25-2570-cr

In the United States Court of Appeals for the Second Circuit

United States of America,

Appellant,

v.

Payton Gendron,

Defendant-Appellee.

On Appeal from the United States District Court
For the Western District of New York

REPLY BRIEF FOR APPELLANT UNITED STATES OF AMERICA

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I. The Court has jurisdiction over this appeal.

Section 3731 is "a broad authorization to appeal unless prohibited by the Double Jeopardy Clause." *United States v. Aslam*, 936 F.2d 751, 754 (2d Cir. 1991). This authority is rooted in § 3731's text, which requires courts to "liberally construe[]" the statute "to effectuate its purposes." 18 U.S.C. § 3731. Section 3731's "purpose[]," *id.*, is not a mystery that invites, as Gendron claims, "judicial improvisation." GB at 25 (quotation marks omitted).[1] To the contrary: Congress's "purpose[]," *id.*, in passing § 3731 was to remove "highly technical . . . . vagaries" in prior statutes authorizing government appeals. *United States v. Wilson*, 420 U.S. 332, 337 (1975) (recounting § 3731's predecessors, which were "a failure" and "a most unruly child that [did] not improve[] with age") (quotation marks omitted). In other words, the statute's well-documented purpose was to "remove all statutory barriers to Government appeals and to allow all appeals whenever the Constitution would permit." *Id.*

Gendron does not dispute § 3731's purpose. Indeed, he largely acknowledges that § 3731, as interpreted by the Supreme Court in *Wilson* and

[1] Gendron's response brief is cited as "GB." The government's opening brief is cited as "OB."

this Court in subsequent cases, provides jurisdiction over this appeal.[2] *See* GB at 23. He maintains, however, that these cases were "wrongly decided." *Id.* That objection, of course, is not one that this Court may resolve. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We reaffirm that if a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.") (quotation marks omitted); *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004) ("[W]e . . . are bound by the

[2] Gendron argues that *Wilson*'s discussion of § 3731's purpose was "dictum[] because § 3731 expressly encompassed the dismissal order under review." GB at 22. But the Supreme Court could not, as § 3731's text requires, "effectuate [the statute's] purposes," 18 U.S.C. § 3731, without discussing the statute's purposes. Moreover, this Court has treated *Wilson*'s discussion of § 3731's purpose as part of the case's holding. *See, e.g.*, *Aslam*, 936 F.2d at 754 (citing *Wilson*, 420 U.S. at 337).

Gendron also argues that a footnote in *Sanabria v. United States*, 437 U.S. 54, 63 n.16 (1978), "cabined" *Wilson*. *See* GB at 24. *Sanabria* did not "cabin[]," *id.*, *Wilson*. *Sanabria* observed that § 3731 was "'intended to remove all statutory barriers' to appeals from orders terminating prosecutions," *Sanabria*, 437 U.S. at 63 n.16 (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977)), because the issue in *Sanabria* was just that: an order terminating a prosecution. *Id.* at 58-59. *Sanabria* did not purport to limit *Wilson*; to the contrary, the case cited in *Sanabria*, *Martin Linen Supply Co.*, repeated *Wilson*'s holding: "[I]n enacting § 373 . . ., 'Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit'." *Martin Linen Supply Co.*, 430 U.S. at 568 (quoting *Wilson*, 420 U.S. at 337).

decisions of prior panels until such time as they are overruled either by an *en banc* panel of our Court or by the Supreme Court."). *Wilson* therefore answers the jurisdictional question in this case: because this appeal is not "prohibited by the Double Jeopardy Clause," § 3731 provides this Court with jurisdiction. *Aslam*, 936 F.2d at 754.[3]

Gendron argues in the alternative that § 3731's text does not allow the government to appeal the district court's order. Specifically, he claims that the district court's order did not "exclud[e] evidence," 18 U.S.C. § 3731, because "evidence associated with each of the stricken non-statutory aggravating factors will come in at trial," subject to evidentiary limits. GB at 27.

This is beside the point. Precluding the government from using evidence to prove one factor, but not another, is still an "exclu[sion]." 18 U.S.C. § 3731. Section 3731's "plain language" does not require "that an order suppressing or excluding evidence . . . do so for all purposes." *United States v. Delatorre*, 157 F.3d 1205, 1208 (10th Cir. 1998). And to the extent that the term "excludes" is

[3] To the extent that Gendron claims that *Wilson*'s interpretation of § 3731 relies on outdated methods of statutory interpretation, there is no basis to revisit a long-settled interpretation of a statute that the government and courts have relied on for more than half a century. *See Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 456 (2015) ("[*S*]*tare decisis* carries enhanced force when a decision . . . interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees.")

ambiguous, § 3731's command to "liberally construe[]" the statute, 18 U.S.C. § 3731, resolves that ambiguity in favor of finding jurisdiction.

