No. 19-906

In the Supreme Court of the United States

PHILIP N. ANTICO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the *Allen* charge given at petitioner's request, which noted that the trial was expensive and referred to the cost of retrial, violated his rights to due process and an impartial jury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-57a) is reported at 934 F.3d 1278. The order of the district court denying petitioner's motions for judgment of acquittal and new trial (Pet. App. 58a-64a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2019. A petition for rehearing was denied on October 23, 2019 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on January 21, 2020. 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 Southern District of Florida, petitioner was convicted of obstruction of justice, in violation of 18 U.S.C. 1512(b)(3). Pet. App. 22a, 59a. Petitioner was

sentenced to three years' probation. *Id.* at 25a. The court of appeals affirmed petitioner's conviction but vacated his sentence and remanded for resentencing. *Id.* at 3a-57a.

1. On August 20, 2014, a Boynton Beach Police Department (BBPD) officer attempted to perform a traffic stop. Pet. App. 6a. The driver of the car did not stop, and a high-speed chase involving several BBPD officers ensued. *Ibid.* After the car was forced to stop, a group of officers approached it with their guns drawn. *Ibid.* Several of the officers proceeded to assault the driver and passengers by kicking and punching them. *Id.* at 6a-7a. The assault was recorded by a sheriff's office helicopter flying overhead. *Id.* at 7a.

Later that evening, the officers—who did not know that the assault had been recorded from the helicopter—filed their Officer Reports about the incident. Pet. App. 7a. BBPD officers are trained that such reports are the primary means of reporting the details about their use of force. *Ibid.* Five of the officers, however, failed to provide accurate accounts of their use of force, with several omitting any mention that they had punched or kicked the car's occupants. *Id.* at 8.

Petitioner was the BBPD Sergeant who directly supervised three of the officers who committed the assault. Pet. App. 7a. Although he was not at the scene, he saw the car's driver at the hospital the night of the incident and was aware of his injuries. *Ibid.* A week later, petitioner watched the helicopter video. *Id.* at 9a. In order to allow the reporting officers to conform their Officer Reports, which they had submitted and validated as complete, he repeatedly returned them for revision before passing them along to the BBPD chief of

police. *Id.* at 9a-10a. A "digital audit trail" of the reports revealed that petitioner rejected Officer Reports 11 times in the 29 hours after watching the video, including rejecting the reports of two of the assaulting officers three times each. *Id.* at 9a-10a, 19a. After the officers changed their reports, petitioner approved the reports and transmitted them to the chief of police, who referred the matter to state and federal authorities to determine whether the officers violated any laws. *Id.* at 10a.

In February 2015, agents from the Federal Bureau of Investigation (FBI) interviewed petitioner. Pet. App. 10a. At the time of the interview, both petitioner and the FBI agents were unaware that the BBPD reporting system retained a digital audit trail of the changes the officers made to their reports. *Ibid.* During the interview, petitioner stressed that the Officer Reports would not raise a "red flag" about the reporting officers' verity, because they accurately stated that the officers had "thrown punches and kicks." *Id.* at 10a-11a. He concealed, however, that the officers' *initial* completed and validated reports omitted mention of that conduct. *Id.* at 11a. When asked whether he returned any of the reports for correction, petitioner replied that he would have to check and that "I might have rejected a couple." *Ibid.* Petitioner also told the agents that he "'never really had an issue with . . . these guys not being accurate in their . . . report writing,' and 'paint[ing] a picture of what happened.'" *Ibid.* (brackets in original). Petitioner added "that the only statement he should have had a subordinate officer change in his report was a 'grammatical error' stating that a suspect's face hit the officer's hand instead of vice versa." *Ibid.*

2. A federal grand jury charged petitioner with one count of obstruction of justice relating to his misstatements and omissions in his interview with the FBI, in violation of 18 U.S.C. 1512(b)(3), and two counts of falsification of records relating to his aiding and abetting of the filing of false police reports by two of the assaulting officers, in violation of 18 U.S.C. 1519. Pet. App. 18a. The case proceeded to trial, where government witnesses testified that petitioner's misleading statements and omissions had hindered the FBI's investigation because they gave the false impression that the officers involved could be trusted. *Id.* at 18a-20a.

