No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LORI MILLIRON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 18 U.S.C. §3, one who, knowing that an offense against the United States has been committed, "receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment" is an accessory after the fact. When the principal offense is punishable by life imprisonment, the accessory faces up to fifteen years in prison, three times the maximum for perjury.

The question presented is:

> Whether a witness "assists the offender" within the meaning of 18 U.S.C. §3 merely by giving false or misleading testimony to a grand jury when that testimony supplies the offender with no alibi, no exculpatory account of the crime, and no help in escaping.

PARTIES TO THE PROCEEDING

Lori Milliron was the defendant-appellant below, and respondent the United States of America was the plaintiff-appellee.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

United States v. Milliron, No. 1:22-cr-00012-WJM-2 (D. Colo.) (judgment entered June 26, 2023).

United States v. Milliron, No. 23-1217 (10th Cir.), 179 F.4th 790 (opinion and judgment entered June 23, 2026; rehearing and rehearing en banc denied Aug. 31, 2026).

United States v. Rudolph, No. 1:22-cr-00012-WJM-1 (D. Colo.) (judgment entered Aug. 21, 2023); *United States v. Rudolph*, No. 23-1278 (10th Cir.) (judgment entered Sept. 8, 2025), 152 F.4th 1197; *Rudolph v. United States*, No. 25-675 (U.S.) (cert. denied Jan. 12, 2026), 146 S. Ct. 1463.

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PETITION FOR A WRIT OF CERTIORARI

Lori Milliron respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–47a) is reported at 179 F.4th 790. The order denying rehearing and rehearing en banc (App. 48a) is unreported. The district court's order denying Milliron's motion to dismiss the accessory-after-the-fact count (App. 49a–56a) is unreported.

JURISDICTION

The court of appeals entered its judgment on June 23, 2026. App. 1a. It denied a timely petition for rehearing and rehearing en banc on August 31, 2026. App. 48a. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3 of Title 18 of the United States Code provides:

> Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.
>
> Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the

> principal is punishable by life imprisonment or death, the accessory shall be imprisoned not more than 15 years.

INTRODUCTION

Lori Milliron did not hide a fugitive, drive a getaway car, destroy evidence, or supply anyone with an alibi. She answered a prosecutor's questions before a federal grand jury for over an hour. The government charged that some of her answers were false, and it prosecuted her for those statements in three different ways: as perjury under 18 U.S.C. §1623, as obstruction of justice under 18 U.S.C. §1503, and, because the grand jury was investigating a murder, as being an accessory after the fact to that murder under 18 U.S.C. §3. The perjury charges carried a maximum sentence of five years each. The accessory charge carried fifteen.

The court of appeals sustained the accessory conviction on the ground that, in the Tenth Circuit, a false statement made to investigators to protect an offender "assists the offender" within the meaning of §3. App. 28a–33a. The panel did not rest that rule on any sustained analysis of the statute's text, its common-law origins, or its place in the federal criminal code. It acknowledged instead that "if we were writing on a blank slate, we might take a hard look at the words around 'assists'" under *Yates v. United States*, 574 U.S. 528 (2015), and it conceded that adding an accessory charge to almost every grand-jury perjury indictment "might present an overcharging problem." App. 28a, 33a. But the panel considered itself

bound by a fifty-year-old per curiam opinion that never analyzed the question. App. 29a–30a (citing *United States v. Day*, 533 F.2d 524 (10th Cir. 1976)).

The Tenth Circuit's rule cannot be reconciled with the common-law meaning that §3 codified, as courts across the country continue to apply it. The highest courts of Massachusetts, Oregon, Washington, Wyoming, and Texas, applying the common-law offense of accessory after the fact or statutes that codify or succeed it, hold that words spoken to the authorities make the speaker an accessory only when they give the offender real aid—such as a false alibi, a false account of the crime that gives the offender a defense, or false information that helps him escape—and not, without more, when they merely deny knowledge or fail to help the investigation. Those courts ask what the words did for the offender; the Tenth Circuit asks only whether the words were false and spoken to protect him. Under the state courts' rule, the testimony on which the court of appeals relied (that the offender "probably" proclaimed his innocence in a specific conversation) is not conduct that satisfies the requirements of §3.

Nor can the Tenth Circuit's rule be reconciled with this Court's approach to construing federal obstruction statutes. Congress has specifically addressed false testimony and false statements to investigators in statutes that carry lesser penalties and contain carefully calibrated limits. Reading §3's general "assists" clause to reach the identical conduct converts every falsehood told to protect someone in an

investigation of a crime punishable by life imprisonment into a fifteen-year felony, and leaves it to prosecutors to decide which of those falsehoods to charge that way. That is precisely the assurance the government offered below, telling the court of appeals that accessory charges "based on lies alone" are "reserved for particularly egregious situations." Gov't C.A. Reh'g Resp. 4–5. This Court has rejected that kind of assurance again and again. *See, e.g., Dubin v. United States*, 599 U.S. 110, 131 (2023); *Marinello v. United States*, 584 U.S. 1, 11 (2018); *McDonnell v. United States*, 579 U.S. 550, 576 (2016).

The question was pressed at every stage and decided by both courts below, and it is outcome-determinative: without the accessory conviction, Milliron's 204-month sentence exceeds the maximum sentence that could be imposed on all of her remaining convictions combined, even if the sentences ran consecutively. The Court should grant the petition.

