No. 20-443

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

DZHOKHAR A. TSARNAEV

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

REPLY BRIEF FOR THE PETITIONER

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This is no ordinary capital case. It is a prosecution for terrorism, involving horrific crimes that struck at the entire Nation. Respondent's victims, their families, the jury, the district court, and the government devoted enormous effort to fairly adjudicating respondent's guilt and securing a lawful death sentence for his grievous offenses. The court of appeals then set aside that sentence on demonstrably erroneous grounds, one of which was a supposedly longstanding voir dire rule that had apparently escaped even the court's own notice when it praised the jury-selection procedures before trial. The decision below needlessly requires a new and more onerous penalty trial where respondent's victims would relive their trauma. A decision of such significance to so many should be reviewed by this Court.

Respondent's principal argument against review is that the court of appeals' holdings are largely case-

specific. But the court committed legal error in imposing a one-size-fits-all voir dire rule. Even setting that aside, this Court has often reviewed fact-intensive issues in capital cases, and surely such review is equally warranted in a case of this magnitude. The district court reasonably exercised its discretion not only in conducting voir dire, but in declining to allow the penalty phase of respondent's trial to become a minitrial of respondent's brother for a different crime allegedly committed two years before the Boston Marathon bombing. In so holding, this Court would necessarily dispense with the subsidiary issue of whether respondent was entitled to withheld evidence about that different crime, which respondent incorrectly describes as a "third" holding that could "independent[ly]" support the decision below. This Court should grant certiorari, reverse that decision, and allow this case to reach its just conclusion.

A. The Court Of Appeals Failed To Give Due Respect To The District Court's Management Of Voir Dire

The inflexible voir dire rule imposed by the court of appeals was both unexpected and unjustified. Respondent cannot square that court's directive to ask particular questions with this Court's recognition of trial judges' broad discretion over jury-selection procedures. The supervisory power does not permit courts of appeals to contravene the clear instructions of this Court.

1. This Court has made clear that "[n]o hard-and-fast formula dictates the necessary depth or breadth of *voir dire*" in a federal criminal trial. *Skilling* v. *United States*, 561 U.S. 358, 386 (2010). Instead, determining "the measures necessary to ensure [juror] impartiality—

including with respect to pretrial publicity—lies "'particularly within the province of the trial judge.'" *Id.* at 386-387 (citation omitted).

Respondent does not dispute that the district court here adopted multiple measures to expose potential bias arising from pretrial publicity, including inquiries on the jury questionnaire, follow-up questions in person, and an opportunity for questions from the parties. Pet. 19-20. Nor can respondent deny that the court of appeals in 2015 "commend[ed]" that "rigorous" voir dire as "thorough and appropriately calibrated to expose bias," only to turn around five years later and denounce it as inadequate because the district court did not ask every prospective juror what he or she had specifically "'read and heard about the case.'" Pet. App. 53a, 250a, 253a (citation omitted); cf. Br. in Opp. 33.

Respondent contends (Br. in Opp. 32-33) that the court of appeals' turnabout was not unexpected because its post-trial decision cited language in *Patriarca* v. *United States*, 402 F.2d 314 (1st Cir. 1968), cert. denied, 393 U.S. 1022 (1969). But respondent does not explain why, if the "*Patriarca* rule" (Br. in Opp. 24) was actually well established, the court of appeals' pretrial decision did not identify it, the district court was apparently unware of it, and he himself did not raise it until appeal. And respondent does not dispute that the First Circuit has *never* before vacated a conviction or sentence based on *Patriarca*. See Pet. 23; cf. Br. in Opp. 25, 32.

Respondent attempts to cast aside (Br. in Opp. 33) the court of appeals' pretrial decision because it rejected "a mid-voir dire mandamus petition seeking a change of venue." But that decision came *after* the district court had provisionally qualified the prospective jurors from which the parties selected the jury. Pet.

