No. 20-443

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

DZHOKHAR A. TSARNAEV,

Respondent.

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

BRIEF FOR THE NATIONAL FRATERNAL ORDER OF POLICE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

On the night of April 18, 2013, three days after detonating shrapnel bombs at the finish line of the Boston Marathon, respondent and his brother Tamerlan loaded Tamerlan's car with explosives and left Tamerlan's home in Cambridge, Massachusetts. Driving past the Massachusetts Institute of Technology, the brothers spotted MIT Police Officer Sean Collier's parked squad car. Respondent and Tamerlan approached the squad car from behind and shot Officer Collier execution-style at point-blank range, once between the eyes, twice in the side of the head, and three times in the hand.

Officer Collier was not the last law enforcement officer who would die before respondent was brought to justice. The subsequent shootout in Watertown, Massachusetts also wounded seventeen law enforcement officers. Boston Police Officer Dennis Simmonds was injured by a hand grenade and later died as a result of the injuries he sustained.

The National Fraternal Order of Police ("FOP") is the world's largest organization of sworn law enforcement officers, with more than 356,000 members in more than 2,100 lodges. The FOP is the voice of law enforcement personnel who dedicate their lives to protecting and serving our communities, including those

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[1] The parties have consented to the filing of this brief. No counsel for a party authored any part of this brief; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

who, like Officer Collier and Officer Simmonds, make the ultimate sacrifice.

The FOP and its members have an interest in the outcome of this case because the erroneous decision of the court of appeals will impede efforts to secure justice for law enforcement officers injured or killed in the line of duty. The court of appeals held that district courts in "high-profile case[s]" must always grant requests by defense counsel to ask each prospective juror questions about the content of the pretrial publicity to which they have been exposed. Many cases in which the defendant is prosecuted for murdering a law-enforcement officer will naturally fit the court of appeals' concept of a "high-profile" case.

If left uncorrected, the categorical rule announced by the court of appeals will become mandatory in virtually every case tried in federal court in the First Circuit where, as here, the United States seeks to hold a criminal defendant responsible for the murder and maiming of federal or state law enforcement personnel. *See* 18 U.S.C. §§ 1114 (murder of federal law enforcement officers), 1121 (murder of state law-enforcement officers aiding federal investigations).

SUMMARY OF ARGUMENT

I. The court of appeals applied an inflexible *voir dire* rule for "high-profile" cases, which is incorrect and should be reversed. The court of appeals' exercise of its supervisory power flouts this Court's repeated command that district courts be given "wide discretion * * * in conducting *voir dire* in the area of pretrial publicity." *Mu'Min v. Virginia*, 500 U.S. 415, 427 (1991). Courts reviewing convictions even in the highest-profile cases have heeded this Court's admonition

and refused to mandate content-specific *voir dire*, as a matter of either the Constitution or their supervisory authority. Preserving district courts' "wide discretion" in overseeing *voir dire* is particularly essential in high-profile cases like this one, which often involve lengthy and complex *voir dire* proceedings.

The First Circuit's decision to supplant the district court's judgment with its own after-the-fact assessment also ignores the extensive procedural protections available to federal capital defendants. These protections, in addition to "reliance on the judgment of the trial court," *id.*, ensure that the verdict and sentence in a capital case is not the result of bias stemming from pretrial publicity. There is no justification for the court of appeals' decision to disregard this Court's directives and strip the district court of its authority to manage *voir dire*.

II. The court of appeals' decision also will have grave consequences for respondent's victims and their family members. Once the district court empanels a new jury, respondent's victims and their families will again face respondent and will again offer testimony describing how the bombings have transformed their lives. The court of appeals would force respondent's victims and their families to re-live these horrific events from seven years ago. The court's decision will inflict needless psychological and emotional suffering on the individuals whose interests the justice system should protect and vindicate.