STATEMENT

A. Legal Background

At common law, an accessory after the fact was one who, "knowing a felony to have been committed, receives, relieves, comforts or assists the felon." 4 William Blackstone, *Commentaries on the Laws of England* *37 (William Carey Jones ed., 1916). Blackstone's illustrations of the offense all involved providing personal aid to the felon: "furnishing him with a horse to escape his pursuers,

money or victuals to support him, a house or other shelter to conceal him, or open force and violence to rescue or protect him," or conveying "instruments to a felon to enable him to break gaol." *Id.* at *37–38. Because the aid had to run to the felon himself, one who received stolen goods was not an accessory, "because he received the goods only, and not the felon." *Id.* at *38; *see also* 2 Wayne R. LaFave, *Substantive Criminal Law* §13.6(a) & nn.11–12 (3d ed., Oct. 2026 update) ("the aid must have been given to the felon personally"). And "the mere failure to report the felony or to arrest the felon" did not suffice. *Id.* §13.6(a). Rather, such a failure to report constituted the separate, lesser offense of misprision. *Id.* §13.6(b).

Federal law long punished accessories after the fact without defining the offense. In 1948, when Congress recodified Title 18, it added the definition that now appears in the first paragraph of §3. The revisers explained that the new language was "based upon authority of *Skelly v. United States*," 76 F.2d 483 (10th Cir. 1935), which had defined an accessory after the fact in terms drawn from Blackstone and cited "Jones' Blackstone, books 3 and 4, page 2204." 18 U.S.C. §3 note (Historical and Revision Notes); *see Skelly*, 76 F.2d at 487. Section 3 punishes the accessory by up to half the principal's maximum term or, where the principal offense is punishable by life imprisonment or death, by up to fifteen years.[1]

[1]The penalty provision derives from 18 U.S.C. §551 (1940 ed.). In 1990 Congress raised the maximum for accessories to offenses punishable by life

Congress has separately and specifically addressed the conduct at issue here. False material declarations before a grand jury are punishable by up to five years, 18 U.S.C. §1623(a), subject to a recantation defense, *id.* §1623(d). False statements to federal investigators are punishable by up to five years. *Id.* §1001(a). Corruptly endeavoring to obstruct the due administration of justice is punishable by up to ten years, id. §1503(b)(3), and requires a nexus to a judicial proceeding, *United States v. Aguilar*, 515 U.S. 593, 599–600 (1995). Harboring or concealing a person for whose arrest a warrant has issued is punishable by up to one year, or five if the warrant is for a felony. 18 U.S.C. §1071. And concealing a known felony is punishable by up to three years. *Id.* §4.

B. Factual Background

Milliron had a long relationship with Lawrence Rudolph, a dentist who, a jury later found, murdered his wife while the couple was on safari in Zambia in 2016. App. 3a–6a & n.1. In December 2021 the government charged Rudolph by complaint with foreign murder and mail fraud. App. 5a. A few weeks later, Milliron attended a hearing on Rudolph's motion to dismiss the complaint, at which the government laid out its case. *Ibid.* The next day she appeared, under subpoena, before the grand jury investigating Rudolph and testified for "over an

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imprisonment or death from ten years to fifteen. Crime Control Act of 1990, Pub. L. No. 101-647, §3502, 104 Stat. 4789, 4921.

hour," discussing "among other things her relationship with Rudolph and his comments about the FBI's investigation." *Ibid.* "Soon after, the grand jury indicted Rudolph." *Ibid.* A month later it indicted Milliron. *Ibid.*

Each of the seven counts against Milliron "stemmed from her grand-jury testimony." App. 6a. The grand jury charged five counts of perjury, 18 U.S.C. §1623(a); one count of obstruction of justice, 18 U.S.C. §1503(a); and one count of being an accessory after the fact to foreign murder, 18 U.S.C. §§3, 1111, 1119. App. 6a. The accessory count rested on no conduct other than Milliron's testimony itself. See App. 6a, 51a.

Two aspects of that testimony are implicated here. In the first (Count Six), the prosecutor asked Milliron why Rudolph had given her money, and she said she did not know. App. 2a, 7a–19a. In the second (Count Nine), after Milliron testified that Rudolph had told her about the FBI's investigation, the prosecutor asked about their conversation:

> Q: Did he say anything about whether [Bianca's death] was an accident?
>
> A: No. He had told me previously it was an accident.
>
> . . .
>
> Q: Did he proclaim his innocence?
>
> A: He probably did. I don't really recall that.

App. 20a; see App. 22a. The government's theory was that Milliron's answer, "He probably did," was false because Rudolph, having admitted the killing, "would

never have proclaimed his innocence." App. 37a (Carson, J., concurring in part and dissenting in part). The court of appeals later sustained the conviction on a narrower reading of the question, as one asking about a specific conversation. App. 21a–25a.

