No. 18-1049

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

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE

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BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE[1]

Amicus curiae is the National Association of Criminal Defense Lawyers (NACDL). NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

[1] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief. Petitioner and respondent have consented to the filing of this brief.

NACDL was founded in 1958. It has a membership of many thousands of direct members and up to 40,000 affiliated members. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in this Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL appears in support of the petition for certiorari to emphasize the importance of the question presented to criminal defendants and their lawyers. Although trial by jury is a centerpiece of our criminal justice system, juries sometimes convict defendants based on evidence that does not establish guilt beyond a reasonable doubt. In those instances, Rule 29 of the Federal Rules of Criminal Procedure empowers—and, indeed, obligates—courts to enter judgment of acquittal to protect a defendant's constitutional due process right to be convicted only upon proof beyond a reasonable doubt. The equipoise rule is a tool that meaningfully facilitates courts' exercise of this constitutional obligation. The Third and Fifth Circuits' rejection of the equipoise rule undermines criminal defendants' constitutional right to be convicted only upon proof that establishes guilt beyond a reasonable doubt.

SUMMARY OF ARGUMENT

The petition presents a question central to the fair administration of criminal justice: when the evidence in a criminal case is evenly balanced between guilt and in-

nocence, has the government satisfied its constitutional obligation to prove guilt beyond a reasonable doubt? The answer to that question must be no. The Court should therefore grant the petition.

I. A criminal conviction requires proof of guilt beyond a reasonable doubt. Rooted in the Due Process Clause of the Constitution, this standard protects against wrongful convictions and gives effect to the presumption of innocence. Even when properly instructed, juries sometimes convict defendants in cases where the evidence does not satisfy this standard—whether because jurors' emotions or biases cloud their capacity to reason, because they misapprehend the reasonable-doubt standard, or for some other reason.

Petitioners' case is one such example; the jury convicted petitioners notwithstanding that, as the district court found, the government's evidence of intent was evenly or nearly evenly balanced between guilt and innocence. The courts of appeals have applied the equipoise rule in other, analogous cases where the government's circumstantial evidence gives rise to equally compelling inferences of guilt or innocence. In that circumstance, courts have appropriately held that a reasonable jury would necessarily have a reasonable doubt about the defendant's guilt and the conviction therefore cannot stand.

II. When a jury convicts a defendant in the absence of proof establishing guilt beyond a reasonable doubt, the Due Process Clause requires the reviewing court to enter judgment of acquittal. The equipoise rule is a common-sense rule that facilitates courts' exercise of this constitutional duty. It helpfully locates the sufficiency-of-the-evidence analysis on the spectrum of burdens of proof with which courts are familiar. And it protects criminal defendants' right to be convicted only upon

proof that establishes guilt beyond a reasonable doubt. The Third and Fifth Circuits' rejection of this rule undermines this constitutional right and threatens to produce convictions that lack evidentiary support proving guilt beyond a reasonable doubt. As this case illustrates, the availability of the equipoise rule may well be the difference between conviction and acquittal.

ARGUMENT

I. The Jury System Is an Imperfect Protection Against Wrongful Convictions

A. The requirement to prove "beyond a reasonable doubt . . . every fact necessary to constitute the crime" is foundational to our criminal justice system. *In re Winship*, 397 U.S. 358, 364 (1970). This requirement "'reflect[s] a profound judgment about the way in which law should be enforced and justice administered.'" *Id.* at 361-62 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968)). It is "designed to exclude as nearly as possible the likelihood of an erroneous judgment" in light of the "magnitude" of the defendant's interests in a criminal case. *Addington v. Texas*, 441 U.S. 418, 423 (1979). It both embodies and protects the "axiomatic and elementary" presumption of innocence that "lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895); *accord Lego v. Twomey*, 404 U.S. 477, 486-87 (1972) ("A high standard of proof is necessary . . . to ensure against unjust convictions by giving substance to the presumption of innocence."). It is by now well settled that the obligation to prove guilt beyond a reasonable doubt is part of the due process rights protected by the U.S. Constitution. *In re Winship*, 397 U.S. at 364.