For example, in *United States v. Johnson*, 764 F.3d 937 (8th Cir. 2014)—a capital case—the Eighth Circuit held that § 3731 permitted the government to appeal an order allowing the government to "introduce . . . evidence underlying the [aggravating factor for] substantial planning and premeditation of" certain murders, "so long as [the evidence] was not introduced for the purpose of proving that statutory aggravating factor as to" other murders. *Id.* at 941. Gendron dismisses *Johnson* as an "out-of-Circuit case[]," GB at 28, but he does not address *Johnson*'s holding that jurisdiction was proper because, as in this case, "the district court . . . entered an order excluding evidence." *Id.* at 942.

II. The surviving victims aggravator is valid.

1. Section 3592(c) identifies sixteen potential aggravating factors, but it also permits a capital jury to "consider . . . any other aggravating factor for which notice has been given." 18 U.S.C. § 3592(c). Gendron does not dispute that "any" "has an expansive meaning, that is, one or some indiscriminately of whatever kind." *United States v. Gonzalez*, 520 U.S. 1, 5 (1997) (quotation marks omitted). The "cardinal canon" of statutory interpretation is, of course, "that a legislature says in a statute what it means and means in a statute what is says

there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). So where, as here, "the statute's language is 'plain, the sole function of the courts is to enforce it according to its terms.'" *United States v. Kozeny*, 541 F.3d 166, 171 (2d Cir. 2008) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)) (other quotation marks omitted). On its face, then, § 3592(c) authorizes the surviving victims aggravator alleged in this case. After all, the term "any" means just that: "any."

Section 3593(a)'s text reinforces this conclusion. It provides that "[t]he factors for which notice is provided under this subsection *may include* factors concerning the effect of the offense on the victim and the victim's family," as well as "any other relevant information." 18 U.S.C. § 3593(a) (emphasis added). This is "language of inclusion, not exclusion"; it "speaks to what 'may be included,'" and its "final phrase ('and any other relevant information'), though ambiguous, is read most naturally as a catch-all for what may be deemed 'relevant' by the court." *United States v. Whitten*, 610 F.3d 168, 188 (2d Cir. 2010) (quoting 18 U.S.C. § 3593(a)). In other words, § 3593(a)'s broad language, like § 3592(c)'s, reflects Congress's recognition that "it could not foresee every criminal circumstance that might arise," *United States v. Bin Laden*, 126 F. Supp. 2d 290, 302 (S.D.N.Y. 2001), and that, consequently, the government should be permitted to allege non-statutory factors that are relevant to "the character of the individual and the circumstances of the crime." *Tuilaepa v. California*, 512 U.S. 967, 972 (1994) (quotation marks omitted). *See also* S. Rep. No. 101-170 at 21 (1989) ("Section 3593(a) provides that . . . [the government] must file . . . a notice . . . and set forth the aggravating factors (including any not specifically listed in section 3592) the [g]overnment proposes to introduce at the hearing.")

This is consistent with other provisions of the FDPA governing aggravating factors. Section 3592(c), as noted, permits the government to present evidence about "*any* other aggravating factor for which notice has been given." 18 U.S.C. § 3592(c) (emphasis added). And § 3593(c) provides that "information may be presented as to *any* matter relevant to the sentence, including any . . . aggravating factor permitted . . . to be considered under section 3592." 18 U.S.C. § 3593(c) (emphasis added). Gendron attempts to sidestep this broad language by arguing that it "presuppose[s] the existence of a valid non-statutory aggravating factor." GB at 44. That is wrong. Section 3592(c)'s reference to "any other aggravating factor," 18 U.S.C. § 3592(c), is the primary authority for non-statutory aggravating factors. Not only does it come at the end of a list of aggravating factors that "the jury . . . shall consider," *id.*, but the statute's title—which informs the statute's meaning, *Dubin v. United States*, 599 U.S. 110, 120-21 (2023)—is "Mitigating and aggravating factors to be considered in determining whether a sentence of death is justified." Contrary to

Gendron's claim, then, § 3592(c) does "work independent of § 3593(a)." GB at 43.

Gendron responds that 18 U.S.C. § 3593(a) impliedly limits the term "any" in § 3592(c). Specifically, he contends that "§ 3593(a) captures the types of evidence at issue in each of the [Supreme] Court's trilogy of victim-impact cases," such that the statute codifies "exactly what *Payne* [*v. Tennessee*, 501 U.S. 808 (1991),] permitted." GB at 38-39. As Gendron observes, § 3593(a)'s description of potential victim-based evidence uses "language [that] tracks" *Payne*'s. *Id.* at 38. The result, Gendron claims, is that "§ 3593(a) permits this kind of victim-impact aggravator, but no other." *Id.* at 41.

