No. 18-____

IN THE

Supreme Court of the United States

PETER M. HOFFMAN, MICHAEL P. ARATA, and SUSAN HOFFMAN

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Anton Metlitsky
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, N.Y. 10036
(212) 326-2000

Kendall Turner
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Jeffrey L. Fisher
Counsel of Record
O'MELVENY & MYERS LLP
2765 Sand Hill Road
Menlo Park, Cal. 94025
(650) 473-2633
jlfisher@omm.com

QUESTIONS PRESENTED

1. Whether a federal court must grant a motion for judgment of acquittal when, construing the evidence in the light most favorable to the government, evidence of guilt and innocence is evenly balanced.

2. Whether a conviction for mail or wire fraud must be vacated where it is based on claims for benefits under an ambiguous regulatory scheme and the defendant acted consistently with an objectively reasonable interpretation of that scheme.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES (continued)

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

RULES

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTIONAL PROVISIONS

PETITION FOR A WRIT OF CERTIORARI

Petitioners Peter M. Hoffman, Michael P. Arata, and Susan Hoffman respectfully request a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 901 F.3d 523 and reprinted in the Appendix to the Petition ("App.") at 1a-83a. The judgment of the district court is unpublished but reprinted at App. 84a-220a, and the transcript of the district court's oral sentencing ruling is reprinted at App. 221a-236a.

JURISDICTION

The court of appeals issued its decision on August 24, 2018, App. 1a, and denied rehearing on October 10, 2018, *id.* 237a-239a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The pertinent provisions of the U.S. Code, the Federal Rules of Criminal Procedure, and Louisiana law are reprinted at App. 240a-284a.

INTRODUCTION

Petitioners were convicted of mail and wire fraud in connection with their applications for Louisiana

tax credits. The government's theory was that petitioners knew they were entitled to tax credits only for expenses paid in cash or cash equivalents, and that they falsely represented that they had made such payments when they had not. Yet it is undisputed that no preexisting law, regulation, or judicial decision established the impermissibility of applying for tax credits for non-cash commitments.

The district court also found that the evidence, considered in the light most favorable to the government, was in equipoise as to petitioners' guilt or innocence. Fifth Circuit precedent nevertheless required acceptance of the jury's guilty verdict. This result violates fundamental due process and federalism principles and implicates two questions on which the courts of appeals are deeply divided.

First, only the Fifth and Third Circuits require affirmance of guilty verdicts where the evidence is evenly balanced. The First, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits hold that, where evidence of guilt and innocence is in equipoise, a conviction cannot stand. Only this later, majority approach is consistent with Federal Rule of Criminal Procedure 29 and the constitutionally required reasonable doubt standard, which allows a conviction only when evidence of guilt *exceeds* evidence of innocence. *See In re Winship*, 397 U.S. 358 (1970).

Second, this Court has long made clear that due process precludes holding someone "criminally responsible for conduct which he could not reasonably understand to be proscribed." *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (quotation omitted).

Consistent with this basic principle, most courts of appeals that have considered the issue have held that a defendant cannot be guilty of fraud in seeking benefits under an ambiguous regulatory scheme if his actions were consistent with an objectively reasonable interpretation of that scheme. The Fifth Circuit here, however, sustained the defendants' convictions, notwithstanding the district court's undisputed finding that the rules about permissible tax credit submissions were "confusing," "not so clear," and had many "gray areas." App. 92a. Other courts of appeals would have applied this Court's fair-notice jurisprudence to resolve this case differently.

This Court should grant certiorari to provide much needed clarity and uniformity for criminal defendants, prosecutors, and courts alike.

STATEMENT OF THE CASE

1. In 2007, Louisiana enacted the Motion Picture Incentive Act, 47 La. Rev. Stat. § 6007. "The primary objective" of the statute was "to encourage development in Louisiana of a strong capital and infrastructure base for motion picture film." *Id.* § 6007(A). To this end, the statute allowed investors to obtain 40 cents of tax credits for every qualifying dollar "expenditure" on film infrastructure in Louisiana. App. 90a.

Two Louisiana agencies reviewed—and, if appropriate, approved—applications for film infrastructure credits. The administrative review process began with an applicant seeking an initial certification letter approving a project as a State-certified infrastruc-

ture project. The pre-certification letter set forth conditions, such as deadlines and minimum spending requirements, for the earning and disbursement of credits. It also set forth a schedule for the "structured release" of tax credits for use prior to completion of the project. App. 90a-91a, 97a-102a.

If a pre-certification letter issued, and the applicant accepted it, the applicant was then required to submit to the State an audited and certified cost report of infrastructure expenditures. Based on these submissions, the agencies determined whether the expenditures met the conditions imposed by the law and the pre-certification letter. If so, the agencies certified the qualifying expenditures. No credits could be applied to offset the Louisiana taxpayer's income tax liability or transferred to other Louisiana taxpayers for cash, unless the State released them pursuant to the "structured release" scheme outlined in the pre-certification letter. App. 91a.

No guidance on the implementation of the tax credit program (other than the statute itself) existed until 2010. As a result, the contours of what constituted permissible tax credit submissions were "confusing," "not so clear," had a lot of "gray areas," and were "complicated enough to where it required an applicant to get an audit by a Louisiana CPA firm." Applicants, auditors, and administrators alike "struggled" with the law. App. 91a-92a

The statute was revised in 2009. As relevant here, the revisions provided—for the first time—that funds were "expend[ed]" for purposes of qualifying for tax credits only if "cash or cash equivalent[s were] exchanged for goods or services." La. Rev. Stat.

§ 6007(B)(3) (2009). By contrast, the 2007 version of the statute—which applied to all petitioners' applications—contained no such limitation. *See* La. Rev. Stat. § 6007(B) (2007).

Throughout this period, State administrators were, as a matter of practice, flexible in allowing various types of expenditures so as to attract more infrastructure projects. These administrators routinely worked with applicants to allow changes or substitutions of expenditures, or requested more information from applicants to support submissions. Applicants for infrastructure tax credits sometimes relied on the give-and-take of the State administrators to glean an understanding of what the State might accept as a qualifying expenditure. App. 91a-94a.