During deliberations, the jury sent a note to the district court stating: "Your Honor, we as a jury have reached a verdict on two counts. On the third we cannot agree. We sincerely request your insight on this matter." Pet. App. 20a. The court conferred with counsel, and petitioner's counsel proposed that the jury be sent home for the night and that the court read them an "*Allen* charge" the next day if they continued to be deadlocked after additional deliberations. *Ibid.* (citation omitted). An *Allen* charge, derived from this Court's decision in *Allen* v. *United States*, 164 U.S. 492 (1896), is a set of supplemental instructions that encourage deadlocked jurors to reexamine the grounds for their opinions and continue deliberations in an effort to reach a verdict. The government agreed. Pet. App. 20a.

The district court then asked for confirmation that, if the court received another note from the jury about being deadlocked, the parties wanted the court to read the jury the *Allen* charge from the Eleventh Circuit's Pattern Jury Instructions, which it referred to as "the modified *Allen* charge." Pet. App. 20a; see *id.* at 21a. Petitioner's counsel replied, "Correct." *Id.* at 20a. The

court then told the jury to break for the evening and return in the morning to continue deliberating. *Id.* at 20a-21a. Before adjourning, the district court advised counsel for petitioner and the government to review the applicable instruction from the Eleventh Circuit's Pattern Jury Instructions, which is identified as "T-5, the modified *Allen* charge." *Id.* at 21a.

The following morning, the jury sent a second note stating: "Your Honor, we, the jury, are not able to agree on one count. No amount of time, talk, contemplation or discussion of the facts provided shall result in a unanimous decision." Pet. App. 21a. The court discussed the note with counsel and explained that it could ask the jury to return a partial verdict on the counts on which it agreed, or could give the jury the modified *Allen* charge. *Ibid.* The court then described what it understood to be the government's position: "So, the Government would bring the jury in, acknowledge the note and read T-5, the modified *Allen* charge, and send them back." *Ibid.* The government confirmed that that was its position. The district court then asked, "Defense?" *Ibid.* Petitioner's counsel responded, "That is my request." *Ibid.*

The district court then read the requested Pattern Jury Instruction, stating to the jury in full:

> This is an important case. The trial has been expensive in time, effort, money and emotional strain to both the defense and prosecution. If you should fail to agree on a verdict the case will be left open and may have to be tried again. Another trial will increase the cost to both sides, and there is no reason to believe that the case can be tried again by either side better or more exhaustively than it has been tried before you.

> Any future jury must be selected in the same manner and from the same source as you were chosen, and there is no reason to believe that the case could ever be submitted to twelve men and women more conscientious, more impartial, or more competent to decide it, or that more or clearer evidence could be produced.
>
> If a substantial majority of your number are in favor of a conviction, those of you who disagree should consider whether your doubt is a reasonable one since it appears to make no effective impression on the minds of others. On the other hand, if a majority or even smaller number of you are in favor of an acquittal, the rest of you should ask yourselves again, and most thoughtfully, whether you should accept the weight and sufficiency of evidence which fails to convince your fellow jurors beyond a reasonable doubt.
>
> Remember at all times that no juror is expected to give up an honest belief he or she may have as to the weight or effect of the evidence, but after full deliberation and consideration of the evidence in the case, you must agree upon a verdict if you can do so.
>
> You must also remember that if the evidence fails to establish guilt beyond a reasonable doubt, the Defendant should have your unanimous verdict of not guilty. You should not be in a hurry in your deliberations and take all the time which you feel is necessary. I ask you to retire again and continue your deliberations with these additional comments in mind and apply them in conjunction with the other instructions I have previously given to you.

Pet. App. 80a-81a (emphasis omitted).

After the district court gave the *Allen* charge, the jury deliberated for another hour and then sent the

court a third note stating that the court's "comments were/are material," and that as a result it had reached a verdict. Pet. App. 22a. The jury found petitioner guilty on the obstruction-of-justice count and acquitted him on the two falsification-of-records counts. *Ibid.*

Petitioner moved the district court "for a new trial on the ground that the *Allen* charge was 'unconstitutionally coercive' because it asked the jury to consider the costs of the trial and possible retrial." Pet. App. 22a; see *id.* at 63a. The court denied the motion, explaining that the language of its *Allen* charge, which came from the court of appeals' Pattern Jury Instructions and had been approved by that court in various cases, was not unduly coercive. *Id.* at 22a-23a, 63a.