Gendron has things wrong. Even if § 3593(a)'s text "hews . . . closely to the Supreme Court's [victim-impact] cases" (*id.* at 38-39), nothing in the FPDA suggests that § 3593(a) imposes an outer limit on victim-based aggravating factors. There is a simpler explanation for why Congress included § 3593(a) in the FDPA. *Payne* held that the Constitution permitted victim-impact evidence, but the Court left it to each jurisdiction to decide whether to permit such evidence in capital cases. *See Payne*, 501 U.S. at 830-31 (O'Connor, J., concurring.) *See also id.* at 831 (noting that *Payne* did not "hold . . . that victim impact evidence must be admitted, or even that it should be admitted"). Thus, understood in its proper historical context, § 3593(a) is not a "specific authorization" that limits a "general authorization." GB at 40-41 (quotation marks omitted). It is simply Congress's effort to "take advantage of *Payne*'s holding," *id.* at 38, by confirming that the phrase "any other aggravating factor" in § 3592(c) includes victim-impact evidence.

It does not follow that *Payne* (or § 3593(a)) sets a ceiling on the sort of victim-related evidence that is admissible in a capital sentencing hearing. To start, even if *Payne* explains *why* Congress might have included § 3593(a) in the FDPA, that does not provide license to disregard § 3592(c)'s clear and expansive language. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993) ("[V]ague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the specific issue under consideration.") (emphasis omitted). Further, neither *Payne* nor any of the Supreme Court's subsequent decisions have held that *Payne* limits victim-based aggravating factors. To the contrary, *Payne* itself "refers repeatedly to the specific harm caused as encompassing loss felt by 'community' or 'society.'" *Whitten*, 610 F.3d at 188 (quoting *Payne*, 501 U.S. at 822-23). And the Supreme Court has held that non-statutory aggravators are permissible if they help the sentencer "consider all of the circumstances of the crime in deciding whether to impose the death penalty." *Jones v. United States*, 527 U.S. 373, 401-02 (1999). If the "circumstances of the crime" include the fact that a victim sustained life-changing injuries after surviving the defendant's crime, then a surviving victim's injuries are "relevant to the selection phase decision." *Id.* at 401.

2. The FDPA defines the term "victim" just once: in 18 U.S.C. § 3593(c), which relies on the definition of "victim" in 18 U.S.C. § 3510. That statute, in turn, describes the "[r]ights of victims to attend and observe trial" in both capital and non-capital cases. 18 U.S.C. § 3510. As to capital cases, § 3510(b) prohibits a district court from excluding "any victim of an offense" "from a trial of a defendant accused of that offense because such victim may, during the sentencing hearing, testify as to the effect of the offense on the victim and the victim's family or as to any other factor for which notice is given" under 18 U.S.C. § 3593(a). 18 U.S.C. § 3510(b). Finally, § 3510(c) defines the term "victim" (through cross-reference) expansively as "a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime." 34 U.S.C. § 20141(e)(2). In short, the FDPA's *only* definition of "victim" recognizes that both "the victim" and "the victim's family" may attend the trial, and it contemplates that a surviving "victim" may testify. 18 U.S.C. § 3510(b). After all, a deceased victim could not "testify as to the effect of the offense on the victim." *Id.* Only a surviving victim could do that.[4]

[4] Section 3510's legislative history reinforces this understanding. Section 3510 was added to Title 18 as part of the Victim Rights Clarification Act of 1997. *See* Pub. L. 105-6, 111 Stat. 12. Congress passed the legislation to overturn an order

Gendron agrees that the term "victim" in § 3593(c) encompasses surviving victims because it contemplates victims who attend the trial. *See* GB at 45. And Gendron does not dispute that, as the government's opening brief observed, the ordinary meaning of the term "victim" includes surviving victims. *See* OB at 53 (citing dictionary definition of "victim" as "one [who] is injured . . . under any of various conditions"). Yet Gendron argues that § 3593 actually contains *two* definitions of "victim": one definition in § 3593(c), which, by referencing 18 U.S.C. § 3510, includes surviving victims; and a second, implied definition for the rest of § 3593, which refers *only* to deceased victims. The modest difference between "victim," 18 U.S.C. § 3593(a), and "victim[] as defined in section 3510," *id.* § 3593(c), does not carry the significant weight that Gendron asks it to shoulder.