ARGUMENT

I. The First Circuit's Categorical "High-Profile Case" Rule Is An Abuse Of The Court Of Appeals' Supervisory Power.

The court of appeals held that it is always an abuse of discretion, in any "high-profile case[]," for a district court to deny defense counsel's request to individually ask every prospective juror questions about the "kind" of pretrial publicity to which they have been exposed, including "what they had read and heard about the case." Pet. App. 53a, 55a (citation and brackets omitted). This categorical "high-profile" *voir dire* rule ignores the Court's admonition in *Mu'Min v. Virginia* that "wide discretion [be] granted to the trial court in conducting *voir dire* in the area of pretrial publicity." 500 U.S. 415, 427 (1991). In *Skilling v. United States*, the Court reiterated its directive that "[a]ppellate courts making after-the-fact assessments of the media's impact on jurors should be mindful that their judgments lack the on-the-spot comprehension of the situation possessed by trial judges." 561 U.S. 358, 386 (2010).

Nothing about this case, either the amount of pretrial publicity or the capital sentence, justifies the court of appeals' deviation from *Mu'Min* and *Skilling*. Nor is a categorical "high-profile case" rule necessary given the extensive procedural protections afforded a criminal defendant in federal court, especially in a capital case such as this one. The Court should reverse the court of appeals.

A. The First Circuit Abandoned This Court's Directive That District Courts Be Given "Great Latitude" In Conducting *Voir Dire*.

In evaluating respondent's challenge to the *voir dire* process, the court of appeals disposed of this Court's decision in *Mu'Min* in a single paragraph. The court sidestepped *Mu'Min* on the ground that it did not involve federal courts' supervisory power: "*Mu'Min* arose on direct review of a state-court criminal conviction—which mean[s] the Supreme Court's 'authority' was 'limited to enforcing the commands of the Constitution." Pet. App. 56a (alterations and citation omitted). Because respondent was tried in federal court, the court of appeals reasoned that it "enjoy[ed] more latitude in setting standards for *voir dire* * * * under [its] supervisory power.'" *Id.* (quoting *Mu'Min*, 500 U.S. at 424). "This distinction makes all the difference," the court held, because the circuit precedent that the court of appeals purported to apply, *Patriarca v. United States*, 402 F.2d 314 (1st Cir. 1968), "emanated from [the court's] supervisory powers." Pet. App. 57a. But the "latitude" the court of appeals asserted to create new rules for the federal trial courts pales beside the "*great* latitude" that "the trial court retains * * * in deciding what questions should be asked on *voir dire*." *Mu'Min*, 500 U.S. at 424 (emphasis added).

1. In *Mu'Min*, the Court reviewed the *voir dire* conducted by a state trial court. The case had "engendered substantial publicity." 500 U.S. at 417. During *voir dire*, the trial court denied defense counsel's request to ask potential jurors questions about the content of any publicity they had seen about the case. *Id.*

at 419. The jury convicted Mu'Min, and the trial court (on the jury's recommendation) sentenced him to death.

On review, this Court held that the Constitution does not require asking "about the specific contents of the news reports to which [prospective jurors] had been exposed" or "precise inquiries about the contents of any news reports that potential jurors have read." 500 U.S. at 417, 424-25. The Court acknowledged that its "cases dealing with the requirements of *voir dire* are of two kinds: those that were tried in federal courts, and are therefore subject to this Court's supervisory power, and those that were tried in state courts, with respect to which [the Court's] authority is limited to enforcing the commands of the United States Constitution." *Id.* at 422 (citations omitted). But a "theme[] [that] emerge[s] from *both* sets of cases" is that "the trial court retains great latitude in deciding what questions should be asked on *voir dire*." *Id.* at 424 (emphasis added). These cases "stressed the wide discretion granted to the trial court in conducting *voir dire* in the area of pretrial publicity." *Id.* at 427. Ultimately, the Court explained, "[w]hether a trial court decides to put questions about the content of publicity to a potential juror or not, it must make the same decision at the end of the questioning: is this juror to be believed when he says he has not formed an opinion about the case?" *Id.* at 425. Because "the adequacy of *voir dire* is not easily subject to appellate review," *id.* at 424 (quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981)), the trial court is uniquely suited to determining the effect of pretrial publicity on potential jurors:

> Particularly with respect to pretrial publicity, we think this primary reliance on the judgment of the trial court makes good sense. The judge of that court sits in the locale where the publicity is said to have had its effect and brings to his evaluation of any such claim his own perception of the depth and extent of news stories that might influence a juror.