App. 35a-41a, 235a. Under respondent's theory, the voir dire error had already occurred by that time. Yet the court of appeals examined the pretrial-publicity concerns and found that the voir dire had provided "'a sturdy foundation to assess fitness for jury service.'" *Id.* at 253a (quoting *Skilling*, 561 U.S. at 395). Respondent offers no tenable justification for the court's decision to invalidate on the back end the same procedures that it had correctly praised on the front end.

2. The court of appeals' rule was not only unexpected, but wrong. This Court has recognized that a "trial court requires great latitude in deciding what questions should be asked on *voir dire*." *Mu'Min* v. *Virginia*, 500 U.S. 415, 424 (1991). The court of appeals' rule, in contrast, dictates "questions" that must "be asked on *voir dire*"—the antithesis of "the wide discretion granted to the trial court in conducting *voir dire* in the area of pretrial publicity." *Id.* at 424, 427.

Respondent attempts to find flexibility in the court of appeals' rule because a district court "must exercise discretion to trigger the rule" by finding "'a significant possibility that jurors have been exposed to potentially prejudicial material.'" Br. in Opp. 31-32 (citation omitted). That limited triggering decision, however, is not "latitude in deciding *what questions should be asked*." *Mu'Min*, 500 U.S. at 424 (emphasis added). And the "after-the-fact" flyspecking of voir dire on a "cold transcript" that is invited by the court of appeals' rule is precisely the sort of "second-guessing" that appellate courts should "resist[]." *Skilling*, 561 U.S. at 386.

Respondent errs in contending (Br. in Opp. 26-33) that the court of appeals' rigid voir dire rule is a permissible exercise of its supervisory authority. The supervisory power is not a blank check for an appellate panel

to impose any rule it might deem desirable. See, *e.g.*, *United States* v. *Hasting*, 461 U.S. 499, 506-507 (1983). Rather, the power must be exercised with "some caution" and within the "considered limitations" of the surrounding law. *United States* v. *Payner*, 447 U.S. 727, 734, 737 (1980). For example, "the supervisory power does not authorize" a suppression rule where the Court's own "Fourth Amendment decisions have established beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence," as the "values assigned to the competing interests do not change because a court has elected to analyze the question under the supervisory power instead." *Id.* at 735-736.

Here, respondent acknowledges this Court's holding in *Mu'Min* v. *Virginia*, *supra*, that "the Sixth Amendment does not require content-specific questions" about pretrial publicity. Br. in Opp. 27. But he nevertheless defends a supervisory rule that imposes precisely that requirement. Respondent suggests (*id.* at 27, 30) that *Mu'Min* supports such a rule because the opinion noted that some lower courts had adopted similar ones. See 500 U.S. at 426-427. *Mu'Min*, however, cited those decisions only to illustrate that lower courts were *divided* on whether to require such questions. *Id.* at 426. Far from endorsing a rule of the sort at issue here, the Court emphasized that "both" its constitutional and supervisory decisions dictate that "the trial court retains great latitude in deciding what questions should be asked on *voir dire*." *Id.* at 424.

Finally, respondent notes (Br. in Opp. 30) that this Court has "used its own supervisory powers to regulate discrete aspects of voir dire by compelling specific inquiries about racial prejudice in certain circumstances."

But the cited decisions involved "fail[ures] to ask *any* question which could be deemed to cover the subject" of racial prejudice. *Aldridge* v. *United States*, 283 U.S. 308, 311 (1931) (emphasis added); see *Rosales-Lopez* v. *United States*, 451 U.S. 182, 189 (1981) (plurality opinion). And this Court has distinguished the general inquiry required by those decisions from a more specific scripting requirement of the sort the panel erroneously imposed here. See *Mu'Min*, 500 U.S. at 424.

B. The Waltham Evidence Did Not Justify The Court Of Appeals' Vacatur Of Respondent's Sentence

The court of appeals' second ground for vacating respondent's sentence was another unjustified usurpation of the district court's discretion. The district court correctly determined that respondent was not entitled to divert the penalty proceeding for his own acts of terrorism into a confusing minitrial over allegations about a different crime by his brother Tamerlan two years earlier. Like the court of appeals, respondent offers no sound basis to overcome the "great deference," Pet. App. 73a (citation omitted), owed to the district court's decision to exclude Ibragim Todashev's unverified (and unverifiable) claims about the Waltham crime.