2. Despite controversy surrounding the tax credit program, Louisiana's statute worked: It attracted film infrastructure projects from numerous investors, including petitioners. App. 3a. From 2007 to 2012, petitioners refurbished a dilapidated mansion in New Orleans, transforming it into a state-of-the-art post-production film studio. *Id.* 95a, 12a. Upon the studio's completion, Louisiana promoted it on the State's film production website. DE636:1490-1491; DE637:1716-1717.

Petitioners obtained funding for their studio project—called Seven Arts Pictures Louisiana (SAPLA)—from a variety of sources, including their applications for film infrastructure credits. App. 95a-96a. In 2008, Petitioners obtained the required pre-certification letter for SAPLA, and petitioner Michael Arata accepted the letter as SAPLA's agent. *Id.* 97a-102a.

Ultimately, petitioners submitted three applications for tax credits. These applications were based in part on SAPLA's payments to Damon Martin and Leo Duvernay. Martin is a film post-production engineer who owned a business that rented post-production equipment. Duvernay was SAPLA's general contractor. App. 102a.

Martin had agreed to provide equipment worth $1,027,090 in exchange for a 25% share in SAPLA. To document this agreement, SAPLA wired $1,027,090 to Martin, and Martin wired that money back to SAPLA. App. 102a-103a, 162a.

As for Duvernay, he had a binding construction contract with SAPLA for $2 million, funded into an escrow account. Although Duvernay had not yet performed the agreed-upon construction work when SAPLA submitted its first tax credit application, SAPLA wired funds to Duvernay to commemorate their agreement, and Duvernay wired the funds back to SAPLA. SAPLA later paid Duvernay these amounts (and nearly $2,000,000 more). App. 103a, 158a-160a.

In other words, the transactions with Martin and Duvernay documented real commitments and contributions that were necessary to complete the facility. Petitioners made no representations regarding final payment to Duvernay or Martin in their tax credit submissions because—as noted above—no such representation was required by the relevant, 2007 Louisiana law. *See* App. 93a n.8 (quoting government witness "admi[ssion] that the film office 'accepted expenditures in forms other than cash,'" "that the law never defined expenditure," and that "the words 'cash'

or 'spend' . . . were nowhere in the pre-certification form" sent to petitioners).

Before including these expenses in SAPLA's tax credit application, Mr. Arata determined (and numerous trial witnesses confirmed) that Louisiana had previously granted tax credits in similar situations. App. 160a-161a; *see id.* 164a ("[T]here is no dispute that circular bank transactions are not intrinsically unlawful."). Indeed, the State's representative testified at trial that so-called "circular" cash transfers were approved for tax credits "all the time," and that the State "didn't care" whether the funds were sent back to the originator after receipt by the vendor. DE637:1582. The State did not even require tax credit applicants to provide documentation of both sides of a transaction, even though such documentation is necessary to determine whether any particular transaction is "circular." *Id.* at 1606.

On February 26, 2009, Mr. Arata sent the first application to the State with the audited cost report. The audit listed $1,027,090 in equipment expenditures to Martin and $1,749,257 in construction expenditures to Duvernay. The report also listed $3.7 million for the building, which was purchased for $1.7 million. On June 19, 2009, the State paid out $1,132,480.80 in tax credits. App. 104a-105a.

In summer 2009, Mr. Arata terminated his relationship with Mr. Hoffman in connection with SAPLA and other projects. App. 10a. On January 20, 2010, Mr. Hoffman submitted a second audited cost report to the State, seeking additional tax infrastructure credits for its financial commitments to SAPLA's developer and its legal and overhead expenses. App.

87a, 196a. All were documented via circular transfers, and all were fully disclosed to SAPLA's auditors. DE637:1643-51, 1824, 1843-44.

In late 2009 or early 2010, the State's forensic accountant audited petitioners' submissions. In the process, he asked Mr. Hoffman for additional documentation. The accountant identified irregularities in the claimed expenditures, which led the auditors of the first two tax credit submissions to withdraw their audit reports. SAPLA then retained a new auditor to review all expenditures originally claimed in the first and second audit reports and to support additional tax credits earned by the project. App. 106a.

After the new audit issued in July 2012, the State reinstated the previously-issued tax credits. App. 107a-108a. The State wrote to Mr. Hoffman that, based on the replacement audit, "tax credits previously disallowed for this project are hereby reinstated [and] are no longer subject to . . . recapture." *Id.* 108a. The State never attempted to recapture, rescind, or otherwise invalidate the project's tax credits. DE636:1495. Nor could it: It remains legally bound by its 2012 decision that issuance of the tax credits in 2009 was proper. *Id.* at 1500.

The post-production film studio was completed and began to operate in June 2012. App. 109a. There is no dispute that the tax credits released to the project were earned. *Id.* 85a n.1. It is also undisputed that the State "got what it bargained for," an up-and-running post-production film studio, and that it suffered no loss from the tax credits it issued. *Id.* 77a-78a. As the district court said: "Any attempt by the government . . . to downplay or overlook this fact or to

suggest that the project's completion is merely anecdotal is frivolous and a patent overreach." DE673:25 n.18.

3. The federal government nevertheless charged petitioners with participating in a tax credit fraud scheme. It charged each petitioner with wire fraud, mail fraud, conspiracy, and aiding and abetting. It also charged Mr. Arata with making false statements to federal agents. Each charge stemmed from petitioners' tax credit applications. App. 109a-110a.

The core dispute at trial was whether petitioners' submissions to the State complied with state law. *See, e.g.*, DE673:31 (district court order noting the prosecution's "singular focus on State law requirements" in prosecuting petitioners for federal fraud). The government focused on petitioners' documentation of its financial commitments to Martin and Duvernay. The government's theory was that petitioners' tax-credit applications were fraudulent because petitioners represented that they had expended all funds before they applied for tax credits, and that this representation was false because Louisiana law authorized tax credits only for final cash payments. *See, e.g.*, App. 87a-88a; DE634:2380 ("[Louisiana] want[s] you to show that you're spending the money, that you're spending the money in the state. And not the Michael Arata/Peter Hoffman definition of 'spend.' The definition of 'spend' that everybody knows and understands.").

But the government's theory was based on an incorrect statement of the law. As noted above, the 2007 version of the law—the law that all agree applied to petitioners' applications—did *not* contain a

requirement that funds be expended before a tax-credit application would be granted; the Legislature amended the law in 2009 to add that requirement.