C. Proceedings in the District Court

Before trial, Milliron moved to dismiss the accessory count on the ground, among others, that accessory liability "extends only to acts meant to help someone escape arrest and legal proceedings—not as the government would have it, to acts like perjury meant only to influence the outcome of the legal process." App. 53a (quoting motion). The district court denied the motion, relying on *United States v. Day*, 533 F.2d 524 (10th Cir. 1976); *United States v. White*, 771 F.3d 225 (4th Cir. 2014); and *United States v. Rux*, 412 F.2d 331 (9th Cir. 1969). App. 53a–54a. The court cautioned, however, that it did "not hold that lying or misleading the authorities to protect someone from criminal liability is always sufficient" under §3, and it acknowledged the concerns the Tenth Circuit had expressed about so broad a reading in *United States v. Lepanto*, 817 F.2d 1463, 1468 (10th Cir. 1987). App. 54a–55a n.2.

At trial, the government at first presented the accessory and obstruction counts as resting on the charged perjury. C.A. App. vol. 8, at 1749–51. In closing argument, however, it told the jury that "[b]oth the accessory after the fact and the

obstruction counts are not limited to the perjury counts. They're not limited to just those lies that are charged in the perjury counts because, of course, you can say things that mislead the grand jury that aren't technically lies." C.A. App. vol. 19, at 4937. The jury acquitted Milliron of three of the five perjury counts and convicted her on the remaining two (Counts Six and Nine), on the obstruction count, and on the accessory count. App. 6a. The district court denied Milliron's motion for judgment of acquittal and imposed an above-guidelines sentence of 204 months in prison. *Ibid.*

D. The Court of Appeals' Decision

The court of appeals vacated the Count Six perjury conviction for insufficient evidence. The questions "asked a witness to report from inside another person's head," and "unless the government can show that the witness has a firm foundation for that knowledge, it shouldn't indict a witness for saying that he or she doesn't know." App. 19a. It also offered "an important reminder. To address imprecise and evasive testimony, prosecutors should ask better questions rather than pitch perjury charges." App. 18a. Over a dissent, the court affirmed the Count Nine conviction, holding that a reasonable jury could find the answer "He probably did" to be knowingly false and material. App. 20a–27a.[2]

[2]Judge Carson would have vacated Count Nine as well, but he agreed with the majority's treatment of the accessory count. App. 37a. He added that the accessory conviction would stand even if both perjury convictions were vacated, because the

The court then rejected Milliron's argument that her accessory conviction "cannot rest on perjury alone." App. 27a–33a. It began with the text: "We could just say that lying to a grand jury to prevent someone who committed a crime from going to trial 'assists [that] offender.'" App. 28a. But it immediately acknowledged that "if we were writing on a blank slate, we might take a hard look at the words around 'assists' to avoid giving it 'a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.'" *Ibid.* (quoting *Yates*, 574 U.S. at 543 (plurality opinion)).

"But we aren't writing on a blank slate," the court continued, because it was "bound by" *United States v. Day*. App. 29a. In *Day*, an inmate who lured a fellow inmate to the place where he was killed later told an FBI agent that he and the victim had been attacked by three masked individuals whom he could not identify. 533 F.2d at 525–26. The *Day* court held, in a single sentence, that the agent's testimony about that account was "substantial proof" that the defendant had assisted the killers within the meaning of §3. *Id.* at 526. Responding to Milliron's point that *Day* "did not explicitly reject the argument she makes here," the panel said: "Maybe so, but it got close enough." App. 29a. The panel then distinguished the Tenth Circuit's later expression of doubt about the reach of §3 in *United States*

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government had told the jury that Count Three was not limited to the charged perjury. App. 46a–47a n.2.

v. Lepanto, as dictum that concerned only unsworn statements. App. 30a–31a. It found unhelpful the Seventh Circuit's observation in *United States v. Osborn*, 120 F.3d 59, 64 (7th Cir. 1997), that the answer is not "free from doubt," because *Osborn* "only reiterates that courts, including the *Lepanto* court, have doubted, but never held, that the accessory statute allows 'a simple lie to authorities' to prove accessory after the fact." App. 32a. And it found inapplicable the principle that "[a] mere withholding of information is not equivalent to supplying affirmative and deliberate falsehoods" on the ground that "Milliron's Count Nine statement was an affirmative and deliberate falsehood." *Ibid.*

Finally, the court addressed the disparity between §3's fifteen-year maximum and perjury's five-year maximum. It agreed with the government that "there are many ways to be an accessory after the fact," listing "lying to an investigator" alongside "disposing of a shotgun" and "moving and disposing of a victim's body." App. 33a. "Yet," the court acknowledged, "Milliron's argument highlights a valid concern. Were the government to add an accessory charge to almost every indictment for perjury before a grand jury, it might present an overcharging problem." *Ibid.* It rejected the disparity argument as undeveloped, ibid., and affirmed "[b]ecause Milliron's conduct fell within our circuit's interpretation of 18 U.S.C. §3." *Ibid.*

E. Rehearing

Milliron sought rehearing en banc on the accessory question. The government did not defend *Day*'s reasoning on its own terms. It argued principally that the question "almost never arises," that accessory charges "based on lies alone are the exception, not the rule," and that such charges "are reserved for particularly egregious situations." Gov't C.A. Reh'g Resp. 2, 4–5. It also argued that the doubts other courts had expressed concerned unsworn statements, not "false statements made under oath." *Id.* at 4–5. The court of appeals denied rehearing. App. 48a.

REASONS FOR GRANTING THE PETITION

I. The Tenth Circuit's Rule Conflicts With the Rule Applied by State Courts of Last Resort to the Same Common-Law Offense, and the Federal Courts of Appeals Have Never Resolved the Question.

