mitigation defense for Roof that included expert testimony explaining how Internet algorithms featuring hateful content facilitated Roof's online radicalization; lay testimony that Roof was shy and nonviolent before he encountered this material; expert testimony on Roof's good behavior in pretrial detention and likely future as a nonviolent, compliant prisoner; evidence that Roof reacted passively when assaulted in jail; testimony—described by the trial court as "powerful"—from a pastor who mentored Roof and saw his potential for rehabilitation; and family witnesses who would have told

cross-examined government witnesses, objected to improper testimony and argument, and offered a coherent case for a life sentence. While it is impossible to know what the outcome of such a contested proceeding might have been, without question, jurors would have faced a wholly different—and more complete—picture as they deliberated on a life-or-death verdict.

C. The Fourth Circuit got it wrong

This case also calls for review because the Fourth Circuit got the answer to the question presented so wrong. A long line of Supreme Court precedent emphasizes a represented defendant's significant autonomy over his defense. And the Court's capital jurisprudence suggests a specific Sixth Amendment right to waive mitigation. These considerations, coupled with the deeply personal nature of a penalty-phase defense, have led most state and federal courts to place the choice to present mitigation in a defendant's hands. But even if lawyers could make some mitigation decisions, at a minimum, the near-universal view that defendants have the autonomy to forgo mental-health defenses at trial signals a fundamental right to reject labeling oneself as mentally ill. This Court should grant review to bring the Fourth Circuit's jurisprudence in line with this Court's and the majority position.

1. Over the past five decades, this Court has emphasized time and again the significant autonomy a criminal defendant retains over his defense. *McCoy*, 138 S. Ct. at 1508 (recognizing "Sixth Amendment contemplates a norm in which the

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jurors about their continued love for and ongoing relationship with Roof. JA 5251-52, 6521-23, 6964.

accused, and not a lawyer, is master of his own defense" (cleaned up)); *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017) (referring to "fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty"); *Faretta v. California*, 422 U.S. 806, 819-21 (1975) (discussing defendant's "personal" right to present "*his* defense"). That autonomy persists even when a defendant chooses representation by counsel. "For the Sixth Amendment, in granting to the accused personally the right to make his defense, speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." *McCoy*, 138 S. Ct. at 1508 (cleaned up); *see id.* ("The choice is not all or nothing: To gain assistance, a defendant need not surrender control entirely to counsel.").

The Fourth Circuit's decision in *Roof* wrongly rejects this approach. Rather than regard counsel as an assistant to a willing defendant, it casts her as an expert whose judgment trumps her client's, on even the most personal of questions. App. 40a-41a; *see United States v. Chapman*, 593 F.3d 365, 370 (4th Cir. 2010) (asserting that when "opinions of lay [defendants] are substituted for the judgment of legally trained counsel," it undermines the criminal justice system (internal quotation marks omitted)). That outdated view cannot be squared with this Court's insistence on respect for defendant autonomy.

2. The Fourth Circuit's decision also conflicts with Supreme Court cases suggesting, though not expressly holding, that capital defendants may waive mitigation. In *Schriro v. Landrigan*, 550 U.S. 465, 475 (2007), this Court affirmed a

death sentence where the defendant "instructed his counsel not to offer any mitigating evidence." It did the same in *Blystone v. Pennsylvania*, 494 U.S. 299, 306 n.4 (1990), where "contrary [to] advice from his counsel, petitioner decided not to present any proof of mitigating evidence during his sentencing proceedings." In line with that precedent, the majority of state and federal courts hold that a defendant may limit mitigation, with some citing *Landrigan* and *Blystone* in support.[17] The Fourth Circuit, alongside just a handful of other courts, is an outlier in rejecting that view.

3. What the Fourth Circuit gets wrong, the majority of jurisdictions gets right: "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." *Maestas*, 299 P.3d at 959. Whether to present mitigation is, "like the decision to testify or plead guilty, . . . very significant to the outcome of the proceedings." *Id.* It is also deeply personal. "Mitigating evidence often involves . . . intimate, and possibly repugnant, details about the defendant's life, background, and family. As such, like other decisions reserved for the defendant, the decision not to put this private information before the jury" implicates individual autonomy and should be left to defendants. *Id.*; *see McCoy*, 138 S. Ct. at 1508 (respecting defendant's autonomy "to avoid, above all else, the opprobrium that comes with admitting" stigmatizing facts).

[17] *See, e.g.*, *Maestas*, 299 P.3d at 960; *Robert*, 820 N.W.2d at 143-44; *Wallace*, 893 P.2d at 510.