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in *United States v. McVeigh*, which had held that "families and survivors of the Oklahoma City bombing had to be excluded from the trial proceedings if they were to give crime victim impact testimony at the sentencing phase." H.R. 105-28, at 12 (1997) (dissenting views). *See also United States v. Turner*, 367 F. Supp. 2d 319, 332 (E.D.N.Y. 2005) (recognizing that § 3510 "was enacted in response to the trial court's exclusion of victims from the proceedings in the Oklahoma City bombing case on the ground that they might give victim impact testimony at a penalty phase"). Section 3510's express purpose, then, was to ensure that all victims—including surviving victims—could testify in a capital sentencing hearing. *See United States v. McVeigh*, 153 F.3d 1166, 1216-17 (10th Cir. 1998) (observing that victim testimony included testimony from three surviving victims).

There is a far more straightforward interpretation: the single definition of "victim" in § 3593(c) applies throughout the FDPA. Gendron argues that this is incorrect because, in his view, "[w]henever the FDPA uses the term 'victim,' the statute makes clear that the term refers to a homicide victim who has died." GB 34. Gendron concedes elsewhere that § 3593(c) contemplates surviving victims. GB at 45. But regardless, both things can be true. A "victim" can include a surviving victim (as § 3593(c)'s definition contemplates), even if the most common type of "victim" in the FDPA is a homicide victim. That many "victims" under the FDPA are deceased is not a reason to ignore § 3593(c)'s broader definition of "victim." *See Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from the term's ordinary meaning.") And Congress's decision to define "victim" in § 3593(c), but not in § 3593(a), does not mean that the term "victim" in § 3593 has multiple meanings. To the contrary, "[s]tatutory definitions may appear in a separate section, or in the body of other substantive sections, juxtaposed with the defined terms." 2A Singer et al., *Sutherland Statutes and Statutory Construction*, § 47:7 (7th ed.) ("*Sutherland Statutes*").

More fundamentally, if Congress had intended the same term to have multiple meanings in the *same statute*—one broad and the other narrow—one would expect Congress to provide both definitions. This is particularly true because § 3593(c)'s broad definition of "victim" complements other provisions of the FDPA that anticipate evidence from (or about) victims who survived their injuries. *See* 18 U.S.C. § 3592(c)(15) (aggravator for previous conviction for "a crime of sexual assault or crime of child molestation"); *id.* § 3592(c)(16) (aggravator for killing or "attempt[ing] to kill more than one person in a single criminal episode"); *id.* § 3592(d)(4) (aggravator for drug offenses in which the defendant, "[i]n committing the offense, . . . used a firearm . . . to threaten, intimidate, assault, or injure a person"). And § 3593(c)'s definition of "victim" is consistent with the broad definition of "victim" used elsewhere in Title 18, which focuses only on "harm[]," rather than on whether a victim is alive or deceased. *See* 18 U.S.C. § 3771(e)(2)(A) (provision in Crime Victims' Rights Act defining "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense"). In short, the FDPA contemplates that surviving victims may testify in a capital sentencing hearing.

3. Gendron's final argument is that the term "the offense" in § 3593 refers only to a capital offense. 18 U.S.C. § 3593(a). *See* GB at 32-33. That is true. However, a non-statutory aggravating factor is not limited to an "offense" in any technical sense, and the FDPA's authorization for non-statutory aggravating factors—§ 3592(c)—is not limited to factors concerning an "offense." A non-statutory aggravating factor must, instead, direct the sentencer

to "consider all of the circumstances of the crime in deciding whether to impose the death penalty." *Jones*, 527 U.S. at 401-02. In a mass-shooting case such as this one, the "circumstances of the crime," *id.* at 402, include the fact that multiple people sustained physical and emotional injuries as a result of being shot.

What is more, § 3593(a)'s list of potential victim-based evidence includes "the *effect* of the offense on the victim." 18 U.S.C. § 3593(a) (emphasis added). This language can comfortably be read to encompass more than just the direct result of the capital offense on a deceased victim; it can also be read to describe how a capital offense affected surviving victims. To take an example from this case, Gendron is charged with a capital offense for murdering Aaron Salter, an armed security guard who was Black. (GA 5). In the course of exchanging gunfire with Salter in an effort to kill him, Gendron shot two white Tops employees. (GA 5-6). Those employees therefore suffered the "effect[s]," 18 U.S.C. § 3593(a), of a capital offense—that is, Salter's murder. Gendron shot the third surviving victim (who is Black) in the Tops parking lot. (GA 5.). That victim likewise suffered the "effects" of capital crimes.

