No. 18-1581

In the Supreme Court of the United States

MICHAEL LOWRY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether sufficient evidence supports petitioners' convictions for perjury before a grand jury, in violation of 18 U.S.C. 1623.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Pa.):

United States v. *Michael J. Sullivan*, No. 13-cr-39-1 (Aug. 20, 2014)

United States v. *Michael Lowry*, No. 13-cr-39-2 (Jan. 29, 2015)

United States v. *Robert Mulgrew*, No. 13-cr-39-3 (Dec. 10, 2014)

United States v. *Willie Singletary*, No. 13-cr-39-4 (Mar. 30, 2015)

United States v. *Thomasine Tynes*, No. 13-cr-39-5 (Dec. 10, 2014)

United States v. *Mark A. Bruno*, No. 13-cr-39-6 (Aug. 14, 2014)

United States v. *William Hird*, No. 13-cr-39-7 (Dec. 17, 2014)

United States v. *Henry P. Alfano*, No. 13-cr-39-8 (Nov. 2, 2015)

United States v. *Robert Moy*, No. 13-cr-39-9 (Aug. 14, 2014)

United States Court of Appeals (3d Cir.):

United States v. *William Hird*, No. 17-4754 (Jan. 18, 2019)

United States v. *Thomasine Tynes*, No. 14-4804 (Jan. 18, 2019)

United States v. *Robert Mulgrew*, No. 14-4812 (Jan. 18, 2019)

United States v. *Michael Lowry*, No. 15-1344 (Jan. 18, 2019)

United States v. *Willie Singletary*, No. 15-1739 (Jan. 18, 2019)

United States v. *Henry P. Alfano*, No. 15-3765 (Jan. 18, 2019)

United States Supreme Court:

Henry P. Alfano and William Hird v. *United States*, No. 18-1552 (Pet. filed June 17, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 913 F.3d 332. The order of the district court denying petitioners' motions for acquittal (Pet. App. 68a-89a) is unreported but is available at 2014 WL 5795575.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 2019. A petition for rehearing was granted in part and the opinion was subsequently amended on January 18, 2019. On April 11, 2019, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including May 18, 2019. On May 13, 2019, Justice Alito further extended the time to and including June 17, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner Tynes was convicted on two counts, and petitioners Lowry and Mulgrew were each convicted on one count, of perjury before a grand jury, in violation of 18 U.S.C. 1623. Tynes Am. Judgment 1; Lowry Judgment 1; Mulgrew Judgment 1. Tynes was sentenced to 24 months of imprisonment, to be followed by one year of supervised release. Tynes Am. Judgment 2-3. Lowry was sentenced to 20 months of imprisonment, to be followed by one year of supervised release. Lowry Judgment 2-3. Mulgrew was sentenced to 18 months of imprisonment, to be followed by three years of supervised release. Mulgrew Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-43a.

1. Petitioners formerly served as judges on the Philadelphia Traffic Court. Pet. App. 68a. During their tenure, petitioners and some of their colleagues engaged in a scheme of "fixing tickets." *Id.* at 69a. Under that scheme, "personal assistants and other court house staff" would transmit "extrajudicial communications" requesting "consideration"—"code" for "favorable dispositions [for] well-connected ticket-holders who knew a Traffic Court judge or an employee." *Ibid.* The judges participating in the scheme "routinely grant[ed]" those requests. *Ibid.*

All three petitioners received and acted upon numerous requests for consideration. Tynes received such requests through her secretary and courtroom officer. C.A. App. 4589a-4590a, 4592a-4595a. In one example, Tynes received a request for special treatment for a friend of a court employee; the friend neither spoke nor raised a defense at the hearing, yet Tynes found him not