4. Even if some mitigation decisions might be considered strategic, the choice to label oneself mentally ill is so personal that it goes beyond trial tactics. It is a decision that, in many ways, resembles the choice to present an insanity or diminished capacity defense, which nearly all jurisdictions reserve for defendants. *See United States v. Read*, 918 F.3d 712, 719 n.2 (9th Cir. 2019) (collecting cases); *Johnson v. State*, 17 P.3d 1008, 1013-15 & n.14 (Nev. 2001) (same); *cf. Breton v. Comm'r of Corr.*, 159 A.3d 1112, 1130-36, 1145-46 & nn.11-12 (Conn. 2017) (analogizing choice to reject mental-incapacity defense to waiver of mitigation). While some courts protect the right to forgo an insanity defense because asserting it involves admitting guilt, others recognize the "grave, personal implications" of proclaiming oneself mentally ill "that are separate from [an insanity defense's] functional equivalence to a guilty plea." *Read*, 918 F.3d at 721; *see State v. Tribble*, 67 A.3d 210, 230 (Vt. 2012); *State v. Bean*, 762 A.2d 1259, 1265-67 (Vt. 2000); *Treece v. State*, 547 A.2d 1054, 1060 (Md. 1988). These include not "contradicting [one's] own deeply personal belief that he is sane," *Read*, 918 F.3d at 721, avoiding "the social stigma associated with an assertion or adjudication of insanity," *id.*, and—where "the conduct in question involves what the defendant views as a political, religious, or sociological protest"—the possibility that asserting a mental-impairment defense "may rob the protest of much of its significance in the defendant's eyes," *Treece*, 547 A.2d at 1060. The same considerations may inform a capital defendant's wish to not depict himself as mentally ill; they are the precise concerns that Roof expressed at trial. Because mitigating evidence of mental illness

affects these especially personal and fundamental interests, the choice to present mental-health mitigation should rest with the defendant, even if other mitigation decisions are outside his authority.

The Fourth Circuit's opinion deepens a lower-court divide and is fundamentally wrong. This Court should grant certiorari.

II. The Court should grant review because the Fourth Circuit's opinion conflicts with this Court's Commerce Clause jurisprudence

Certiorari is separately warranted to resolve a conflict between the Fourth Circuit's opinion and this Court's Commerce Clause precedents.

The extent of federal authority over local violent crime cuts to the heart of States' role in the Framers' two-tiered system of government. That design limits Congress to "enumerated powers," *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819), while reserving "numerous and indefinite" powers to the States. *United States v. Lopez*, 514 U.S. 549, 552 (1995) (internal quotation marks omitted). The Framers entrusted most daily affairs to state governments because they are "more local and more accountable," *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012), and to guard against accumulation of "arbitrary power," *Bond v. United States*, 564 U.S. 211, 222 (2011). Of States' traditional police power there is "no better example . . . than the suppression of violent crime and vindication of its victims." *United States v. Morrison*, 529 U.S. 598, 618 (2000).

The federal government's prosecution of Roof's intrastate attack under the religious obstruction statute, 18 U.S.C. § 247(a)(2), invaded that core state power—a result the Fourth Circuit wrongly sanctioned by reading any limits out of

Congress's Commerce Clause authority through a novel and expansive interpretation of its scope. *Lopez* and *Morrison* forbid such unbounded interpretations of the Commerce power, and even in the commercial context this Court has refused to hold transactions "in" interstate commerce based on prior or subsequent uses of interstate channels and instrumentalities. The Fourth Circuit countermanded those decisions, stretching the "in" interstate commerce category into a gaping end-run around *Lopez* and *Morrison* by extending it to any local, intrastate crime preceded by the defendant's driving intrastate on interstate highways, searching or posting on the Internet, using the telephone, or navigating by GPS—conduct so commonplace as to precede most any modern-day offense. If not corrected, the Fourth Circuit's novel, far-reaching interpretation threatens to enable federal regulation of virtually any violent crime, obliterating States' traditional primacy over criminal law and creating a federal police power this Court "*always* ha[s] rejected." *Lopez*, 514 U.S. at 584 (Thomas, J., concurring).

A. The Fourth Circuit's decision conflicts with *United States v. Lopez* and *United States v. Morrison*

1. The Constitution's Interstate Commerce Clause, U.S. Const. art. I, § 8, cl. 3, permits Congress to regulate two basic categories of activity. First, activity that is "in" interstate commerce because it involves interstate travel or use of interstate instrumentalities like railroads, highways, or the Internet. And second, activity that—though wholly intrastate—has a "substantial effect" on interstate commerce. *United States v. Darby*, 312 U.S. 100, 118-19 (1941); *see Perez v. United States*, 402 U.S. 146, 150 (1971).

