UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-against- : 16 Cr. 760 (RMB)

AHMAD KHAN RAHAMI, :
a/k/a/ AHMAD RAHIMI

Defendant. :

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MEMORANDUM OF LAW IN SUPPORT OF AHMAD RAHIMI'S
MOTION FOR CHANGE OF VENUE

David E. Patton
Federal Defenders of New York, Inc.
Attorney for Defendant
Ahmad Rahimi
52 Duane Street, 10th Floor
New York, New York 10007
Tel.: (212) 417-8700

Peggy Cross-Goldenberg
Meghan J. Gilligan
Sabrina P. Shroff

Of Counsel

TO: Joon H. Kim
United States Attorney
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007

Attn.: Emil J. Bove III
Andrew J. DeFilippis
Shawn G. Crowley
Nicholas J. Lewin
Assistant United States Attorneys
Southern District of New York

TABLE OF CONTENTS

TABLE OF AUTHORITEIS

Cases

Constitutional Provisions & Statutes

Other Authorities

PRELIMINARY STATEMENT

Ahmad Khan Rahimi is charged in an eight count indictment in the Southern District of New York ("SDNY") in connection with two bombs[1] that were recovered on September 17, 2016, in the Chelsea neighborhood of New York City, in the vicinity of 135 West 23rd Street and 27th Street between 6th and 7th Avenues, respectively. For the reasons explained below, venue must be changed pursuant to Fed. R. Crim. P. 21(a), and the Fifth and Sixth Amendments to the Constitution, because prejudice against Mr. Rahimi is presumed in this district.

Venue survey data for this district and alternative jurisdictions (the District of District of Columbia and District of Vermont)[2] analyzed by Mr. Rahimi's retained venue expert reveals:

- Nearly all respondents in Manhattan (90%) were aware of Mr. Rahimi's case;
- The Manhattan venire harbors a comparatively strong presumption of guilt and holds an overwhelmingly negative view of Mr. Rahimi;
- A very high number of individuals in the Manhattan venire were in the Chelsea neighborhood on September 17, 2016, or the days following while the perpetrator remained at large, or personally know someone who was.

The survey data, which indicates a presumption of prejudice in this district, is buttressed by the expert's analysis of pretrial publicity. According to that analysis,

[1] Mr. Rahimi is accused of detonating one bomb and planting a second bomb which did not explode.

[2] For convenience, the SDNY is referred to as "Manhattan," the District of the District of Columbia as "D.C." and the District of Vermont as "Burlington." The venue expert's survey covered each district in its entirety, not just the named city.

there has been twice as much coverage of Mr. Rahimi's case in Manhattan papers than in in D.C., and nearly five times as much coverage as in Burlington publications.

The media coverage in the respective jurisdictions differs not only in quantity, but also in quality. Most notably, the expert's analysis demonstrates that media coverage in this district has the qualitative hallmarks of prejudicial pretrial publicity recognized by the Supreme Court and Second Circuit, *e.g.*:

- Blatantly prejudicial information, including information tantamount to a confession, *e.g.*, a video purportedly depicting Mr. Rahimi placing one of the bombs, and publication of incendiary statements regarding terrorist groups and jihad from a blood-soaked, bullet-pierced journal alleged to be Mr. Rahimi's;

- A near-singular focus on Mr. Rahimi, rather than the bombs themselves;

- Demonization of Mr. Rahimi as a terrorist inspired by terrorist organizations like ISIS, despite the fact that he is not charged with a terrorism offense;

- Inflammatory (and potentially inadmissible) information about Mr. Rahimi, *e.g.*, his alleged involvement in bombings in New Jersey, and his father's statements to the FBI about his son's supposed "fascination" with jihad; and

- Numerous statements by the government—including "tweets" by the former SDNY U.S. Attorney—about Mr. Rahimi and other aspects of his prosecution.

The prejudicial effect of this publicity is compounded by the fact that, as the survey data shows, the Manhattan venire has followed the case at a much higher rate than have potential jurors in the alternative jurisdictions. And, this prejudicial publicity is only likely to increase as trial approaches, especially because trial will begin just two weeks after the one-year anniversary of the bombing.

In light of the prejudicial publicity and attitudes of the venire, this Court should find that there is a presumption of prejudice in this district compelling a change of venue in order to preserve Mr. Rahimi's indelible right to a fair trial.

FACTUAL BACKGROUND

On November 16, 2016, Mr. Rahimi was indicted in Manhattan on counts of using weapons of mass destruction in the U.S., bombing a public place, destroying property by fire or explosives, transporting and receiving explosives, and using a destructive device during a crime of violence in connection with the September 17, 2016 bombing in the Chelsea neighborhood of New York City.

Substantial publicity started almost immediately after the first bomb detonated.[3] *See, e.g.*, Affirmation of Sabrina P. Shroff, dated Apr. 5, 2017, at Ex. 1. In ensuing days, when the perpetrator remained at large, coverage continued and, once Mr. Rahimi was identified as a suspect, was supplemented by media reports, emergency alerts, and statements by government officials about Mr. Rahimi's alleged role. *See, e.g.*, Exs. 2-4. Following Mr. Rahimi's arrest, coverage evolved to also include reports about his personal life, *e.g.*, his supposed allegiance to ISIS; his prior travel to Pakistan; his father's statements to the FBI about Mr. Rahimi's purported "fascination" with jihad and "terrorist organizations"; and the bombings and police shooting Mr. Rahimi is alleged to have perpetrated in New Jersey. *See, e.g.*, Exs. 5-8. The case—and Mr. Rahimi personally—has been covered regularly ever since. Notably, the government has been responsible for much of this publicity. Officials have repeatedly made statements regarding Mr. Rahimi and the case in highly public forums. For example, former SDNY U.S. Attorney Preet Bharara "tweeted" that Mr.

