No. 20-443

In the Supreme Court of the United States

UNITED STATES, PETITIONER

v.

DZHOKHAR A. TSARNAEV

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

BRIEF OF AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[1]

The American Bar Association (ABA) is the largest voluntary association of attorneys and legal professionals in the world. Its members come from all fifty states, the District of Columbia, and the United States territories. Its membership includes attorneys in law firms, corporations, nonprofit organizations, and local, state, and federal governments, as well as judges, legislators,

[1] Pursuant to S. Ct. Rule 37.3(a), all parties have provided blanket consent to the filing of amicus curiae briefs in support of either or neither party. No counsel for a party authored this brief in whole or in part and no person or entity other than the amicus or counsel made a monetary contribution to its preparation or submission.

law professors, law students, and associates in related fields.[2]

Since its founding in 1878, the ABA has worked to protect the rights secured by the Constitution and has developed guidance to aid courts, prosecutors, and defense counsel on matters related to the criminal justice system. As part of this work, the ABA has for years published the ABA Standards for Criminal Justice, which provide a comprehensive set of principles articulating the ABA's recommendations for fair and effective criminal justice systems. Courts have often looked to the Criminal Justice Standards for guidance. See, *e.g.*, *Padilla* v. *Kentucky*, 559 U.S. 356, 367 (2010); *Strickland* v. *Washington*, 466 U.S. 668, 688–89 (1984).

In particular, the ABA has long published standards to ensure that high-publicity criminal trials are conducted fairly. In 1968, after extensive research and interviews with judges, prosecutors, and defense attorneys, the ABA adopted criminal justice standards, including a standard for questioning prospective jurors about exposure to "potentially prejudicial material." *ABA Standards for Criminal Justice, Fair Trial and Free Press* § 3.4(a), at 130 (Mar. 1968) (*1968 Fair Trial Standards*). As amended, this standard remains ABA policy today. See *ABA Standards for Criminal Justice: Fair Trial and Public Discourse* § 8-5.4, at 15 (4th ed. 2016) (*Current Fair Trial Standards*).[3] It provides:

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial members of the ABA. No member of the Judicial Division Council participated in the adoption of or endorsement of the positions in this brief, nor was it circulated to any member of the Judicial Division Council prior to filing.

[3] https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/fair_trial_commentaries.pdf.

> If it is likely that any prospective jurors have been exposed to prejudicial publicity, they should be individually questioned to determine what they have read and heard about the case and how any exposure has affected their attitudes toward the trial. Questioning should take place outside the presence of other chosen and prospective jurors and in the presence of counsel. A record of prospective jurors' examinations should be maintained and any written questionnaires used should be preserved as part of the court record.

Ibid.

The ABA takes no position on the case-specific question whether the court of appeals' judgment should be affirmed or reversed here, which may depend on factors beyond the scope of ABA *voir dire* policies. The ABA instead submits this brief to underscore the importance of content questioning to ensuring a fair trial in high-publicity cases. In particular, individualized content questioning during *voir dire* enables judges, as well as prosecutors and defense counsel, to ensure that jurors are, in fact, impartial and have not become biased by pretrial publicity, and in turn to fairly exercise their discretion in deciding whether to strike or challenge jurors. The ABA's long-considered view is that, in high-publicity cases, there is no adequate substitute for individualized *voir dire* content questioning.

SUMMARY OF ARGUMENT

Dzhokhar Tsarnaev and his older brother, Tamerlan Tsarnaev, committed a horrific terrorist attack in 2013, detonating two bombs at the finishing line of the Boston Marathon. The attack killed three people and seriously injured hundreds more. The bombing, the manhunt

that followed, and the FBI's investigation received unprecedented media attention. Given the pervasive publicity, the prospective jurors called for Tsarnaev's trial almost certainly had read, seen, or heard accounts of the events through news reports or social media. Individual *voir dire* was therefore essential to ensure that the jurors were not biased and instead remained impartial. A fair trial is a "basic requirement of due process … regardless of the heinousness of the crime charged, [or] the apparent guilt of the offender." *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961).

Since its founding, the ABA has worked to develop guidance to aid courts in matters related to the criminal justice system. As part of this work, for over fifty years, the ABA has had a policy that speaks directly to the jury selection procedures in high-publicity cases like this. The ABA's Standard 8-5.4 recognizes that, "[i]f it is likely that any prospective jurors have been exposed to prejudicial publicity, they should be individually questioned to determine what they have read and heard about the case and how any exposure has affected their attitudes toward the trial." *Current Fair Trial Standards* § 8-5.4, at 15. Such questioning in turn is commonplace in high-publicity cases.