To this end, petitioners presented uncontroverted evidence that they believed the project's applications complied with the custom and practice of what the State accepted from other applicants and, at the very least, reasonable people could debate whether their submissions were permissible expenditures. App. 88a-90a. Petitioners emphasized that so-called "circular" cash transfers were not intended to deceive and did not deceive anyone but rather established an audit trail for the date of non-cash qualifying expenditures and that they were made in Louisiana. *See id.* 157a-165a; DE637:1574-84. They also introduced evidence, and the district court found, that the 2007 film infrastructure tax law "was implemented haphazardly and in a manner rife with disorder." App. 89a.

At the conclusion of an 11-day trial, the jury found Mr. Hoffman guilty of all 21 charges against him: conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. § 371; wire fraud, in violation of 18 U.S.C. § 1343; and mail fraud, in violation of 18 U.S.C. § 1341. Mr. Arata was acquitted of 12 wire fraud charges, but convicted of a total of 13 charges: conspiracy to commit mail and wire fraud; seven substantive wire fraud counts; mail fraud; and false statements, in violation of 18 U.S.C. § 1001. Finally, Susan Hoffman was convicted of conspiracy, wire fraud, and mail fraud, but she was acquitted of 14 wire fraud charges. App. 110a.

4. Petitioners moved for judgment of acquittal under Federal Rule of Criminal Procedure 29,[1] and the district court reversed most of the counts of conviction. App. 110a-111a, 219a-220a.

The district court observed that petitioners' fraud convictions rested on "a troubling feature of this federal criminal case, the fact of an inconsistently managed State program where applicants are given piecemeal information and left with little guidance to determine for themselves what the State might accept as qualified expenditures." App. 157a. Moreover, "Mr. Arata reviewed past projects in an effort to learn what the State had previously accepted." *Id.* The court further acknowledged that "there is no dispute that circular bank transactions are not intrinsically unlawful so long as they are properly documented and disclosed," which occurred here. *Id.* 164a.

The district court nevertheless denied the motion for judgment of acquittal as to the fraud relating to the transactions with Martin and Duvernay, as well as the later claims for interest and overhead for which no credits were ever certified or released. It explained that, for the government to prove its case, it had to show beyond a reasonable doubt that (1) the defendants knowingly devised a scheme to defraud; (2) the scheme employed false material representations; (3) the defendants transmitted information by wire for the purpose of executing the scheme; and (4) the defendants acted with specific intent to defraud. App.

---

[1] As relevant here, Rule 29 provides: "A defendant may move for a judgment of acquittal . . . within 14 days after a guilty verdict or after the court discharges the jury, whichever is later." Fed. R. Crim. Proc. 29(c)(1).

117a-120a. It further recognized that evidence in the record "supported a jury finding that the defendants lacked the specific intent to defraud the State when they submitted the Duvernay and [Martin] documents in accordance with their claim of a good faith understanding of the custom and practice of the indisputably murky film tax credit regime." *Id.* 165a-166a.

But the trial court held that there was "a critical fact issue" on petitioners' "specific intent to defraud" that would have allowed the jury to conclude that petitioners submitted documents in support of their tax credit applications "as part of a scheme to defraud." App. 165a-166a. In other words, applying "bind[ing]" Fifth Circuit case law, the district court found "that a rational jury could have rejected [petitioners'] good faith defenses and, instead, accepted the government's evidence that the transactions as styled were misleading and intended to mislead in order to obtain tax credits." *Id.* 166a.

The Fifth Circuit opinion that "constrained" the district court from acquitting was *United States v. Vargas-Ocampo*, 747 F.3d 299 (5th Cir. 2014) (en banc). App. 166a, 112a-113a & n.18. *Vargas-Ocampo* "abandoned" the so-called equipoise rule, i.e., the rule "that the Court must reverse a conviction if the evidence construed in favor of the verdict gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence to the crime charged." *Id.* 113a n.18. As the district court explained: "That the equipoise formula was abandoned is of some consequence in this case, where the evidence on the defendants' intent as to certain fraud charges gives

equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence." *Id.*

While sentencing each petitioner to a term of probation, the district court expressed concern about the equipoise rule. It stated that the defendants "remain[ed] convicted" only "[b]ecause of the oddity of this Court's oversight of the jury verdict under Rule 29 of the Federal Rules of Civil Procedure," i.e., because *Vargas-Ocampo* had rejected the equipoise rule. App. 232a-233a.

Also during sentencing, the district court reiterated that the law animating petitioners' fraud convictions was ambiguous. The judge stated: "this case presents a classic example of bewilderment resulting from confusion caused by inconsistent applications of the law." App. 231a. It stressed that the relevant "statutory environment" "was bungled," and "lacked leadership" and "coherence." *Id.* Finally, the district judge cautioned that such "unchecked prosecutorial zeal deals a vicious body blow to the Constitution." *Id.* 232a.

5. Petitioners appealed their judgments of conviction, while the government appealed the sentence. The Fifth Circuit affirmed in part and reversed in part, reinstating some of petitioners' fraud convictions relating to their applications for film industry tax credits. App. 51a.

As relevant here, petitioner Arata argued that if, after all inferences are granted the government, there is equal evidence of guilt and innocence, that "necessarily means that the government has not proven its case beyond a 'reasonable doubt.'" Arata Br., *United*

States v. Hoffman, No. 16-30104, 2016 WL 6822138, at *31, *32 (5th Cir. Nov. 15, 2016) (hereinafter "Arata Br."). In response, the Fifth Circuit acknowledged that guilty verdicts must be overturned if "no rational juror could have found guilt beyond a reasonable doubt." App. 27a-28a (quoting *United States v. Sanjar*, 876 F.3d 725, 744 (5th Cir. 2017)). But, consistent with its unanimous 2014 en banc decision in *Vargas-Ocampo*, the court of appeals did not apply the equipoise rule.

The Fifth Circuit also rejected petitioners' argument that ambiguity in Louisiana's tax credit scheme deprived them of fair notice that the statements that they made in connection with that scheme could be considered intentionally false or fraudulent. *See* Hoffman Br., *United States v. Hoffman*, No. 16-30104, 2016 WL 7046238, at *19, *59, *65 (Nov. 30, 2016); Arata Br., 2016 WL 6822138, at *2, *26. The Fifth Circuit concluded that this lack of clarity was irrelevant because the elements of the mail and wire fraud statutes themselves "provide[d] sufficient notice," and "[t]he government did *not* have to prove violations of state law." App. 26a (emphasis added).