III. The racial animus aggravator is valid.

1. "[R]ace," 18 U.S.C. § 3593(f), is different than racism, and a crime motivated by racism is "more purposeful," *Tison v. Arizona*, 481 U.S. 137, 156 (1987), regardless of the victims' race. Section 3593(f) codifies the constitutional guarantee that a person not be punished differently because of his or her race. But it does not unsettle the "[d]eeply ingrained . . . idea" that a person's punishment "ought to be" "more severe[]" if his conduct was "more purposeful." *Id*. In other words, § 3593(f) prohibits a jury from considering a defendant's or victims' race, but it does not prohibit a jury from considering a defendant's racist motive.

Gendron does not dispute that motive is "generally a proper sentencing consideration." GB at 53. He instead argues that the racial animus aggravator in this case "isn't drawn to motive generally" because, in Gendron's reading, "[i]t cites Gendron's anti-Black animus and the victims' Black race in particular." *Id.* at 53-54. Gendron, however, fails to read the racial animus aggravator as a whole: it alleges that his "bias, hatred, . . . contempt," and "animus" towards Black people "played a role" in his crimes. (GA 28). The terms "bias, hatred, . . . contempt," and "animus" are all ways of describing Gendron's racist motivation. And if there were any doubt on this score, one need only look to the aggravator's title: "Racially-Motivated Killings." (GA 28). The aggravator, in other words, does not seek to punish Gendron because his victims were Black. It seeks to punish Gendron because his crimes were motivated by racism.

The racial animus aggravator describes the victims' race in order to "'direct the jury'" (as it must to "pass constitutional muster'') "'to the individual circumstances of the case.'" *United States v. Sampson*, 486 F.3d 13, 46 (1st Cir. 2007) (quoting *Jones*, 527 U.S. at 401-02). But the terms that describe Gendron's motive—"bias, hatred, . . . contempt," and "animus" (GA 28)—are all race-neutral. They focus not on the victims' race but on the fact that Gendron committed "[r]acially-[m]otivated [k]illings." (GA 28).

2. Gendron faults the government for "read[ing] out the statutory requirement [in § 3593(f)] not to 'consider' race at all." GB at 52 (quotation marks omitted). However, the rest of § 3593(f) reinforces the statute's narrow role.

The best evidence of the meaning of the word "consider" in § 3593(f) comes from the statute's remaining text. *Sutherland Statutes* § 47:16 ("Courts may clarify the meaning of doubtful words in an ambiguous statute by reference to other associated words and phrases. The commonsense canon of *noscitur a sociis* counsels that a word is given more precise content by the neighboring words with which it is associated.") Section 3593(f) requires a court to instruct a capital jury not to "consider the race . . . of the defendant or any victim" when "considering whether a sentence of death is justified." 18 U.S.C. § 3593(f). The court must then instruct the jury that it may "not . . . recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race . . . of the defendant or of any victim may be." *Id.*

Section 3953(f)'s certification requirement thus tells the jury what it means to "consider," *id.*, race: the statute asks the jury to change the defendant's and victim's races and then ask itself whether its sentence would be the same. If the answer is "no," then the jury has improperly "consider[ed]," *id.* § 3593(f), race. To "consider" race, then, means sentencing a defendant to death because he is one race or because his victims are one race.

A jury can comfortably consider a defendant's racist motive while also certifying that the jury has not "consider[ed]," *id.*, race. Gendron argues that this would require a jury to engage in "mental gymnastics." GB at 48 (quotation marks omitted). The aggravator does not, however, as Gendron paraphrases it, allege that he should be sentenced to death because he "hated and killed 'Black' victims." *Id.* The aggravator is entitled "Racially-Motivated Killings," and it directs the jury to Gendron's "bias, hatred, . . . contempt," and "animus," all of which "played a role" in his murders. (GA 28). As explained above, racism, bias, hatred, and animus are all race-neutral ways of describing Gendron's motive. A jury can therefore find that that aggravator has been proven while also certifying that its sentence would be the same if Gendron's or the victims' races were different.

Several recent examples show that Gendron severely underestimates a jury's ability to separate the concepts of race and racism. The racial animus aggravator in this case is, in relevant part, nearly identical to non-statutory aggravating factors alleged in other bias-motivated mass shooting cases. For instance, *United States v. Bowers*, 2:18-cr-00292, involved a mass shooting at a synagogue in Pittsburgh, Pennsylvania. One of the non-statutory aggravating factors in *Bowers* alleged—in language that is nearly identical to the racial animus aggravator in this case—that the defendant "expressed hatred and contempt toward members of the Jewish faith and his animus toward members of the Jewish faith played a role in the killings of" each of the named victims. *Id.* Docket Entry 86 at 4 (W.D. Pa. August 26, 2019). Consistent with § 3593(f), the district court in *Bowers* instructed the jury that it could not consider, among other things, the "religious beliefs" of the defendant or the victims when determining the sentence. *Id.* Docket Entry 1573 at 98 (transcript of jury charge). Specifically, the district court instructed the jury that, "[i]f a change in any of those traits would have caused any of you to make a different decision as to any issue, you should go back and reconsider your sentencing decision." *Id.* The *Bowers* jury found that the government had proven the religious animus aggravator while also certifying its compliance with § 3593(f). *See id.* Docket Entry 1537 at 4 (verdict sheet finding animus aggravator proven); *id.* at 26 (§ 3593(f) certification).

