No. 18-1552

IN THE

SUPREME COURT OF THE UNITED STATES

HENRY P. ALFANO et al.,

Petitioners,

v.

UNITED STATES OF AMERICA et al.,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

BRIEF OF RESPONDENTS LOWRY, MULGREW AND TYNES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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July 2019

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QUESTION PRESENTED

Does a program of showing leniency in the adjudicatory process as a personal or political favor to certain accused wrongdoers constitute a "scheme to defraud" the local government, in violation of the mail and wire fraud statutes, by "obtaining property" in the form of potential fines and fees that might be assessed if the underlying accusations of non-criminal wrongdoing were sustained?

LIST OF ALL PARTIES

The petitioners are Henry Alfano and William Hird. This brief is filed for Michael Lowry, Robert Mulgrew and Thomasine Tynes, who are deemed to be respondents (in addition to the United States) under this Court's Rule 12.6, because they were co-appellants of Alfano and Hird in the court below and did not join with them in this Court as petitioners. Respondents have also filed their own petition, raising a separate issue, which has been docketed at No. 18-1581.

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BRIEF OF ADDITIONAL RESPONDENTS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondents Michael Lowry, Robert Mulgrew, and Thomasine Tynes jointly suggest that this Court grant the petition for a writ of certiorari filed by their co-appellants below, Henry Alfano and William Hird, to review the judgment and order of the United States Court of Appeals for the Third Circuit affirming the convictions and sentences of all of them.

STATEMENT OF THE CASE

Respondents Michael Lowry, Robert Mulgrew and Thomasine Tynes were elected, non-lawyer judges of the Philadelphia Traffic Court. A federal grand jury indicted them, along with co-defendants Henry Alfano and William Hird (among others), for devising and executing a scheme to defraud the City and State of revenues in the form of fines and penalties that would potentially have become due had drivers been convicted of the traffic offenses alleged in tickets that local police had issued. The government's theory was that the judges of Traffic Court systematically gave special "consideration" to favored litigants in their court. (There was no accusation, however, nor any evidence, that any of them took bribes or otherwise profited from this alleged "scheme.")

The present respondents filed or joined in pretrial motions to dismiss the charges as failing to state a cognizable theory of "property"-based mail and wire fraud under 18 U.S.C. §§ 1341, 1343, and 1349. Their pretrial motions were denied. Pet. Appx. 50–76.

Petitioners Henry Alfano and William Hird pleaded guilty to the fraud charges under an agreement, pursuant to Fed.R.Crim.P. 11(a)(2), allowing them to preserve those issues for appeal. The appeal, however, was unsuccessful. Pet. Appx. 1–23.

After a lengthy trial at which the particulars of numerous alleged traffic violations were examined, and at which the evidence showed that the judges had wide discretion to show leniency to accused drivers without strict regard for legal rules, the petit jury acquitted the present respondents and the rest of their co-defendants of all such charges. At the same time, the jury convicted each of the respondents of one or more instances of alleged false declarations before the grand jury in violation of 18 U.S.C. § 1623, a kind of perjury.

On appeal, respondents Tynes and Lowry argued that the questions to which they allegedly responded falsely were fundamentally ambiguous, and thus immune from perjury prosecution under this Court's decision in *Bronston v. United States*, 409 U.S. 352 (1973), while Mulgrew argued that his responses were literally truthful, measured against the ill-framed questions he was asked. This, too, would require reversal under *Bronston*. Tynes also invoked literal truth as a defense for one of her answers.