This standard reflects a core precept of the Fifth and Sixth Amendments: that criminal trials must be conducted fairly before an impartial jury on the basis of the evidence produced in court. Indeed, "[t]he theory of our trial system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Skilling* v. *United States*, 561 U.S. 358, 378 (2010) (quoting *Patterson* v. *Colorado ex rel. Atty. Gen.*, 205 U.S. 454, 462 (1907) (Holmes, J.)).

It is the responsibility of the judge, not individual jurors themselves, to determine whether they have an open mind. See *Morgan* v. *Illinois*, 504 U.S. 719, 729–30 (1992). And a juror's positive response to the question—"can you be fair and impartial given what you have learned about this case?"—is not reliable. The juror's assurance may be overly optimistic, or a juror may be unaware of (or disinclined to admit) the extent to which pretrial publicity has impacted his or her ability to consider competing evidence. Without more, the court and parties thus will lack a foundation for evaluating whether the juror actually retains an open mind. Content questioning during *voir dire* protects the integrity of trials by providing the court, prosecution, and defense with the factual basis they need to critically assess whether a juror is capable of setting aside pretrial media exposure to reach a verdict based solely on the evidence introduced at trial.

Such specific content questioning is even more important in today's media environment. The immense growth in the number and variety of media sources—from cable and satellite television and radio, to Internet news and chatrooms, to the rise of social media—has vastly expanded the range and quality of sources through which jurors may hear about a case. Inflammatory or one-sided reports, or even outright disinformation, are significant concerns. The trial judge (and the parties) also may be unaware of or unfamiliar with the reports any individual juror is reading or hearing. Asking jurors to recall specifics about what they have read or heard may lead to revelations a juror had not previously consciously considered. And the answers will provide judges and counsel with the tools to accurately assess a juror's exposure to pretrial publicity and

how it may have impacted the juror's state of mind. Moreover, by establishing a detailed record of what jurors learned and how they reacted to it, content questioning facilitates appellate review.

In light of the extraordinary pretrial publicity in this particular case, it would have aided the court and parties to question jurors about the specific content of whatever media they read, saw, or heard. Where a questionnaire is used to facilitate *voir dire* (as was done here), it is particularly helpful to include initial content questions to facilitate individual follow-up questions. Such questioning would have been helpful in providing the court with the foundation for determining whether each juror actually retained an open mind notwithstanding exposure to pretrial publicity.

ARGUMENT

I. Content Questioning Is A Vital Tool For Ensuring A Fair Trial In High-Publicity Cases

A. Identifying Biased Jurors Is Critical To Preserving The Right To A Fair Trial In High-Publicity Cases

The Sixth Amendment expressly provides a right to trial before "an impartial jury." U.S. Const. Amend. VI. "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin*, 366 U.S. at 722. This Court has also long recognized that Due Process requires an impartial jury to decide a case based on the evidence introduced at trial. "[F]ailure to accord an accused a fair hearing violates even the minimal standards of due process." *Ibid.*; see U.S. Const. Amend. V; *Murphy* v. *Florida*, 421 U.S. 794, 799 (1975) ("The constitutional standard of fairness requires that a defendant have 'a panel of impartial, "indifferent" jurors.'"). And "[d]ue process

means a jury capable and willing to decide the case solely on the evidence before it." *Smith* v. *Phillips*, 455 U.S. 209, 217 (1982). "[C]onclusions to be reached in a case" must be induced "only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Skilling*, 561 U.S. at 378 (quoting *Patterson*, 205 U.S. at 462).

Voir dire "plays a critical function" in empaneling an impartial jury. *Rosales-Lopez* v. *United States*, 451 U.S. 182, 188 (1981) (plurality opinion). "The theory of the law is that a juror who has formed an opinion cannot be impartial." *Reynolds* v. *United States*, 98 U.S. 145, 155 (1878). And "[w]ithout an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Morgan*, 504 U.S. at 729–30 (quoting *Rosales-Lopez*, 451 U.S. at 188).