A. In the Tenth Circuit, any false statement made to protect an offender is enough to "assist[] the offender" under 18 U.S.C. §3.

The decision below holds that a witness who gives false testimony to a grand jury to protect someone who has committed a federal crime thereby "assists the offender" under §3. It reached that result by applying a broader circuit rule: any false statement to investigators, made to protect an offender, is enough. The panel listed "lying to an investigator" as one of the "many ways to be an accessory after the fact." App. 33a. The Tenth Circuit applied that rule to an unsworn statement to an FBI agent in *United States v. Day*, 533 F.2d 524, 526 (10th Cir. 1976), and the panel applied it here to sworn grand-jury testimony. In neither setting does the rule

require a showing that the statement gave the offender an alibi or a defense, helped him escape, or was even likely to aid him. It was enough that Milliron's answer underlying Count Nine was "an affirmative and deliberate falsehood." App. 32a.

That rule rests on *Day*. But *Day* never considered the question. The defendant's only challenge to the elements of the accessory offense was to the sufficiency of the evidence, and he conceded that the jury had been properly instructed. *Day,* 533 F.2d at 526. The court disposed of the assistance element in two sentences. *Ibid.* And the falsehood in *Day*—an invented account of three masked attackers whom the defendant could not identify—was precisely the kind of false exculpatory narrative that courts applying the common-law rule have long treated as accessory conduct. See *Rivera*, 121 N.E.3d at 1128–29 (describing *Commonwealth v. Doherty*); Part I.C, *infra*. The panel itself allowed that *Day* may not have "explicitly reject[ed]" the argument Milliron makes. App. 29a.

B. Other federal decisions, including the Tenth Circuit's own, have questioned the rule, but none has resolved the question.

Federal courts that have actually considered whether a lie to the authorities can by itself make one an accessory after the fact have expressed serious doubt. In *United States v. Lepanto*, 817 F.2d 1463 (10th Cir. 1987), the Tenth Circuit warned that, "[a]s construed by the government, the language of 18 U.S.C. §3 is broad enough to prohibit anything less than enthusiastic cooperation with investigating authorities," and it was "not convinced that Congress intended to mandate it on

pain of imprisonment in every instance." 817 F.2d at 1468. The court quoted the Fifth Circuit's warning that "the restricted application with the traditional rigid standards of proof of statutes forbidding false swearing or perjury cannot be so easily circumvented by imposing a criminal penalty for the making of every false unsworn statement, as such, to a federal officer." *Ibid.* (quoting *Miller v. United States*, 230 F.2d 486, 489 (5th Cir. 1956)). The Ninth Circuit, addressing a defendant who lied to agents about a suspect's presence in her apartment, stated, in dicta, that the decisions on which the defendant relied "do stand for the proposition that such a lie is not itself a violation of [§] 3," and it declined to order the charge dismissed only because the defendant "did more": she "received [the suspect] in her apartment, together with the fruits of his crimes, and kept him there." *United States v. Prescott*, 581 F.2d 1343, 1353 (9th Cir. 1978) (reversing the conviction on other grounds). The lie, in the Ninth Circuit's view, "would be evidence as to her intent in doing what she did." *Ibid.* In the Tenth Circuit, the lie is the offense. The Seventh Circuit, though it found probable cause to arrest a person who had lied to investigators, said that it does "not think the answer is free from doubt." *United States v. Osborn*, 120 F.3d 59, 64 (7th Cir. 1997). A later Tenth Circuit panel acknowledged the "serious concerns" raised by treating false statements as accessory conduct, observing that "it is doubtful that anyone who engages in 'less than enthusiastic cooperation with investigating authorities' should be subject to

prosecution as an accessory." *McFarland v. Childers*, 212 F.3d 1178, 1189 (10th Cir. 2000) (addressing Oklahoma accessory statute in qualified-immunity case and quoting *Lepanto*, 817 F.2d at 1468). And the Navy-Marine Corps Court of Military Review, surveying the federal decisions, concluded that "[t]he Federal circuits appear to be split on whether merely lying about one's knowledge of the whereabouts of a person, absent more, is sufficient to make one an accessory after the fact." *United States v. Davis*, 39 M.J. 942, 945 (N.M.C.M.R. 1994), *aff'd*, 42 M.J. 453 (C.A.A.F. 1995).

Lepanto and *Prescott* did not need to decide the question because the evidence in both cases contained something more than a lie. *Lepanto*, 817 F.2d at 1468–69 (disposal of evidence); *Prescott*, 581 F.2d at 1353 (harboring). *Osborn* decided only whether there was probable cause to arrest. 120 F.3d at 64. Federal decisions affirming §3 convictions based on false statements have not analyzed the question either. *See United States v. White*, 771 F.3d 225, 233–34 (4th Cir. 2014) (defendant deflected suspicion from his co-conspirator onto innocent tenants; only intent disputed); *United States v. Roach*, 502 F.3d 425, 446 (6th Cir. 2007) (rejecting, without analyzing whether a false denial can constitute assistance, a sufficiency challenge the court found perfunctory); cf. *Davis*, 39 M.J. at 945 (affirming under Article 78, UCMJ, where the accused's lies diverted investigators onto a person he knew to be innocent). The decision below is the first, so far as

Milliron is aware, to hold that a federal witness's false or misleading grand-jury testimony, standing alone, is accessory conduct that can support a conviction under §3.