3. The court of appeals affirmed. Pet. App. 3a-57a.

As relevant here, the court of appeals explained that "[t]he doctrine of invited error bars [petitioner's] challenge to the *Allen* charge." Pet. App. 42a. The court observed that it was petitioner who "first proposed that the district court give a 'modified *Allen* charge' if the jury deadlocked a second time." *Ibid.* The court further observed that after the jury deadlocked a second time, petitioner confirmed that he wanted the district court to give the modified *Allen* charge from the court of appeals' 2016 Pattern Jury Instructions. *Ibid.* The court therefore determined that, "[b]ecause [petitioner] invited the court to give the modified *Allen* charge, he is precluded from challenging it as error now." *Ibid.*

The court of appeals additionally determined that petitioner's challenge would have been without merit even if he had not invited the instruction in question. Pet. App. 43a. The court noted that the modified *Allen* charge from its 2016 Pattern Jury Instructions "is

nearly identical to that from [its] 2010 Pattern Jury Instructions," with the exception that the former omits the words "'obviously'" and "'only'" from the latter's statement that "[o]bviously, another trial would only increase the cost to both sides." *Ibid.* (citations omitted; brackets in original). The court observed that it has "'repeatedly' held that the 2010 Pattern Jury Instructions' *Allen* charge 'is appropriate and not coercive.'" *Ibid.* (quoting *United States* v. *Oscar*, 877 F.3d 1270, 1286 (11th Cir. 2017)). "Because the 2016 modified *Allen* charge is substantially similar to the 2010 version," the court concluded that it was "bound by [its] prior precedent to uphold [the former's] language as not inherently coercive." *Ibid.* (citing *United States* v. *Rey*, 811 F.2d 1453, 1460 (11th Cir.), cert. denied, 484 U.S. 830 (1987)). Accordingly, the court, held that the district court "committed no error, plain or otherwise, in giving the modified *Allen* charge." *Ibid.*

ARGUMENT

Petitioner contends that the district court's *Allen* charge referring to the expense of trial and the cost of retrial was erroneous, and that the circuits are in conflict as to whether such instructions are unduly coercive. Petitioner waived that argument by affirmatively requesting the instruction, and the petition for a writ of certiorari should be denied for that reason alone. In any event, the court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. As an initial matter, this Court's review is not warranted at this time because this case is in an interlocutory posture, which "alone furnishe[s] sufficient ground for the denial" of a petition for a writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*,

240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari). While the court of appeals affirmed petitioner's conviction, it remanded his case for resentencing. See Pet. App. 57a. Petitioner will have the opportunity to raise his current claim, together with any other claims that may arise from further proceedings in the lower courts, in a single petition for a writ of certiorari following those proceedings. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment).

2. In any event, because petitioner requested the *Allen* charge about which he now complains, petitioner waived any challenge he might otherwise have raised to it. After the jury stated that it was deadlocked on one count, petitioner asked that the district court give the *Allen* charge to the jury if it continued to be deadlocked after additional deliberations, and twice confirmed this request. Pet. App. 20a-21a. The second confirmation followed the opportunity to review overnight the precise wording of the charge. *Id.* at 21a. Only after the jury found him guilty of obstruction of justice did petitioner argue to the district court and the court of appeals that the modified *Allen* charge was coercive.

As this Court has explained, invited error is a form of waiver. See *Johnson* v. *United States*, 318 U.S. 189, 200-201 (1943). This Court does not "permit an accused to elect to pursue one course at the trial and then, when

that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him." *Id.* at 201. When a district court "follow[s] the course which [the defendant] himself helped to chart and in which he acquiesced," a challenge to the district court's decision is "plainly waived." *Ibid.*; see *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999) ("As the city itself proposed the essence of the instructions given to the jury, it cannot now contend that the instructions did not provide an accurate statement of the law."); *United States* v. *Ozcelik*, 527 F.3d 88, 97 n.6 (3d Cir. 2008) (declining to consider defendant's argument that jury instructions were erroneous, explaining that because defendant had "made a joint request in favor of the very instructions he now challenges, he waived his right to raise these instructional issues on appeal under the invited error doctrine"), cert. denied, 555 U.S. 1153 (2009). The court of appeals thus correctly denied relief on this claim, and further review is not warranted.

3. Even if petitioner had not invited the *Allen* charge of which he now complains, this issue does not warrant further review. Petitioner argues that the court of appeals' decision upholding the instruction conflicts with the "modern trend in the judiciary * * * against highlighting the costs of a retrial to a jury in an *Allen* charge." Pet. 8 (emphasis omitted; capitalization altered). But the propriety of a given *Allen* charge is a fact-intensive question, and he does not identify any court of appeals that would have found reversible error in these circumstances.

a. An *Allen* charge is an instruction by the trial court that urges deadlocked "jurors to reexamine the grounds for their opinions and to continue deliberations