The court also ruled on three related challenges to the district court's jury charge, each of which was targeted to ensure that petitioners could not be convicted for failing to comply with an ambiguous state regulatory scheme. First, the court ignored petitioners' argument that the district court should have charged that petitioners' good faith interpretation of state law was a complete defense to a charge of mail and wire fraud, as both crimes require proof of a specific intent

to defraud. Second, the court also ignored the argument that the jury should have been charged that the government was required to prove beyond a reasonable doubt that each petitioner participated in the alleged scheme willfully. Third, the court rejected petitioners' challenge to the district court's charge that the government did not need to prove that the petitioners violated Louisiana law, concluding that the federal law charges did not turn on violations of state law. App. 54a-55a. Petitioners filed a petition for rehearing, but the court of appeals denied it. *Id.* 237a-239a.

REASONS FOR GRANTING THE WRIT

This petition presents two questions that have divided the courts of appeals and that warrant this Court's review.

First, the federal courts of appeals are deeply divided over whether a district court should direct a judgment of acquittal when evidence of guilt and evidence of innocence is in equipoise. As the district court here recognized, petitioners' convictions depend entirely on the Fifth Circuit's view that an acquittal is not required in that setting. But in most circuits, the district court would have granted petitioners' motion for a judgment of acquittal. Only this Court can resolve the conflict over this recurring and important question, and this case presents an ideal vehicle through which to do so.

Second, and relatedly, the federal courts of appeals are divided over whether a federal conviction for fraud must be vacated where it is based on claims for benefits under an ambiguous regulatory scheme and

the defendant acted consistently with an objectively reasonable interpretation of that scheme. As the district court recognized here, Louisiana's film industry tax credit regime was rife with ambiguity, and petitioners acted consistently with an objectively reasonable view of it. The Fifth Circuit nevertheless affirmed (and reinstated) petitioners' various fraud convictions stemming from their violations of the State's tax credit scheme.

This Court's intervention is especially appropriate because the Fifth Circuit's views on both questions presented are patently incorrect. That court's refusal to allow district courts to enter an acquittal where the evidence is in equipoise is inconsistent with fundamental due process principles, including the presumption of innocence. And the Fifth Circuit's tolerance for convictions where the defendants acted consistently with an objectively reasonable interpretation of an ambiguous state regulatory scheme flouts fair notice requirements, disregards the intent element of mail and wire fraud, and conflicts with the nation's careful balance of state and federal powers. The federal fraud statutes should not be construed as a tool for overzealous federal prosecutors to convert (at most) a failure to comply with an ambiguous state civil regulatory scheme into a federal felony.

The petition should be granted, and the decision below reversed.

A. The Equipoise Issue

1. The Courts Of Appeals Are Divided Over The Validity Of The Equipoise Rule

a. The First, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits hold that, where evidence of guilt and innocence is in equipoise, a conviction cannot stand.

The First Circuit adopted the equipoise rule in *United States v. Andujar*, 49 F.3d 16, 20 (1st Cir. 1995). As it explained in one of its many cases reaffirming its approach, that rule is essential to satisfy due process:

> If the evidence viewed in the light most favorable to the verdict gives equal or nearly equal circumstantial support to a theory of guilt or a theory of innocence . . . a reasonable jury must necessarily entertain a reasonable doubt.

United States v. Lopez-Diaz, 794 F.3d 106, 111-12 *(1st Cir. 2015)* (quotation omitted).

The Sixth Circuit adopted the equipoise rule in *United States v. Caseer*, 399 F.3d 828 (6th Cir. 2005), likewise explaining: "If the evidence . . . gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, we must reverse the conviction, as under these circumstances a reasonable jury *must necessarily entertain* a reasonable doubt." *Id.* at 840 (internal citation and quotation marks omitted).

The Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits have endorsed the rule for the same reasons.

See, e.g., *United States v. Johnson*, 592 F.3d 749, 755 (7th Cir. 2010) ("In this situation, the evidence is essentially in equipoise; the plausibility of each inference is about the same, so the jury necessarily would have to entertain a reasonable doubt."); *United States v. Wright*, 835 F.2d 1245, 1249 n.1 (8th Cir. 1987); *United States v. Lovern*, 590 F.3d 1095, 1107 (10th Cir. 2009); *Cosby v. Jones*, 682 F.2d 1373, 1383 (11th Cir. 1982); *Curley v. United States*, 160 F.2d 229, 233 (D.C. Cir. 1947).

b. Although the Fifth Circuit initially followed the equipoise rule too, that court, sitting en banc, unanimously rejected the rule in *United States v. Vargas-Ocampo*, 747 F.3d 299 (5th Cir. 2014) (en banc). In the Fifth Circuit's view, the equipoise rule "usurp[s] the jury's function" because it encourages appellate courts to engage in "'the type of fine-grained factual parsing' necessary to determine that the evidence presented to the factfinder was in 'equipoise.'" *Id.* at 301 (quotations omitted). In the Fifth Circuit, therefore, an appellate court considering an appeal of a denial of a Rule 29 motion may consider only "whether the inferences drawn by a jury were rational" and "whether the evidence is sufficient to establish every element of the crime." *Id.* at 302.

The Third Circuit, like the Fifth, rejects the equipoise rule. *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 431-32 (3d Cir. 2013) (en banc); *United States v. Pungitore*, 910 F.2d 1084, 1129 (3d Cir. 1990).

c. State courts likewise disagree about the proper approach to sufficiency-of-the-evidence challenges when the evidence, viewed in the light most favorable

to the government, is equally balanced as to guilt and innocence. Most state courts have adopted the equipoise rule.[2] But courts in Texas and New Mexico have rejected it.[3]

2. The Issue Is Exceptionally Important

a. Federal Rule of Criminal Procedure 29 effectuates the reasonable-doubt standard by allowing the trial court to enter a judgment of acquittal after the jury verdict when the evidence is insufficient to sustain a conviction. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). Because of the importance of the constitutional guarantees embodied in the reasonable doubt standard, this Court has not hesitated to intervene to ensure uniform interpretation and application of Rule 29. *See, e.g.*, *Carlisle v. United States*, 517 U.S. 416 (1996); *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977); *see also, e.g.*, *Brinegar v. United States*, 338 U.S. 160, 174 (1949) (explaining that government's burden of proof in criminal cases was "developed to safeguard men from dubious and