Id. at 427.

2. In *Skilling*, a noncapital case,[2] the Court also addressed the *voir dire* ramifications of "pervasive" pretrial publicity resulting from the collapse of Enron. Skilling argued that *voir dire* was insufficient because the district court had failed to probe sources of potential bias, including pretrial publicity. The Court disagreed and affirmed Skilling's conviction. To uncover potential bias stemming from pretrial publicity, the district court asked potential jurors questions concerning the extent of their exposure to pretrial publicity, whether anything in the news had influenced their opinions, and whether "any opinion [they] may have formed regarding Enron or [Skilling] [would] prevent their impartial consideration of the evidence at trial." 561 U.S. at 389-392 (alterations in original, internal quotation marks omitted).

This Court approved the district court's *voir dire* even though the court had not asked many of the questions now required by the First Circuit. As the dissent

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[2] The First Circuit was unclear whether it was applying a special rule for high-profile *capital* cases—which, of course, it could not have derived from *Patriarca*, a noncapital case—or for all high-profile cases. *See* Pet. App. 59a-60a. Either would be erroneous. Indeed, it is the rare federal capital prosecution that is not "high-profile."

noted, (a) "[m]ost prospective jurors were asked just a few yes/no questions about their general exposure to media coverage and a handful of additional questions concerning any responses to the written questionnaire that suggested bias"; (b) "the court rarely sought to draw them out with open-ended questions about their impressions of Enron or Skilling"; and (c) the court "did not seek elaboration about the substance of" conversations prospective jurors had had after seeing media coverage. 561 U.S. at 453-56 (Sotomayor, J., concurring in part and dissenting in part).

3. The decision of the court of appeals cannot be reconciled with this Court's directive that trial courts enjoy "wide discretion * * * in conducting *voir dire* in the area of pretrial publicity and in other areas of inquiry that might tend to show juror bias." *Mu'Min*, 500 U.S. at 427. Here, the district court began with a "long and detailed one-hundred-question questionnaire" (Pet. App. 249a) provided to prospective jurors, which included general questions about each juror's media consumption and the sources of that consumption, in addition to specific questions about each juror's exposure to pretrial publicity. Pet. App. 27a, 372a-373a; *see also Skilling*, 561 U.S. at 388-89 & n.22 (noting that *voir dire* is just the culmination of a lengthy process that includes the questionnaire, which must not be "undervalue[d]"). During the twenty-one days of *voir dire* that followed, both the district court and respondent's counsel asked prospective jurors countless follow-up questions, including about their exposure to media coverage related to the case. *See* Pet. Br. 26 (citing J.A. 290, 299-300, 311-12, 317-18, 326-28, 331-32, 339, 350, 360-61, 371-72, 383-84, 399-401, 407-12, 419-21, 434, 448-49, 455-56, 459).

Doing exactly what this Court has cautioned against, the court of appeals "undervalued" the district court's efforts and focused myopically on the pretrial publicity associated with the Boston Marathon bombings. Having concluded that this publicity resulted in "a significant possibility" of "expos[ure] to potentially prejudicial material[s]," Pet. App. 53a (quoting *Patriarca*, 402 F.2d at 318), the court of appeals decided that there was only one permissible response to that "possibility"—to carry out "content-specific questioning," *id.* at 55a, even though the district court had chosen to address the matter in other ways.