The respondents further argued on appeal that the overwhelming predominance of the fraud charges in a trial that lasted more than a month, at which respondents were forced to confront and justify dozens of past favorable dispositions of various minor traffic tickets cherry-picked by the government to raise suspicions about their integrity and fairness, prejudiced the jury's ability to apply the rules of law to the

perjury charges, notwithstanding their eventual acquittals on all the fraud counts. The Court of Appeals did not reach this "prejudicial spillover" argument, because it rejected on the merits the Alfano-Hird argument for dismissal of the fraud counts (referred to in the opinion below as "Sullivan's motion"). Pet. Appx. 26–27 n.24.[1]

In an amended opinion filed upon denial of rehearing, the U.S. Court of Appeals for the Third Circuit in a precedential opinion rejected all of the respondents' arguments challenging their perjury convictions. Pet. Appx. 23–45. The court therefore affirmed the two petitioners' and three respondents' convictions.

Petitioners Alfano and Hird petitioned this Court for a writ of certiorari to challenge the rejection of their attack on the mail fraud theory underlying this case. Respondents Lowry, Mulgrew and Tynes petitioned separately (No. 18-1581), challenging the

[1] Petitioner Tynes sought to participate with her co-defendants in the pretrial dismissal motion by submitting a proposed order allowing joinder. The court below held that effort procedurally deficient and disallowed her attempt to rely on it in support of the spillover prejudice argument on appeal. *See* Pet. Appx. 27 n.25; *but see* Pet. Appx. 26–27 n.24 (accepting that Tynes joined the motion). If this Court grants the instant Alfano-Hird petition and reverses, it should reject the Third Circuit's either self-contradictory or at least overly punctilious refusal of Tynes's joinder, and should remand her case as well.

affirmance of their perjury convictions.[2] In that petition (Point 3), they noted their standing to join petitioner's mail fraud arguments. They therefore suggested that if this present petition is granted and a reversal results, the affirmance of respondents' convictions for perjury should also be vacated and remanded to the Court of Appeals for further consideration of the merits of their spillover argument.

For the reasons discussed in this brief, supplementing those set forth in the petition itself, the petition should be granted.

REASONS FOR GRANTING THE PETITION

1. The decision of the court below disregards this Court's precedent and conflicts with the decisions of other circuits.

In case after case over the last 30 years, this Court has reinforced the limiting construction that it placed on federal mail and wire fraud prosecutions in *McNally v. United States*, 483 U.S. 350 (1987), that is, that a "scheme to defraud" requires a purpose to obtain "property" from a victim by deceit or misrepresentation. If the object of a scheme is not to deprive another of "money or property," then there is no

[2] The Solicitor General has waived response to the instant petition. (As to the respondents' separate petition, on the other hand, No. 18-1581, the government requested an extension of time to respond.) For the reasons set forth in the petition and those further reasons set forth herein, at the very least this Court should reject the government's waiver and call for a response in petitioners' case.

offense under these laws.[3] See *Cleveland v. United States*, 531 U.S. 12 (2000).[4] See also *Loughrin v. United States*, 573 U.S. 351 (2014) (bank fraud); *Sekhar v. United States*, 570 U.S. 729 (2013) (extortion); *Neder* v. *United States*, 527 U.S. 1 (1999) (mail and wire fraud).

The indictment in petitioners' case charged "a scheme to defraud the City of Philadelphia and Commonwealth of Pennsylvania, and to obtain money and property." 2 CA3 Appx. 241a. The money in question was alleged to be "funds to which the Commonwealth and the City were entitled," 2 CA3 Appx. 185a, that is, "money which would have been properly due as fines and costs." 2 CA3 Appx. 197a.

The indictment acknowledged that it was only "[g]uilty adjudications" that "subjected a violator to statutorily determined fines and costs of court ...." 2 CA3 Appx. 188a. From the "manner and means" discussion and the overt act averments of the indictment's introductory conspiracy count, *see* 2 CA3 Appx. 195–240a, it is apparent that the government did not charge that fines and fees, once assessed and due to the City or Commonwealth, were diverted elsewhere (such as to the judges themselves). Rather, the theory of the indictment is clearly that by failing, for

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[3] This case was not indicted under the "honest services" extension enacted by Congress after *McNally*, *see* 18 U.S.C. § 1346, because there were no bribes or kickbacks. See *Skilling v. United States*, 561 U.S. 358 (2010).