In *Lopez*, this Court refined these categories into three prongs: (1) "use of the channels of interstate commerce," such as highways and rail lines; (2) "instrumentalities of interstate commerce," like automobiles and aircraft, "or persons or things in [i]t"; and (3) intrastate activities "that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59. Congress refers to the first two *Lopez* prongs in statutes with the shorthand "in [interstate] commerce," while using "affecting [interstate] commerce" to denote the third. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115-17 (2001); *United States v. Ballinger*, 395 F.3d 1218, 1231 (11th Cir. 2005) (en banc).

2. In *Lopez* and *Morrison*, this Court cabined Congress's ability to regulate intrastate crime under the third, "substantially affects," prong, mandating a tight connection between the regulated activity and the interstate effect. But those cases also defined "first principles" for the Commerce Clause as a whole, applicable to all three prongs. *Lopez*, 514 U.S. at 552. First, Congress cannot regulate everything under its Commerce power, and courts cannot interpret the Commerce Clause so broadly that it reaches conduct "completely internal" to one State or "obliterate[s] the distinction between what is national and what is local." *Id*. at 552-53, 557 (internal quotation marks omitted); *see Morrison*, 529 U.S. at 608, 616 n.7 (same). And second, Congress's power to regulate commerce is at its nadir in the realm of violent crime—quintessentially noncommercial, local activity at the core of States' police power. *Lopez*, 514 U.S. at 561 & n.3; *Morrison*, 529 U.S. at 610-11, 618.

To effectuate these bedrock principles, *Lopez* and *Morrison* forbade Congress from regulating violent crime only tenuously linked to interstate commerce. In *Lopez*, this Court struck a federal prohibition on intrastate gun possession near schools—"a criminal statute" having "nothing to do with 'commerce' or any sort of economic enterprise." *Lopez*, 514 U.S. at 561. The Court deemed any link between intrastate gun possession, the economic impact of crime, and decreased national productivity fatally expansive; it would extend to "not only all violent crime, but all activities that might lead to violent crime," destroying "any limitation on federal power" in an area "where States historically have been sovereign." *Id*. at 564.

Likewise, the Court in *Morrison* struck a federal regulation of gender-based violence as beyond Congress's Commerce Clause power, stressing the attenuated nature of any "causal chain" between such violence and commerce between the States. *Morrison*, 529 U.S. at 615. As in *Lopez*, predicating Commerce Clause authority on such indirect connections would "allow Congress to regulate any crime" and "obliterate the Constitution's distinction between national and local authority." *Id.* The Court explained that "the regulation and punishment of intrastate violence not directed at [interstate commercial] instrumentalities, channels, or goods has always been the province of the States," not Congress. *Id.* at 618 (cleaned up).

3. The Fourth Circuit eviscerated *Lopez*'s and *Morrison*'s limits by opening a vague and far-reaching realm of criminal conduct to federal Commerce Clause regulation. Though the government conceded Roof's obstruction of the victims' religion did not "substantially affect" interstate commerce under prong 3, App. 73a,

the Fourth Circuit held it was "in interstate commerce" under prongs 1 and 2 because of commonplace acts Roof undertook beforehand: using GPS navigation, driving intrastate on interstate highways, using the telephone, and searching and posting on the Internet. The Fourth Circuit did not even require those acts to be a "key component of the offense" or occur during its commission. App. 73a-74a. Indeed, Roof's Internet posting—the primary focus of the Fourth Circuit's ruling—did not further the offense at all because, as none of the victims was aware of it, it did not obstruct their religious exercise.

The appeals court's decision is irreconcilable with *Lopez* and *Morrison*. Its reliance on ubiquitous, pre-offense acts that need not even further the offense embraces precisely the attenuated-linkages approach that *Lopez* and *Morrison* rejected. The opinion also conflicts with *Morrison*'s bar against federal regulation of intrastate violent crime "not directed at [interstate commercial] instrumentalities, channels, or goods." *Morrison*, 529 U.S. at 618. Far from leaving such local crime's regulation to the States, as *Morrison* directs, it creates a vast and unbounded category of federally-regulated "commuter criminals,"[18] who drive or pick up the telephone before engaging in violent acts not directed at any interstate concerns. *Id.*[19] The Fourth Circuit's opinion thus usurps the core zone of State sovereignty—

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[18] Colin V. Ram, *Regulating Intrastate Crime: How the Federal Kidnapping Act Blurs the Distinction Between What Is Truly National and What Is Truly Local*, 65 Wash. & Lee L. Rev. 767, 770 (2008).

[19] While two other circuits have cited pre-offense uses of instrumentalities to support Commerce Clause jurisdiction, those cases involved state line crossings for the purpose of committing the offense or use of instrumentalities in the commission of the crime itself. *United States v. Small,* 988 F.3d 241, 252 (6th Cir. 2021)

violent crime—by enabling Congress to penalize any assault that follows highway-driving, GPS-, telephone-, or Internet-use, or whatever combination of such acts a particular court finds sufficiently subjectively "importan[t]" to the defendant and "proxim[ate]" to the offense. App. 74a. The breadth and indeterminacy of this approach obliterates *Lopez* and *Morrison*'s required distinction between "what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18.