The court of appeals' decision is especially striking given the praise that a different panel of the same court of appeals heaped on the district court's *voir dire* in rejecting a pretrial mandamus petition. The court of appeals found that the district court had "taken ample time to carefully differentiate between those individual jurors who have been exposed to publicity but are able to put that exposure aside and those who have developed an opinion they cannot put aside." Pet. App. 253a. The court of appeals had it right the first time.

Even courts reviewing convictions in the highest-profile cases in this country's history have not required the type of content-specific inquiries mandated by the First Circuit. *Skilling* concerned "an event of once-in-a-generation proportions," and included "tens of thousands" of media reports and "full-throated denunciations" of the defendant. 561 U.S. at 448 (Sotomayor, J., concurring in part and dissenting in part). Another case, *United States v. Haldeman*, involved the prosecution of government officials involved in the Watergate scandal. 559 F.2d 31 (D.C. Cir. 1976). The D.C. Circuit held that the district

court did not abuse its discretion in denying defense counsel's request for content-specific questions pertaining to prospective juror's exposure to the "extraordinarily heavy coverage in both national and local news media." *Id.* at 59. There are many other instances where courts in "high-profile cases" have denied defense counsel's request for *voir dire* on the contents of pretrial publicity to which prospective jurors may have been exposed, either as a matter of the court's supervisory authority[3] or on constitutional grounds.[4] That the pretrial publicity in this case was

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[3] *See, e.g.*, *United States v. Montgomery*, 772 F.2d 733, 735-36 (11th Cir. 1985) (in case with "substantial pretrial publicity," *voir dire* "was adequately thorough and searching to enable the court to determine whether the jurors were impartial" even though "the judge did not ask specifically what each juror had read or heard" and "defendants were not permitted to question the jurors individually" about their exposure to pretrial publicity).

[4] *See, e.g.*, *Bible v. Schriro*, 497 F. Supp. 2d 991, 1015-16 (D. Ariz. 2007) (holding that it "was not fundamentally unfair" in a "high profile" case to deny defense counsel's request case for individualized inquiry into the contents of prospective juror's exposure to pretrial publicity), *aff'd sub nom. Bible v. Ryan*, 571 F.3d 860 (9th Cir. 2009); *Robinson v. Gundy*, 174 F. App'x 886, 890-91 (6th Cir. 2006) (rejecting argument that "*voir dire* was inadequate [because petitioner] was entitled to question prospective jurors individually about the content and effect of their exposure" to the "extensive" pretrial publicity in the case); *Ervin v. Davis*, No. 00-CV-01228, 2016 WL 3280608, at *6 (N.D. Cal. June 15, 2016) (holding that denial of counsel's request to *voir dire* jurors regarding their exposure to a potentially prejudicial news article was "not constitutionally required" and did not "render[] [the defendant's] trial fundamentally unfair"); *United States v. Rahman*, 189 F.3d 88, 121 (2d Cir. 1999) (rejecting argument in terrorism case that *voir dire* "was insufficient with respect to (1) [] prior knowledge of the case from reports [jurors] may have heard in the media" despite jurors only being asked "whether they had heard anything about the case," "the source of that information,"

"extensive" provides no basis for the court of appeals to ignore this Court's admonitions in *Mu'Min* and *Skilling* that the district court be afforded wide discretion in conducting *voir dire*.