---

[2] *Tatum v. State*, 63 Ala. 147, 150 (1879); *State v. Ruiz*, 1998 WL 436557, at *3 (Ariz. Ct. App. Aug. 4, 1998); *State v. Schweitzer*, 18 A. 787, 788-89 (Conn. 1889); *Harris v. United States*, 125 A.3d 704, 709 (D.C. 2015); *Reid v. State*, 212 Ga. App. 787, 789 (1994), *overruled on other grounds by Maddox v. State*, 322 Ga. App. 811 (2013); *Commonwealth v. Goss*, 428 S.W.3d 619, 626 (Ky. 2014); *Taylor v. State*, 346 Md. 452, 458 (1997); *Commonwealth v. Croft*, 345 Mass. 143, 145 (1962); *Cotton v. State*, 144 So.3d 137, 145-46 (Miss. 2014); *State v. May*, 689 S.W.2d 732, 736 (Mo. Ct. App. 1985); *Day v. State*, 303 P.3d 291, 298 (Ok. Crim. App. 2013); *In re J.B.*, 189 A.3d 390, 409 (Pa. 2018); *Haskins v. Commonwealth*, 44 Va. App. 1, 9 (2004).

[3] *Mackey v. State*, 2002 WL 31521379, at *3 (Tex. App. Nov. 14, 2002) (citing cases); *State v. Sutphin*, 107 N.M. 126 (1988).

unjust convictions, with resulting forfeitures of life, liberty and property").

Review is warranted here for the same reasons. As the district court made clear, petitioners' convictions would have been reversed in most courts of appeals. But the Fifth Circuit affirmed their convictions, as the Third Circuit would have done, too. This stark disparity in the criminal procedure is intolerable.

b. The government has argued previously that "[d]isagreement about the utility of the equipoise notion is not an issue of sufficient significance to warrant this Court's intervention" because it does not "produce[] different outcomes on materially indistinguishable facts," Br. in Opposition, *Vargas-Ocampo v. United States*, No. 13-10737, at 15 (U.S. Aug. 27, 2014). But the difference between the equipoise rule and the approach to Rule 29 adopted by the Fifth Circuit is no mere academic distinction. Nor is the equipoise rule simply a rearticulation of *Jackson*'s reasonable doubt standard. As this case shows, the equipoise rule can (and often does) mean the difference between a guilty verdict and an acquittal, as the district court held was true here.

Indeed, this Court itself has recognized that crystalizing the concept of evidentiary equipoise can make a decisive difference in outcomes. In *O'Neal v. McAninch*, 513 U.S. 432 (1995), the Court considered whether a federal habeas court should deem a trial error harmless when "the matter is so evenly balanced that [the judge] feels himself in virtual equipoise." *Id.* at 435. It held that, in that situation, the reviewing court should "treat the error, not as if it were harmless, but as if it affected the verdict (i.e., as

if it had a 'substantial and injurious effect of influence in determining the jury's verdict')." *Id.*

In other words, this Court has already recognized that, when evidence is at or near equipoise, the party not bearing the burden of persuasion should prevail—and that the treatment of evidence in equipoise has outcome-determinative results in a meaningful number of cases. *See also Johnson v. United States*, 529 U.S. 694, 713 n.13 (2000) (when interpretations of a criminal statute are in equipoise, the rule of lenity resolves the interpretation in defendant's favor); *Morrison v. California*, 291 U.S. 82, 94-96 (1934) (where evidence is in equipoise, the government has not carried its burden of proof); *Davis v. United States*, 160 U.S. 469, 492-93 (1895) (where evidence of a defendant's sanity is in equipoise, the defendant is entitled to an acquittal), *superseded on other grounds by statute as stated in Dixon v. United States*, 548 U.S. 1, 12 (2006). This Court would not have repeatedly adopted this articulation if it were redundant or otherwise meaningless.

3. This Case Presents An Ideal Vehicle To Resolve The Issue

This case presents an ideal vehicle to resolve the question whether the Fifth Circuit erred in failing to apply the equipoise rule. The district court explicitly noted that it would have entered a judgment of acquittal were it not "constrained" by the Fifth Circuit's rejection of that rule. App. 166a. It reiterated this point during sentencing. *Id.* 232a-233a. The Fifth Circuit did not dispute that determination. Accord-

ingly, if the Court grants certiorari and adopts the equipoise rule, the decision below would have to be reversed.

4. The Decision Below Is Incorrect

Contrary to the Fifth Circuit's position, the equipoise rule properly implements Rule 29 and is essential to satisfy the constitutional requirement that criminal convictions rest on evidence proving guilt beyond a reasonable doubt.

a. This Court has repeatedly recognized that the reasonable doubt standard is constitutionally required. *See, e.g.*, *In re Winship*, 397 U.S. 358, 368 (1970). It serves to safeguard the presumption of innocence that protects all citizens from unwarranted criminal punishment.

Thus, when it comes to judicial review of criminal convictions under Federal Rule of Criminal Procedure 29, this Court has explained that "the critical inquiry" is "whether the record evidence could reasonable support a finding of guilt beyond a reasonable doubt." *Jackson*, 443 U.S. at 318. The court must "view[] the evidence in the light most favorable to the prosecution," and then determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319.

The Court has specifically rejected the view that a conviction should be reversed only when there is "no evidence whatever in the record to support" it. *Thompson v. City of Louisville*, 362 U.S. 199, 206 (1960); *see Jackson*, 443 U.S. at 320 (rejecting the "no evidence" rule). As this Court explained, the "'no evidence' rule is simply inadequate to protect against

misapplications of the constitutional standard of reasonable doubt." *Jackson*, 443 U.S. at 320. That is because a "mere modicum of evidence may satisfy a 'no evidence' standard." *Id.* (quotation omitted). "Any evidence that is relevant—that has any tendency to make the existence of an element of a crime slightly more probably than it would be without the evidence—could be deemed a 'mere modicum.'" *Id.* (internal citation omitted). But this Court has already made clear that it can "not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." *Id.*

b. This approach to Rule 29 balances the primacy of juries in criminal prosecutions with courts' fundamental responsibility to safeguard the reasonable doubt standard and due process. To protect against overzealous, biased, or eccentric juries, Rule 29 requires the trial judge to acquit when the government has not proven guilt beyond a reasonable doubt, so as to "guarantee the fundamental protection of due process of law." *Jackson*, 443 U.S. at 319. In other words, Rule 29 is designed to protect against overreaching prosecutions by allowing for judicial enforcement of the reasonable doubt standard, as the trial court noted in this case, *see* App. 231a-232a.