Similarly, in *United States v. Roof*, 2:15-cr-00472-RMG—which involved a racist mass shooting at a predominantly Black church in Charleston, South Carolina—one of the non-statutory aggravating factors alleged that the defendant "expressed hatred and contempt towards African Americans, as well as other groups, and his animosity towards African Americans played a role in the murders charged in the Indictment." *Id.* Docket Entry 164 at 6 (D.S.C. May 24, 2016). As in *Bowers*, the *Roof* jury was able to find the racial animus aggravating factor satisfied while also certifying its compliance with § 3593(f). *See id.* Docket Entry 871 (verdict sheet).

3. Gendron's appeal to policy does not overcome the clear import of § 3593(f)'s text, structure, and history.

As discussed above, § 3593(f)'s text contains a single prohibition: a jury may not "consider" a defendant or victim's "race." 18 U.S.C. § 3593(f). It does not, however, prohibit consideration of a defendant's racist motive. Section 3593(f)'s structure accords: Congress placed § 3593(f) at the end of a procedural statute, rather than in an adjoining statute, § 3592, whose express purpose is to identify appropriate "[m]itigating and aggravating factors to be considered in determining whether a sentence of death is justified."[5] 18 U.S.C. § 3592. Section 3593(f) is therefore best understood not as a substantive limit on aggravating and mitigating factors, but as a statute governing what evidence a jury may consider in selecting a sentence.

Section 3953(f)'s limited role is supported by the statute's history. Congress passed § 3593(f) as part of the Federal Death Penalty Act of 1994. *See* Pub. L. 103-322, § 60002, 108 Stat. 1796, 1966 (1994). Section 3593(f) was therefore passed in the shadow of three Supreme Court cases that permitted a sentencer—including a capital sentencer—to consider a defendant's racist motivation when imposing sentence.

This line of cases began five years before Congress passed the Anti-Drug Abuse Act of 1988, relevant provisions of which are nearly identical to § 3593(f).

[5] Gendron argues that the government seeks to "have it both ways" by arguing that § 3593(a) and § 3593(c) authorize certain aggravating factors. GB at 56. But the primary source of authority for non-statutory aggravating factors is § 3592(c), which permits the jury to "consider whether any other aggravating factor for which notice has been given exists." 18 U.S.C. § 3592(c). That is what the government argued in its opening brief. *See* OB at 48 ("To start, § 3592(c) permits the government to present evidence about 'any other aggravating factor for which notice has been given.'") (emphasis omitted). Sections 3593(a) and 3593(c) govern the contents of the government's notice of intent to seek the death penalty (which necessarily must allege the nature of the aggravating factors) and the manner in which the government may introduce victim-impact evidence.

See Pub. L. 100-690, § 7001, 102 Stat. 4181, 4392 (1988). In *Barclay v. Florida*, 463 U.S. 949 (1983) (plurality opinion), the Supreme Court held that the Constitution does "not prohibit a trial judge from taking into account the elements of racial hatred" that motivated a defendant to commit murder. *Id.* at 949. In two subsequent decisions issued in the two years leading up to § 3593(f)'s passage, the Court reaffirmed *Barclay*'s holding and confirmed the role that a defendant's racism may play at sentencing. In *Dawson v. Delaware*, 503 U.S. 159 (1992), the Court read *Barclay* for the proposition that "it was most proper for the sentencing judge to 'take into account the elements of racial hatred in this murder.'" *Id.* at 166 (quoting *Barclay*, 463 U.S. at 949) (editorial marks omitted). And the next year, in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), the Supreme Court confirmed that the Constitution permits a sentencer to enhance a defendant's sentence if his crime was motivated by racism. *Id.* at 485-90.

Congress passed the FDPA the year after the Court decided *Mitchell*. So even if Gendron can question whether *Barclay* "rise[s] to the level of a precedent of which Congress is presumed to be aware," GB at 59 (quotation marks omitted), he cannot question whether, in passing the FDPA, Congress was presumed to have been aware of two contemporaneous Supreme Court decisions interpreting *Barclay* for the proposition that a sentencer—including a capital sentencer—could consider a defendant's racist motivation for committing his crimes. *See Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 700 (2022) ("This Court generally assumes that, when Congress enacts statutes, it is aware of this Court's relevant precedents.")