B. The Fourth Circuit's decision conflicts with this Court's commercial Commerce Clause jurisprudence

The Fourth Circuit's expansion of *Lopez* prongs 1 and 2 also conflicts with this Court's limited interpretation of those prongs in the commercial regulation context.

1. Even in the commercial realm, where Congress's Commerce power is at its zenith, this Court has refused to find transactions "in" interstate commerce unless they actually cross state lines or directly target interstate channels or instrumentalities. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542-44 (1935) (transactions "in" interstate commerce must be "part of interstate commerce"); *see Gonzales v. Raich*, 545 U.S. 1, 34 (2005) (Scalia, J., concurring) (*Lopez* prongs 1 and 2 "are the ingredients of interstate commerce itself"). This limited category includes interstate transfers of funds,[20] interstate purchases of

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(defendants crossed state lines and used a rental car "in the commission of the crime" of kidnapping); *Ballinger*, 395 F.3d at 1224 (multi-state church-arson spree where defendant crossed state lines six separate times to burn churches in four States).

[20] *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 245 (1980).

equipment,[21] employees engaged in interstate transportation,[22] and other types of "direct[] engage[ment] in the production, distribution, or acquisition of goods or services in interstate commerce." *United States v. Am. Bldg. Maint. Indust.*, 422 U.S. 271, 283 (1975).[23]

Transactions merely *preceded* by interstate acts, by contrast, are not "in" interstate commerce, because interstate commerce ends "when movement of the item in question has ceased in the destination state." *McElroy v. United States*, 455 U.S. 642, 653 (1982) (collecting cases); *see Carter v. Carter Coal Co.*, 298 U.S. 238, 309 (1936) (holding "when interstate commercial intercourse" concludes, "federal regulatory power ceases").[24] In *A.L.A. Schechter*, for example, this Court held the slaughter and sale of chickens in intrastate warehouses was *not* "in" interstate commerce, though the chickens had previously been transported from out of state. *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 543. Likewise, the Court held in *Gulf*

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[21] *United States v. Robertson*, 514 U.S. 669, 671 (1995).

[22] *Circuit City Stores, Inc.*, 532 U.S. at 109, 117-18.

[23] *See also Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 520 (1941) (interstate rivers); *Associated Press v. Nat'l Labor Rel. Bd.*, 301 U.S. 103, 125-26 (1937) (interstate news-exchange agencies); *United States v. Ferger*, 250 U.S. 199, 204-06 (1919) (interstate bills of lading), *Caminetti v. United States*, 242 U.S. 470, 491 (1917) (transporting women interstate); *Champion v. Ames*, 188 U.S. 321, 357-58 (1903) (interstate transportation of lottery tickets).

[24] *See also United States v. Patton*, 451 F.3d 615, 621-22 (10th Cir. 2006) (holding "channels" and "instrumentalities" prongs are confined to "interstate transportation itself, not manufacture before shipment or use after shipment," and "things actually being moved in interstate commerce, not all people and things that have ever moved across state lines"); *cf. Sebelius*, 567 U.S. at 556 (holding Commerce Clause doesn't permit Congress to regulate conduct of individuals not currently active in the health insurance market, simply because they may later become active in it).

Oil Corp. v. Copp Paving Co., Inc., 419 U.S. 186, 195-97 (1974), that manufacturing concrete for subsequent use in interstate highways is not itself an activity "in" interstate commerce. Nor is the intrastate purchase, from local distributors, of janitorial equipment previously shipped from out of state, since, "[b]y the time [of the purchase], the flow of commerce ha[s] ceased." *Am. Bldg. Maint. Indust.*, 422 U.S. at 285. In each of these cases, the Court required a contemporaneous link between the regulated activity and interstate commerce, refusing to "expand the concept of the flow of commerce" to any "activities that are perceptibly connected to its instrumentalities" through prior or subsequent interstate transactions. *Gulf Oil*, 419 U.S. at 198. Such reasoning would rely on a "chain of connection [that] has no logical endpoint," and establish "limits nebulous in the extreme." *Id.*

2. If Congress's prongs 1 and 2 "in" interstate commerce authority cannot reach even *commercial* intrastate transactions preceded by interstate movement, it certainly cannot extend to *noncommercial*, intrastate, *criminal* acts whose only tie to interstate commerce is the defendant's ancillary use of highways, a GPS device, the telephone, or the Internet at some earlier point in time. The same danger of nebulous, nonexistent limits on the "in" interstate commerce power this Court warned against in *Gulf Oil* is present in the Fourth Circuit's open-ended extension of prongs 1 and 2 to pre-offense acts. Indeed, the Fourth Circuit's reliance on such attenuated connections to interstate channels and instrumentalities here has even less justification than the rejected linkages in civil cases like *Gulf Oil*, because Roof's case concerns an area—violent crime—with no commercial aspect at all.