The equipoise rule is consistent with this Court's instructions regarding Rule 29. Indeed, *Jackson* specifically (and approvingly) cited a D.C. Circuit decision adopting the equipoise rule. *See Jackson*, 443 U.S. at 317, 319 n.11 (citing *Curley*, 160 F.2d at 232-33). That makes sense: the rule allows the jury, and then (separately) the judge to evaluate whether the evidence is sufficient to sustain a criminal conviction.

The jury may acquit if it is not. And even if the jury convicts, the judge is nonetheless obliged to acquit if the defendant's guilt was not proven beyond a reasonable doubt.

The equipoise rule also gives life to the "beyond a reasonable doubt" standard itself. That standard is obviously greater than the civil standard preponderance-of-the-evidence standard. *See, e.g.*, *Winship*, 397 U.S. at 367-68. This means, as the Sixth Circuit put it, that "[i]f the evidence . . . gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, we must reverse the conviction, as under these circumstances a reasonable jury *must necessarily entertain* a reasonable doubt." *Caseer*, 399 F.3d at 840 (citation and quotations omitted).

c. The Fifth Circuit's contrary approach to Rule 29 is inconsistent with this Court's decisions, constitutional principles, and logic. It compresses the two distinct safeguards—the jury and the judge—into one, eviscerating the very purpose of Rule 29 as explicated in *Jackson*.

In the Fifth Circuit, district courts must uphold a jury verdict unless "the inferences drawn by a jury were . . . speculative or insupportable," or where there was insufficient evidence "to establish every element of the crime"—even if the evidence, viewed in the light most favorable to the verdict, is evenly balanced. *Vargas-Ocampo*, 747 F.3d at 302. That approach cannot be reconciled with the beyond-a-reasonable-doubt standard, which precludes a conviction where a reasonable doubt of guilt exists, *even if evidence of guilt also exists*.

In other words, the Fifth Circuit's rejection of the equipoise rule limits a district court's power to grant a Rule 29 motion to situations where "no evidence" of guilt exists, which is the rule this Court rejected in *Jackson*. The Court rejected that rule precisely because it does not sufficiently protect those accused of crimes. *See Jackson*, 443 U.S. at 420.

There is no merit to the Fifth Circuit's position that the equipoise rule must be rejected because it undermines *Jackson*'s instructions to view the evidence in the light most favorable to the prosecution. *Contra Vargas-Ocampo*, 747 F.3d at 301. As the First Circuit has explained, it is entirely logically consistent to, *first*, construe the evidence in the light most favorable to the prosecution, and *second*, reverse the conviction if the evidence so viewed is in equipoise. *See Lopez-Diaz*, 794 F.3d at 111-12 (holding that acquittal under Rule 29 is appropriate where "the evidence viewed in the light most favorable to the verdict gives equal or nearly equal circumstantial support to a theory of guilt or a theory of innocence") (quotations omitted).

That means that in some cases—for example, when the case turns on witness credibility—the equipoise rule will never be triggered, because once all inferences are granted the government, the evidence necessarily will be sufficient. But in cases (such as this one) that turn entirely on circumstantial evidence of the defendants' state of mind, the equipoise rule gives effect to the standard this Court has already established under Rule 29 and the Due Process Clause—a criminal conviction cannot be sustained when no reasonable juror could conclude that the

crime's elements have been proved *beyond a reasonable doubt*.

B. The Ambiguity Issue

1. The Courts of Appeals Are Divided On The Permissibility Of A Fraud Conviction In This Setting

a. The First, Seventh, Eighth, Tenth, and Eleventh Circuits all recognize that a conviction for federal criminal fraud cannot be sustained where, as here, the defendants acted consistently with an objectively reasonable interpretation of an ambiguous law. *See United States v. Farinella*, 558 F.3d 695 (7th Cir. 2009); *United States v. Whiteside*, 285 F.3d 1345 (11th Cir. 2002); *United States v. Prigmore*, 243 F.3d 1 (1st Cir. 2001); *United States v. Migliaccio*, 34 F.3d 1517 (10th Cir. 1994); *United States v. Anderson*, 579 F.2d 455 (8th Cir. 1978).

In each case, the defendants were charged with committing fraud by making statements that were materially false based on the government's reading of a complex regulatory scheme. *Prigmore*, 243 F.3d at 13-14 (FDA regulations regarding testing and marketing devices); *Farinella*, 558 F.3d at 696-97 (wire fraud and misbranding food with intent to defraud); *Anderson*, 579 F.2d at 459 (making false statements to the government by falsely certifying requests for reimbursement); *Migliaccio*, 34 F.3d at 1520 (conspiracy to defraud the government and mail fraud by filing false health care claims); *Whiteside*, 285 F.3d at 1345 (making false statements in government-sponsored healthcare reimbursement cost reports).

In each case, the defendants argued that their actions were not fraudulent because, even if they misunderstood the law, their interpretation was objectively reasonable and thus incompatible with a fraud prosecution based on a stricter reading of the law. *See, e.g.*, *Prigmore*, 243 F.3d at 13-14. In each case, the court of appeals agreed: "It is a denial of due process of law to convict a person of a crime because he violated some bureaucrat's secret understanding of the law." *Farinella*, 558 F.3d at 699; *see Migliaccio*, 34 F.3d at 1525; *Anderson*, 579 F.2d at 460; *Whiteside*, 285 F.3d at 1351-52. Because "the government bears the burden to negate any reasonable interpretations that would make a defendant's statement factually correct where reporting requirements are ambiguous," *Migliaccio*, 34 F.3d at 1525, and because the government failed to bear that burden, the courts reversed the defendants' convictions. *See also United States v. Vallone*, 698 F.3d 416, 454 (7th Cir. 2012) ("[I]f the court were to find the law objectively ambiguous, that finding would require dismissal of the indictment, as the defendants would not have had appropriate notice that their conduct was illegal."), *vacated on other grounds by Dunn v. United States*, 570 U.S. 901 (2013).[4]