C. State courts of last resort applying the same common-law offense and its statutory successors have adopted a limiting rule that the Tenth Circuit rejects.

The courts that have examined the common-law offense closely have drawn the line the Tenth Circuit refused to draw. They recognize that words alone can sometimes aid an offender, but only words that actually furnish aid: a false alibi, a false account of the crime that gives the offender a defense, or false information that helps him escape. A false denial of knowledge, a refusal to cooperate, or other false or evasive testimony that gives the offender nothing of the kind is not, without more, accessory conduct.

The Supreme Judicial Court of Massachusetts, construing an accessory statute written in the common-law form, held that a person may provide "the 'direct, personal assistance' necessary to be an accessory after the fact through words alone spoken to the police during an interview, but only where he or she 'aids' or 'assists' the principal by providing the police with a false alibi or comparable information that would exculpate the principal, a false narrative of the crime that would give the principal a defense, or false information to assist in the principal's escape." *Commonwealth v. Rivera*, 121 N.E.3d 1121, 1125, 1128

(Mass. 2019). The court reversed a conviction resting on false and misleading statements that did none of those things. *Id.* at 1128–30.

The Supreme Court of Oregon reached the same result nearly fifty years earlier. Surveying Blackstone and the treatises, it observed that "[t]he examples describing criminal conduct uniformly consist of an affirmative act from which the intention to aid an offender to escape arrest, conviction, or punishment is obvious." *State v. Clifford*, 502 P.2d 1371, 1374 (Or. 1972). A false denial does not qualify unless the evidence shows both that the actor lied "with the intent to aid the offender" and that "the lie was, under the existing circumstances, likely to aid the offender to escape arrest or punishment." *Ibid.* The court reversed the conviction of a man who falsely told police that he had not seen a murderer. *Id.* at 1375.

Other courts agree. The Supreme Court of Wyoming holds that "merely denying knowledge of the principal's involvement in a crime will not give rise to a charge of accessory after the fact," as distinguished from "[a]ffirmative statement[s] of facts tending to raise any defense for" the principal, "such as supplying a false alibi." *Stephens v. State*, 734 P.2d 555, 557 (Wyo. 1987) (quoting *Clifford*, 502 P.2d at 1374 (quoting *Tipton*, 72 S.W.2d at 293)). The Texas Court of Criminal Appeals held that a witness who falsely told investigating officers that she knew nothing about a murder was not thereby an accomplice to it, because she "gave no affirmative false testimony which would have in any manner exculpated"

the killer. *Tipton v. State*, 72 S.W.2d 290, 293 (Tex. Crim. App. 1934) (applying accomplice-witness rule; reserving whether false testimony before a grand jury would be treated differently). The Supreme Court of Washington, construing that State's successor to the accessory offense, holds that deception counts only if it is "an affirmative act or statement that raises a defense for the other person, or which, in itself, indicates an effort to shield or protect the other person." *State v. Budik*, 272 P.3d 816, 821 (Wash. 2012) (citations omitted).

Even the authorities on which the government may rely are consistent with the limiting principle. The California decision most often cited for the proposition that a lie can make one an accessory involved "a false alibi which removed the principal from the scene of her crime." *People v. Duty*, 269 Cal. App. 2d 97, 104 (1969). The North Carolina decision cited in §3's revision notes affirmed the conviction of a man who drove the assailant forty-five miles from the scene of the stabbing and arranged his further transportation. *State v. Potter*, 19 S.E.2d 257, 258–59 (N.C. 1942). Finally, the leading treatise's statement that false testimony and false information can qualify rests on false-alibi and exculpatory-narrative cases.[3]

[3]LaFave's sole authority for the proposition that "giving false testimony at an official inquiry into the crime" can make one an accessory is a nineteenth-century Texas decision, *Blakeley v. State*, 7 S.W. 233 (Tex. Ct. App. 1888). 2 LaFave, *supra*, §13.6(a) n.21. His authorities for "giving false information to the police in order to divert suspicion away from the felon" are a false-alibi case and a case the

D. The conflict warrants this Court's review.

Milliron acknowledges that the state decisions construe state statutes. But many of those statutes, like §3, codify the common-law offense in its traditional terms, and the courts construing them have applied the common-law meaning. Rivera, 121 N.E.3d at 1125–26; Clifford, 502 P.2d at 1373–74. Section 3's operative language was likewise drawn directly from the common law. 18 U.S.C. §3 note; *Skelly v. United States*, 76 F.2d 483, 487 (10th Cir. 1935). When Congress uses a common-law term, it "presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *Morissette v. United States*, 342 U.S. 246, 263 (1952). The courts that have carefully examined that body of learning have reached the opposite conclusion from the one the Tenth Circuit reached in this case. The result is that a witness whose false answer gives the offender no alibi, no defense, and no means of escape would not have been criminally liable under the decisions of the highest courts of Massachusetts, Oregon, Washington, or Wyoming, yet the same witness before a federal grand jury in Colorado faces up to fifteen years in prison. The meaning of a

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Supreme Judicial Court later read as involving statements that exculpated the principal, and he adds that "[c]ertain lies . . . are sometimes deemed insufficient." *Id.* n.22 (citing *Duty* and *Commonwealth v. Wood*, 19 N.E.2d 320 (Mass. 1939), for the former proposition and *Clifford* for the latter); see *Rivera*, 121 N.E.3d at 1128 (describing *Wood*).

federal criminal statute should not depend on how one appellate panel chose, half a century ago and without analysis, to answer a sufficiency-of-the-evidence challenge.