guilty. *Id.* at 3148a, 3158a-3159a, 3192a, 3197a-3198a, 3821a-3822a. Similarly, Lowry received requests for consideration through his personal assistant, who would convey the requests to Lowry in the courtroom by "lean[ing in] and just catch[ing] his eye." *Id.* at 1823a; see *id.* at 1822a-1824a. In one instance, another traffic judge told a friend not to worry about a ticket for leaving the scene of an accident; the case then came before Lowry, who dismissed the ticket. *Id.* at 3891a, 3905a, 3919a-3925a, 3927a, 4001a. Finally, Mulgrew received requests for consideration through his personal assistant, who would convey the requests to him in the robing room before court. *Id.* at 1381a-1385a, 1451a-1452a, 1455a. In one case, a court employee asked Mulgrew to give special treatment to the employee's niece; even though the niece did not attend her hearing, Mulgrew found her not guilty. *Id.* at 1033a-1035a, 1040a, 1464a-1465a.

All three petitioners also made requests for consideration to other judges. For example, Tynes would leave index cards with names for her secretary, who would then convey those names to the personal assistants of other judges. C.A. App. 4596a-4599a, 4630a-4631a. Similarly, Lowry would direct his personal assistant to pass along requests made by ward leaders. *Id.* at 1832a-1833a, 1839a-1840a. And in one case, he sought consideration for his nephew, who had received a ticket for careless driving; the nephew did not show up for the hearing, but the presiding judge nonetheless found him not guilty. *Id.* at 1844a-1845a, 1847a-1848a, 1981a, 1996a-1999a, 2012a-2013a. Mulgrew, likewise, would direct his personal assistant to deliver index cards bearing names to other judges' personal assistants, who "knew what it meant." *Id.* at 1389a; see *id.* at 1387a-1399a.

2. In October and November 2011, petitioners testified before a federal grand jury investigating criminal activity in the Traffic Court. Tynes testified under oath:

> Q In all the years you've been there have you ever been asking to give favorable treatment on a case to anybody?
>
> A No, not favorable treatment. People basically know me. The lawyers know me. The Court officers know me, and I have been called a no-nonsense person because I'm just not that way. I take my position seriously, and the cards fall where they may.
>
> Most of the time, going back to you, the people in my Court plea bargain. They know that most of the time—ninety percent of the time—say ninety percent, I go with the police officer's recommendation. That ten percent I don't a lot of times, with people speeding, if they want to plea, I won't allow that.
>
> Q So in all those years no one has ever asked you to find somebody not guilty—
>
> A No.
>
> Q —or to find a lesser violation, find a lesser fine, anything along those lines.
>
> A No. I will say to people go to court, go to trial and see what happens.
>
> Q Not only the people who were written the tickets, but any fellow judges? Has the Court Administrator ever asked you to continue a case to another judge or anything along those lines?
>
> A If they ask me to, it has nothing to do with the case. It could be something where—sometimes cases are merged where somebody has the same

name as somebody else and it's merged and we find out that it could be a DUI or something and it's not that person. So, they will come to me and say, Judge, we have a case here and we have to continue it because there's nothing wrong with it. I say that's okay, fine, whatever. I don't inquire too much about what's going on.

Q Ward leaders, politicians has anyone called you and said I have Johnny Jones coming up next week and I would appreciate it if—if you would look favorably on him when he comes through? Has anything like that ever happened?

A Throughout the years ward leaders and people have called all the time and asked me questions. The only thing I will say to them is they need to go to court. If you think it's a problem, they need to hire a lawyer or make sure you bring all your evidence to court. If it's something like inspection, make sure you bring your papers and things like that. That's what I would tell them to do. I give advice that way. I don't know if that's wrong or not, but I do.

Q You've never taken action on a request?

A No.

C.A. App. 528a-530a.

Similarly, Lowry testified under oath:

Q. So if I understand your testimony, you're saying you don't give out special favors; is that right?

A. Well, I know it appears that way, and it's hard for me to prove to you that what's in—

Q. I'm just asking. Your testimony is you don't give out special favors; is that right?

A. No, I treat everybody in that courtroom the same.

Q. You treat everybody fairly?

A. I'm a lenient judge. I will admit to that.

Q. You treat everybody fairly?

A. Yes, I do.

Q. And these notices that you get from your personal or from other people, they don't affect you in any way; is that right?