In fact, such broad discretion is *most* needed in highly publicized cases such as this one, given the lengthy and complex *voir dire* proceedings they often involve. For example, in *State v. Addison*, 87 A.3d 1 (N.H. 2013), the New Hampshire Supreme Court recounted the extensive *voir dire* involved in the capital trial for the murder of Officer Michael Briggs. *Id.* at 35, 36-38. The *voir dire* in this case lasted "approximately seventeen days," involved "[a]pproximately 1,200 prospective jurors," and "generat[ed] approximately 2,800 pages of transcript testimony." *Id.* at 42. Three hundred prospective jurors "reported to the courthouse for jury selection," and each filled out a "forty-one page [questionnaire]" covering a host of subjects, including media exposure. *Id.* Thereafter, "approximately 114 prospective jurors" were questioned individually by the trial judge and attorneys. *Id.* at 43. Similarly, *United States v. Whitten*, 610 F.3d 168 (2d Cir. 2010), recounted the *voir dire* in another capital case involving the murder of a law enforcement officer. That *voir dire* involved "[a]pproximately 600 potential jurors," *id.* at 176, with 260 of those potential jurors completing a "54-page questionnaire," including questions about "relevant media exposure," and then being questioned individually by the trial judge. *Id.* at 185-86. *See also McNabb v. State*, 887 So.2d 929, 946 (Ala. Crim. App. 2001) (*voir dire* in capital murder trial for murder of law

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and "whether they could nonetheless render 'a fair and impartial verdict'").

enforcement "was extensive," "encompass[ing] approximately 8 volumes of the 18-volume certified record").

Insisting on questioning that adds to the already-considerable length and complexity of *voir dire* risks more than just wasting judicial resources. Courts, including this one, have also recognized that a lengthier and more complex *voir dire* poses an unintended risk of confusing the jury. *See Patton v. Yount*, 467 U.S. 1025, 1039 (1984) (recognizing that "ambiguous" and "at times contradictory" testimony from venire members "is not unusual on *voir dire* examination, particularly in a highly publicized criminal case"); *McNabb*, 887 So. 2d at 946 (recounting that "many of the prospective jurors were confused" and noting that "[t]he record * * * is replete with leading, ambiguous, confusing, and repetitive questions"). It is in precisely these contexts—where risks of juror bias must be balanced against risks of juror confusion—that district courts' "wide discretion" is most needed to ensure that *voir dire* fulfills rather than hampers its intended purpose.

Ultimately, imposing a one-size-fits-all regime for *voir dire* in all "high profile" cases only will serve to impede the administration of justice in cases, like this one, involving the killing of a law enforcement officer. In 2015 alone—the year in which respondent murdered Officer Collier—41 other federal, state, and local law enforcement officers were murdered in the line of duty.[5] Since that time, more than 250 additional on-duty law enforcement officers have been

[5] FBI, *Law Enforcement Officers Feloniously Killed: 2010-2019*, tbl. 1, https://ucr.fbi.gov/leoka/2019/topic-pages/tables/table-1.xls; FBI, *Federal Officers Killed and Assaulted: 2015*, https://ucr.fbi.gov/leoka/2015/federal/federal_topic_page_-2015.

murdered.[6] Any of these cases undoubtedly would qualify as "high profile" and, if tried in a federal court governed by the First Circuit's supervisory-power rule,[7] would require individualized questioning at *voir dire*—regardless of the facts of the case or the actual risk of prospective-juror bias. Such a rule would needlessly prolong already lengthy and contentious trials—a particularly gratuitous outcome in light of the ample protections afforded death-penalty defendants in the federal system. *See* pp. 13-16, *infra*.

B. The Federal System Already Provides Ample Protection To Capital Defendants.

In *Mu'Min* this Court held that there is no constitutional requirement to ask prospective jurors the type of "content-specific questions" that the court of appeals insisted on here, and this Court noted that state courts had not adopted such a requirement as a prudential matter, either.[8] *Mu'Min* set the baseline

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[6] FBI, *Law Enforcement Officers Feloniously Killed: 2010-2019*, *supra*; Nat'l Law Enforcement Memorial and Museum, *Law Enforcement Officers Fatalities Report* (2020), http://nleomf.org/wp-content/uploads/2021/01/2020-LE-Officers-Fatalities-Report-opt.pdf.

[7] *See* 18 U.S.C. §§ 1114 (murder of federal law-enforcement officers), 1121 (murder of state law-enforcement officers aiding federal investigations).