C. This case is an ideal vehicle to clarify Congress's authority to regulate intrastate violent crime under *Lopez* prongs 1 and 2

This case provides an ideal opportunity to affirm *Lopez*'s and *Morrison*'s application to the Commerce Clause's "channels" and "instrumentalities" prongs because it involves a clearly intrastate crime. As the Fourth Circuit acknowledged, Roof's only uses of interstate channels and instrumentalities occurred outside the actual offense: the act of religious obstruction defined in Section 247(a)(2). App. 73a-74a.[25] And that offense—an in-person physical attack inside a church—exemplifies

[25] Because Section 247(a)(2) punishes religious obstruction itself, not interstate travel or use of interstate instrumentalities to further religious obstruction, it is distinguishable from statutes that implicate *Lopez* prongs 1 and 2 because they do criminalize interstate travel or interstate-instrumentality use. *Cf. Carr v. United States*, 560 U.S. 438, 454 (2010) (holding offense is the "conduct at which Congress took aim"). While this Court has held that Congress can punish interstate travel or use of interstate instrumentalities to "promote" intrastate harm, *Brooks v. United States*, 267 U.S. 432, 436 (1925), that holding only applies to congressionally-defined offenses that include or consist of interstate travel or use of an interstate instrumentality. *Cf. United States v. Morgan*, 748 F.3d 1024, 1031 (10th Cir. 2014) (upholding statute penalizing *"us[ing] . . .* any . . . [interstate] *instrumentality"* to commit or "further[]" kidnapping (emphasis added)); *United States v. Campbell*, 783 F. App'x 311 (4th Cir. 2019) (same); *United States v. Mandel*, 647 F.3d 710, 712 (7th Cir. 2011) (upholding statute criminalizing "us[ing]" interstate facilities to further murder-for-hire); *United States v. Marek*, 238 F.3d 310, 317 (5th Cir. 2001) (en banc) (same). Unlike the purely intrastate religious obstruction offense defined in Section 247(a)(2)—which makes no mention of interstate channels or instrumentalities—such statutes define the crime as interstate movement, use of interstate instrumentalities, or possession of things in interstate commerce, to further some harmful result. *See Kentucky Whip & Collar Co. v. Illinois Cent. R. Co.*, 299 U.S. 334, 348 (1937) (Congress can regulate the transportation in commerce of goods or people to prevent harm); *United States v. Chesney*, 86 F.3d 564, 570 (6th Cir. 1996) (holding felon-in-possession statute a valid exercise of the Commerce authority because possession of an interstate-traded firearm is part of interstate "economic activity" including shipping, transporting, and receipt).

the noneconomic, intrastate crime *Lopez* and *Morrison* locate at the core of States' police power.[26]

Nor does any alternative basis support Commerce Clause jurisdiction in this case. *Lopez*'s independent "affecting commerce" prong was not at issue because the government expressly waived reliance on it. App. 73a. And though the government separately asserted jurisdiction based on Roof's use of interstate-traded items during the offense—a gun, ammunition, and tactical pouch—the Fourth Circuit declined to address that argument. App. 75a n.46. Indeed, the appeals court recognized that the government's alternative theory was untenable because it rested on felon-in-possession cases, which affirm Congress's power to "proscribe possession of an item—a gun—and that item is the object that must move through interstate commerce," whereas "the religious-obstruction statute does not focus on the possession of an item" at all, "but rather the offense of obstructing religion itself." App. 76a & n.48.[27]

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[26] Whereas religious obstruction could potentially be accomplished "in" interstate commerce through threatening telephone, mail, or email messages, or by mailing destructive items, no such facts are present here. App. 73a-74a.

[27] Though Congress can regulate an interstate-traded gun's possession as one link in the interstate firearms trade, the mere fact that a gun has previously traveled interstate does not similarly justify federal jurisdiction over any violent offense subsequently committed using it; the link between the crime and the gun's past interstate movement is too attenuated. *See e.g., Scarborough v. United States,* 431 U.S. 563, 575 (1977) (gun's prior interstate movement suffices for felon-in possession statute); *United States v. Singletary*, 268 F.3d 196, 204 (3d Cir. 2001) (felon-in-possession statute "addresses items sent in interstate commerce and the channels of commerce themselves"); *Chesney,* 86 F.3d at 569-70 (felon-in-possession statute is part of a comprehensive regulation of the interstate firearms trade); *United States v. Kallestad*, 236 F.3d 225, 229 (5th Cir. 2000) ("It is one thing for Congress to prohibit possession of a weapon that has itself moved in interstate