A. Virtually no effect at all.

C.A. App. 489a-490a.

Finally, Mulgrew testified under oath:

Q. How about other judges, Have other judges ever approached you or called to you or get a message to you either themselves or through their personals saying someone is going to be on your list next week or next Monday and you could look some special way towards the case?

A. No, they haven't.

Q. Never?

A. No.

Q. How about your personal, Has your personal received any calls like that from other judges, other ward leaders that she's conveyed to you saying that so-and-so has called about this case?

A. If she did, she didn't convey them to me.

Q. And your personal is who?

A. Gloria Mcnasby.

Q. Have you ever seen on traffic court files—You actually get a file when someone's case is called?

A. Right.

Q. So the case is called and you get a file presented to you; is that right?

A. Uh-huh.

Q. Have you ever seen any index cards or notations on the file indicating that a person has called or taken some special interest in this case?

A. Nope.

C.A. App. 432a-433a.

In a further exchange, Mulgrew testified:

Q. Let me make sure as well that if I got your testimony correct. You're saying that if other people whether they be political leaders, friends and family, anybody who is approaching your personal and asking her specifically to look out for a case, see what she can do in a case, give preferential treatment, however you want to phrase it, that she is not relaying any of that information on to you; is that correct?

A. No, she isn't.

C.A. App. 437a-438a.

3. On January 29, 2013, a grand jury in the Eastern District of Pennsylvania returned a 77-count indictment charging petitioners and others with various offenses related to operating a ticket-fixing scheme in traffic court. Indictment 1-79. The indictment charged petitioners with fraud, conspiracy, and, as relevant here, perjury before a grand jury, in violation of 18 U.S.C. 1623. Indictment 67-73.

Following a jury trial, petitioners were acquitted of fraud and conspiracy, but were convicted of perjury for their statements to the grand jury. Pet. App. 2a. In a post-trial order, the district court denied petitioners' motions for a judgment of acquittal and a new trial. *Id.* at 68a-89a. Among other things, the court rejected petitioners' contentions that insufficient evidence supported their convictions for perjury. *Id.* at 72a-85a.

4. The court of appeals affirmed the judgment as to petitioners. Pet. App. 1a-43a. It rejected petitioners' contentions that insufficient evidence supported their convictions, which were premised on their assertions that the questions posed to them before the grand jury were vague or that their answers were truthful. *Id.* at 20a-21a.

The court of appeals observed that, in order to convict a defendant for perjury before a grand jury, the government must prove that the defendant took an oath before that jury and then "knowingly made a 'false material declaration.'" Pet. App. 21a (quoting 18 U.S.C. 1623)). Citing this Court's decision in *Bronston* v. *United States*, 409 U.S. 352 (1973), the court of appeals explained that "'precise questioning is imperative'" and that "inaccuracies" resulting from the witness's confusion about the meaning of a question do not amount to perjury. Pet. App. 21a (quoting *Bronston*, 409 U.S. at 362) (brackets omitted). The court further explained that precision "is assessed in context," not by examining the question in isolation. *Ibid.*

The court of appeals also observed that "[c]hallenges to the clarity of a question are typically left to the jury, which has the responsibility of determining whether the defendant understood the question." Pet. App. 22a. The court stated that—under the "highly deferential

standard of review" applicable when an appellate court reviews a conviction for sufficiency of the evidence—a challenge to the clarity of a question should succeed on appeal only where it is "'entirely unreasonable to expect that the defendant understood the question posed to him.'" *Id.* at 20a, 22a (citation omitted). The court explained that its review was "focused on glaring instances of vagueness or double-speak by the examiner at the time of questioning * * * that—by the lights of any reasonable fact-finder—would mislead or confuse a witness." *Id.* at 23a. "Questions that breach this threshold," the court recognized, "are 'fundamentally ambiguous' and cannot legitimately ground a perjury conviction." *Ibid.* (citation omitted). Applying that standard, the court of appeals upheld petitioner's convictions for perjury, emphasizing that its "review [wa]s fact-dependent" and that "each [petitioner] raises some unique issues." *Ibid.*