[8] States had declined to mandate such procedures by statute, in state constitutions, or as a matter of supervisory power. There was "no * * * consensus, or even weight of authority, favoring petitioner's position" among state courts. *Mu'Min*, 500 U.S. at 426. In fact, every state court decision the Court analyzed had "refused to adopt such a rule." *Ibid.* (citing *State v. Lucas*, 328 S.E.2d 63, 64-65 (S.C. 1985), *cert. denied*, 472 U.S. 1012 (1985); *Commonwealth v. Burden*, 448 N.E.2d 387, 393 (Mass. App. Ct.

for essentially all capital cases at the time, because the Federal Death Penalty Act of 1994 had not yet been adopted and the federal death penalty was largely nonexistent. Today the worst acts of terrorism and some other horrific crimes are eligible for the federal death penalty, but there is no reason to impose a *voir dire* straitjacket on federal district courts that does not apply in any other capital case anywhere in the Nation.

Indeed, the court of appeals identified no such reason—it simply adopted the rule because it could. *See* Pet. App. 56a-59a (emphasizing that *Mu'Min* applied the Constitution, not the supervisory power). But despite the court of appeals' cursory reference to "death is different" reasoning, Pet. App. 60a, there is nothing about federal capital cases that justifies the special procedure the court of appeals insisted on.

The federal system already offers capital defendants ample procedural protections. These procedures, along with the district court's independent evaluation of the venire, help to ensure that a jury's decision to impose a capital sentence is not the result of juror bias emanating from pretrial publicity.

First, the size of federal judicial districts is one factor that protects capital defendants from the effects of potentially prejudicial pretrial publicity. Nearly all federal judicial districts and divisions cover a larger area than state trial courts do. *See, e.g.*, D. Mass. Local R. 40.1(c) (the Eastern Division covers nine counties, from the New Hampshire border to Nantucket). A federal venire must be a fair cross-section of the

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1983); and *Commonwealth v. Dolhancryk*, 417 A.2d 246, 248 (Pa. Super. Ct. 1979)).

entire district or division, conducted pursuant to a detailed plan for random jury selection. 28 U.S.C. §§ 1861, 1863. The entire jury pool is less likely to be exposed to publicity concerning an event that garners substantial local or regional media coverage. *See Skilling*, 561 U.S. at 382 ("the size * * * of the community in which the crime occurred" can mitigate potential prejudice). Notably, the court of appeals in this case refused to hold that the district court abused its discretion in denying respondent's motion to change venue, in part because "most of the publicity was true" and it was "largely factual." Pet. App. 46a, 47a.

Second, the federal system provides capital defendants with a statutory right to two counsel, one of whom must be "learned in the law applicable to capital cases." 18 U.S.C. § 3005. They also receive funding for expert services, such as jury consultants. 18 U.S.C. § 3599(f); *see also* Jill Miller, *The Defense Team in Capital Cases*, 31 Hofstra L. Rev. 1117, 1132 (2003); Subcomm. on Fed. Death Penalty Cases, Judicial Conf. of the U.S., *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* 12 (May 1998) (jury consultants are "frequently used in federal death penalty cases"). Respondent had his own jury expert, for example. *See, e.g.*, ECF No. 1080-1 (defendant's expert report on jury venire).

Third, the federal system offers more protection than many state systems at the jury-selection stage. For example, each side may use twenty peremptory challenges in federal capital cases, whereas many states permit fewer peremptory challenges in capital

cases.[9] And, of course, federal jury selection is overseen by a federal district judge with life tenure.

Finally, defendants like respondent currently benefit from the extraordinarily robust unanimity rule followed in federal court. A federal sentencing jury must be unanimous not just on the threshold findings—guilt, mental state, and at least one aggravating factor that renders the defendant death-eligible—but on the decision to sentence the defendant to death. Unlike in some other systems, a hung jury does not result in a retrial of the penalty phase; if even a single juror does not vote to impose the death penalty, the defendant receives a lesser sentence. Pet. App. 119a; *see* 18 U.S.C. §§ 3593-3594; *Jones v. United States*, 527 U.S. 373, 380-81 (1999).