Finally, the Fourth Circuit's decision sets a dangerous precedent. The ubiquity of modern telecommunications cannot license Congress to regulate all human activity or "punish felonies generally." *Cohens v. Virginia*, 19 U.S. 264, 428 (1821); *see Sebelius*, 567 U.S. at 557 (Congress cannot regulate all human activity); *cf. Bond*, 572 U.S. at 848, 860 (local poisoning not a federal matter); *Jones v. United States*, 529 U.S. 848, 857-58 (2000) (no general federal arson law). If everyday, pre-offense uses of highways, the Internet, and the telephone suffice to confer federal jurisdiction, no violent offense is outside Congress's reach. And noneconomic crime will no longer be the province of the States; instead, Congress's regulatory power will extend just as far in the area of violent crime as it does over economic transactions at the heart of commerce.

Federalism is the casualty of this approach. Twenty-nine States prohibit religious obstruction under a variety of locally-tailored laws. JA 222, 247-49. Extending federal regulation to virtually any act of religious obstruction—as the Fourth Circuit's holding does—deprives States of the final say on whether and how such conduct is punished, and blurs the line between federal and State responsibility at the core of the Framers' constitutional scheme. *See Lopez*, 514 U.S.

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commerce, but it is quite another thing for Congress to prohibit homicides using such weapons."); *United States v. Rodia*, 194 F.3d 465, 473 (3d Cir. 1999) (holding the connection between production of child pornography and prior interstate movement of camera and film too attenuated). Indeed, neither this Court nor any federal court of appeals has held that Commerce Clause jurisdiction extends to any violent crime committed using an interstate-traded weapon or item.

at 561 n.3; *id.* at 583 (Kennedy, J., concurring) (explaining broad federal regulation discourages State experimentation with policy solutions).

This Court should grant certiorari to remedy the direct conflict between the Fourth Circuit's Commerce Clause holdings in this case and the Court's longstanding limitations on Congress's Commerce Clause power.

III. The Court should grant review to reconcile lower courts' conflicting interpretations of Congress's enforcement powers under the Reconstruction Amendments

This Court also should grant certiorari to harmonize the standards used to assess Congress's authority under the Reconstruction Amendments. While the Court has adopted stringent tests for analyzing legislation under the Fourteenth and Fifteenth Amendments, an outdated and overly-deferential test still applies to laws enacted under the Thirteenth Amendment. The three Reconstruction Amendments contain nearly-identical enforcement provisions that empower Congress to pass "appropriate legislation" to achieve their respective goals.[28] And for nearly a century following their adoption, this Court applied a uniform "necessary and proper" test to evaluate laws enacted under each.

The Court subsequently developed strict tests with evidence-based limits to check congressional authority under the Fourteenth Amendment, which guarantees due process and equal protection, and the Fifteenth Amendment, which ensures the

[28] Section 2 of the Thirteenth and Fifteenth Amendments provides that "Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amend. XIII, § 2; *id.* amend. XV, § 2. Section 5 of the Fourteenth Amendment gives Congress the "power to enforce, by appropriate legislation, the provisions of this article." *Id.* amend. XIV, § 5.

right to vote regardless of race. But absent direction from the Court that these evidence-based limits are equally applicable to the Thirteenth Amendment, lower courts remain bound to apply an overly-deferential standard that fails to meaningfully link Thirteenth Amendment legislation with that amendment's goal—abolishing slavery, including the "badges" and "incidents" thereof.

Review by this Court is needed to again harmonize Congress's enforcement powers under the three Reconstruction Amendments.

A. The lower courts, awaiting direction from this Court, apply a deferential standard to the Thirteenth Amendment and more stringent tests to the Fourteenth and Fifteenth Amendments

1. For nearly a century following Reconstruction, this Court applied a uniform "necessary and proper" test to analyze Congress's "defined and limited" enforcement powers under the Reconstruction Amendments. *Oregon v. Mitchell*, 400 U.S. 112, 128-29 (1970) (reading Reconstruction Amendments' enforcement provisions as subject to identical limitations). That test gave Congress powers that were broad, but still limited by the principle that legislation must be "necessary" to serve a legitimate goal and "proper" in its scope.