First, the court of appeals affirmed Tynes's convictions, which rested on two exchanges; in one, Tynes denied that she had "ever been asked to give favorable treatment on a case to anybody," and in the other, she denied that she had ever "taken action on a request." Pet. App. 24a-26a (citations omitted); see *id.* at 24a-30a. The court rejected Tynes's contention that the terms "favorable treatment" and "request" were fundamentally ambiguous. *Id.* at 28a; see *id.* at 24a-28a. Examining the "obvious, consistent focus" of the relevant "line of questioning," the court found that the "broader context would give any reasonable fact-finder more than enough basis to conclude that the witness knew the point of reference for both the term 'favorable treatment' and 'request' was ticket fixing." *Id.* at 26a, 28a. The court likewise rejected Tynes's contention that

Tynes herself should be deemed to have interpreted "the question about favorable treatment * * * as asking whether she accepted any bribes" and that "[h]er response of 'no'" was therefore "literally true." *Id.* at 28a. The court acknowledged that, "[o]f course, perjury arises only from making knowingly false material declarations," and that "a witness who answers an ambiguous question with a non-responsive answer that the witness believes is true —even if the answer is misleading —does not commit perjury." *Ibid.* The court found, however, that "the trial record" neither "support[ed] [any] reasonable inference" that the government asked Tynes only about bribes, nor "provide[d] any reason why Tynes would interpret the question in this way." *Id.* at 29a.

Second, the court of appeals affirmed Lowry's conviction, which rested on one exchange; the examiner had asked Lowry whether he "'g[a]ve out special favors,'" and Lowry had responded, "'No, I treat everybody in that courtroom the same.'" Pet. App. 31a (citation omitted); see *id.* at 30a-36a. The court rejected Lowry's contention that "the phrase 'special favors' is subject to many interpretations." *Id.* at 32a. After analyzing the "larger context for the question asked of Lowry," the court found that "the line of questioning reasonably supports a conclusion that this inquiry referenced conduct associated with allegations of ticket fixing" and that "Lowry answered as if his understanding of the question was consistent with this interpretation." *Id.* at 31a-32a.

Third, the court of appeals affirmed Mulgrew's conviction, rejecting Mulgrew's contention—which the court noted was reviewable only for plain error—that the two responses underpinning his convictions were literally

true. Pet. App. 36a-40a & n.30. In the first exchange, Mulgrew had claimed that he was not aware whether his personal assistant had received "any calls" from "other judges, other ward leaders that she's conveyed to [Mulgrew], saying so-and-so has called about this case." *Id.* at 37a (citation omitted). Although Mulgrew contended that the word "call" referred exclusively to telephone calls, and that his answer was therefore literally true, the court found that "the context of the question" made it "obvious" that the question "focus[ed] on the substance of the communications between Mulgrew's personal assistant and himself, rather than the mode of those communications." *Id.* at 37a-39a. In the second exchange, Mulgrew denied that anyone had asked his personal assistant to "*see what she can do* in a case." *Id.* at 39a (citation omitted). Mulgrew contended that the question asked whether anyone had approached the personal assistant for the purpose of asking *her* for preferential treatment, and that his denial was accordingly truthful. The court rejected that contention, explaining that Mulgrew had "cherry-pick[ed] a small part of the question out of context, distorting it," and that "[t]he full text and follow up question show that the thrust of the inquiry was whether Mulgrew's personal assistant was informing him of the names of those requesting preferential treatment from him." *Ibid.* In sum, the court found, "the evidence [wa]s sufficient for a reasonable jury to conclude Mulgrew understood that both of these questions were focused on whether his personal assistant informed him of requests for him to give preferential treatment." *Id.* at 40a.