[3] Unless otherwise noted, all references to Exhibits are to those appended to the Shroff Affirmation.

Rahimi "attacked" the "American way of life," and publicly proclaimed Mr. Rahimi was "driven by a commitment to violent jihad," Exs. 9 & 19.

In light of this media coverage, and because the bombing occurred in the heart of this district and thus was likely to have impacted the venire, Mr. Rahimi's counsel engaged a venue expert to assess pretrial publicity and juror partiality in this and other jurisdictions.[4] The expert's work involved (i) public opinion polling of the venire, and (ii) analysis of media coverage in the respective jurisdictions.[5] *See* Ex. 38 at 4-6 (hereinafter "Rep.").

Based on the expert's analysis and binding precedent, Mr. Rahimi moves for a change of venue to Vermont (or another district the Court deems appropriate) on the ground that the prejudicial impact of proceeding to trial in Manhattan must be presumed because there is a "reasonable likelihood" that prejudicial pretrial publicity here will prevent a fair trial. *United States v. Sabhnani*, 599 F.3d 215, 232 (2d Cir. 2010) (citation omitted).

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[4] Counsel selected D.C. and Burlington as potential alternative venues because they are reasonably close (and, in the case of Burlington, also within the Second Circuit); accessible to witnesses and other interested persons; and far enough removed from New York so as to minimize the likelihood of selecting a venire personally affected by the bombing or exposed to pretrial publicity of the magnitude observed in the New York market. *See United States v. McVeigh*, 918 F.Supp. 1467, 1474 (W.D. Okla. 1996); *see also United States v. Marcello*, 280 F. Supp. 510, 523 (E.D. La. 1968).

[5] The expert analyzed online articles from: the *New York Times*, *New York Post*, *New York Daily News*, and *Wall Street Journal* (Manhattan); *Washington Post* and *Washington Times* (D.C.); and *Burlington Free Press* and *Brattleboro Reformer* (Burlington). The *Wall Street Journal* was treated as a Manhattan publication due to its comparatively high circulation rates in New York. *See* Wall St. J., *Regional Advertising General Rates* (2017), http://bit.ly/2nxAIsZ.

ARGUMENT

I. Relevant Legal Standard

The Sixth Amendment secures to an accused the right to trial "by an impartial jury of the state and district wherein the crime shall have been committed." *See also* U.S. Const., Art. III, § 2, cl. 3. However, these prescriptions do not prevent transfer to a different location at the defendant's request if local prejudice will prevent a fair trial. *See Skilling v. United States*, 561 U.S. 358, 378 (2010); *see also* U.S. Const. amend. V. Fed. R. Crim. P. 21(a) similarly provides that "[u]pon the defendant's motion, the court must transfer the proceeding . . . to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there."

A defendant challenging venue before jury selection must show "presumed prejudice." *United States v. Ayala*, 64 F. Supp. 3d 446, 449 (E.D.N.Y. 2014) (citation omitted). Under the Constitutional standard, a presumption of prejudice arises, which cannot be abated by voir dire, "when prejudicial publicity so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from that community." *Id.* To effect transfer under Rule 21(a), the defendant need only show a "reasonable likelihood" that prejudicial pretrial publicity will prevent a fair trial. *Sabhnani*, 599 F.3d at 232 (citation omitted).

In assessing whether the presumption has been established, the Second Circuit has instructed courts to consider "the extent to which the government is responsible for generating the publicity, the extent to which the publicity focuses on the crime rather than the individual defendants charged with it, and other factors reflecting on

the likely effect of the publicity on the ability of potential jurors in the district to hear the evidence impartially." *Id.* (citation omitted). Other relevant factors include: (i) the nature of the information publicized about the defendant or crime, *e.g.*, a defendant's confession or other "blatantly prejudicial information," or whether the information was "vivid [and] unforgettable"; (ii) the size and character of the community; (iii) the impact on the community; and (iv) the "decibel level of media attention" in the period between the crime and trial. *Skilling*, 561 U.S. at 382-84.[6]

There is no dispute that a presumption of prejudice "attends only in the extreme case."[7] *Id.* For the reasons set forth below, this is one such extreme case.

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[6] *In re Tsarnaev*, 780 F.3d 14 (1st Cir. 2015), is inapposite. There, the First Circuit was applying the "onerous" and "extraordinarily deferential" standard of review applicable when a defendant seeks the "extraordinary remedy" of mandamus relief, *i.e.*, a finding that "the district court was manifestly wrong," defendant's "right to relief is clear and indisputable," "irreparable harm [would] result," and "the equities favor such drastic relief," *id.* at 16, 19, not the *de novo* standard which this Court must apply. Furthermore, the First Circuit expressly stated that the defendant could renew his venue challenge on direct appeal, where it would be considered under the less exacting abuse of discretion standard. *Id.* at 18. Thus, any reliance on *Tsarnaev* would be premature, given that the First Circuit has not yet decided whether the district court abused its discretion in denying the *Tsarnaev* venue motion and that there was a strong dissent in that decision. *See id.* at 29-50 (Torruella, J. dissenting).