Especially given the extensive procedural protections available to capital defendants in the federal system, this case presents no reason to depart from this Court's repeated admonition that trial courts should be given "wide discretion" in conducting *voir dire*, *Mu'Min*, 500 U.S. at 427, in favor of a new and rigid supervisory-power rule that applies *only* in the federal system. Federal capital prosecutions are relatively rare, but they are exceptionally important. As cases like this illustrate, federal court is the forum for prosecuting crimes that everyone, including the defendant, "view[s] * * * as an attack on all of America." Pet. App. 48a. Federal appellate judges should not reverse such verdicts based on an incorrect and inflexible rule of *voir dire*.

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[9] *Compare* Fed. R. Crim. P. 24(b)(1) *with, e.g.*, Ohio Crim. R. 24(D) (six), *and* Tex. Code Crim. Proc. art. 35.15(a) (fifteen).

II. The First Circuit's Decision Will Inflict Needless Suffering On Victims And Their Families.

This Court has instructed that "reversals of convictions under the court's supervisory power must be approached with some caution" due to "the trauma the victims of these particularly heinous crimes would experience in a new trial, forcing them to relive harrowing experiences now long past." *United States v. Hasting*, 461 U.S. 499, 506-07 (1983) (citation and internal quotations omitted). Instead of following this Court's directive, the court of appeals embraced the opposite approach: it vacated respondent's death sentence based on a categorical rule it derived for the first time from an obscure fifty-year-old circuit precedent. Indeed, but for the concession of guilt, it would have reversed the convictions, too. *See* Pet. App. 61a n.33. That is hardly a "cautious" approach.

The consequences of that approach are grave and will be borne by respondent's many victims and their families. The court's decision means that the victims and their families, including MIT Police Officer Sean Collier's family members, will testify at a second penalty-phase trial and re-live, yet again, the horrific events of eight years ago. The Court should end this tragedy and provide closure to the victims and their families.

Victim impact testimony is a key feature of capital sentencing. Congress specifically provided that aggravating factors in a federal capital trial "may include factors concerning the effect of the offense on the victim and the victim's family," and consideration of these victim-impact factors "may include oral testimony." 18 U.S.C. § 3593(a)(2); *see* 139 Cong. Rec. S14919 (daily ed. Nov. 3, 1993) (statement of Sen.

Biden). Nearly every federal capital case includes victim-impact testimony.[10]

This case was no exception. Twenty-four of respondent's victims and their family members provided victim-impact testimony detailing the horrific impact of respondent's terrorist attack.[11] Two of the victim-impact witnesses were Officer Sean Collier's younger brother, Andrew Collier, and his stepfather, Joseph Rodgers.

Andrew Collier testified that Sean had "wanted to be a police officer" "as long as I can remember." ECF 1609, 4/22/15 Tr. 48-12. That desire stemmed from Sean's strong "moral compass * * * . He was always – it was black and white. What's right and what's wrong. And he was the one always fighting for what's right." *Id at* 48-11. It was not until Sean's death that his family "found out how many great things he was doing for people in the community." *Id.* at 48-12. His death is "something that will affect me and my family for the rest of our lives * * * . [E]ven when we're having fun, there's always a cloud over whatever event it is, whether it's a holiday or a vacation." *Id* at 48-17. When asked what he misses the most about Sean, Andrew replied, "The only answer I can really come up with * * * is I miss Sean. I miss everything about him.

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[10] Wayne A. Logan, *Confronting Evil: Victims' Rights in an Age of Terror*, 96 Geo. L.J. 721, 728 (2008) (victim impact evidence "has come to play a central role in the sentencing phase of U.S. capital trials").