---

[4] *Vallone* arose in the tax fraud context. Tax fraud requires proof of, among other things, willfulness. 698 F.3d at 483. The district court and Fifth Circuit did not, however, require the government to prove willfulness here to secure petitions' mail and wire fraud convictions (though it did require willfulness for the conspiracy and false statement charges). App. 37a, 115a-123a. That approach creates a loophole that allows tax fraud cases to be prosecuted under the mail and wire fraud statutes—i.e., without

Moreover, these courts of appeals agreed (when the argument was raised) that the district court was required to instruct the jury to assess the defendants' criminal culpability under their reasonable view of the law. *See Prigmore*, 243 F.3d at 17; *Migliaccio*, 34 F.3d at 1523-25; *see also Vallone*, 698 F.3d at 451. This approach is "rooted in the due process-based 'fair warning requirement,'" which "recognizes that, in a prosecution based on the theory that a defendant has defrauded the government by making false statements . . . , there has been no crime if the statements were not false (or if there was no duty to divulge) under an objectively reasonable interpretation of the law." *Prigmore*, 243 F.3d at 17-18 (quotations omitted).

b. The Fifth Circuit's approach squarely conflicts with these decisions.

Petitioners' case shares the key features of the cases just described: (1) an essential element of the alleged fraud was that petitioners made materially false statements as part of a scheme to defraud, and (2) the government's theory that petitioners made false representations depended on a particular understanding of the underlying regulatory scheme. In the First, Seventh, Eighth, Tenth, and Eleventh Circuits,

---

proof of willfulness—whenever the tax fraud involves tax credits, exclusions from income or deductions. *See also Handakas v. United States*, 286 F.3d 92, 100 (2d Cir. 2002), *overruled on other grounds by United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc) (explaining that using the federal wire fraud statute to prosecute claims of tax fraud "would effect a breathtaking expansion of mail fraud. Every false . . . state tax return sent by mail [or e-filed] would be punishable as a felony in federal court.").

an acquittal would have been entered because petitioners' statements could only have been found materially false by accepting the highly contested view that tax credits were not allowed absent actual expenditure of cash. At the very least, these circuits would have required a jury charge explaining that acquittal was required so long as petitioners' were acting under a reasonable, good faith understanding of the law.[5]

But the Fifth Circuit concluded that defendants' criminal convictions presented no due process problem because the mail fraud statute itself was not confusing. App. 24a-26a. That decision cannot be reconciled with the decisions from other circuits described above. The Fifth Circuit's approach is inconsistent with other circuits' because in those circuits, there could be no specific intent to defraud (at least not beyond a reasonable doubt) if petitioners were acting consistent with a reasonable interpretation of Louisiana's tax-credit scheme. Again, the government's theory of fraud here was that petitioners made statements in their tax-credit applications that could be

[5] The government failed to prove its case for the additional reason that the evidence as to the materiality of petitioners' false statements was (at best) in equipoise. *See Neder v. United States*, 527 U.S. 1, 21 (1999) (holding that proof of materiality is required in mail and wire fraud cases). A misrepresentation is "material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed." *Id.* at 16 (quotations omitted). Here, because the law did not clearly prohibit tax credit applications like petitioners', and because both the State and auditors testified that "circular" cash transfers were routinely approved for tax credits, evidence of the materiality of defendants' allegedly false statements is in equipoise, at most.

construed as false *only because they were allegedly improper under Louisiana law*. DE673:31 (district court order noting the prosecution's "singular focus on State law requirements" in prosecuting petitioners for federal fraud). If Louisiana's law was ambiguous and the defendants acted consistent with a reasonable construction of that law—as the district court expressly found and the Fifth Circuit refused to consider—then petitioners would be acquitted in First, Seventh, Eighth, Tenth, and Eleventh Circuits. Here, in contrast, petitioners were convicted precisely because they "violated some bureaucrat's secret understanding of the law." *Farinella*, 558 F.3d at 699.

2. The Issue Is Exceptionally Important

a. This Court has not hesitated to intervene to protect defendants from convictions where (as here) they lacked fair notice their conduct was criminal. *See, e.g.*, *Coates v. City of Cincinnati*, 402 U.S. 611 (1971). That is because it is a bedrock due process principle "that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (quotation omitted); *see also Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) ("No one may be required at the peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.").

The Court has demonstrated heightened concern about fair notice recently. *See, e.g.*, *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); *McDonnell v. United States*, 136 S. Ct. 2355 (2016); *Johnson v. United States*, 135 S. Ct. 2551 (2015); *Skilling v. United*

States, 561 U.S. 358 (2010). And it has long demonstrated concern about notice in the context of the mail and wire fraud statutes in particular. *See McNally v. United States*, 483 U.S. 350 (1987), *superseded by statute as recognized in Skilling*, 561 U.S. 358; *Fasulo v. United States*, 272 U.S. 620 (1926). As the Court put it in *Fasulo* when considering a notice challenge to a charge of conspiracy to commit mail fraud: "There are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute." 272 U.S. at 629.

b. Moreover, the absence of discernable standards for petitioners' alleged crimes implicates principles of federalism. *See McNally*, 483 U.S. at 360. "Prosecutorial discretion has been exercised here to sharpen the penalty for the violation of certain state laws that, in the estimation of a federal prosecutor, are insufficiently policed or punished by the state itself." *United States v. Handakas*, 286 F.3d 92, 110 (2d Cir. 2002), *overruled on other grounds by United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003).

For this reason, this Court has specifically warned against the federalization of local and state laws. *See*, *e.g.*, *Bond v. United States*, 572 U.S. 844, 854-66 (2014); *Cleveland v. United States*, 531 U.S. 12, 24-45 (2000). As this Court has recognized, this trend upsets the traditional constitutional balance between the national government and the states, and thus "the very structure of the Constitution." *Bond*, 572 U.S. at 862. Although "maintaining that constitutional balance is not . . . an end unto itself," "denying any one government complete jurisdiction over all the concerns of public life" allows "federalism [to] protect[]

the liberty of the individual from arbitrary power. *Id.* at 863.