[7] The circuits are split as to whether the presumption is rebuttable. *See Skilling*, 561 U.S. at 385 n.18; *United States v. Casellas-Toro*, 807 F.3d 380, 388-89 (1st Cir. 2015). Regardless, as set forth *infra*, rebutting the presumption is impossible here.

II. Survey data and media analysis of pretrial publicity demonstrate a presumption of prejudice against Mr. Rahimi in this district.

A. Survey data reflects a high degree of case awareness and presumption of Mr. Rahimi's guilt in this district.

The key finding from the expert's analysis of survey data is that, among the venues considered, Manhattan ranked as more prejudiced on all critical metrics, *i.e.*, case awareness, pre-judgment of guilt, and case salience[8]:

Venue	Case Awareness	AKR Guilty	Uncert. AKR Guilt	AKR Neg. view	Pres./knew someone pres.
Manhattan	90%	45%	35%	64%	84%
Washington, D.C.	73%	26%	55%	44%	60%
Burlington	70%	15%	60%	43%	33%

The first three columns—measuring awareness of the bombing and views regarding Mr. Rahimi's guilt—demonstrate that nearly all Manhattan respondents (90%) indicated awareness of the case. Rep. at 7. This statistic is particularly compelling when considered alongside the expert's finding that there was nearly five times the coverage in Manhattan papers as in Burlington publications, *id.* at 20, and that the venire in this district has followed the case at more than three times the rate of the Burlington venire, *id.* at 15. Strikingly, too, there is a strong pre-judgment of guilt in this district—nearly half of Manhattan respondents admitted to having already adjudged Mr. Rahimi guilty, and only 35% expressed uncertainty regarding his guilt. *Id.* By contrast, just 15% of Burlington respondents have prejudged Mr. Rahimi's guilt, and more than half (60%) expressed uncertainty. *Id.* at 9. The data thus reflects both "bombardment of the community" with pretrial publicity in this

[8] Statistics from the expert's report are rounded to the nearest percentage point.

district and a corresponding prejudicial effect in the venire. *Estes v. Texas*, 381 U.S. 532, 538 (1965).

Manhattan respondents' overwhelmingly negative view of Mr. Rahimi and pre-judgment of his guilt are particularly prejudicial due to the long-recognized danger of "conformity prejudice" among the venire, *i.e.*, fear of community disapproval for rendering an unpopular verdict, which limits the efficacy of voir dire in ferretting out jurors biased by adverse publicity. *See McVeigh*, 918 F. Supp. at 1473. That the majority of potential jurors in this district have a negative view of Mr. Rahimi and nearly half favor a guilty verdict—before hearing a single piece of evidence at trial—confirms that the danger of "conformity prejudice" is acute here. *See* Rep. at 9.

Equally compelling is that 84% of the Manhattan venire indicated a personal connection to the bombing, *i.e.*, they were in New York City during the bombing or when the perpetrator remained at large, or knew someone who was. *Id.* at 11. Manhattan measured far higher than D.C. (60%) and Burlington (33%) on these salience metrics. *Id.* Notably, too, more than half of Manhattan respondents were in New York City during the bombing, while *no* Burlington respondents were. *Id.* at 10. Furthermore, Manhattan respondents were about twice as likely as those in Burlington to have had a close family member in New York City during the bombing. *Id.* at 12. Collectively, these statistics reflect the importance of the case to the Manhattan venire, which increases the likelihood of bias. *See Gonzales v. Thomas*, 99 F.3d 978, 987 (10th Cir. 1996) (citing *Smith v. Phillips*, 455 U.S. 209 (1982)) (O'Connor, J., concurring).

Finally, several of the open-ended survey questions indicate that pretrial publicity has tainted the Manhattan venire by exposing it to prejudicial and potentially inadmissible information. For example, Manhattan respondents (13%) were more than four times as likely as Burlington respondents (3%) to cite widely publicized video footage of Mr. Rahimi allegedly placing one of the bombs as the most compelling evidence against him. Rep. at 12. Notably, more than three-quarters of Burlington respondents could not even recall *any* evidence from the media coverage whatsoever. *Id.* In addition, Manhattan respondents were about twice as likely as Burlington respondents to recall reading about the alleged motivation for the bombing in pretrial publicity.[9] *Id.* at 13.

B. Media analysis establishes that there has been sustained, blatantly prejudicial pretrial publicity in this district, which is likely to increase as trial approaches.

The expert's analysis of media coverage confirms there has been (and continues to be) prejudicial pretrial publicity regarding Mr. Rahimi and the bombing in this district. Based on the expert's review of major newspaper publications in this district and the alternative jurisdictions, there has been more than twice the number of

[9] Also of note is that several Manhattan respondents cited "religion" as the "most compelling evidence" against Mr. Rahimi. Rep. at 12. Although the number of respondents providing this response was admittedly low, the prejudicial impact of this belief cannot be underestimated, because it is axiomatic that a defendant's religion "is an improper consideration for a jury." *Tobias v. Smith*, 468 F. Supp. 1287, 1291 (W.D.N.Y. 1979) (citation omitted).

articles in New York papers than in D.C., and nearly five times as many articles as in Burlington.[10] Rep. at 20.