As NACDL's members know all too well, the jury system is an imperfect safeguard of the constitutional right to be convicted by proof beyond a reasonable doubt. "[E]ven a properly instructed jury will sometimes act unreasonably, a reality the American judicial system has recognized by providing for appeal of determinations of guilt in criminal trials." Diane Kutzko, *The* Jackson v. Virginia *Standard for Sufficiency of the Evidence*, 65 Iowa L. Rev. 799, 806 (1980); *see also, e.g.*, Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 Marq. L. Rev. 591, 618 (2009) ("As is now obvious, trial-level factfinders can be and sometimes are wrong.").

There are many reasons why juries may sometimes convict irrationally. Emotions, sympathy, or extrajudicial biases may cloud jurors' capacity to reason. The defendant may be particularly unpopular, or the case may have received a high degree of public attention, making rational analysis of the record evidence difficult. Some cases are particularly complex, both factually and legally. In other cases, jurors may misunderstand the government's burden of proof, notwithstanding the court's instructions. As Judge Jon O. Newman of the Second Circuit has recognized, jury instructions on the reasonable-doubt standard are "ambiguous and open to widely disparate interpretation by jurors." Jon O. Newman, *Beyond Reasonable Doubt*, 68 N.Y.U. L. Rev. 979, 985 (1993). Although courts assume that any "statement of the burden more rigorous than the 'preponderance of the evidence' standard reduces the likelihood of conviction in close cases," Judge Newman observed that "[w]hether that assumption is true is difficult to measure." *Id.* at 984. He recounted one study that attempted to test that assumption by trying a case before twenty-two mock juries, with three different in-

structions on the burden of persuasion: "The conviction rate for the jurors who heard the 'reasonable doubt' standard was slightly lower than the vote for the group hearing the 'preponderance' standard and fell significantly among the jurors hearing the 'feel sure and certain' formulation." *Id.* at 984-85 (citing London School of Economics Jury Project, *Juries and the Rules of Evidence*, 1973 Crim. L. Rev. 208). He identified another study in which jurors and judges were asked to "quantify as a percentage of certainty" the preponderance-of-the-evidence and reasonable-doubt standards; the jurors located those standards closer to each other than did the judges. *Id.* at 984 (citing Rita James Simon & Linda Mahan, *Quantifying Burdens of Proof*, 5 Law & Soc'y Rev. 319 (1971)). Based on these and other studies, Judge Newman concluded that "the traditional charge might be producing some unwarranted convictions." *Id.* at 985.

B. Petitioners' convictions illustrate the point. Petitioners' convictions arose out of their applications for tax credits under Louisiana's film industry tax credit program. Through their film-related ventures, petitioners purchased a building in New Orleans, intending to renovate and develop it into a postproduction film studio. Pet. App. 4a. They applied for film infrastructure tax credits to help offset the cost of the project. Pet. App. 4a. They were ultimately convicted, as is relevant here, of mail and wire fraud in connection with their applications for the tax credits. Pet. App. 110a.

Petitioners challenged their convictions on the ground that the evidence was insufficient. Pet. App. 110a. As to the core fraud charges, the district court found the government's case against petitioners "troubling." Pet. App. 157a. According to the court, "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." Pet. App. 113a n.18.

Nevertheless, the district court found itself "constrained" by the Fifth Circuit's abandonment of its prior "equipoise rule," Pet. App. 166a, which had provided that a reviewing 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 of the crime charged.'" *United States v. Vargas-Ocampo*, 747 F.3d 299, 301-02 (5th Cir. 2014) (en banc) (quoting *United States v. Jaramillo*, 42 F.3d 920, 923 (5th Cir. 1995)). Apparently because the Fifth Circuit had jettisoned the equipoise rule—which the district court noted was "of some consequence in this case," Pet. App. 113a n.18—the district court affirmed the fraud convictions notwithstanding its concerns. In so doing, it essentially asked whether there was *some* evidence in the record on which a rational juror could find guilt, without separately assessing whether that evidence established guilt *beyond a reasonable doubt*. *See* Pet. App. 165a-167a.[2]