1. Respondent criticizes the district court's finding that the Waltham evidence lacked probative value as "based on incomplete information," asserting that the court "did not know that the government itself had concluded" that Todashev's story "was sufficiently reliable to support a sworn search warrant affidavit." Br. in Opp. 17-18, 21. In fact, respondent's counsel invoked the affidavit in the district court in arguing the motion in limine. Resp. C.A. Add. 340-341. And while the FBI agent who swore out the affidavit truthfully described what Todashev had *claimed*, he could not and did not

endorse the veracity of Todashev's story in all of its particulars. Resp. C.A. Sealed Add. 31-34. Respondent errs in suggesting (Br. in Opp. 20-21) that the affiant's belief that Todashev's statements could support an *investigatory* search would have allowed the defense to introduce Todashev's story in a way that "the government could not have contested," thereby somehow avoiding a minitrial. That estoppel theory is legally baseless, and the affidavit would not have enabled the jury to assess Todashev's credibility, which would have been critical given his incentive to downplay his own involvement in the Waltham murders by exaggerating Tamerlan's. Pet. 27.

Respondent contends that the Waltham evidence was "highly probative" of his "central mitigation theory" that he "was susceptible to, and acted under, Tamerlan's influence." Br. in Opp. 18-19. But respondent's Waltham-as-mitigation theory would have required the jury to adopt an implausible chain of unsupported inferences. For the Waltham evidence to be probative of respondent's relative culpability for the Boston Marathon bombing, jurors would have needed to conclude that (1) Tamerlan committed the Waltham murders in the particular way that Todashev claimed; (2) Tamerlan's conduct in doing so suggested a willingness and ability to force his own brother to do his bidding; and (3) such willingness and ability carried over to respondent's vastly different crime committed two years later.

Respondent identified no evidence that would support the first inference, beyond the statements of a deceased witness with an obvious incentive to lie. The second inference was refuted by the evidence: rather than controlling Todashev to commit "horrific violence," Br. in Opp. 19, Tamerlan allowed Todashev to *decline* to

commit murder, Pet. 28. And to the extent that respondent was aware of any specifics of the Waltham crime, he reacted with approval for the furtherance of jihad, not apprehension that he himself would be conscripted into murder. Pet. 30. Respondent's third inference cannot be squared with either the obvious differences between the two crimes or with the overwhelming evidence that he was no unwilling accomplice to terrorism. Respondent personally placed and detonated a bomb in service of his own jihadist beliefs, and he attempted to justify his murderous actions even after he believed that Tamerlan had died. Pet. 28-29.

Furthermore, because respondent's potential mitigation argument based on Todashev's Waltham story was so contrary to the evidence, any error in excluding that evidence was harmless beyond a reasonable doubt. Pet. 29-30. Respondent contends that "the jury was receptive to the argument that Tamerlan influenced respondent" because it "rejected a death sentence for all counts based on acts for which Tamerlan was present." Br. in Opp. 22-23. On the contrary, the jury's verdict confirms the irrelevance of the Waltham issue by demonstrating the jury's careful consideration of each of respondent's crimes and its determination that capital punishment was warranted for the horrors that he *personally* inflicted—including placing a bomb behind a group of children and detonating it. Pet. 30. The verdict does not indicate that the jury had any inclination to absolve respondent of culpability for those personal atrocities based on suggestions of Tamerlan's influence.

2. Respondent errs in contending that a separate unchallenged "*Brady* ruling would prevent this Court from ruling for the government on the [second] question presented." Br. in Opp. 14; see *id.* at 1-2, 13, 16. The

court of appeals' subsidiary conclusion that withholding particular Waltham evidence violated *Brady* v. *Maryland*, 373 U.S. 83 (1963), was not an "independent ground[]" for the court of appeals' judgment (Br. in Opp. 10).