More importantly, the content of these articles has been highly prejudicial, *e.g.*:

- Numerous articles (including headlines) describing Mr. Rahimi as a "terrorist" and alleging that he has links to terrorist organizations like Al Qaeda, Exs. 6 & 10;

- Pervasive photographs of the devices, victims' injuries, and Mr. Rahimi laying in the street after being shot by New Jersey police, Exs. 11 & 12;

- Photographs of the blood-stained, bullet-pierced journal allegedly taken from Mr. Rahimi containing incendiary statements regarding jihad, Exs. 5 & 13;

- A video alleged to show Mr. Rahimi placing one of the bombs in Chelsea[11];

- Ubiquitous statements by Mr. Rahimi's father regarding his son's purported "interest in terrorist organizations like Al Qaeda" and "fascination" with jihad, as well as accounts of Mr. Rahimi's criminal history and past contact with the FBI, Exs. 6 & 13; and

- Myriad press releases, press conferences, and other statements by government officials, Exs. 15-23, including former U.S. Attorney Bharara's "tweets" indicating that Mr. Rahimi is a terrorist and accusing him of "attack[ing]" the "American way of life," Ex. 9.

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[10] These statistics do not include coverage in other online and print publications, television, or radio. Because a significant portion of Manhattan respondents (45%) indicated that they consume their news from television, rather than newspapers or the internet (32%), *see* Rep. at 15, it is important to bear in mind that the media analysis for this district may therefore underreport, to an extent, the venire's exposure to prejudicial pretrial publicity, including the video allegedly showing Mr. Rahimi placing one of the bombs. *See infra* n. 11.

[11] *See* Wall St. J. Video, *N.Y. Bombing Suspect Likely Inspired by Terrorists* (Sept. 21, 2016), http://on.wsj.com/2nnk5DY.

The most notable statistics from the expert's analysis indicating that pretrial publicity has been so pervasive as to establish a presumption of prejudice are:

Venue	No.	AKR named	AKR photos	Damage photos	Jrnl.
Manhattan	249	172	89	53	27
Washington, D.C.	111	106	13	5	16
Burlington	50	33	11	3	4

As reflected above, this district has had significantly more coverage of the bombing than either of the alternative jurisdictions—*i.e.*, here, there has been twice as much coverage as in D.C. papers, and almost five times as much coverage as in Burlington publications. Rep. at 20. In addition, the pretrial publicity in this district has been prejudicial in terms of its qualitative characteristics. For example, here, more than two-thirds of the articles concerning the bombing identified Mr. Rahimi by name. *Id.* at 23. Many of the articles also contained inflammatory photographs, *e.g.*, showing Mr. Rahimi in various contexts both pre- and post-arrest (36%), or damage allegedly caused by the devices (21%). *Id.* Furthermore, approximately 11% of the articles contained inflammatory and potentially inadmissible information (including photographs) regarding the journal allegedly recovered from Mr. Rahimi. *Id.* And, as set forth in the expert's report, there also have been many articles published in this district concerning Mr. Rahimi's alleged involvement in New Jersey bombings and a police shootout around the time of the underlying conduct here; his apprehension in New Jersey; and his father's statements to the FBI about Mr. Rahimi's alleged "fascination" with jihad. *See id.*

Thus, as set forth below, under established Supreme Court and Second Circuit precedent, the pretrial publicity and survey data demonstrate that there exists a

presumption of prejudice against Mr. Rahimi in this district sufficient to require a change of venue.

III. The presumption of prejudice against Mr. Rahimi in this district compels a change of venue to preserve his indelible right to a fair trial.

Since the events of September 17, 2016, this case has generated substantial publicity, effected tremendous local impact, and galvanized a community reaction similar to that which has compelled federal courts adjudicating similar prosecutions to recognize that a change of venue was warranted, even at the pre-voir dire stage. *See, e.g.*, *Rideau v. La.*, 373 U.S. 723, 726 (1963); *Shepherd v. Fla.*, 341 U.S. 50, 51-53 (1951) (per curiam); *McVeigh*, 918 F. Supp. at 1474; *United States v. Saya*, 980 F. Supp. 1157, 1158 (D. Haw. 1997); *United States v. Florio*, 13 F.R.D. 296, 299 (S.D.N.Y. 1952); *United States v. Lawson*, 08-21, 2009 WL 511935, at *2 (E.D. Ky. Mar. 2, 2009); *Marcello*, 280 F. Supp. at 514 ("[T]he efficacy of depending upon the voir dire to determine whether substantial prejudice exists has [] been seriously questioned.").

A. Pretrial publicity has been "blatantly prejudicial."

The nature of the pretrial publicity here—in terms of both the "volume" and "substance"—warrants a change in venue. *United States v. Al Fawwaz*, 98-1023, 2015 WL 400621, at *5 (S.D.N.Y. Jan. 23, 2015). As of March 15, 2017, there have been nearly 250 articles published about the bombing in New York newspapers. Rep. at 20. *See United States v. Gordon*, 380 F. Supp. 2d 356, 365 (D. Del. 2005), *rev'd on other grounds*, 183 F. App'x 202 (3d Cir. 2006) ("hundreds" of articles supported change of venue). By contrast, there have been only 50 articles published in

Burlington papers. Furthermore, articles have appeared in Burlington papers in less than half (42%) of the weeks since the bombing occurred. Rep. at 22.