C. This case is not an isolated incident. Juries sometimes convict defendants in cases where the evidence—even when viewed in the light most favorable to the gov-

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[2] Judge Newman warned of this tendency: "My concern is that federal appellate courts, including my own, examine a record to satisfy themselves only that there is *some* evidence of guilt and do not conscientiously assess whether the evidence suffices to permit a finding by the high degree of persuasion required by the 'reasonable doubt' standard." Newman, *supra*, at 993.

ernment—is balanced evenly (or worse) between guilt and innocence. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). A common example is a case where the government's circumstantial evidence gives no way to distinguish between different plausible and competing inferences, one of which leads to guilt and the other to innocence. In these and similar circumstances, courts have applied the equipoise rule to hold that the government failed to prove the defendant's guilt beyond a reasonable doubt.

1. In an opinion by then-Judge Gorsuch, the Tenth Circuit applied the equipoise rule in *United States v. Lovern*, 590 F.3d 1095 (10th Cir. 2009). In that case, a pharmacy computer technician was convicted of conspiracy to distribute controlled substances and distribution of controlled substances in violation of the Controlled Substances Act ("CSA"). *Id.* at 1099. The technician, Robert Barron, was "a high-school dropout with no experience in the medical or pharmaceutical fields." *Id.* at 1098. He worked for the Red Mesa Pharmacy, which filled and shipped prescriptions placed through two websites (SafeTrust Processing and IntegraRx) that allowed customers across the country to obtain prescription drugs simply by filling out an online questionnaire. *Id.* Barron's job was to log into the SafeTrust and IntegraRx websites, access the prescriptions that Red Mesa was to fill, and print labels for those prescriptions. *Id.* at 1105. His only training for these "menial computer tasks" was a fifteen-minute phone call with SafeTrust and IntegraRx representatives on how to access and create accounts for the websites; he had no prior experience in pharmacies or any kind of medical training. *Id.*

The government brought charges against various defendants, including Barron, for violations of the CSA. *Id.*

at 1099. The government's theory of liability required it to show that Barron knew that the prescriptions he helped fill were issued by physicians at SafeTrust and IntegraRx who were "acting outside the usual course of professional medical practice" or that the prescriptions were issued without a legitimate medical purpose. *Id.* at 1104. The "strongest piece of evidence supporting the government's theory of the case" was an instant message conversation in which Barron told a SafeTrust employee that he did not want the expiration to run out on several drugs that had been sitting at Red Mesa, and said, "Hook a brother up on scripts. I need some fake customers please." *Id.* at 1106-07 (internal quotation marks omitted). At trial, the jury found Barron guilty. *See id.* at 1098.

Writing for the court of appeals, Judge Gorsuch observed that the instant message left a reasonable factfinder with several "equally reasonable" inferences. *Id.* at 1107. One inference was that Barron believed that there were no real customers at the other end of the prescriptions, because no customers ever appeared in person at the pharmacy. Another reasonable inference was that Barron thought that the pharmacy acted unlawfully by relying on the Internet to receive and process orders. However, in order to sustain his conviction, the evidence had to support an inference "not only that Barron knew that *something* was fishy" about the pharmacy's operations, but specifically that he "knew that physicians working for SafeTrust and IntegraRx wrote prescriptions without first meeting with their patients, and that this failure to do so was inconsistent with legitimate medical practices or purposes." *Id.* (emphasis added); *see also id.* at 1109 ("Mr. Barron very likely knew something was wrong at Red Mesa. But so many things were wrong, and the government's proof doesn't

give a rational fact-finder any reason to think that, among them all, Mr. Barron knew of the particular problem that gives rise to liability under the CSA . . . .").

The court of appeals held that "[e]ven viewing the message in the light most favorable to the jury's verdict, it gives us no way to distinguish among several plausible and competing inferences about its meaning." *Id.* at 1107. In a case where 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 1107 (quoting *United State v. Caseer*, 399 F.3d 828, 840 (6th Cir. 2005)). The court therefore reversed Barron's convictions.