II. The Decision Below Is Wrong.

A. Section 3 reaches personal aid to the offender, not every false word spoken to the authorities or a grand jury.

Section 3 does not punish obstructing justice in general. It punishes one who "receives, relieves, comforts or assists *the offender*." 18 U.S.C. §3 (emphasis added). Each verb describes aid given to the offender himself: receiving him into one's home, relieving him with money or food, comforting him with shelter, assisting him to escape. Every one of Blackstone's examples involves physical or material help that the felon himself could use to evade justice. 4 Blackstone, *supra*, at *37–38. Under the principle that "a word is known by the company it keeps," *Yates v. United States*, 574 U.S. 528, 543 (2015) (plurality opinion), "assists" describes help of the same kind, not any act that might frustrate an investigation. Congress "would not go to the trouble of spelling out the list" of specific forms of aid "if a neighboring term swallowed it up." *Fischer v. United States*, 603 U.S. 480, 490 (2024). The same is true of "comforts," the other verb charged here. App. 51a. To comfort the offender, as Blackstone used the word, is to give him something he can use, such as shelter. Testimony that gives the offender nothing of use comforts him no more than it assists him.

Section 3 also separates the conduct it prohibits (receiving, relieving, comforting, or assisting the offender) from the purpose with which that conduct must be undertaken ("in order to hinder or prevent his apprehension, trial or punishment"). The Tenth Circuit's reading collapses the two. On that reading, any act undertaken with the purpose of hindering a trial "assists the offender," so that §3 becomes a general prohibition of obstructing justice, punishable by up to fifteen years whenever the underlying crime is serious enough. The drafters of the Model Penal Code warned that a "general prohibition of any 'aid' is likely to lead courts to haphazardly narrowing interpretations or perhaps to excess coverage." Model Penal Code §242.3 cmt. at 233 (Am. L. Inst. 1980), quoted in 2 LaFave, *supra*, §13.6(a) & n.60. The decision below illustrates the second danger.

The common-law meaning that Congress adopted confirms the point. At common law, the aid "must have been given to the felon personally." 2 LaFave, *supra*, §13.6(a). "[T]he mere failure to report the felony or to arrest the felon" was not enough. *Ibid.* And as the decisions discussed above show, courts applying the common law treated words as accessory conduct only when the words themselves gave the offender something: an alibi, a defense, or a way to escape. Testimony that merely fails to help the investigation, or that recounts what the offender said in a way the government regards as misleading, gives the offender nothing.

B. The statutory structure forecloses the Tenth Circuit's reading.

Congress has enacted a comprehensive statutory scheme addressing false testimony and other interference with criminal investigations. Perjury before a grand jury carries a five-year maximum and is subject to a recantation defense. 18 U.S.C. §1623(a), (d). False statements to investigators carry five years. *Id.* §1001(a). Obstruction under §1503 carries ten years, *id.* §1503(b)(3), and requires a nexus to a judicial proceeding, *United States v. Aguilar*, 515 U.S. 593, 599–600 (1995). Harboring a fugitive carries up to one year, or up to five if the warrant issued on a felony charge, 18 U.S.C. §1071, and courts have held that a "failure to disclose the location of a fugitive" is not "harboring" or "concealing" under that provision. *Lepanto*, 817 F.2d at 1468 (citing *United States v. Magness*, 456 F.2d 976, 978 (9th Cir. 1972), and *United States v. Foy*, 416 F.2d 940, 941 (7th Cir. 1969)). Misprision carries three years and requires an affirmative act of concealment. 18 U.S.C. §4; *United States v. Adams*, 961 F.2d 505, 508 (5th Cir. 1992).

The Tenth Circuit's reading allows the government to convert each of those offenses into an accessory charge carrying up to fifteen years whenever the investigation concerns a crime punishable by life, and up to half the principal's maximum in every other case. This Court has repeatedly declined to read general obstruction language in a way that would "render superfluous the careful

delineation of different types of obstructive conduct" in neighboring provisions, *Fischer*, 603 U.S. at 493, or make "the specific provisions redundant, or perhaps the subject matter of plea bargaining," *Marinello*, 584 U.S. at 9. The same principle applies with greater force to §3, which reaches beyond its common-law core only if its general verbs are given a meaning that swallows the specific statutes Congress wrote.

The Tenth Circuit's reading does more than duplicate the specific statutes. It overrides the limits Congress built into them. A witness who recants may escape perjury liability, 18 U.S.C. §1623(d), but §3 has no recantation defense. Perjury requires a literally false answer to a precisely framed question. *Bronston v. United States*, 409 U.S. 352, 360–62 (1973). The prosecutor told the jury in closing that the accessory count reached testimony that "mislead[s] the grand jury" without being "technically lies." C.A. App. vol. 19, at 4937. The difference matters: "false and misleading are two different things." *Thompson v. United States*, 604 U.S. 408, 413 (2025). This case shows how the Tenth Circuit's rule works in practice. The jury acquitted Milliron of three of the five perjury counts, and the court of appeals vacated a fourth for insufficient evidence that her answers to imprecise questions were knowingly false. App. 6a, 18a–19a. Yet the accessory conviction, carrying three times the maximum penalty for the one perjury count that survived, rests on the same testimony. That is the circumvention the Fifth Circuit warned against

seventy years ago: the "traditional rigid standards of proof" for perjury cannot be "so easily circumvented by imposing a criminal penalty for the making of every false unsworn statement." *Miller*, 230 F.2d at 489. If that is true of unsworn statements, it is all the more true of sworn testimony, for which Congress wrote a specific statute with specific protections.