Finally, the court of appeals rejected petitioners' argument that their convictions for perjury should be vacated because they were prejudiced by "spillover" from

evidence of fraud-related charges on which they were ultimately acquitted. Pet. App. 23a n.24. The court agreed that "where there is evidence of prejudice resulting from 'spillover' evidence from counts that should have been dismissed, reversal is warranted." *Ibid.* But it observed that it had rejected the contention (raised by co-defendants convicted on those charges) that the additional charges should have been dismissed. *Ibid.*

ARGUMENT

Petitioners renew their claims (Pet. 7-23) that insufficient evidence supported their convictions for perjury before a grand jury, asserting that the answers underlying those convictions either were literally true or came in response to fundamentally ambiguous questions. The court of appeals correctly rejected those claims, and its decision does not conflict with any decision of this Court or of any other court of appeals. As the court explained, its "review [wa]s fact-dependent" and addressed "unique issues." Pet. App. 23a. Further review of the court's factbound determination is not warranted.

1. In *Bronston* v. *United States*, 409 U.S. 352 (1973), this Court held that an individual may not be convicted of perjury under 18 U.S.C. 1621 for giving an answer that is "literally true but not responsive to the question asked and arguably misleading by negative implication." *Id.* at 353. The Court explained that the text of the statute asks whether the witness has "willfully . . . state[d] . . . any material matter" that he believes to be untrue, not whether the witness has "state[d] any material matter that implies any material matter that he does not believe to be true." *Id.* at 357-358. The Court also "perceive[d] no reason why Congress would intend the drastic sanction of a perjury prosecution to cure a testimonial mishap that could readily have been reached

with a single additional question by counsel alert—as every examiner ought to be—to the incongruity of [the witness's] unresponsive answer." *Id.* at 358. Although *Bronston* involved perjury in violation of 18 U.S.C. 1621, lower courts have applied its principles to perjury before a grand jury in violation of 18 U.S.C. 1623. See, *e.g.*, *United States* v. *Strohm*, 671 F.3d 1173, 1183 n.7 (10th Cir. 2011).

Lower courts have also determined that a response to a question can sometimes constitute perjury even if the question could theoretically be understood in more than one way. More specifically, they have explained that a witness commits perjury if he understands the question as the government did and, having that understanding, answers falsely. See, *e.g.*, *United States* v. *Culliton*, 328 F.3d 1074, 1079 (9th Cir. 2003) (per curiam), cert. denied, 540 U.S. 1111 (2004); *United States* v. *Swindall*, 971 F.2d 1531, 1553 (11th Cir. 1992), cert. denied, 510 U.S. 1040 (1994); *United States* v. *Slawik*, 548 F.2d 75, 86 (3d Cir. 1977). The lower courts have further explained that it is usually for the finder of fact to determine how the defendant understood the question, and that a reviewing court should reverse a conviction only where the question is "'fundamentally ambiguous'" —that is "so ambiguous that it is not amenable to jury interpretation." *United States* v. *Ryan*, 828 F.2d 1010, 1015 (3d Cir. 1987) (citations omitted), abrogated on other grounds by *United States* v. *Wells*, 519 U.S. 482 (1997); see *United States* v. *Manapat*, 928 F.2d 1097, 1099-1100 (11th Cir. 1991); *United States* v. *Lighte*, 782 F.2d 367, 375 (2d Cir. 1986).

The lower courts have approved reliance on context when determining the meaning of a question and when

determining whether a question is fundamentally ambiguous. See, e.g., *United States* v. *Richardson*, 421 F.3d 17, 33 (1st Cir. 2005) ("In determining whether a statement made in response to an ambiguous question could be said to be false, the context of the question and answer becomes critically important.") (citation and internal quotation marks omitted), cert. denied, 547 U.S. 1162 (2006); *United States* v. *Farmer*, 137 F.3d 1265, 1269 (10th Cir. 1998) ("A defendant may not succeed on a claim of fundamental ambiguity by isolating a question from its context in an attempt to give it a meaning entirely different from that which it has when considered in light of the testimony as a whole."); *United States* v. *Robbins*, 997 F.2d 390, 395 (8th Cir.) ("The literally true answers to the questions that are the basis of the false oath charge must be considered in the context in which they were given."), cert. denied, 510 U.S. 948 (1993); *Lighte*, 782 F.2d at 373 ("[A] jury need not examine isolated segments of the question and answer exchange, but may view it within the context of the entire line of questioning.").