When a criminal case has been the subject of extensive pretrial publicity, the need for effective *voir dire* is particularly acute. "[P]retrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Skilling*, 561 U.S. at 384 (citation omitted). But "any criminal case that generates a great deal of publicity presents some risks that the publicity may compromise the right of the defendant to a fair trial." *Chandler* v. *Florida*, 449 U.S. 560, 574 (1981). In particular, pretrial publicity may cement biases or distort deliberations, depriving the defendant of the guarantee of a jury that is "impartial[]" and "unswayed by outside influence." *Skilling*, 561 U.S. at 379. Media exposure to such prejudicial publicity may, for example, cause jurors to perceive the defense or the government's case in a more or less favorable light; give jurors a narrative

framework that leads them to assign more or less probative value to evidence based on how it fits that narrative; cause jurors to develop an emotional response that colors their perceptions of guilt; or expose them to inflammatory evidence that was not admissible at trial.[4] Targeted *voir dire* is thus necessary to determine whether the juror has formed "preconceived notion[s]" and, if so, whether "the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin*, 366 U.S. at 723. Cf. *Skilling*, 561 U.S. at 389 ("The District Court conducted *voir dire* … aware of the greater-than-normal need, due to pretrial publicity, to ensure against jury bias.").

B. As ABA Policy Has Long Recognized, Content Questioning Is A Vital Tool For Identifying Biased Jurors In High-Publicity Trials

The ABA's Criminal Justice Standards have long expressed a policy favoring content questioning in high-publicity cases because asking jurors what they saw or

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[4] See, *e.g.*, David Yokum et al., *The Inability to Self-Diagnose Bias*, 96 Denv. L. Rev. 869 (2019); Lorraine Hope et al., *Understanding Pretrial Publicity: Predecisional Distortion of Evidence by Mock Jurors*, 10 J. Experimental Psych. 111 (2004); Christine L. Ruva et al., *Positive and Negative Pretrial Publicity: The Roles of Impression Formation, Emotion, and Predecisional Distortion*, 38 Crim. Just. & Behav. 511 (2011); Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 Psych. Pub. Pol'y & L. 677 (2000); Neil Vidmar, *When All of Us Are Victims: Juror Prejudice and "Terrorist" Trials*, 78 Chi.-Kent L. Rev. 1143, 1150–51 (2003); Christine L. Ruva et al., *Your Bias Is Rubbing Off on Me: The Impact of Pretrial Publicity Jury and Jury Type on Guilt Decisions, Trial Evidence Interpretation, and Impression Formation*, 26 Psych. Pub. Pol'y & L. 22 (2020).

heard before trial gives courts and parties the necessary tools to ensure that seated jurors are impartial and that trials in turn are fair.

1. The ABA's work to develop criminal justice standards began in 1964 under the leadership of then-ABA President Lewis F. Powell. See Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 Crim. Just. 10 (2009). As part of that project, the ABA formed a Committee on Fair Trial and Free Press in response to growing concern that pretrial publicity could compromise a court's ability to conduct a fair trial. From 1959 through 1963, this Court had reversed criminal convictions in a string of cases based on jurors' exposure to prejudicial media coverage, making evident the need for standards for effective *voir dire*. See *Marshall* v. *United States*, 360 U.S. 310 (1959); *Irvin*, *supra*; *Rideau* v. *Louisiana*, 373 U.S. 723 (1963). As Justice Frankfurter observed in 1961, "Not a Term passes without this Court being importuned to review convictions … in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts … exerting pressures upon potential jurors before trial." *Irvin*, 366 U.S. at 730 (Frankfurter, J., concurring).

The 1963 assassination of President John F. Kennedy prompted further concern. In the aftermath, local police provided "running commentary" on the fast-moving investigation, with the press "publiciz[ing] virtually all of the information about the case" as it was being gathered. *Report of the President's Commission on the Assassination of President Kennedy* 231–35 (1964). "Inevitabl[y]," some of the commentary was inflammatory, and many disclosures "proved to be erroneous." *Id.* at

235. Oswald was himself killed, but the Warren Commission observed that "Oswald's opportunity for a trial by 12 jurors free of preconception as to his guilt or innocence would have been seriously jeopardized by the premature disclosure and weighing of the evidence against him." *Id.* at 239. Moreover, the Commission observed that "[t]he number and variety of misstatements issued by the police … would have greatly assisted a skillful defense attorney." *Id.* at 238.