[11] Respondent argued in the court of appeals that the FDPA prohibited penalty-phase victim impact testimony from survivors. The court rejected Tsarnaev's challenge, holding that "even assuming without granting that Dzhokhar is correct here, the surviving spectators' testimony had relevance to the jury's weighing of aggravating factors other than victim impact." Pet. App. 98a.

There isn't one thing that stands out that I can say: That's it. That's what I miss the most." *Id.* at 48-17.

Sean's stepfather, Joseph Rogers, said that Sean "was a cop at an early age." *Id.* at 48-20. During college, Sean "was a volunteer for the Somerville Auxiliary Police" and "was the youngest sergeant they had ever had." *Id.* at 48-22. Once Sean graduated from college, the Somerville Police Department "sponsored him to the MBTA Transit Police Academy," and "[i]n 2010, he graduated from the MBTA Police Academy" with "the highest grade point average of anybody who had ever graduated." *Id.* at 48-22 to -23. The day he graduated from the Academy was "probably the happiest day of his life." *Id.* at 48-27 to -28.

Mr. Rogers recounted how he learned that Sean had been murdered: "they took us to see Sean. * * * He had a hole in the middle of his head and he was shot to pieces. And he's laying there. They don't really clean you up much; they just wipe off the blood. And my wife is touching him and his blood is coming up in her hands." *Id.* at 48-29. Since Sean's death, his mother has "been diagnosed with having post-traumatic stress disorder. She keeps remembering that night and being told, what he looked like, and it runs over in her mind." *Id.* at 48-29 to -30. Each of Sean's six siblings was severely impacted: one sibling "moved to Texas and that way it's easier for her not to talk about it." *Id.* at 48-32. Another sibling "has had to deal with a lot of the press, the unending press that we get, and that's been very difficult on her and her marriage." *Id.*

The jury also heard victim-impact testimony from the family members of the three people murdered by the bombing, plus testimony from many injured survivors. The survivors testified about how the shrapnel

bombs that respondent detonated mutilated their bodies, and how the bombings unleashed a flood of psychological and emotional torment. One survivor testified that he was "in a very dark place" and "not wanting to live" anymore. Pet. App. 100a. Another was unable to testify because he checked himself into a mental-health facility as a result of the bombings. *Id.*

Because the court of appeals vacated respondent's death sentence, the district court must "empanel a new jury, and preside over a new trial strictly limited to what penalty [respondent] should get on the death-eligible counts." Pet. App. 3a (citation omitted). That means that Andrew Collier, Joseph Rogers, and other family members and victims will again take the stand to testify, face respondent, and detail how their lives changed forever seven years ago.

No one should ever have to experience the type of suffering that respondent unleashed on his victims. Yet, the court of appeals' decision means that the victims and their family members will have to re-live these events—twice. Facing respondent and testifying will re-open wounds and will take a psychological and emotional toll that lasts long after the (second) trial is over.[12]

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[12] Logan, *supra*, at 770 ("One can hardly expect victims and witnesses to come to a state of 'psychological healing' after recounting a highly traumatic experience.") (citation omitted); Lynette M. Parker, *Increasing Law Students' Effectiveness When Representing Traumatized Clients: A Case Study of the Katharine & George Alexander Community Law Center*, 21 Geo. Immigr. L.J. 163, 176 n.48 (2007) ("Researchers and scholars have noted that for many traumatized clients litigation and the legal process can result in re-traumatization."); Jennifer L. Wright, *Therapeutic Jurisprudence in an Interprofessional Practice at the University of St. Thomas Interprofessional Center for Counseling and Legal*

Adopting the court of appeals' rule would mean that many future victims in many future cases will experience the same trauma. Given those costs, imposing a judge-made, federal-court-only *voir dire* rule would need an exceptionally persuasive justification. The court of appeals gave none.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Services, 17 St. Thomas L. Rev. 501, 509 (2005) ("The risk of re-traumatization of clients who have to repeat and relive their experiences of abuse, first in the lawyer's office and then in court, is serious.").