2. The court of appeals acknowledged those legal principles in the decision below. Citing *Bronston*, the court recognized that, "[o]f course, perjury arises only from making knowingly false material declarations" and that "a witness who answers an ambiguous question with a non-responsive answer that the witness believes is true—even if the answer is misleading—does not commit perjury." Pet. App. 28a. The court likewise explained that "'precise questioning is imperative as a predicate for the offense of perjury,'" that it is "typically" the function of "the jury" to determine whether "the witness understood the question well enough to give an an-

swer that he or she knew to be false," and that a reviewing court should overturn a conviction only if the question is "'fundamentally ambiguous'"—*i.e.*, so ambiguous that the question would mislead the witness "by the lights of any reasonable fact-finder." *Id.* at 21a-23a (brackets and citations omitted). And the court noted that the meaning of a question "is assessed in context." *Id.* at 21a.

The court of appeals then correctly applied those principles when conducting its "fact-dependent" review, Pet. App. 23a, of petitioners' convictions. First, the court correctly rejected Tynes's argument that the terms "favorable treatment" and "request" in her grand-jury questioning were fundamentally ambiguous; as the court observed, the "obvious, consistent focus" of the relevant "line of questioning" would give a "reasonable fact-finder more than enough basis to conclude that the witness knew the point of reference for both the term 'favorable treatment' and 'request' was ticket fixing." *Id.* at 26a, 28a. The court likewise correctly rejected Tynes's argument that the question about "favorable treatment" referred solely to bribes; a reasonable fact-finder could conclude that the Government asked about more than bribes, and that Tynes understood as much when responding. *Id.* at 30a. Second, the court correctly rejected Lowry's contention that the phrase "special favors" in his grand-jury questioning was fundamentally ambiguous; as the court noted, the "line of questioning" and the "larger context" allowed a reasonable jury to find that "this inquiry referenced conduct associated with allegations of ticket fixing" and that Lowry's "understanding of the question was consistent with this interpretation." *Id.* at 31a-32a. Finally, the court correctly rejected Mulgrew's contention—which

was subject to plain-error review, see *id.* at 36a n.30—that the question about "calls" referred exclusively to telephone calls and that the question about communications to Mulgrew's personal assistant referred only to requests for preferential treatment from the personal assistant herself. As the court recounted, "the evidence [wa]s sufficient for a reasonable jury to conclude Mulgrew understood that both of these questions were focused on whether his personal assistant informed him of requests for him to give preferential treatment," and that, having that understanding, Mulgrew answered falsely. *Id.* at 40a.

3. Petitioners' objections to the court of appeals' factbound decision lack merit.

Petitioners contend (Pet. 8) that the court of appeals disregarded the principle that "a perjury conviction fails unless the government proves beyond a reasonable doubt that the witness understood the cited question, at the time that she answered it, in a way that would make her allegedly-perjurious answer false." In advancing that contention, petitioners overlook the difference between the standard applicable at trial and the standard applicable to a sufficiency-of-the-evidence challenge after trial. As the court of appeals' decision accurately reflects, the government bears the burden at trial of convincing "the jury" beyond a reasonable doubt that "the defendant understood the question" and answered falsely, Pet. App. 22a. Once the jury finds the defendant guilty, however, a reviewing court may not "disturb the verdict if '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* at 21a (citation omitted); see *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). The question addressed by the court of appeals was therefore not, as

petitioners suggest (Pet. 8), whether the perjury statute requires the government to prove "beyond a reasonable doubt that the witness understood the cited question." Rather, the question on sufficiency-of-the-evidence review of a verdict based on uncontested jury instructions was, as the court of appeals recognized, whether a "reasonable fact-finder" had "enough basis to conclude" that the witness understood the question, Pet. App. 28a.