The ABA responded by establishing the Committee on Fair Trial and Free Press, to adopt standards for how best to address the impact of publicity on criminal trials. See *id.*, Ex. 2183 at 2 (ABA press release of Dec. 7, 1963); Paul C. Reardon, *The Fair Trial–Free Press Standards*, 54 A.B.A. J. 343, 343 (1968). Led by reporter David L. Shapiro, the Committee cast a wide net, soliciting input from state and federal judges, prosecutors, police officials, criminal defense attorneys, academics, and other bar groups. See *id.* at 344.

Based on its research, the Committee in 1966 recommended (and the ABA in 1968 adopted) model standards governing judicial proceedings in criminal cases. C.A. App. 11628 (*Tentative Draft: Standards Relating to Fair Trial and Free Press* 130–31 (Dec. 1966) (*1966 Draft Fair Trial Standards*)); *1968 Fair Trial Standards* at 130. The resulting standards ultimately "received support from most of the legal profession." *Neb. Press Ass'n* v. *Stuart*, 427 U.S. 539, 550 (1976).

Those standards recommended, among other things, that whenever there is "a significant possibility that individual [prospective jurors] will be ineligible to serve because of exposure to potentially prejudicial material," *voir dire* should include an examination of each juror to "determin[e] what the prospective juror has read and

heard about the case and how his exposure has affected his attitude towards the trial." *1968 Fair Trial Standards* § 3.4(a), at 130; see also *1966 Draft Fair Trial Standards* § 3.4(a), at 130 (same). The policy thus reflected the sense of the profession that jurors in high-publicity trials should be questioned to determine the content of the news to which they were exposed and how that impacted the juror's ability to perform his or her duties.

2. The ABA's fair trial standards have evolved since 1968, but the content questioning standard retains its core: "[i]f it is likely that any prospective jurors have been exposed to prejudicial publicity, they should be individually questioned to determine what they have read and heard about the case and how any exposure has affected their attitudes toward the trial." *Current Fair Trial Standards* § 8-5.4, at 15. The standard "does not dictate the precise content of the voir dire," but it calls for substantive questioning that "elicits the content of information to which the jurors have been exposed, the medium through which the jurors were exposed, the frequency of exposure, and the effects of that exposure." *Id.* at 80. The commentary to Standard 8-5.4 recognizes that the court may facilitate this substantive examination by using jury questionnaires. *Ibid.*

The practical justification for this longstanding policy is simple. It is the judge's "responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence." *Morgan*, 504 U.S. at 729–30; see *Murphy*, 421 U.S. at 800 (a "juror's assurances that he is equal to this task cannot be dispositive of the accused's rights"). But merely asking a juror whether he or she can be fair and

impartial is unhelpful and indeed may be counterproductive. "Natural human pride" may lead a juror in good faith to believe he can be fair and impartial "without stopping to consider the significance or firmness of impressions he might have gained from news reports." *United States* v. *Dellinger*, 472 F.2d 340, 375 (7th Cir. 1972). And as set forth above, see pp. 7–8 & n.4, *supra*, media exposure may shape a juror's views in ways the juror does not recognize. See also *Smith* v. *Phillips*, 455 U.S. 209, 221–22 (1982) (O'Connor, J., concurring) (observing that a "juror may have an interest in concealing his own bias," or "may be unaware of it"); Norbert L. Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity*, 40 Am. U. L. Rev. 665, 695 (1991) (finding that jurors who claimed they could be impartial after being exposed to publicity were as likely to convict as jurors who doubted impartiality).

Jurors may also "resent being individually asked whether they can be fair and impartial; they feel their integrity is being questioned." *1966 Draft Fair Trial Standards* at 136. Such questioning can also "embarrass or intimidate the juror," suggesting he "would be derelict in his duty if he would not cast aside any preconceptions." *Ibid.* The result is that "[f]ew prospective jurors will admit to bias, and most, when asked if they can be fair and impartial in deciding a matter before them, answer 'Yes.'" *United States* v. *Perez*, 387 F.3d 201, 203, 205 (2d Cir. 2004).

Without more information, if a juror makes a general promise to be fair and impartial, the court or parties will lack a factual basis for exploring whether that answer is overly optimistic or whether the juror can faithfully perform his or her role. "Thus the need to lay

an adequate foundation for the court's own determination of this ultimate question is particularly acute." *1966 Draft Fair Trial Standards* at 136.