This case exemplifies the continuing problem of the government's efforts to federalize state laws. Under the guise of the mail and wire fraud statutes, federal prosecutors pursued and secured convictions of petitioners for their alleged misrepresentations in their Louisiana tax credit submissions. But whether those statements were fraudulent turns entirely on what is deemed permissible under Louisiana's tax credit regulatory scheme—that is, after all, why the government initially relied on the later-enacted Louisiana statute to argue that tax credits were not allowed absent actual expenditure of cash funds, only to excise that citation from the case after petitioners pointed out that the government was citing the wrong law. This Court's review is warranted to ensure that the federal fraud statutes do not enable federal prosecutors to criminalize arguable violations of state civil regulatory schemes.

3. This Is An Ideal Vehicle To Address The Issue

This case is an ideal vehicle to determine whether a fraud conviction can stand where the defendants act consistently with an objectively reasonable interpretation of an ambiguous regulatory scheme. Petitioners here were charged with falsely representing that they were entitled to tax credits under Louisiana law. The truth or falsity of their representations turned on what submissions were permissible under the State's tax credit regulatory regime. The district court expressly found that the "statutory environment" "was bungled," and "lacked leadership" and "coherence."

App. 231a. And it specifically flagged that, because of this lack of clarity, this case threatened to allow "unchecked prosecutorial zeal [that] deals a vicious body blow to the Constitution." *Id*. 232a. In other words, petitioners lacked fair notice of what was permitted or prohibited in tax credit applications. The Fifth Circuit did not disagree with the district court on the ambiguity of the tax-credit regulatory regime. Instead, it concluded that the state-law scheme's ambiguity was irrelevant as a matter of law. If this Court were to reverse that legal determination, the decision below would have to be reversed.

4. The Decision Below Is Incorrect

Contrary to the Fifth Circuit's holding, a fraud conviction cannot stand where a defendant has acted consistently with an objectively reasonable interpretation of an ambiguous regulatory regime.

The mail and wire fraud statutes criminalize schemes to defraud executed by mail or wire with a specific intent to defraud. App. 37a; *see also Schmuck v. United States*, 489 U.S. 705, 718 n.10 (1989). Petitioners had no notice that they could not include the challenged transactions in their Louisiana tax credit applications (much less that doing so was a federal crime). Accordingly, they simply could not have acted with the requisite specific intent to defraud required by the mail and wire fraud statutes. To allow petitioners' convictions to stand nevertheless would stretch the scienter requirement beyond recognition and violate fair notice principles. But that is precisely what the Fifth Circuit allowed when it rejected petitioners' requested willfulness and good faith instructions, along with their fair notice arguments.

a. The law was (at best) ambiguous insofar as whether it prohibited petitioners' applications for tax credits for the Martin and Duvernay transactions, as well as the later applications claiming overhead and interest expenses. The district court found, and the federal government never disputed, that so-called "circular" transactions (which reflected payments that were ultimately made) are not illegal. And the uncontroverted testimony of government and defense witnesses established that these transactions "happened all the time" in the Louisiana film tax credit industry. DE637:1582. Moreover, neither the Fifth Circuit nor the government ever identified *any* preexisting regulations or a judicial decision establishing that Louisiana tax credit submissions based on "circular" transactions was fraudulent. This lack of notice that petitioners' actions were criminal alone warrants reversal of their convictions. *See, e.g.*, *Farinella*, 558 F.3d at 699 (reversing conviction because it was based on "some bureaucrat's secret understanding of the law"); *Migliaccio*, 34 F.3d at 1525 (reversing conviction because "the government bears the burden to negate any reasonable interpretations that would make a defendant's statement factually correct where reporting requirements are ambiguous").

Nor is the Fifth Circuit's cursory assertion that the "government did not have to prove violations of state law," App 26a, an answer to petitioners' notice arguments. It is undisputed that the government had to show a specific intent to defraud to sustain the mail and wire fraud convictions. The only bases for these convictions were petitioners' tax credit submissions to Louisiana. Thus, the government *did* have to show

that petitioners had sufficient notice that their state tax credit submissions were unlawful. If petitioners' applications were lawful under state law—i.e., if tax credits were allowable without final expenditure of funds—then their representations in their tax credit submissions could not be false.

b. Relatedly, because petitioners did not know this action was unlawful, they could not have engaged in these transactions with the requisite intent. To prove the fraud offenses for which petitioners were indicted, the government had to show (among other things) a specific intent to defraud. *See* App. 37a. That is, the government had to show that the petitioners specifically intended to defraud Louisiana when they submitted their tax credit applications. The lack of clarity about what tax credit applications were permissible means that the government cannot have shown beyond a reasonable doubt that petitioners acted with the requisite specific intent to defraud. At the very least, petitioners' good faith basis for their actions should have been a complete defense to the charges. *See, e.g.*, *United States v. Young*, 470 U.S. 1, 31 (Brennan, J., concurring in part and dissenting in part) (explaining that good faith is a complete defense to mail and wire fraud charges). And the jury should have been instructed accordingly. *See, e.g.*, *Migliaccio*, 34 F.3d at 1523-25 (where the defendant is accused of committing mail fraud by making false statements, the jury should be instructed that "the government bears the burden to negate any reasonable interpretations that would make a defendant's statement factually correct where reporting requirements are am-

biguous"). The Fifth Circuit's conclusion that the ambiguity of Louisiana's scheme is irrelevant cannot be reconciled with these established principles.

c. To the extent there is any doubt about whether the relevant fraud statutes cover petitioners' conduct, the rule of lenity resolves the doubt in favor of acquittal. That principle should operate with special force here, where the guidelines for tax credit submissions did not even exist at the time of petitioners' allegedly unlawful actions. As this Court has cautioned, judicially-created liability rules should not be expanded beyond their existing contours without congressional authorization, *see*, *e.g.*, *Skilling*, 561 U.S. at 409-11, consistent with the principle that "legislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971); *see also United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (holding that "penal laws are to be construed strictly" because "[i]t is the legislature, not the Court, which is to define a crime, and ordain its punishment").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Anton Metlitsky
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, N.Y. 10036
(212) 326-2000

Kendall Turner
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Jeffrey L. Fisher
Counsel of Record
O'MELVENY & MYERS LLP
2765 Sand Hill Road
Menlo Park, Cal. 94025
(650) 473-2633
jlfisher@omm.com

February 7, 2019