The Supreme Court of Washington rejected a comparable reading of its rendering-criminal-assistance statute, as applied to false disavowals of knowledge, for the same reasons. Because the legislature had "expressly criminalized making false or misleading material statements to the police" as a gross misdemeanor, while rendering criminal assistance could be a felony, the court held that the "statutory scheme evidences legislative intent to require an affirmative act or statement in order to constitute 'deception'" under the felony statute. *Budik*, 272 P.3d at 820. The structure of federal law points even more clearly in the same direction.

C. The government's reliance on prosecutorial restraint confirms the problem.

The government did not defend the Tenth Circuit's rule below by identifying any limit in the statute's text. Instead, it assured the court of appeals that accessory charges "based on lies alone are the exception, not the rule," and "are reserved for particularly egregious situations." Gov't C.A. Reh'g Resp. 4–5. On appeal, it went further, telling the court of appeals that "even true answers could support the

accessory charge if they were purposefully evasive, obstructive, or ambiguous." Gov't C.A. Br. 52. This Court has consistently refused to accept that kind of assurance as a substitute for limits found in the statute itself. "[T]o rely upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute's highly abstract general statutory language places great power in the hands of the prosecutor." *Marinello*, 584 U.S. at 11. The Court "cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *Dubin*, 599 U.S. at 131 (quoting *McDonnell*, 579 U.S. at 576). The Court has instead "traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress and out of concern that a fair warning should be given to the world in language that the common world will understand." *Aguilar*, 515 U.S. at 600 (citations and internal quotation marks omitted); *accord Fischer*, 603 U.S. at 497. No witness reading §3 would understand that a false or misleading answer to a grand juror's question makes her an accessory to the crime under investigation.

D. The court of appeals' reasoning does not support its rule.

The panel rested its rule on *Day*, which did not consider the question. And its effort to distinguish *Lepanto* on the ground that Milliron testified "under oath, not in an 'unsworn statement,'" App. 31a, gets the analysis backwards. Sworn testimony is exactly what the perjury statutes address. The more closely the

conduct resembles perjury, the clearer it is that Congress has enacted legislation governing that conduct elsewhere, with a lesser penalty and its own safeguards.[4]

The panel's only limiting observation does not narrow its rule. The panel noted that a witness who lies "to help only himself" lacks the purpose §3 requires. App. 33a n.11. But that is a limit on intent, not on what counts as assistance. Under the panel's rule, any witness who lies to protect someone else during an investigation of a serious federal crime is an accessory after the fact, whether or not the lie gives the offender any actual aid.

The panel's answer to the penalty disparity, that "there are many ways to be an accessory after the fact," App. 33a, does not justify applying the higher penalty to testimony. Apart from *Day* itself, the panel's examples were "disposing of a shotgun" and "moving and disposing of a victim's body." *Ibid.* Those acts put evidence of the crime beyond investigators' reach, which is why §3 punishes them more severely than §1623 punishes false testimony. Their seriousness says nothing

[4]The court of appeals also observed that Milliron received the warnings given to grand-jury witnesses, including that false statements "could result in charges against her." App. 31a n.10. But a warning that false statements "could result in charges" does not say which charges, and a witness would naturally understand it to refer to perjury, the offense Congress created for false testimony. Nothing in it suggests that a witness's false answer exposes her to liability as an accessory to the very crime under investigation, at three times perjury's maximum penalty.

about why a witness's answer to a grand juror, which §§1623 and 1503 already reach, should carry a higher maximum.

The reasoning below also shows where the rule leads. The district court held that Milliron's testimony could support the accessory count because it "might well have convinced the grand jury not to return an indictment." App. 53a. The court of appeals sustained the accessory conviction on an answer it had held material on the ground that Rudolph's proclaiming his innocence to Milliron "might have carried more weight with the grand jury than his proclaiming it to the world at large." App. 26a–27a; see App. 32a. Neither court identified anything the testimony gave Rudolph; each pointed instead to its capacity to influence the grand jury. That capacity is materiality, the element that already separates perjury from an immaterial falsehood. 18 U.S.C. §1623(a). On that reasoning, every material false declaration to a grand jury investigating another person "assists" that person, and §3, as applied to testimony, becomes §1623 with a purpose requirement added and up to three times the maximum penalty.