The ABA has long supported content questioning because it provides that foundation for determining whether a juror who has been exposed to out-of-court publicity is actually biased. Asking a juror what they have seen or heard is more likely "to elicit information and encourage candor," *ibid.*, as those are questions of historical fact rather than questions about value judgments or predictions. And once the parties and the court learn the facts regarding the "nature and degree" of the juror's pretrial exposure, they can ask follow up questions to explore whether or how it has influenced the juror's approach to the case. *Id.* at 136–37.

For example, a prospective juror may have been exposed to "highly significant information (such as the existence or contents of a confession), or other incriminating matters that may be inadmissible in evidence, or particularly inflammatory material." *Id.* at 137. Exposure to such material is itself insufficient to strike a juror, but further probing would be needed to determine how exactly the juror reacted to that specific information and whether the juror still has an open mind. See *Current Fair Trial Standards* at 80. Without knowing what the juror saw or heard, however, the court and the parties would have difficulty evaluating the juror's answers or determining the effect of pretrial publicity on the juror's impartiality.[5]

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[5] In *Mu'Min* v. *Virginia*, 500 U.S. 415 (1991), this Court recognized that the constitutional minimum requirements of due process do not require state courts to follow the ABA's policy. *Id.* at 424–25. At that time, the ABA policy on juror questioning was

Finally, conducting this individual questioning on the record facilitates appellate review. See *Current Fair Trial Standards* at 80. With the back-and-forth recorded, an appellate court can see for itself how the court exercised its discretion. See, *e.g.*, *Skilling*, 561 U.S. at 389 ("Inspection of the questionnaires and *voir dire* of the individuals who actually served as jurors satisfies us that … the selection process successfully secured jurors who were largely untouched by Enron's collapse.").

C. Content Questioning Is Particularly Important In The Modern Media Landscape

Content questioning has become even more vital in recent years. In the 1960s, jurors encountered news about the case from a limited universe of sources, and a judge sitting in that community would also likely be familiar with the very same sources and their reporting. For example, in *Irvin*, the trial occurred in Evansville, Indiana, after a "build-up of prejudice" that was "clear and convincing." 366 U.S. at 725–26. Notably, "the newspapers in which the stories appeared were delivered regularly to approximately 95% of the dwellings" in the county and "the Evansville radio and TV stations,

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"based on a substantive rule that renders a potential juror subject to challenge for cause" if "he has been exposed to and remembers 'highly significant information' or 'other incriminating matters that may be inadmissible.'" *Id.* at 430. The Court observed that was a "stricter standard … than that which we have held the Constitution to require." *Ibid.* The ABA has since changed that underlying rule. See *Current Fair Trial Standards* § 8-5.4, at 15. That change makes clear that the need for content questioning is rooted in the constitutional requirement that a juror must not have "such fixed opinions that they could not judge impartially the guilt of the defendant." *Mu'Min*, 500 U.S. at 430.

which likewise blanketed that county, also carried extensive newscasts covering the same incidents." *Id.* at 725. The parties and the court may not have seen or heard all of the same coverage, but would have had some common understanding of the reporting, its content, and the risks of bias emanating therefrom.

The media landscape is radically different today, as there has been an "explosion in sources of information." *Current Fair Trial Standards* at xxviii. "In addition to broadcast and cable television," jurors now "may learn about a case by listening to conventional or satellite radio, reading a newspaper or magazine in print or on the Internet, or by reading a blog, Facebook, or Twitter post." *Ibid.* (footnotes omitted).

At the dawn of the twenty-first century, social media was in its infancy. But over the last decade, social media has become a significant news source for many millions of people. In 2008, a study found that one in eight American adults consumed news on social media—but by 2019, that figure had jumped to "more than 70%." Ro'ee Levy, *Social Media, News Consumption, and Polarization: Evidence from a Field Experiment*, 111 Am. Econ. Rev. 831, 831 & n.1 (2021). Through platforms like Facebook and Twitter, non-professional journalists, bloggers, and pundits now can reach a nationwide audience. Jennifer Kavanagh et al., *News in a Digital Age: Comparing the Presentation of News Information over Time and Across Media Platforms* 7 (2019).