2. The Seventh Circuit confronted equally plausible and competing inferences in a case that turned on the distinction between conspiracy to distribute drugs and nonconspiratorial drug dealing. *See United States v. Johnson*, 592 F.3d 749 (7th Cir. 2010). Willie Earl Johnson appealed his convictions on several drug charges, including one count of conspiracy to possess and distribute crack cocaine. *Id.* at 752. The government had recorded a number of calls in which Johnson asked to purchase resale quantities of drugs from his supplier or from one of his supplier's associates. *Id.* at 752-54. The court noted that a drug-distributing conspiracy requires proof that the defendant agreed with someone else to distribute drugs. *Id.* at 754. It observed, however, that when the alleged co-conspirators are in a buyer-seller relationship, an agreement to buy drugs should not be conflated "with the drug-distribution agreement that is alleged to form the basis of the charged conspiracy." *Id.*

The court described the plausible, competing inferences arising from the evidence as follows:

> If the prosecution rests its case only on evidence that a buyer and seller traded in large quantities of drugs, used standardized transactions, and had a prolonged relationship, then the jury would have to choose between two equally plausible inferences. On one hand, the jury could infer that the purchaser and the supplier conspired to distribute drugs. On the other hand, the jury could infer that the purchaser was just a repeat wholesale customer of the supplier and that the two had not entered into an agreement to distribute drugs to others.

Id. at 755. Because the plausibility of each inference is about the same in this scenario, the "evidence is essentially in equipoise." *Id.* The court ultimately reversed Johnson's conviction on the conspiracy charge. *Id.* at 789.

3. In *United States v. Andujar*, 49 F.3d 16 (1st Cir. 1995), the First Circuit also faced equally persuasive theories of guilt or innocence. The case involved a drug-conspiracy conviction arising out of an unsuccessful operation to import narcotics into Puerto Rico from Colombia. The appellant, Jose Salvador Andujar, owned a tire center in Puerto Rico. *Id.* at 18. Andujar told William Linder, who sold oysters from a kiosk adjacent to the tire center, that one of his frequent oyster customers (Pedro Infante-Ruiz, or "Infante") wanted to see him inside the tire center. *Id.* at 19. During that meeting, Infante asked Linder to use his boat to retrieve a load of drugs. *Id.* Linder, a confidential government informant, agreed to do so, and then informed the government of Infante's illegal offer. *Id.* The next day, Linder re-

turned to the tire center, where Andujar instructed him to return the following day to meet Infante. *Id.* When Infante was late to that scheduled meeting, Linder requested that Andujar call Infante to determine his whereabouts, which Andujar did. *Id.* Infante arrived shortly thereafter and picked up Linder. *Id.*

The scheduled rendezvous in the ocean was ultimately unsuccessful, as the boat carrying the drugs from Colombia never appeared and Linder's boat sank during the expedition. *Id.* at 20. Afterwards, Infante told Linder not to tell anyone about the failed mission and instructed him to tell Andujar if he ever needed to speak with Infante. *Id.* Andujar, along with others, was subsequently indicted and convicted of conspiracy to import marijuana and a related firearms offense. *Id.*

In reviewing the sufficiency of the evidence, the First Circuit noted that while Andujar arranged meetings between Linder and Infante, he was not present at the meetings, and there was no evidence that would have suggested to him that the meetings concerned a pending drug deal. *Id.* at 21-22. Andujar argued, rather, that "the evidence at trial showed no more than 'mere presence' at the Tire Center." *Id.* at 21. The court found that Andujar's actions "offer[ed] equal support to both Andujar's mere presence theory and the prosecution's theory that Andujar was knowingly acting as a facilitator and go-between in the conspiracy, which of course constitutes participatory involvement." *Id.* at 22. In this circumstance, "[w]hen a jury is confronted . . . with equally persuasive theories of guilt and innocence, it cannot rationally find guilt beyond a reasonable doubt." *Id.* The court therefore vacated Andujar's conviction for conspiracy to import marijuana. *Id.*