For example, in the decades immediately following Reconstruction, the Court struck down Thirteenth Amendment legislation guaranteeing "the full and equal enjoyment" of public accommodations to all persons, *Civil Rights Cases,* 109 U.S. 3, 9 (1883), and upheld legislation imposing penalties for "the holding of any person to service or labor," *Clyatt v. United States*, 197 U.S. 207, 208 (1905). The difference was that the denial of access to public accommodations had "nothing to do with slavery or involuntary servitude," *Civil Rights Cases*, 109 U.S. at 24, whereas

banning peonage fit squarely within Congress's Thirteenth Amendment domain. The Court later applied similar tests to Congress's powers under the Fourteenth and Fifteenth Amendments, upholding laws barring English requirements and literacy tests as prerequisites to voting as necessary and proper because the "blight of racial discrimination" had long "infected the electoral process." *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

But soon after, the Court affirmed Congress's exercise of its Thirteenth Amendment authority to outlaw racial discrimination in real estate transactions, applying a more deferential "rational basis" test that gave Congress wide discretion to define the "badges and the incidents of slavery." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968). The decision relied on evidence showing that Congress enacted the legislation to sever the link between housing discrimination and involuntary servitude, explaining, "when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery." *Id.* at 442-43. Yet despite *Jones*'s reliance on record evidence, lower courts have seized upon its "rational basis" language to loosen the reins on Congress's power under the Thirteenth Amendment. *See* Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 Colum. L. Rev. 1459, 1469 (2012).

2. Meanwhile, this Court's modern jurisprudence has given rise to a more robust system of checks and balances to ensure legislators do not abuse their limited powers under the other Reconstruction Amendments.

In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court struck down the Religious Freedom Restoration Act as an invalid exercise of Congress's Fourteenth Amendment enforcement power. It held that absent any "modern instances of generally applicable laws passed because of religious bigotry," the legislation lacked "congruence and proportionality between th[at] injury" and "the means adopted to" remedy it. *Id.* at 530. The Court cautioned that "[l]acking such a connection, legislation may become substantive in operation and effect," exceeding its "remedial" objective and rewriting the Constitution. *Id.* at 520.

Then, in *Shelby County v. Holder*, 570 U.S. 529 (2013), the Court invalidated a statute expanding portions of the Voting Rights Act, holding that it exceeded Congress's enforcement authority under the Fifteenth Amendment. As the Court explained, earlier civil rights legislation had succeeded in removing numerous barriers to voting that persisted after Reconstruction, and the new restrictions, which were "based on decades-old data and eradicated practices," could not be justified by the community's "current needs." *Id.* at 531-32.

3. This Court has not yet addressed how *City of Boerne*'s "congruent and proportional" and *Shelby County*'s "current needs" tests apply to the Thirteenth Amendment's substantively-identical enforcement provision. Absent the Court's guidance, lower courts remain bound by *Jones* to apply the "rational basis" test to legislation enacted under the Thirteenth Amendment.

In this case, the Fourth Circuit joined three other appeals courts in holding that Congress had a "rational basis" to enact subsection (a)(1) of the Hate Crimes

Prevention Act ("HCPA"),[29] which prohibits causing injury to another because of the person's actual or perceived race, color, religion, or national origin. App. 78a-83a; *see United States v. Metcalf*, 881 F.3d 641, 644-45 (8th Cir. 2018); *United States v. Cannon*, 750 F.3d 492, 499-500 (5th Cir. 2014); *United States v. Hatch*, 722 F.3d 1193, 1201-06 (10th Cir. 2013). In each of the four cases, the defendant challenged subsection (a)(1) as an invalid exercise of Congress's Thirteenth Amendment authority because it criminalizes conduct unconnected to slavery and because legislators did not establish that the legislation was necessary to serve an existing need.[30] But in each case, the court declined to apply *City of Boerne*'s "congruent and proportional" test or *Shelby County*'s "current needs" test. Instead, citing the "rational basis" standard from *Jones*, the courts did not question Congress's broad declaration that any injurious act motivated by another's race, color, religion, or national origin constitutes a "badge" or "incident" of slavery.

B. This case is an ideal vehicle for the Court to reconcile Congress's enforcement powers under the Reconstruction Amendments

Unless and until this Court clarifies *City of Boerne*'s and *Shelby County*'s relevance to the Thirteenth Amendment context, lower courts will persist in

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[29] Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, Pub. L. No. 111-84, 123 Stat. 2835; *see* 18 U.S.C. § 249.

[30] Congress relied on its Thirteenth Amendment authority to enact subsection (a)(1), which criminalizes acts motivated by one's race, color, religion, or national origin. It relied on a different source of authority—the Commerce Clause—for subsection (a)(2), which criminalizes acts motivated by one's actual or perceived gender, sexual orientation, gender identity, or disability. *Cannon*, 750 F.3d at 497-98.

applying disparate standards to the three Reconstruction Amendments' nearly-identical enforcement clauses.