More importantly, the *substance* of the articles in Manhattan has been "blatantly prejudicial," potentially inadmissible, and presumptive of guilt. *Skilling*, 561 U.S. at 382. *First*, the pretrial publicity has focused on Mr. Rahimi rather than the charged crimes, *e.g.*, more than two-thirds of the articles mention Mr. Rahimi by name, Rep. at 23, and many have done so in headlines. *See, e.g.*, Exs. 21 & 30. *Cf. United States v. Maldonado-Rivera*, 922 F.2d 934, 967 (2d Cir. 1990) (no abuse of discretion denying venue change where "only one out of 173 articles mentioned" defendant in headline).

Of particular relevance to the prejudice analysis is that Mr. Rahimi has been "demonized" in many of these articles and portrayed as an outsider, a foreigner, and a disloyal American. *McVeigh*, 918 F. Supp. at 1472 (prejudicial publicity warranted change to out-of-state venue where, *inter alia*, defendants were "demonized" as being "associated with right wing militia groups"). Among other highly prejudicial portrayals, Mr. Rahimi has been described in headlines as "a terrorist with a family of sympathizers" who was "inspired by Bin Laden." Exs. 10 & 24. *See Florio*, 13 F.R.D. at 297-98 (venue change where pretrial publicity characterized defendant as a "mobster" and ex-convict); *Marcello*, 280 F. Supp. at 515 (same, where defendant (a reputed Mafia leader) submitted exhibits "illustrat[ing] the sinister image of [him] which ha[d] been conveyed . . . via [pretrial] publicity," *e.g.*, as an "underworld leader" and "rackets figure"); *see also Shepherd*, 341 U.S. at 53 ("highly prejudicial" headlines

support change of venue). Still other articles discussed the FBI's prior contact with Mr. Rahimi's family about his alleged interest in terrorist organizations and jihad, or mentioned terrorist groups or past (completely unrelated) terrorist attacks. *See* Rep. at 23. This publicity is especially prejudicial because Mr. Rahimi is not even charged with a terrorism crime. *See, e.g.*, *United States v. Cortez*, 251 F.R.D. 237, 237 (E.D. Tex. 2007) (prejudicial pretrial publicity compelled venue change where defendant adduced "recent, extensive" pretrial publicity from print, television, and online publications showing defendant "on film and in photographs and stating that he [wa]s a prime suspect" in a different offense).

Still other articles have contained uncorroborated inflammatory—and likely inadmissible—information (including in headlines) about Mr. Rahimi, *e.g.*, that years prior to the bombing, he was "grilling up kebabs in Pakistan," where "he may have been radicalized." Ex. 7. *See United States v. Abrahams*, 466 F. Supp. 552, 557 (D. Mass. 1978) (venue change where articles painted "black and bleak picture of [defendant]"); *United States v. Angiulo*, 897 F.2d 1169, 1181 (1st Cir. 1990) ("inflammatory or sensational" media coverage more prejudicial "than "factual coverage"). The prejudicial effect of the portrayal of Mr. Rahimi as a "terrorist" is magnified because it stands in "sharp contrast" to the media's "humanization of the victims," witnesses, and first responders, *McVeigh*, 918 F. Supp. at 1471-72. *See, e.g.*, Exs. 25-28.[12]

[12] *See also* N.Y. Post, *This video of a bystander giving first responders Starbucks will warm your heart* (Sept. 19, 2016), http://nyp.st/2ckoTWp.

Mr. Rahimi has been similarly portrayed as "sinister" by government officials—including the former U.S. Attorney. In "tweets" on his official Twitter page (with more than 265,000 followers), former U.S. Attorney Bharara accused Mr. Rahimi of being the "Chelsea bomber" who "attacked" the "American way of life" and would face "terrorism charges." Exs. 9 & 20. And in a formal press release, Mr. Bharara claimed Mr. Rahimi was "driven by a commitment to violent jihad." Ex. 19. *See United States v. Ebens*, 654 F. Supp. 144, 146 (E.D. Mich. 1987) (venue change based on "comment and castigation of [defendant by] public figures"); *see also Casellas-Toro*, 807 F.3d at 387 (1st Cir. 2015) (prejudice presumed where "media reported rumors about [defendant's] character," which were discussed on social media). Despite Mr. Bharara's public statements, Mr. Rahimi is not, in fact, been charged with a terrorism offense.

Second, there has been widespread publicity of "vivid, unforgettable," and damaging information, which the Supreme Court has "recognized as particularly likely to produce prejudice." *Skilling*, 561 U.S. at 384. Without question, likely most damaging has been the broadcast of video footage purportedly showing Mr. Rahimi placing one of the bombs, which is tantamount to the type of "confession" that courts have concluded warrants venue change.[13] *See, e.g.*, *Rideau*, 373 U.S. at 724-25 (defendant's confession was broadcast on television three times and thus "[a]ny subsequent court proceedings in a community so pervasively exposed to such a

[13] *See* Wall St. J., *supra* n.11.

spectacle could be but a hollow formality"); *Marcello*, 280 F. Supp. at 516 ("It is impossible to overlook the damaging prejudice to [defendant] created by [an] article and [] photograph of the alleged crime as it actually occurred."); *see also Estes*, 381 U.S. at 538 ("nothing so dramatic as a home-viewed confession" is required to find "bombardment of the community" with pretrial publicity sufficient to warrant change of venue).