Social media platforms connect people and can provide enormous benefits, but can also facilitate the rapid spread of one-sided, inflammatory, misleading, or even false information. See, *e.g.*, Soroush Vosoughi et al., *The Spread of True and False News Online*, 359 Science

1146, 1147 (2018) (finding that "falsehood diffused significantly farther, faster, deeper, and more broadly than the truth in all categories of information"). In particular, social media platforms often present users with articles and content reaffirming or conforming to the user's existing beliefs and preferences. See, *e.g.*, Levy, *Social Media, News Consumption, and Polarization* at 832 (finding that "news sites visited through social media … are associated with more segregated, pro-attitudinal, and extreme news, compared to other news sites visited").[6]

Reflecting those remarkable changes, the ABA in 2016 updated the title of its standards from "Fair Trial and Free Press" to "Fair Trial and Public Discourse." *Current Fair Trial Standards* at xxx. The ABA recognized that, for purposes of ensuring that high-publicity trials are conducted fairly, there is no longer any reason to "distinguish between the 'press' and the 'public' or to privilege the institutional press." *Ibid.* After all, "[a]nyone with access to the Internet can widely disseminate information that can inform the public but can also be prejudicial to fair trial interests." *Ibid.*

Content questioning in high-publicity trials is thus particularly important now. Due to the proliferation of news sources, and because social media is tailored to each user, a single judge (or prosecutor or defense counsel) may be entirely unaware of what a juror might have

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[6] See also Yosh Halberstam & Brian Knight, *Homophily, Group Size, and the Diffusion of Political Information in Social Networks: Evidence From Twitter*, 143 J. Pub. Econ. 73 (2016); Itai Himelboim et al., *Birds of a Feather Tweet Together: Integrating Network and Content Analyses to Examine Cross-Ideology Exposure on Twitter*, 18 J. Computer-Mediated Commc'n 154, 168, 171 (2013).

seen or heard about a case, the source of the juror's exposure, the reliability of the source, the nature of the content, whether it presented an inflammatory or one-sided picture of the case, or otherwise might prompt a reader to develop firm convictions about guilt or punishment. And without knowing *what* a juror has heard, the court and the parties cannot effectively evaluate *how* the juror reacted and whether the juror still has an open mind. Content questioning helps to close that informational gap.

D. Content Questioning Promotes Trial Fairness For All Parties

Content questioning furthers the interests of all participants in ensuring a fair trial because pretrial publicity can distort the trial process in favor of the prosecution or the defense. Content questioning enables the court and the parties to ferret out biases that may exist in all directions to ensure a fair and even playing field.

Reflecting the practical utility of content questioning, the court and trial counsel routinely ask such questions in high-profile cases. In Jeffrey Skilling's trial for his role in the Enron fraudulent accounting scandal, for example, the court asked jurors questions about what they learned from news coverage. See Jury Trial Tr. Vol. 1 at 46, 96, 156, 282, *United States* v. *Skilling*, No. 04-cr-00025 (S.D. Tex. Jan. 30, 2006) ("Do you recall any particular articles dealing with Enron?"; "What stands out in your mind about those articles?"; "[W]hat's your most vivid impression based on what you've read about this case?"; "What do you recall about [the coverage in the *Chronicle* in the last 8 to 10 days]?"). Other examples include the trials of Timothy McVeigh and Terry Nichols for the Oklahoma City

bombing;[7] George Zimmerman for the murder of Trayvon Martin;[8] Martha Stewart for securities fraud;[9] and Roger Stone for charges arising out of the investigation by Special Counsel Robert Muller.[10]

The recent trial of Derek Chauvin for the murder of George Floyd provides a vivid example. When Chauvin killed Floyd, a bystander filmed the murder, including Chauvin kneeling on Floyd's neck for more than nine minutes. *How George Floyd Died, and What Happened Next*, N.Y. Times (May 25, 2021).[11] The bystander uploaded the shocking video on Facebook, where it was viewed millions of times, sparking nationwide protests

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[7] See, *e.g.*, Reporter's Tr., *United States* v. *McVeigh*, No. 96-cr-68 (D. Colo. Apr. 9, 1997), reproduced at https://www.oklahoman.com/article/1075026/okc-bombing-trial-transcript-04281997-1126-cdtcst. For example, the prosecution asked Juror Number 442, "Tell me a little bit about your recall of the early reports of the bombing in April of '95, couple of years ago." *Ibid.*

[8] The questionnaire asked "what have you heard and from what source" about the case. Confidential Juror Questionnaire 2, *Florida* v. *Zimmerman*, No. 12-1083-CFA (Fla. 18th Jud. Cir. Seminole Cnty. June 10, 2013), http://law2.umkc.edu/faculty/projects/ftrials/zimmerman1/Zimjuryquestionaire.pdf.