In fact, Congress's awareness and endorsement of a jury's consideration of a defendant's biased motive is apparent from the broader legislation of which the FPDA was a part. Gendron asserts that "when Congress enacted § 3593(f)'s predecessor provision in 1988, neither" 18 U.S.C. § 245 nor 18 U.S.C. § 247 (both of which make certain hate crimes punishable by death) "included capital penalties, so there was no tension with existing law." GB at 56 (quotation marks omitted). But when Congress enacted § 3593(f), it did so as part of the same bill in which it made violations of § 245 and § 247 punishable by death. *See* Violent Crime Control & Law Enforcement Act of 1994, Pub. L. 103-322, § 60006, 108 Stat. 1796, 1970. Surely, then, Congress did not understand § 3593(f) to prohibit a jury from considering the animus-based nature of these capital crimes, which would render its simultaneous amendments to § 245 and § 247 superfluous. *See id.* (titled "Death Penalty for Civil Rights Murders"). *See also Freytag v. Commissioner*, 501 U.S. 868, 877 (1991) ("Our cases consistently have expressed a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.") (quotation omitted).

Gendron contends that Congress intended § 3593(f) to "do more than the constitutional minimum in favor of anti-discrimination policy," GB at 54, by setting a higher floor than *Mitchell* and *Barclay* permitted. Not only is this suggestion unmoored from § 3593(f)'s text, but there is no reason to think that, in prohibiting consideration of "race," Congress also meant to prohibit consideration of rac*ism*. Congress knew how to address evidence of a defendant's motive at a capital sentencing, *see, e.g.*, § 3592(c)(9), and it chose to say nothing about motive in § 3593(f). What is more, if Congress had intended § 3593(f) to offer more protection than a contemporaneous Supreme Court decision, one would expect a clear statement of that intent. *Compare, e.g.*, 42 U.S.C. § 2000bb(b) (provisions of Religious Freedom Restoration Act stating that one of Act's "purposes" was to provide more protection than was offered by a specifically-identified Supreme Court decision). Gendron identifies none.

Gendron instead resorts to policy arguments and a selective reading of legislative history. He suggests that § 3593(f) reflects Congress's "judgment that any consideration of race in capital sentencing creates a risk of discrimination." GB at 52. But Gendron's speculation about what Congress might "reasonably have determined," *id.* at 53, underscores the danger of relying on legislative history, particularly in the face of clear statutory text. As the Supreme Court has cautioned, not only is "legislative history . . . often murky, ambiguous, and contradictory," but "[j]udicial investigation of legislative history has a tendency to become . . . an exercise in looking over a crowd and picking out your friends." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (quotation marks omitted). So too here: the legislative history for what ultimately became § 3593(f) reflects that Congress intended § 3593(f) to prohibit discrimination against *defendants*, something that is not threatened when the jury considers a defendant's racist motivations. *See* S. Rep. No. 101-170, at 22 (1989) ("[Section 3593(f)] is designed as a special precaution against discrimination by the jury *against the defendant* on the basis of the defendant's or the victim's race, color, national origin, religious beliefs, or gender.") (emphasis added). Section 3593(f)'s title—"Special Precaution To Ensure Against Discrimination"—reinforces this understanding.

IV. The incitement to violence aggravator is valid.

1. "[T]he First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." *Mitchell*, 508 U.S. at 489 (quotation and editorial marks omitted). Gendron agrees that the Constitution "'does not erect a *per se* barrier to the admission of evidence concerning one's beliefs at sentencing simply because those beliefs are protected by the First Amendment.'" GB at 67 (quoting *Daswson*, 503 U.S. at

165) (editorial marks omitted). He argues, however, that his "words weren't being proffered to prove another valid aggravator—they were the aggravator." *Id.*

Gendron again misreads the aggravator. The incitement aggravator does not allege that he should be punished for his speech. As with the racial animus aggravator, the incitement aggravator is instead focused on Gendron's motive: it alleges that Gendron's goal was to "incite violent action by others" and that he did so by "committing the acts of violence charged in this case." (GA 28). As the government's opening brief explained, the district court—which relied on the same reasoning Gendron endorses here—"failed to acknowledge the incitement aggravator's reference to Gendron 'preparing for and committing acts of violence,'" even though "[t]hat allegation . . . is critical to understanding why Gendron's speech here may be used as motive evidence." OB at 43 (quoting GA 28) (editorial marks omitted). The aggravator therefore properly ties Gendron's actions and words to his "particularly blameworthy" motive, *id.* at 41, just as the Constitution requires. Gendron neither addresses nor responds to this language in the aggravator.