[4] The mail fraud statute, despite some ambiguity in its syntax, describes only one offense, which can be committed in only this one way. See *Loughrin v. United States*, 573 U.S. 351, 359 (2014); *Cleveland*, 531 U.S. at 25–26; *McNally*, 483 U.S. at 358–59.

improper reasons, to find certain drivers guilty of the top charge, the judges fraudulently deprived the City and Commonwealth of money.

As the Indictment states: "Traffic Court judges had several options when disposing of citations, including finding the ticketholder guilty of a different offense, guilty, not guilty, not guilty in *absentia*, guilty in *absentia*, guilty with reduction in speed, and dismissal. In addition, the ticketholder could engage in a plea bargain with the police officer or state trooper or other law enforcement officer." 2 CA3 Appx. 187a (italics per original). In other words, in each and every case, there were at least five potential dispositions, all facially lawful, that would result in no money being due, or a lesser amount due, to the City and Commonwealth, and only two (guilty and "guilty *in absentia*") that would produce the maximum revenue.

The question – to put it in terms most favorable to the government – is whether any fines and costs that would have been assessed if the driver were found guilty of the charge on the face of the ticket were "property of" the City and Commonwealth *before* the driver was adjudicated guilty.[5] The indictment thus sought to conceal its true gist, that is, an alleged scheme to deprive the City and Commonwealth of the judges' "honest services" in the pre-*McNally* and pre-*Skilling* sense, that is, of the local governments' supposed "right" to the benefit of a fair and impartial

[5] Thus, the indictment in this case did not allege a scheme to deprive local government of any sort of "right to control a valuable asset, tangible or intangible," that is also a kind of property under such cases as *Carpenter v. United States*, 484 U.S. 19 (1987) (propriety business information is "property.")

trial or hearing in each case. But of course that sort of "right" is an intangible one, at best, and is certainly not "money or property" that belonged to the City or Commonwealth.

In *Pasquantino v. United States*, 544 U.S. 349 (2004), this Court elaborated on *McNally* and held (5-4) that a government's "entitlement" to collect tax revenues was a "property right" of which the governmental entity could be deprived by a mail fraud scheme. *Pasquantino* involved a scheme to smuggle liquor into Canada without paying excise tax due to Canada on the importation. The entitlement to the tax was fixed when the liquor crossed the border, and therefore already constituted "property" of which Canada was to be deprived.

In *Cleveland v. United States*, 531 U.S. 12, 22–27 (2000), by contrast, the Court held that the state of Louisiana was not deprived of "property" by a scheme to corruptly obtain video poker licenses; the state had no property interest in the licenses of which it was deprived when the licenses were issued improperly. Philadelphia and Pennsylvania likewise had no "entitlement" to fines and costs, equivalent to that involved in *Pasquantino*, until and unless a ticketed driver was adjudicated guilty of some violation. Although the Traffic Court was far from a formal criminal tribunal, each accused driver was presumed to be innocent until adjudicated or admitting otherwise. Pet. 15–16 (citing Pennsylvania case law).[6] As a result, the City and state had no established property interest of the kind recognized in *Pasquantino*.

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[6] Moreover, the Pennsylvania Vehicle Code expressly provides that the various fines it establishes are due only in the event of conviction. *See*, *e.g.*, 75 Pa.Cons.Stat. §§ 3362, 6502(a).

These core principles cannot be reconciled with the opinion of the court below. Petitioners' scheme, according to the Third Circuit, "obviate[d] judgments of guilty that imposed the fines and costs," thereby "keeping (or taking) judgments out of the hands of the Government to prevent the imposition of fines and costs." Pet. Appx. 20. But for the scheme, "money ... *would have been* properly due as fines and costs." *Id.* (quoting indictment; emphasis amended). The court below affirmed petitioners' convictions on the impermissible basis that because the scheme, as alleged, had the purpose of dishonestly *preventing* the City from acquiring a property interest in the fines cognizable under *Cleveland*,[7] the petitioners (and respondents) should be convicted to prevent them from getting away with their (alleged) dishonesty. Pet. Appx. 19 ("Appellants cannot rest on the very object of their scheme (to work on behalf of favored individuals to obviate judgments of guilt and the imposition of fines and costs) as the basis to claim that there is not fraud.").