[9] See, *e.g.*, 1/20/04 Tr. 78, *United States* v. *Stewart*, No. 3-cr-717 (S.D.N.Y.) (court asking what the juror understood about the case "from the reports that you read"); 1/22/04 Tr. 381–82, 483–84, in *Stewart*, *supra* (asking jurors who indicated in questionnaire that they watched portions of a Barbara Walters interview with Martha Stewart what the juror heard in the interview).

[10] The questionnaire asked jurors whether they "read or heard anything" about Stone, "about any statements made by or attributed to" him, "or about this case," and if so, to "describe what you have read or heard and the source of the information." Doc. No. 247, *United States* v. *Stone*, No. 19-cr-018 (D.D.C. Nov. 4, 2019).

[11] https://www.nytimes.com/article/george-floyd.html.

and a mass movement. *Ibid.* News outlets and social media extensively covered the events, subsequent protests, and details about Floyd and Chauvin, making effective *voir dire* particularly important.

The court initially sent a questionnaire to a pool of potential jurors in Hennepin County, Minnesota, and included content questions. For example, the first question asked: "What do you know about this case from media reports?" Special Juror Questionnaire 3, *Minnesota* v. *Chauvin*, No. 27-cr-20-12646 (Minn. Dist. Ct. Hennepin Cnty. Dec. 22, 2020).[12] The responses aided both sides in probing whether each remaining juror had an open mind.

For example, although Juror Number 90 indicated he could be fair, the juror had also reported that he had a "very negative" impression of Chauvin from pretrial publicity and did not "see how an officer could justify causing the death of a non-violent alleged criminal well after he ceased to pose any credible threat." After the defense questioned the juror on his responses, the court ultimately excused the juror.[13]

Another prospective juror, Juror Number 19, indicated that he had seen media reports that Floyd may have been under the influence of "hard drugs" and had

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[12] https://mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-20-12646/JurorQuestionnaire12222020.pdf.

[13] *Voir dire* of Juror No. 90, https://youtu.be/r6mGPVhrNhA?t=677. See also, *e.g.*, *voir dire* of Juror No. 91, https://youtu.be/r6mGPVhrNhA?t=3740 (asking juror to clarify which video she had watched, its length, and why she "shut it off mid video").

a "checkered past."[14] Those answers allowed the prosecution to ask pointed follow-up questions, including what the juror meant by "hard drugs" and "what ran through your mind when you heard this?" The juror answered, "Frankly I don't think that should have much impact on the case as whether you're under the influence of drugs doesn't determine whether you should be living or dead." After further back-and-forth, the prosecution declined to challenge the juror, and he was ultimately seated.[15]

Content questions thus provided the judge, as well as both parties, with a strong factual basis for assessing the jurors' ability to be fair and impartial in light of the extensive pretrial publicity. While the Chauvin case is still subject to post-verdict motions and appeal, it provides a recent illustration of the use and effectiveness of individualized *voir dire* content questioning by both the prosecution and the defense.

II. This Case Exemplifies The Type Of High-Publicity Criminal Trial In Which Content Questioning Should Be Used

1. The Tsarnaev brothers committed a horrific attack at the Boston Marathon, killing three people and inflicting severe, life-altering injuries on hundreds of others. See Pet. App. 1a. The ensuing media coverage was "unrivaled in American legal history." *Id.* at 19a. Media and social media coverage reported extensively

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[14] This exchange has been transcribed from the video of the March 9, 2021 individual *voir dire* of Juror Number 19, https://youtu.be/NY97pWeX4Eg?t=9759.

[15] There are many other examples. See, *e.g.*, Juror Number 44, https://youtu.be/gqFgYAqfGWk?t=1243 ("[W]hat specific information were you thinking of when you made that statement [that 'he was not a model citizen']?").

and in real time on the bombing, its aftermath, the devastating impact on the victims and their families, the manhunt for Tsarnaev and his brother, their shootout with police, Tsarnaev's arrest, and statements that Tsarnaev made to federal agents who questioned him at a hospital before reading his *Miranda* rights. Meanwhile, media reports covered the brothers' backgrounds, character, and motivation, including reports of their path towards radicalization.[16] The ubiquitous "Boston Strong" slogan, a message of "courage and resilience," developed as a nationwide reaction to what millions had seen or heard about the case. *Id.* at 12a.