Similarly prejudicial are the numerous articles that have discussed Mr. Rahimi's alleged statements to law enforcement while he was hospitalized with life-threatening injuries. *See, e.g.*, Exs. 29 & 30. The prejudicial effect of these articles is compounded by the fact that the jury will not hear them, as they were involuntary and taken in violation of Mr. Rahimi's right to counsel and, as such, are likely inadmissible. *See Shepherd*, 341 U.S. at 51 (venue change where, *inter alia*, pretrial publicity included reports that defendants had confessed, although no confessions were ever introduced at trial).

Further prejudicing Mr. Rahimi's right to a fair trial in this district are the inflammatory articles that report direct quotes from, or photographs of, the blood-stained, bullet-pierced journal allegedly confiscated from Mr. Rahimi. These articles have reproduced exact quotes from the journal, *e.g.*, "Inshallah the sounds of the bombs will be heard in the streets. Gun shots to your police." Exacerbating the prejudicial effect of these articles is that many were published with incendiary headlines, *e.g.*, "Chelsea bomb suspect's blood-soaked diary full of ISIS praise." Ex. 5. *Cf. Skilling*, 561 U.S. at 382 (while coverage of defendant "not kind," it "contained

no confession or other blatantly prejudicial information" that venire "could not reasonably be expected to shut from sight").

Third, there has been significant publicity in this district about Mr. Rahimi's alleged involvement in bombings and a police shootout in New Jersey around the time of the underlying conduct here. *See, e.g.*, Ex. 12. This publicity is highly prejudicial given the similarity of the crimes, the fact that the New Jersey bombings are not charged in the indictment, and the likely inadmissibility of evidence related to these incidents. *See United States v. Tokars*, 839 F. Supp. 1578, 1579, 1582 (N.D. Ga. 1993) (information not referenced in indictment or unlikely to be admitted at trial is "prejudicial and inflammatory" information supporting venue change).

Finally—but no less prejudicial—are articles reporting Mr. Rahimi's father's statements to the FBI about his son's alleged "fascination" with jihad and "interest" in "terrorist organizations," as well as those concerning Mr. Rahimi's criminal history. *See, e.g.*, Exs. 6 & 31. Such articles are both highly prejudicial and contain information that is likely inadmissible. *See Irvin v. Dowd*, 366 U.S. 717, 725 (1961) (venue change where pretrial publicity focused on defendant's "background," including criminal history).

B. The "decibel level" of pretrial publicity has been substantial and is only likely to increase as trial approaches.

Only seven months have passed since the incidents in question. In that time, the "decibel level of media attention," *Skilling*, 561 U.S. at 383, has been substantial and is likely to increase as the October 2, 2017 trial date approaches. In the week following the bombing, 180 articles were published in New York papers (as compared

to only 34 in Burlington). Rep. at 22. Although coverage has, unsurprisingly, leveled off, New York papers have consistently published articles about the bombing in most (17 of 26) weeks during the relevant time period. *See id.* In Burlington, by contrast, there has been coverage of the bombing in less than half of the relevant period (11 of 26 weeks). *See id.*

The prejudicial effect of the "decibel level" of publicity in this district is exacerbated by the fact that it has consisted not merely of "factual accounts of [] frequent court proceedings." *Maldonado-Rivera*, 922 F.2d at 967. Rather, the coverage also has contained detailed reports about the bombing, Mr. Rahimi's personal life and characteristics, and "vivid [and] unforgettable" information about the case, *Skilling*, 561 U.S. at 384, *e.g.*, the video allegedly showing Mr. Rahimi placing one of the bombs, incendiary quotes from the journal, and highly prejudicial statements by Mr. Rahimi's father. The pretrial publicity has also been dominated by: photographs of Mr. Rahimi in a hospital bed, where he was arraigned and allegedly made statements to law enforcement; Mr. Rahimi's father's statements to the FBI about Mr. Rahimi's purported "fascination" with jihad; and information about Mr. Rahimi's past travel to Pakistan and supposed terrorist motivations. *Cf. Maldonado-Rivera*, 922 F.2d at 967 (no abuse of discretion in denying venue change where publicity "tended to focus on the [crime] itself . . . rather than" defendants).

Pretrial publicity is only likely to increase as the October 2, 2017 trial date approaches. *See United States v. King*, 192 F.R.D. 527, 532 (E.D. Va. 2000) (it is "generally true . . . that the trial of cases involving a somewhat salacious matter

attracts [increased] media attention" as trial nears). Given the proximity of trial to the anniversary of the bombing—a mere 15 days after the first anniversary—there is likely to be a surge in publicity (and therefore prejudice) in the New York metropolitan area at the precise time that voir dire commences.[14] *See Florio*, 13 F.R.D. at 297-98 (venue change because, *inter alia*, publicity became most intense at time of trial); *Saya*, 980 F. Supp. at 1158-59 ("continuous" and "highly damaging" publicity about the case and defendants, and a strong likelihood of "heightened publicity" as trial approached, compelled venue change). *Cf. Skilling*, 561 U.S. at 383 (four years between crime and trial belied finding "decibel level of media attention" sufficient to warrant change of venue); *United States v. Yousef*, 327 F.3d 56, 155 (2d Cir. 2003) (two years since first World Trade Center bombing trial weighed against venue change in defendant's trial for the bombing because "press coverage had substantially subsided" and "there was minimal publicity in the months immediately preceding his trial").