Gendron instead argues that "all the evidence supporting this factor is . . . communicative activity." GB at 68. But a person's words are a typical and common way of proving his motive. That is why this Court has found it "difficult to comprehend" the argument Gendron makes here. *United States v. Salameh*, 152 F.3d 88, 112 (2d Cir. 1998). It is, after all, "beyond cavil that 'the First Amendment does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.'" *Id.* (quoting *Mitchell*, 508 U.S. at 489 (quotation and editorial marks omitted). So too here: Gendron does not dispute that, as the government explained, his speech "cannot be divorced from his decision to commit and livestream the attack; to the contrary, his words explain why he did what he did"—that is, inspire others to commit racially-motivated mass shootings. OB at 40.

2. Gendron next argues that the incitement aggravator is invalid because it "invit[es] the jury to rely on [Gendron's] communicative activities to find the aggravator proved." GB at 65 (quotation marks omitted). In support of this argument, Gendron relies primarily on *Zant v. Stephens*, 462 U.S. 862 (1983), for the proposition that an aggravator is invalid if it "'authorizes a jury to draw adverse inferences from conduct that is constitutionally protected.'" GB at 64 (quoting *Zant*, 462 U.S. at 885).

Dawson v. Delaware explains why Gendron's reliance in *Zant* is misplaced. In *Dawson*, the prosecution sought to introduce evidence of the defendant's membership in the Aryan Brotherhood as an aggravating factor in a capital trial. *See Dawson*, 503 U.S. at 161-163. The defendant was sentenced to death and argued on appeal that his "right to associate with the Aryan Brotherhood [was] constitutionally protected," such that "admission of evidence related to that association at his penalty hearing violated his constitutional rights." *Id.* at 164. In support of this argument, the defendant relied on the same language from *Zant* that Gendron relies on here. *See id.* (quoting relevant language from *Zant* and noting that defendant "contends that the Constitution forbids the consideration in sentencing of any evidence concerning beliefs or activities that are protected under the First Amendment").

The Supreme Court rejected "this submission [as] . . . too broad." *Id.* As the Court explained, decades' worth of cases "emphasize that the sentencing authority has always been free to consider a wide range of relevant material." *Id.* (quotation marks omitted). And, citing *Barclay*, *supra*, the Court observed that "a sentencing judge in a capital case might properly take into consideration 'the elements of racial hatred' in [the defendant's] crime as well as [the defendant's] 'desire to start a race war.'" *Id.* (quoting *Barclay*, 463 U.S. at 970). From these and other cases, *Dawson* "conclude[d] that the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." *Id.* at 165. The Court ultimately concluded that evidence concerning the Aryan Brotherhood was inadmissible, but this holding was largely the result of the manner in which the prosecution had introduced the evidence. *See id.* at 165-66 (observing that parties had stipulated to evidence about Aryan Brotherhood and noting that "narrowness of the stipulation left the Aryan Brotherhood evidence totally without relevance to [defendant's] sentencing proceeding").

The Court explained, however, that such evidence would be permissible if it was "relevant to help prove any aggravating factor." *Id.* at 166 (providing examples). Here, Gendron's words are "relevant to the issues involved," *id.* at 164, because they help explain his motive. And "[t]he mental state with which [a] defendant commits [a] crime" is often "[a] critical facet of the individualized determination of culpability required in capital cases." *Tison*, 481 U.S. at 156. As a result, Gendron's words are properly used to explain why he committed and livestreamed mass murder. *See* OB at 11-14, 40 (summarizing statements bearing on Gendron's intent). The incitement aggravator is, therefore, proper because it focuses on Gendron's particularly blameworthy motive by "direct[ing] the jury to the individual circumstances of the case." *Jones*, 527 U.S. at 402.

CONCLUSION

This Court should reverse the district court's Decision and Order to the extent it strikes the racial animus aggravating factor, the incitement-to-violence aggravating factor, and the injury-to-surviving-victims aggravating factor.

Dated: March 30, 2026, Buffalo, New York.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

United States Of America,

Appellee,

-v- CA # 25-2570-cr

Payton Gendron,

Defendant-Appellant.

I, Charles M. Kruly, Assistant United States Attorney for the Western District of New York, hereby certify that the foregoing brief complies with this Court's Local Rule 32.1(a)(4)(B) word limitation in that the brief is calculated by the word processing program to contain approximately 6,627 words, exclusive of the Table of Contents, Table of Authorities, and Addendum of Statutes and Rules.

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