But the mail and wire fraud statutes address schemes "for obtaining money or property," 18 U.S.C. §§ 1341, 1343, not for depriving or interfering with the *opportunity to acquire* property. In other words, the Court below reasoned, a "scheme" that did *not* violate the statute should be a permissible basis of

[7] The opinion notes that according to one overt act (a superfluous allegation under § 1349, which requires no overt acts), a different defendant (not any of the petitioners or respondents) once undid an adjudicated ticket. Pet.App. 20 (*citing* 2 CA3 Appx. 228–29). Such misconduct, if it occurred, was categorically different from the "scheme or artifice to defraud" under the indictment's charging language.

prosecution precisely because it has as its object preventing a cognizable mail fraud crime from occurring.

The standard applied below cannot be reconciled either with this Court's precedent or with the case law of most of the circuits, thus requiring this Court's intervention. In particular, the decision of the court below squarely conflicts with decisions of the Seventh Circuit. In *Ward v. United States*, 845 F.2d 1459 (7th Cir. 1988), the court of appeals affirmed the post-conviction vacatur of a mail fraud decision based on *McNally*. The defendant there was a lawyer who bribed a judge to reach a favorable disposition of a drunk driving case.[8] As a result, Ward's client's bond was refunded in full rather than after the deduction of fines and costs. As the Seventh Circuit explained, discussing *Ward* in a later case, "[T]hat a state might have lost fines an honest judge might have imposed had defendant not bribed [the] judge was insufficient to establish a property right." *United States v. Ashman*, 979 F.2d 469, 479 (7th Cir. 1992) (failure to execute trades at Chicago Board of Trades by open outcry not deprivation of money or property within fraud statute). See also *United States v. Gimbel*, 830 F.2d 621, 626 (7th Cir. 1987) (no property interest where defendant deprived the Treasury Department of accurate information and data that if properly disclosed, "might have resulted in the Department assessing tax deficiencies").

The other circuits likewise properly focus their analyses in similar cases on whether money or

[8] As a post-*McNally* but pre-*Skilling* (and pre-§ 1346) case, the "honest services" theory relied on by the government at trial was not available to justify the conviction in *Ward*.

property is presently owing or legally due to the victim, not whether money or property could or might become due. The Second Circuit in a civil RICO case based on alleged mail fraud similarly suggested that it would reject the theory that "lost sales" could constitute a property right in the victim's hands merely because it "may become property."

> To be clear, Empire's Amended Complaint also alleges that its own lost sales were an "object of the scheme." We are skeptical that "lost sales" in this context can constitute an object of the scheme, however, because the "object of the fraud" must be " 'property' *in the victim's hands*," and "[i]t does not suffice ... that the object of the fraud *may become property* in the recipient's hands." *Cleveland*, 531 U.S. at 15 (emphasis added). But our analysis of proximate cause and thus the merits of the case do not turn on this issue, so we decline to resolve it.

Empire Merchants, LLC v. Reliable Churchill LLLP, 902 F.3d 132, 141 n.7 (2d Cir. 2018).

The Fifth Circuit has held similarly that unissued tax credits are not "property" in the state's hands because the state "does not derive any benefit, gain, or income from tax credits while it possesses them." *United States v. Griffin*, 324 F.3d 330 (5th Cir. 2003). Likewise, the Ninth Circuit consistently holds that a victim has property rights when money is legally due to the victim, but not before. *See, e.g.*, *United States v. Ali*, 620 F.3d 1062 (9th Cir. 2010) (defendants' scheme to fraudulently obtain software for less than full payment from third party distributors deprived publisher of a property right because company had a

right to full payment if its software was sold outside certain restrictions). While the state, in this case, would have a property right to enforcement of a judgment once entered by the judge, *see* Pet. Appx. 22 & n.20, it did not enjoy a property right to have any particular judgment entered upon the later adjudication of a given ticket.