Given the scope and duration of this coverage, virtually all, if not all, potential jurors entered the courthouse with some exposure to pretrial publicity. Individualized content questioning at the *voir dire* stage, as reflected by long-standing ABA policy, would have been effective in ferreting out the facts, evaluating bias, and ensuring a fair trial. The district court, however, broadly prevented jurors from being asked such questions.

2. Jury selection began with the court asking more than 1,300 prospective jurors to complete a 100-item

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[16] See, *e.g.*, Alissa de Carbonnel & Stephanie Simon, *Special Report: The Radicalization of Tamerlan Tsarnaev*, Reuters (April 23, 2013), https://www.reuters.com/article/us-usa-explosions-radicalisation-special/special-report-the-radicalization-of-tamerlan-tsarnaev-idUSBRE93M0CZ20130423; Luke Harding & Vikram Dodd, *Tamerlan Tsarnaev's YouTube Account Shows Jihadist Radicalization in Pictures*, The Guardian (April 22, 2013), https://www.theguardian.com/world/2013/apr/22/tamerlan-tsarnaev-youtube-jihadist-radicalisation; Connor Simpson, *Who Influenced the Tsarnaev Brothers to Bomb the Marathon?*, The Atlantic (April 21, 2013), https://www.theatlantic.com/national/archive/2013/04/who-influenced-tsarnaev-brothers-bomb-marathon/316080/.

questionnaire. Defense counsel sought to ask prospective jurors what they knew "about the facts of this case before coming to court today (if anything)." Pet. App. 26a. The government initially supported that request, but later changed its position, and the court ultimately refused to allow the question. J.A. 481–83. The final questionnaire did not include content questions. It instead asked whether, "[a]s a result of what you have seen or read in the news media, … you [have] formed an opinion" about Tsarnaev's guilt or whether he "should receive the death penalty." Pet. App. 26a; *id.* at 373a. The questionnaire also asked jurors merely to "describe the *amount* of media coverage you have seen about this case"—not its content—allowing possible answers of only "[a] lot," "[a] moderate amount," "[a] little," and "[n]one." *Id.* at 372a (emphasis added).

After most jurors were excused, the court called 256 jurors back for individual *voir dire* that lasted 21 days. *Id.* at 30a. The defense again sought to ask each juror content questions during individual *voir dire*: for example, "What stands out in your mind from everything you have heard, read[,] or seen about the Boston Marathon bombing and the events that followed." J.A. 489, 491–92, 496–97. The court denied those requests. Pet. App. 30a–31a; J.A. 494. And subject to a few exceptions, *e.g.*, C.A. App. 1810–1812, the court also sustained objections by the government when the defense attempted to ask content questions in response to specific comments by prospective jurors. See Pet. App. 33a; *e.g.*, J.A. 372, 392. For example, when one juror acknowledged that "I suppose that we knew that [Tsarnaev] was involved" from media coverage, the court declined to allow a question to assess what exactly that coverage entailed. J.A. 372.

Jurors were thus asked whether they learned about the bombing through the media and the amount of exposure they had, but except for a few instances, not what they heard or its nature or character. But knowledge of the *volume* of coverage a juror saw or heard provides a weak foundation for assessing bias. For example, a juror might report viewing "[a] lot" of media coverage. Without follow-up questions about *what* the coverage contained, that answer provides little or no insight into the extent to which the coverage was inflammatory or prejudicial or how it impacted the juror's state of mind. What matters in assessing bias from pretrial publicity is whether the juror has formed definite and firm convictions that the juror cannot "lay aside," making the juror unable to "render a verdict based on the evidence presented in court." *Irvin*, 366 U.S. at 723. But it is difficult to assess how a juror has reacted to something the juror saw or heard if the court does not know what that something is.

The ABA accordingly recommends that potential jurors be asked specific content questions to provide the strongest foundation for the constitutional inquiry, and in turn to ensure a fair trial. The modern media landscape, in which jurors could have learned about a case from countless possible sources, makes content questioning all the more important today.

CONCLUSION

This Court should affirm that, when it is likely that prospective jurors have been exposed to prejudicial publicity, they should be individually questioned to determine what they have read and heard about the case and

how any exposure has affected their attitudes toward the trial.

Respectfully submitted,

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