* * * to achieve a final verdict on all counts." *Yeager* v. *United States*, 557 U.S. 110, 114 (2009). Its name comes from this Court's decision in *Allen* v. *United States*, 164 U.S. 492 (1896), in which the Court found no reversible error in a supplemental instruction to that effect. The instruction included a request of jurors holding a minority position to consider the views of the majority and whether their own views were reasonable under the circumstances. *Id.* at 501. The Court stated that the "very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves," noting that "[i]t certainly cannot be the law" that listening with deference to arguments of others is unwarranted where "a large majority of the jury tak[es] a different view of the case from what [the dissenting juror] does himself." *Ibid.*

Nearly a century later, in *Lowenfield* v. *Phelps*, 484 U.S. 231 (1988), this Court reaffirmed the "continuing validity" of the so-called *Allen* charge as "beyond dispute" and observed that "[a]ll of the Federal Courts of Appeals have upheld some form of a supplemental jury charge." *Id.* at 237, 238 n.1 (citations omitted). In holding that the instruction in that case was not unduly coercive, the Court considered the charge "in its context and under all the circumstances," *id.* at 237 (quoting *Jenkins* v. *United States*, 380 U.S. 445, 446 (1965) (per curiam)), and observed that "one of the purposes served by" an *Allen* charge is "the avoidance of the societal costs of a retrial," *id.* at 238. The Court concluded that although every criminal defendant tried by a jury is entitled to an uncoerced verdict, on "these facts" the supplemental instruction did not deny the petitioner any constitutional right. *Id*. at 241.

b. Consistent with *Lowenfield*, the courts of appeals have recognized that whether language in an *Allen* charge is impermissibly coercive "depends heavily on the context in which the statement was made," *United States* v. *Jackson*, 443 F.3d 293, 297 (3d Cir. 2006), and its language as a whole. See, *e.g.*, *United States* v. *Hylton*, 349 F.3d 781, 788 (4th Cir. 2003), cert. denied, 541 U.S. 1065 (2004); *United States* v. *Clinton*, 338 F.3d 483, 490 (6th Cir.), cert. denied, 540 U.S. 1084 (2003); *United States* v. *Washington*, 255 F.3d 483, 485-486 (8th Cir. 2001). The ultimate question is whether the *Allen* charge, under the totality of the circumstances, is so coercive as to undermine the integrity of the deliberative process. See, *e.g.*, *United States* v. *McElhiney*, 275 F.3d 928, 940 (10th Cir. 2001) (adopting a "case-by-case approach"); *United States* v. *Bonam*, 772 F.2d 1449, 1451 (9th Cir. 1985) (per curiam) (addressing whether instruction, "under the circumstances it is given," coerces the jury into rendering a verdict).

In making that determination, courts of appeals have recognized that referring to the costs of trial or retrial can create pressure on the jury to return a verdict, and that in some circumstances that pressure can become undue. See, *e.g.*, *Hylton*, 349 F.3d at 788; *Clinton*, 338 F.3d at 490; *Bonam*, 772 F.2d at 1450; *United States* v. *Angiulo*, 485 F.2d 37, 39 (1st Cir. 1973); *United States* v. *Burley*, 460 F.2d 998, 999 (3d Cir. 1972). But the mere mention of such costs does not "necessarily ma[k]e the charge more coercive," *United States* v. *Mason*, 658 F.2d 1263, 1267 (9th Cir. 1981), or "render the charge coercive *per se*," *Clinton*, 338 F.3d at 490. See *ibid.* (reference to such costs in an *Allen* charge "d[oes] not render the charge coercive *per se*"). Instead, the courts of appeals have recognized that the reference to costs is not

"unduly coercive if it is given in the context of an otherwise balanced charge." *Hylton*, 349 F.3d at 788; see *McElhiney*, 275 F.3d at 945 (agreeing that "the addition of a comment on expense does not *necessarily* make a charge more coercive but that it *can*") (citation and internal quotation marks omitted).

The courts of appeals have recognized, in particular, that an *Allen* charge referring to the costs of trial or retrial can be balanced "by independent reminders of the juror's obligation to follow his own conscientiously held opinion." *Mason*, 658 F.2d at 1268. Thus, courts have found that an *Allen* charge is not unconstitutional where a reference to retrial is paired with a directive that jurors should not abandon their honest or conscientiously held views on the evidence to reach a verdict. See, *e.g.*, *Jackson*, 443 F.3d at 298; *Hylton*, 349 F.3d at 788; *Clinton*, 338 F.3d at 490; *Bonam*, 772 F.2d at 1450-1451. Conversely, courts have found that an *Allen* charge referencing the costs of the trial or retrial was unduly coercive in the absence of such cautionary language. The Ninth Circuit, for example, found that a particular charge was impermissibly coercive when it "made no attempt to counterbalance" a reference to the expense of the case "by further instructing the minority not to abandon their conscientiously held views merely to secure a verdict." *Mason*, 658 F.2d at 1267; see *id.* at 1267-1268; see also *McElhiney*, 275 F.3d at 943-946; *United States* v. *Paniagua-Ramos*, 135 F.3d 193, 197-199 (1st Cir. 1998); *Burley*, 460 F.2d at 999.