The opinion of the court below conflicts with this Court's precedent and with better-reasoned decisions in several other circuits. It is also premised on a gross intrusion of federal authority – wielding the bluntest of instruments, a criminal indictment – into the administration of a quintessentially local governmental institution, a traffic court. See *Loughrin*, 573 U.S. at 361–62; *United States v Bass*, 404 U.S. 336, 349 (1971). The indictment's theory also presumes that each ticket, once challenged, must be adjudicated by a strict and rigid application of evidentiary rules and literal construction of traffic laws, like some idealized model of a felony trial in federal court. But in fact the Philadelphia Traffic Court operated as a "people's court," where leniency and mercy were regularly dispensed by non-lawyer judges assessing the circumstances of ordinary citizens who may have made forgivable mistakes in driving.

Worse yet, the indictment was premised on an unconstitutional presumption of guilt, that upon issuance of a ticket, without more, some fine or penalty was automatically due to the city or state. See *Nelson v. Colorado*, 581 U.S. —, 137 S.Ct. 1249 (2017) (giving substantive constitutional effect to presump-

tion of innocence).[9] This unacceptable presumption of guilt as to the motorists was then echoed in the Third Circuit's decision, which appears to reason that the defendants' argument against the validity of the indictment cannot be correct, simply because if it were, then they would go free of conviction. Pet. Appx. 19.

Neither controlling precedent, nor constitutional principles, nor fundamental fairness can tolerate such a result. The petition should be granted.

2. This case offers an excellent vehicle for clarifying the *Cleveland* rule limiting overbroad application of the mail and wire fraud statutes.

As shown under Point 1, the issues at stake in this case are important, and the holding of the court below conflicts with this Court's precedent and the rulings of other circuits. The record of the instant case also offers a good vehicle for the discussion and resolution of such questions. The petition arises upon the denial of a motion to dismiss the indictment, and thus presents a pure question of law on a closed record. Moreover, after a lengthy trial, the jury entirely rejected the government's underlying theory of this

[9] In legal terms, a traffic ticket is an accusation, no more. The Third Circuit's theory would convert every attempted obstruction of justice in a mandatory restitution case, for example, into an indictable fraud on the alleged victim, regardless of the defendant's guilt or innocence of the offense with which he was charged. For the same reason, almost any attempted witness tampering in a drug case could be prosecuted as a wire fraud with the object of depriving the United States of the mandatory criminal forfeiture judgment that would result from a conviction.

case, acquitting every defendant who stood trial of all charges of mail and wire fraud. So far as the jury could find, based on an extensive presentation of direct and circumstantial evidence, there was no fraud in the operation of the Philadelphia Traffic Court,[10] or at least not in these petitioners' or respondents' courtrooms.

As the jury learned at trial, any tradition of "consideration" that existed resulted not in corrupt "ticket-fixing," but only in the kind of lenient and sympathetic outcomes in particular cases that might eventuate anyway in such an informal, lawyerless, minor local tribunal, simply from the accused drivers' showing up and telling their stories. Protecting such suspects from federal felony conviction is a basic goal of the rule established by this Court in *McNally* and applied in *Cleveland*.

The instant petition therefore presents an appropriate vehicle for resolution of the important question presented.

[10] Much less was there any bribery, as the government appears to have suspected during the grand jury investigation but never charged, as the court below mentions. *See* Pet. Appx. 32–33.

CONCLUSION

For the foregoing reasons, in addition to those set forth by petitioners Alfano and Hird, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: July 19, 2019