II. The "Equipoise Rule" Helps Courts To Fulfill Their Duty To Protect Defendants' Right To Be Convicted by Proof Beyond a Reasonable Doubt

When a jury irrationally convicts a defendant based on evidence that does not establish guilt beyond a reasonable doubt, it is the court's obligation to undo that unconstitutional conviction. The equipoise rule adopted by a majority of the courts of appeals provides courts with an analytic framework for assessing the sufficiency of the evidence under the standard set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). It appropriately anchors the sufficiency-of-the-evidence analysis in the spectrum of burdens of proof with which district courts are intimately familiar, giving effect to the undeniable proposition that if the evidence is evenly balanced between guilt and innocence, even after the evidence is viewed in the light most favorable to the government, no rational jury could find guilt beyond a reasonable doubt. As this case proves, the Third and Fifth Circuits' rejection of this common-sense rule may produce unconstitutional convictions.

A. A Court Must Enter a Judgment of Acquittal If No Rational Factfinder Could Find Guilt Beyond a Reasonable Doubt

As set forth above, the requirement to prove guilt beyond a reasonable doubt "plays a vital role in the American scheme of criminal procedure." *In re Winship*, 397 U.S. at 363. It gives "'concrete substance' to the presumption of innocence, . . . ensure[s] against unjust convictions, and . . . reduce[s] the risk of factual error in a criminal proceeding." *Jackson*, 443 U.S. at 315 (quoting *In re Winship*, 397 U.S. at 363). "At the same time by impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt of the ac-

cused, the standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself." *Id.* (citing *In re Winship*, 397 U.S. at 372 (Harlan, J., concurring)).

In *Jackson v. Virginia*, 443 U.S. 307 (1979), this Court acknowledged the crucial role that courts play in protecting defendants' due process right to be convicted only upon proof beyond a reasonable doubt. This Court held that, because the reasonable-doubt standard is of constitutional dimension, the evidentiary record must support a factfinder's conclusion of guilt: when deciding a motion for acquittal, the reviewing court's task "must be not simply to determine whether the jury was properly instructed, *but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt*." *Id.* at 318 (emphasis added). Under *Jackson*, a court may not affirm a conviction after finding only that *some* evidence supports the conviction, as "it could not seriously be argued that . . . a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." *Id.* at 320. Nor may a reviewing court satisfy itself as to the propriety of a conviction by concluding that the jury was properly instructed. *See id.* at 316-17. Rather, the court must evaluate the record evidence to ascertain "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319.

To be sure, *Jackson* also makes clear that a reviewing court's role in this arena has limits. A reviewing court is not to supplant the role of the factfinder by reweighing the evidence. *See id.* at 318-19 (stating that a reviewing court is not to "'ask itself whether *it* believes

that the evidence at the trial established guilt beyond a reasonable doubt'" (quoting *Woodby v. INS*, 385 U.S. 276, 282 (1966) (emphasis added in *Jackson*)). Thus, it may not resolve conflicts in testimony nor evaluate the credibility of witnesses. The reviewing court's role, in giving effect to the reasonable-doubt standard, is limited to assessing whether the evidence, viewed in the light most favorable to the government, provides a rational factfinder with sufficient evidence to find guilt beyond a reasonable doubt. *See id.*

Implicit in *Jackson* (and Rule 29) is the recognition that factfinders do not always act rationally. *See Jackson*, 443 U.S. at 317 ("[A] properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury."); *see also Freeman v. Zahradnick*, 429 U.S. 1111, 1112 (1977) (Stewart, J., dissenting from denial of certiorari). In such instances, the conviction cannot stand as a matter of due process. It is the duty of reviewing courts to enter a judgment of acquittal in such circumstances.

B. In Cases Where the Evidence Is in Equipoise, No Rational Factfinder Could Find Guilt Beyond a Reasonable Doubt

The equipoise rule helpfully anchors *Jackson*'s constitutionally mandated analysis in the spectrum of burdens of proof that exist in our legal system. Burdens of proof "instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. at 370 (Harlan, J., concurring). In application, the burden of proof tells the factfinder when a case is "close" and how to decide

such "close" cases. *See* Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L. J. 1299, 1299 (1977).