C. The government has been responsible for much of the prejudicial pretrial publicity.

The government's responsibility for prejudicial publicity in this case exceeds the level sufficient to warrant a change in venue. *See Neb. Press Ass'n v. Stuart*, 427

[14] Should this motion be denied, Mr. Rahimi will likely renew the motion at voir dire. *See United States v. Jacques*, 08-117, 2011 WL 1706770, at *1 (D. Vt. May 4, 2011). Considerations of judicial economy and expeditious resolution of the case thus support granting a change in venue now. *See United States v. Engleman*, 489 F. Supp. 48, 50 (E.D. Mo. 1980) (venue change during voir dire would "immeasurably increase the burden, expense, and inconvenience on all parties and the Court," and "result in unacceptable delay"); *see also McVeigh*, 918 F.Supp. at 1470.

U.S. 539, 554-55 (1976) (juror impartiality "in large part shaped by what attorneys, police, and other officials do to precipitate news coverage"). *Cf. Maldonado-Rivera*, 922 F.2d at 967 (no abuse of discretion in denying venue change where government's publicity primarily consisted of press releases containing "factual information" authorized to be disclosed by law); *Sabhnani*, 599 F.3d at 233 (same, where government's statements were primarily factual and concerned court proceedings).

Here, prosecutors have made numerous statements (including on social media and in press releases) regarding Mr. Rahimi's alleged personal beliefs, his statements to law enforcement, and other information regarding the case. *See, e.g.*, Exs. 14, 17, 19, 22-23, 29-30. Additionally, former U.S. Attorney Bharara issued several "tweets" accusing Mr. Rahimi of "attack[ing]" the "American way of life" and describing him as the "Chelsea bomber" who would "face justice" on "terrorism charges." Exs. 9, 15, 18, 20. *See also* Part III(A) *supra* at 15. Other prominent government officials have similarly generated prejudicial publicity, including now-President Donald Trump, the New York State Governor, and the New York City Mayor. *See, e.g.*, Exs. 14, 32-34. Compounding the prejudicial effect of these statements is that many involved or concerned inadmissible evidence about which jurors would not otherwise learn.[15] *See Skilling*, 561 U.S. at 382.

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[15] The government's statements—particularly those on social media, those purporting to describe the motivation for the bombing, and those referencing Mr. Rahimi's statements to law enforcement—likely run afoul of New York's professional conduct rules and thus are even more prejudicial. *See* N.Y. Rules of Prof'l Conduct R. 3.6 (effective Jan. 1, 2017); *See United States v. Silver*, 103 F. Supp. 3d 370, 378-79 (S.D.N.Y. 2015).

D. The size and character of the community cannot dilute the prejudicial effect of the pretrial publicity.

Although this district includes an indisputably "populous metropolitan area," which historically tends to mitigate the effects of prejudicial publicity, *United States v. Griffin*, 94-631, 1996 WL 140073, at *2 (S.D.N.Y. Mar. 27, 1996) (citation omitted), the size and character of the population here cannot dilute the deleterious effects of the publicity due to the nature of the case: a bombing that occurred in the heart of Manhattan, just three miles from the site of the September 11, 2001 and 1993 World Trade Center terrorist attacks. This is especially so because Mr. Rahimi has been repeatedly characterized as a "terrorist" who was inspired by Osama Bin Laden and terrorist organizations (even though he is not facing a single terrorism charge). *See, e.g.*, Exs. 10 & 24. *See United States v. Awadallah*, 457 F. Supp. 2d 246, 253 (S.D.N.Y. 2006) (suggesting that if a defendant was accused of act of "terrorism," "it is possible to imagine that the prejudice [of trial in the SDNY] would be comparable to the community scrutiny and outrage that justified a change in venue in *McVeigh*").

Further illustrating why the size and character of the jury pool here are inadequate to safeguard Mr. Rahimi's right to a fair trial is the impact that the bombing has had on the community. Survey data indicates that 84% of potential jurors in this district had a personal connection to the bombing. Rep. at 11. The community impact in Burlington, by contrast, is negligible: just 33% of survey respondents indicated a personal connection of any kind to the bombing; none were in New York City during the bombing. *Id.* at 10-11.

The impact on the community is likewise reflected in the media coverage. As in *McVeigh*, 918 F. Supp. at 1471-72, a substantial segment of the pretrial publicity here contained information about victims' alleged injuries (58%) and, to a lesser extent, property damage (16%). Rep. at 23. Other articles featured statements by victims, witnesses, residents, or their families regarding the explosions and the effect on their lives. For example, as in *McVeigh*, 918 F. Supp. at 1471, victims and witnesses authored publications and gave interviews that were featured prominently in headlines. *See, e.g.*, Exs. 35-36.