In accord with respondent's own appellate brief, the court of appeals treated the issue of purportedly mitigating evidence about the Waltham crime as a single issue involving two interrelated arguments. See Pet. App. 64a-86a; Resp. C.A. Br. 227. In particular, the court expressly premised its conclusion that material Waltham evidence had been improperly and prejudicially withheld on its conclusion that the jury should in fact have heard Waltham evidence. See Pet. App. 86a (finding the Waltham evidence material under *Brady* because, "as we * * * explained" a few "pages earlier," "Todashev's confession * * * strongly supported the defense's arguments about relative culpability"); see also Br. in Opp. 1-2 (describing the *Brady* holding as "intertwined with" the Waltham-as-mitigation issue). Thus, if this Court agrees with the government either that all the Waltham evidence was properly excluded, or that excluding it did not affect the outcome of the penalty proceeding, it necessarily follows that respondent was not prejudiced by any withholding.

Respondent asserts that disclosing more Todashev evidence could have "enabled the defense to 'develop additional mitigating evidence.'" Br. in Opp. 16 (quoting Pet. App. 86a) (brackets omitted). But "mere speculation" that disclosure of withheld evidence "might have led [defense] counsel to conduct additional discovery that might have led to some additional evidence that could have been utilized" is not a proper basis for a *Brady* claim. *Wood* v. *Bartholomew*, 516 U.S. 1, 6 (1995)

(per curiam). In any event, any additional evidence would have been about the Waltham crime. If this Court rejects the court of appeals' conclusion that evidence of the Waltham crime was necessary for a valid verdict—as the second question presented asks this Court to do—then respondent's ability to further investigate that crime was immaterial.

C. The Questions Presented Warrant Review

Respondent does not dispute either the extraordinary significance of this case or that the decision below would allow reimposition of his capital sentence only after a highly fraught and burdensome repeat of the penalty proceeding that will impose substantial personal costs on his victims. Pet. 31-33. This Court should not permit the court of appeals' erroneous conclusions to cause that result.

Respondent characterizes the court of appeals' holdings as narrow and factbound. Br. in Opp. 15, 21, 24. But the voir dire issue involves a categorical rule that would apply equally to *any* case involving substantial pretrial publicity; that is the very point of adopting an inflexible supervisory rule rather than a case-by-case approach. The issue of district courts' discretion to address pretrial publicity during jury selection will only become more common and significant as social media continues to proliferate. And although both questions presented turn to some extent on the record, that is almost always true in pretrial-publicity cases, and frequently in capital cases more generally. This Court has nevertheless granted review in cases that are equally if not more record specific. See Pet. 31-32.

The purported "vehicle problems" asserted by respondent (Br. in Opp. 1, 12) are no reason to deny review. As explained above, respondent's *Brady* claim

will be resolved by this Court's decision on the second question presented. See pp. 8-10, *supra*. And his juror-misconduct claim (Br. in Opp. 1-2, 6, 13, 29, 33)—which the court of appeals did not decide—should not shield the case from this Court's review. Even if the court of appeals were ultimately to side with respondent on that claim, the remedy would not be vacatur of the capital sentence, as the decision below currently requires, but instead simply an evidentiary hearing in the district court. See Pet. App. 61a (discussing the possibility of further "investigat[ion]" by the district court) (quoting *United States* v. *French*, 904 F.3d 111, 117 (1st Cir. 2018), cert. denied, 139 S. Ct. 949 (2019)); see also Gov't C.A. Br. 135 n.33. Moreover, for reasons explained in the government's brief below, see Gov't C.A. Br. 118-135, the misconduct claim lacks merit, as it involves (at most) ambiguous misstatements by jurors on relatively minor questions that would not have resulted in their disqualification.

Respondent's assertion (Br. in Opp. 2, 13) that the court of appeals is "all but certain to vacate" his death sentence for juror misconduct is thus entirely speculative. And the possibility of a *third* error by the court of appeals is not a basis for declining to address the two dispositive ones that it has already made. This case is exceptionally important to the Nation. This Court should ensure that it is correctly resolved. And the government respectfully requests that the Court do so this Term.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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DECEMBER 2020