c. Under the totality-of-the-circumstances approach dictated by this Court's precedents and employed throughout the courts of appeals in evaluating the constitutionality of an *Allen* charge, the charge given here was not erroneous, let alone plainly erroneous. See

Fed. R. Crim. P. 30(d) (providing that a party "must inform the court of the specific objection" to a proposed instruction "and the grounds for the objection before the jury retires to deliberate," and that "[f]ailure to object in accordance with this rule precludes appellate review" except for plain error).

Like the charge at issue in *Allen* itself, the charge here asked jurors holding minority positions, whether in favor of acquittal or in favor of conviction, to reexamine their views. Pet. App. 80a-81a; see *Allen*, 164 U.S. at 501. To protect minority jurors, the charge included an admonishment similar to the one in *Lowenfield* that "no juror is expected to give up an honest belief he or she may have as to the weight or effect of the evidence." Pet. App. 81a; see *Lowenfield*, 484 U.S. at 235. And consistent with this Court's observation that one of the purposes of an *Allen* charge is "the avoidance of the societal costs of a retrial," *Lowenfield*, 484 U.S. at 238, the charge informed the jury that absent a verdict, "the case will be left open and may have to be tried again," which will "increase the cost to both sides." Pet. App. 80a. Thus, the *Allen* charge, read as a whole, is consistent with those found not to be unconstitutionally coercive by other courts of appeals. Petitioner cites no case holding that a reference to the costs of trial or retrial, accompanied by cautionary language reminding jurors not to give up an honest or conscientiously held belief as to the evidence in order to reach a verdict, is unconstitutionally coercive under the circumstances, much less *per se* coercive and reversible error.[*]

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[*] Petitioner notes that in the 1960s and 1970s, the Third, Seventh, and D.C. Circuits "abolished the use of the traditional *Allen* charge, favoring a more neutral version that does not explicitly mention the cost of a retrial." Pet. 3; see Pet. 3 n.1 (citing *United States* v.

Petitioner asserts (Pet. 15) that because the jury rendered its verdict within an hour of the *Allen* charge, the charge "must have * * * convinced the holdout jurors that a verdict was required." That argument is unfounded. Decisions of this Court and of other courts of appeals—including decisions that petitioner himself relies on—have found no inference of coercion from similar, or even shorter, periods of renewed deliberation. See *Lowenfield*, 484 F.3d at 235, 237-241 (30 minutes of additional deliberation); *Hylton*, 349 F.3d at 784, 788 (15 minutes); *Clinton*, 338 F.3d at 487-491 (less than an hour); *Washington*, 255 F.3d at 485-486 (45 minutes); *United States* v. *Hernandez*, 105 F.3d 1330, 1333-1334 (9th Cir.) (40 minutes), cert. denied, 522 U.S. 890 (1997); *United States* v. *Chigbo*, 38 F.3d 543, 545-546 (11th Cir. 1994) (15 minutes), cert. denied, 516 U.S. 826 (1995). Although the jury indicated that it found the *Allen* charge helpful to its deliberations, Pet. App. 22a, that is the very purpose of such a charge and thus not a basis for deeming it invalid. And no reason exists to speculate that the modified *Allen* charge unduly pressured holdout jurors into reaching a verdict.

Thomas, 449 F.2d 1177, 1187 (D.C. Cir. 1971) (en banc); *United States* v. *Fioravanti*, 412 F.2d 407, 419-420 (3d Cir.), cert. denied, 396 U.S. 837 (1969); *United States* v. *Brown*, 411 F.2d 930, 933-934 (7th Cir. 1969), cert. denied, 396 U.S. 1017 (1970)). Those courts did not do so as a matter of constitutional law, however, but rather through "exertions of supervisory authority," based on the "administrative difficulties associated with" adjudicating individualized *Allen* charges developed by each different district court within a given circuit. *Thomas*, 449 F.2d at 1187 (agreeing with the Third and Seventh Circuits about the wisdom of such a rule). The Eleventh Circuit has chosen to promote uniformity through promulgation of the pattern jury instruction at issue here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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