III. The Question Is Important and Recurring.

The government argued below that the question "almost never arises." Gov't C.A. Reh'g Resp. 2. The conduct at issue, though, arises constantly. Every day federal agents interview the friends, family members, and colleagues of people suspected of federal crimes, and every day grand juries hear their testimony. Under

the decision below, every false answer such a witness gives to protect the suspect exposes the witness to prosecution as an accessory after the fact. In an investigation of any offense punishable by life imprisonment, that means up to fifteen years, three times the maximum for perjury or for false statements under §1001. The likely reason so few reported decisions address the question is that the government ordinarily charges such conduct under the statutes Congress wrote for it, and that an accessory charge carrying three times the penalty is powerful leverage in plea negotiations. Cf. *Marinello*, 584 U.S. at 9 (broad reading of a general provision would make specific provisions "the subject matter of plea bargaining"). The panel itself acknowledged that adding an accessory charge to almost every grand-jury perjury indictment "might present an overcharging problem." App. 33a. This case shows how little such a charge requires. Count Three alleged no act at all, only that Milliron "did comfort and assist the offender." App. 51a. Before trial, the government described the assistance as lying to the grand jury, App. 50a, 54a; at trial, as testimony that was not "technically lies," C.A. App. vol. 19, at 4937; and on appeal, as including "even true answers," Gov't C.A. Br. 52.

This Court has granted review repeatedly in recent years to define the outer limits of general federal obstruction and false-statement provisions. *Fischer*, 603 U.S. 480 (obstructing an official proceeding, 18 U.S.C. §1512(c)(2)); *Marinello*,

584 U.S. 1 (obstructing the due administration of the Internal Revenue Code, 26 U.S.C. §7212(a)); *Yates*, 574 U.S. 528 (destroying or concealing records or tangible objects to obstruct a federal investigation, 18 U.S.C. §1519); *Thompson*, 604 U.S. 408 (making a false statement to influence a federally insured lender or federal agency's action on a loan, 18 U.S.C. §1014); *see also Dubin*, 599 U.S. 110 (aggravated identity theft, 18 U.S.C. §1028A). On the Tenth Circuit's reading, §3 is the broadest of those provisions, and it punishes a bare false answer more severely than any of the statutes Congress wrote to address false testimony. So far as Milliron is aware, this Court has never construed the definition of the offense that Congress added to §3 in 1948, and it has never decided whether false or misleading statements alone can support a conviction under it. The question deserves an answer.

IV. This Case Is an Ideal Vehicle.

This case presents the ideal opportunity for this Court to address the issue. It is a pure question of statutory interpretation, reviewed de novo. App. 28a. Milliron raised it in a pretrial motion to dismiss, on appeal, and in her petition for rehearing en banc. The district court and the court of appeals squarely decided it, the latter in a published opinion. The accessory count rested on no conduct other than Milliron's testimony. App. 6a. And although the panel rejected Milliron's sentencing-disparity argument as undeveloped, App. 33a, it treated that point as a

second argument for a single claim—that her accessory conviction "cannot rest on perjury alone," App. 27a–28a—and it decided that claim, App. 28a–33a. See *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.").

The question is also outcome-determinative. Under the rule applied in *Rivera*, *Clifford*, *Stephens*, *Tipton*, and *Budik*, Milliron's testimony is not accessory conduct. The answer the court of appeals relied on, that Rudolph "probably" proclaimed his innocence in a specific conversation, App. 21a–25a, 32a, merely reported what the offender himself had said. It supplied no alibi, no account of events in Zambia (which Milliron did not witness, see App. 4a), and no help in escaping. Nor did it, in itself, "indicate[] an effort to shield or protect" him, *Budik*, 272 P.3d at 821; repeating the accused's own denial gives him nothing he does not already have. Nor was it "likely to aid the offender," *Clifford*, 502 P.2d at 1374. Rudolph had already been arrested, charged by complaint, and detained when Milliron testified, and the grand jury indicted him soon after. App. 5a, 50a, 52a. The government's alternative theory, that the accessory count also reached testimony that was misleading but not "technically lies," C.A. App. vol. 19, at 4937, is further still from accessory conduct. Nor does the government's description of her testimony as "a sustained pattern of false and misleading

statements," Gov't C.A. Reh'g Resp. 4, change the analysis: answers that each give the offender nothing give him nothing together.

The question matters to Milliron's sentence. The district court imposed the statutory maximum of 180 months on the accessory count, the longest sentence on any count. D. Ct. Doc. 375, at 2. Without the accessory conviction, the statutory maximum for Milliron's remaining convictions (obstruction under §1503 and one count of perjury under §1623) is fifteen years, or 180 months. See 18 U.S.C. §§1503(b)(3), 1623(a). Her 204-month sentence, App. 6a, exceeds that maximum.[5]

Finally, the sworn grand-jury testimony at issue presents the question in its starkest form. The government's vehicle objection below, that doubts about §3's reach concern only unsworn statements, Gov't C.A. Reh'g Resp. 4–5, is not a reason to deny review. It is part of the question presented. If §3 does not reach a protective falsehood told to an investigator, it cannot reach the same falsehood told to a grand jury under oath. That is the setting in which Congress has most specifically defined the offense, in §1623, and fixed its penalty. The oath does not

[5]The court of appeals remanded "for further proceedings" in light of its vacatur of Count Six, App. 36a, which Milliron expects will include resentencing. That proceeding cannot affect the question presented, which the court of appeals finally resolved. This Court has jurisdiction to review the court of appeals' judgment now. 28 U.S.C. §1254(1) (certiorari available "before or after rendition of judgment or decree").

change whether testimony assists the offender; an alibi, a defense, or a means of escape gives the offender the same help whether or not the witness swore to it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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