Thus, this district's large metropolitan population, and the fact that 35% of the Manhattan venire indicated that they have not formed an opinion about Mr. Rahimi's guilt, cannot dilute the prejudicial effects of the pretrial publicity. Rep. at 9. *See Tokars*, 839 F. Supp. at 1584 (venue change even though district contained "very large metropolitan, populous city" (Atlanta) and survey data showed that "30% of the citizenry had no opinion" about the case, because "[w]here the negative publicity has been so intense, the court's task would be made more difficult by prospective jurors' subconscious recollection of news coverage").

E. Survey data and media analysis confirm that there is a presumption of prejudice against Mr. Rahimi in this district.

Courts have concluded that venue change is required where defendants adduced survey data reflecting similar opinions in the venire and pretrial publicity as are present here. *See, e.g.*, *United States v. Sablan*, 08-259, 2014 WL 7335210, at *2 (E.D. Cal. Dec. 19, 2014) ("significant media coverage" and survey data "show[ing] actual bias in more than half the potential jury pool" compelled venue change); *United*

States v. Holder, 399 F. Supp. 220, 228 (D.S.D. 1975) (venue change in Wounded Knee takeover prosecution where Native American defendants' "survey data[] indicate[d] not only massive publicity" but also "a deeply felt prejudice toward" Native Americans, even though "volume of inflammatory media coverage ha[d] subsided"); *see also Tokars*, 839 F. Supp. at 1583.

Here, the survey data and media analysis establish that there has been not only greater publicity about the case in this district, but also that the quality of that coverage has been more prejudicial here. There has been nearly five times as much media coverage in this district than as in Burlington. Rep at 20. Furthermore, as discussed *supra* at 9-17, in much of this coverage, Mr. Rahimi has been demonized as a terrorist and portrayed in a highly negative (and prejudicial) light.

The deleterious effects of this coverage are borne out in the survey data. The clearest evidence of the prejudice caused by the pretrial publicity in this district is that 90% of potential Manhattan jurors said that they were aware of the case, and a significant segment of that pool has prejudged his guilt. Rep. at 7, 9. Specifically, nearly half (45%) of Manhattan respondents said that they have already judged Mr. Rahimi to be guilty, and 64% acknowledged harboring a negative view of him.[16] *Id.*

[16] Although about two-thirds of the Manhattan venire said that they could set aside this belief to render an impartial verdict, courts have recognized that jurors are largely incapable of doing so, especially where potential jurors have a connection to the crime, *see, e.g.*, *Gonzales*, 99 F.3d at 987, like the vast majority of Manhattan respondents do here. *See* Rep. at 10, 11. Importantly, too, more Manhattan respondents than D.C. or Burlington respondents said that they could "definitely" or "probably" *not* set aside their prejudgment of guilt to deliver a fair verdict. *See id.* at 10.

at 9. By contrast, just 15% of Burlington respondents indicated prejudgment of guilt and less than half held a negative view of Mr. Rahimi. *Id.* *See Gordon*, 380 F. Supp. 2d at 365 (venue change where survey data showed that "almost everyone in [county in district surveyed] ha[d] heard about the case, and a substantial majority ha[d] already formed opinions about it"). *Cf. United States v. Salim*, 189 F. Supp. 2d 93, 96-97 (S.D.N.Y. 2002) (no venue change "on the[] very specific facts" presented where, *inter alia*, survey data established "absence of pervasive case-specific recognition" among venire).

The prejudicial effect of the video footage allegedly showing Mr. Rahimi placing one of the bombs—the precise type of publicity courts have found likely to warrant a change in venue, *see, e.g.*, *Rideau*, 373 U.S. at 724-25; *Marcello*, 280 F. Supp. at 516—is similarly corroborated by the survey data. The data shows that Manhattan respondents (13%) were more than four times as likely as Burlington respondents (3%) to cite the footage as the most compelling evidence against Mr. Rahimi. Rep. at 12. The survey data also confirms that, as a general matter, Burlington respondents were less likely to recall *any* evidence from the media coverage whatsoever. *Id.* The prejudicial effect of pervasive publicity regarding the New Jersey bombings and police shootout similarly finds support in the survey data, which indicates that twice as many Manhattan respondents freely recalled details about Mr. Rahimi's apprehension in New Jersey as did respondents in the alternative jurisdictions. *Id.* at 8.

The survey data and media analysis therefore indicate that "prejudicial publicity [has] pervade[d] [and] saturated" this district. *Ayala*, 64 F. Supp. at 449. Accordingly, Mr. Rahimi has "show[n] a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial." *Maldonado-Rivera*, 922 F.2d at 966-67 (citation omitted).

CONCLUSION

For the foregoing reasons, the Court should grant a change of venue, and, based on the venue expert's analysis, it is recommended that venue be changed to Burlington, where the venire's attitudes are demonstrably less prejudicial than here.

Dated: New York, New York

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Respectfully submitted,

Federal Defenders of New York

By: /s/ Sabrina P. Shroff

Sabrina P. Shroff
David E. Patton
Peggy Cross-Goldenberg
Meghan J. Gilligan
Attorneys for Defendant
Ahmad Khan Rahimi
52 Duane Street - 10th Floor
New York NY 10007
Tel: (212) 417-8700