1. For more than two decades, judges and scholars have voiced concerns over the irreconcilable conflict between Congress's seemingly-boundless power under the Thirteenth Amendment and its tightly-cabined authority under the Fourteenth and Fifteenth Amendments. *See Hatch*, 722 F.3d at 1204 (describing Congress's power to define the "badges and incidents of slavery" as having "few limits"); Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power After* City of Boerne v. Flores, 88 Wash. U. L. Rev. 77 (2010); Laurence H. Tribe, American Constitutional Law § 5-15, at 926-27 (3d ed. 2000) (arguing *Jones* empowers Congress to "define the infringement of [any] right[] as a form of domination or subordination and thus an as aspect of slavery, and proscribe such infringement as a violation of the Thirteenth Amendment").

Even the Tenth Circuit, which affirmed the HCPA's constitutionality under *Jones*, cautioned that removing practical limits on Congress's authority to legislate under the Thirteenth Amendment raises important federalism concerns: "Given slaves' intensely deplorable treatment and slavery's lasting effects, nearly every hurtful thing one human could do to another and nearly every disadvantaged state of being might be analogized to slavery—and thereby labeled a badge or incident of slavery under *Jones*'s rational determination test." *Hatch,* 722 F.3d at 1204. Similarly, when the Fifth Circuit upheld the HCPA, Judge Elrod concurred to express her concern over the "growing tension between the Supreme Court's

precedent regarding the scope of Congress's [Thirteenth Amendment] power[]" and later opinions curbing Congress's authority under the Fourteenth and Fifteenth Amendments. *Cannon*, 750 F.3d at 509 (Elrod, J., concurring). Noting that *Jones* erased any meaningful limits on legislative power under the Thirteenth Amendment, Judge Elrod asked this Court for "guidance" on how courts should "harmonize these lines of precedent." *Id.*; *see id.* at 511 ("Under our existing Thirteenth Amendment jurisprudence, it has indeed become difficult to conceive of a principle that would limit congressional power.").

2. Review by this Court is needed to end the judicial gridlock. The same federalism and separation of powers concerns that animated the Court's opinions in *City of Boerne* and *Shelby County* are equally relevant in the Thirteenth Amendment context. But absent this Court's guidance, lower courts remain bound by *Jones* to apply an outdated "rational basis" test to legislation enacted under that amendment. Absent a pronouncement by this Court that Congress's Reconstruction powers are limited and uniform, courts will continue to apply a deferential standard to Thirteenth Amendment legislation while employing more demanding tests to review legislation under the Fourteenth and Fifteenth Amendments. That abdication of meaningful review, if left unchecked, could give Congress authority to define virtually any social ill as a "badge" or "incident" of slavery, wresting control over the very meaning of the Thirteenth Amendment from the courts.[31]

[31] *See United States v. Nelson*, 277 F.3d 164, 190 (2d Cir. 2002) (labeling religious hate crime a badge or incident of slavery); *Williams v. City of New Orleans*, 729 F.2d 1554, 1556 (5th Cir. 1984) (labeling employment discrimination a badge or

3. This case presents the Court with the ideal vehicle to harmonize its precedent and prevent Congress from usurping the police power traditionally entrusted to the States. Roof challenged his HCPA convictions as invalid exercises of Congress's Thirteenth Amendment authority in both the district and appeals courts, and each court squarely rejected his claims. App. 78a-83a, 132a-140a. Had the courts applied the "congruent and proportional" and "current needs" tests as he urged, the HCPA would not have passed constitutional muster. The criminalization of all offenses motivated by race, color, religion, or national origin is not congruent and proportional to the Thirteenth Amendment's goal of eradicating the relics of slavery because its broad scope protects even white individuals who profited from the institution. Indeed, in passing the HCPA, Congress did not purport to link the targeted offenses (which include those committed against white victims) with slavery or involuntary servitude. Nor did Congress make any findings that the HCPA was necessary to address the nation's current needs—likely because the States were actively prosecuting offenders under their existing hate-crime laws. *See Cannon*, 750 F.3d at 510 (Elrod, J., concurring) ("In passing [the HCPA], Congress focused on past conditions and did not make any findings that current state laws, or the individuals charged with enforcing them, were failing to adequately protect

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incident of slavery); Petal Nevella Modeste, *Race Hate Speech: The Pervasive Badge of Slavery That Mocks the Thirteenth Amendment*, 44 How. L.J. 311, 341-43 (2001); Sean Charles Vinck, *Does the Thirteenth Amendment Provide a Jurisdictional Basis for a Federal Ban on Cloning?*, 30 J. Legis. 183, 185-89 (2003); Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment's Role in the Struggle for Reproductive Rights*, 3 J. Gender Race & Just. 401, 409-10 (2000).

victims from racially-motivated crimes."); *see* Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. Pa. J. Const. L. 561, 564 (2012).

The time is ripe for this Court to grant certiorari and reconcile the disparate interpretations of Congress's powers under the nearly-identical enforcement provisions of all three Reconstruction Amendments.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

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