Petitioners also object (Pet. 14) to the court of appeals reliance on context, asserting that "the 'context' of questioning is not to be consulted in a manner that eliminates the requirement of looking to the precise question asked and answer given." That argument "overlooks * * * th[e] fundamental principle * * * of language itself[] that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal* v. *United States*, 508 U.S. 129, 132 (1993). It would make little sense to require juries, or courts reviewing their verdicts, to look only to a single question and answer, precluding any inquiry into the referents for particular terms, or into surrounding exchanges that clarify how the witness understood the question. And nothing in the perjury statute or this Court's decisions requires such an artificially crabbed view of a potentially lengthy exchange.

Finally, petitioners assert that the court of appeals "drastically limit[ed]" the standard of fundamental ambiguity by cabining it to "'glaring instances of vagueness or double-speak.'" Pet. 10 (quoting Pet. App. 23a). But the court "review[ed] every aspect of the record pertinent to both the question and answer" to determine whether a reasonable jury could find that "the wit-

ness understood the question well enough to give an answer that he or she knew to be false." Pet. App. 22a; see *id.* at 22a-23a. And to the extent that petitioners raise specific objections (Pet. 11-16) to the court of appeals "fact-dependent" review of the "unique issues" raised by petitioners, Pet. App. 23a, those factbound details do not warrant this Court's review. See Sup. Ct. R. 10; *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

4. Contrary to petitioners' contention (Pet. 11-16), the decision below does not conflict with the decision of any other court of appeals. Petitioners erroneously assert (Pet. 10) that the standard for fundamental ambiguity applied by the court below "cannot be reconciled" with the standard applied in the Second, Sixth, and Eleventh Circuits. See Pet. 10-11. But those Circuits have each explained that a question is fundamentally ambiguous only when it is "not a phrase with a meaning about which men of ordinary intellect could agree, nor one which could be used with mutual understanding by a questioner and answerer unless it were defined at the time it were sought and offered as testimony." *Lighte*, 782 F.2d at 375 (citation omitted); see *United States* v. *Ahmed*, 472 F.3d 427, 433 (6th Cir. 2006), cert. denied, 551 U.S. 1132 (2007); *Manapat*, 928 F.2d at 1100. In the decision below, the Third Circuit quoted and applied precisely that standard. See Pet. App. 22a n.22 (quoting *Lighte*).

Petitioners also assert (Pet. 11) that other courts of appeals "have vacated convictions predicated upon responses to questions that would be excused under the Third Circuit's test." See Pet. 15 ("The decisions of other circuits illustrate the point and reveal how badly

the decision of the court below deviates from the governing rule."). But the decision below articulates the same legal standard as that consistently used by other courts of appeals. Petitioners' argument thus boils down to an objection to the application of that settled legal standard to the facts of this case. Further review is accordingly unwarranted.

5. Petitioners alternatively argue (Pet. 22-23) that this Court should hold their petition for the disposition of the petition for a writ of certiorari filed by their co-defendants in *Alfano* v. *United States*, No. 18-1552 (filed June 17, 2019). In that petition, petitioners' co-defendants seek this Court's review of their convictions for mail and wire fraud. Petitioners, who were acquitted of those charges, argue (Pet. 22-23) that, if their co-defendants prevail, this Court should vacate the judgment below and remand the case so that the court of appeals can reconsider whether they were prejudiced by "spillover" from evidence presented on the fraud counts.

Petitioners, however, offer no meaningful support for their proposal. In particular, they provide no basis for concluding that the court of appeals might in fact agree that "there is evidence of prejudice resulting from 'spillover,'" Pet. App. 23a n.24. To establish that evidence on one count has a prejudicial spillover effect on another count, a defendant must establish (among other things) that "the jury heard evidence that would have been inadmissible at a trial limited to the remaining valid count[s]." *United States* v. *Cross*, 308 F.3d 308, 317 (3d Cir. 2002). Petitioners do not identify any significant evidence—or, for that matter, any evidence at all—that was introduced with respect to the conspiracy and fraud counts, but that would have been inadmissible if the trial had been limited to the perjury counts, which

involved petitioners' false statements to the grand jury about the activities alleged in the fraud counts. There thus exists no sound basis to the petition pending disposition of the petition in *Alfano*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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