In the civil context, the typical burden of proof is the preponderance-of-the-evidence standard, which "simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before he may find in favor of the party who has the burden to persuade the judge of the fact's existence." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993) (brackets and internal quotation marks omitted) (alteration in original); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 329 (2007). As this Court has recognized, proof beyond a reasonable doubt is, by definition, proof that is substantially more convincing than proof by the preponderance of the evidence. *Addington*, 441 U.S. at 423-25. In fact, some jurisdictions expressly instruct juries that the State's proof in a criminal case must be "more powerful" than the preponderance-of-the-evidence standard used in civil cases. *E.g.*, Barbara E. Bergman, *Criminal Jury Instructions for the District of Columbia* 2-17 (5th ed. 2018); N.J. Model Jury Charge, Reasonable Doubt (rev. Feb. 24, 1997) (same); *see also* 1A Kevin F. O'Malley, et al., *Federal Jury Practice & Instructions* § 12.10 (6th ed. 2008) ("If the jury views the evidence in the case as reasonably permitting either of two conclusions—one of innocence, the other of guilt—the jury must, of course, adopt the conclusion of innocence.").

The equipoise rule helpfully ties the *Jackson* analysis to these familiar burdens of proof. The reasonable-doubt standard demands more than a mere likelihood, or probability, of guilt; it requires a level of proof "designed to exclude as nearly as possible the likelihood of an errone-

ous judgment." *Addington*, 441 U.S. at 423. In cases where the evidence is evenly or near-evenly balanced—*i.e.*, where the government has not proven guilt by even a preponderance of the evidence—the reviewing court cannot properly conclude that guilt beyond a reasonable doubt has been established. As a matter of common sense, the reasonable-doubt standard cannot be satisfied when the evidence as to a necessary element of the offense is in equipoise.

Courts that embrace the equipoise rule have recognized this truism. *See, e.g.*, *Johnson*, 592 F.3d at 755 ("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 on the conspiracy charge"); *Lovern*, 590 F.3d at 1107 ("[W]here, as here, 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." (internal citation and punctuation omitted)); *United States v. Flores-Rivera*, 56 F.3d 319, 323 (1st Cir. 1995) ("[W]here an equal or nearly equal theory of guilt and a theory of innocence is supported by the evidence viewed in the light most favorable to the prosecution, a reasonable jury *must necessarily entertain* a reasonable doubt." (citation and internal quotation marks omitted)); *see also Harris v. United States*, 125 A.3d 704, 709 (D.C. 2015) ("Where evidence of guilt is in equipoise with evidence of innocence, it is perforce insufficient for conviction by the constitutional standard, beyond a reasonable doubt."); *Taylor v. State*, 697 A.2d 462, 465 (Md. 1997) ("[W]hen the evidence equally supports two versions of events, and a finding of guilt requires speculation as to which of the two versions is correct, a conviction cannot be sus-

tained."). If it were otherwise, the reasonable-doubt standard would be indistinguishable from the laxer preponderance-of-the-evidence standard used in the civil context.

C. The Equipoise Rule Meaningfully Protects Defendants' Constitutional Rights

By mandating that courts enter acquittal when the evidence is in equipoise, the equipoise rule implements the constitutional requirement to prove guilt beyond a reasonable doubt. Permitting convictions to stand when the evidence is in equipoise would eviscerate the due process protections recognized in *In re Winship* and *Jackson*.

The Third and Fifth Circuit's rejection of the equipoise rule affects all criminal defendants tried in those Circuits. It authorizes district courts to affirm convictions whenever the government produces some evidence of guilt, even when a rational jury would find the evidence of guilt and innocence to be in equipoise. Indeed, the district court apparently believed that the Fifth Circuit's rejection of the equipoise rule *required* it to affirm the conviction in this case, notwithstanding that the evidence was in equipoise. *See* p. 7, *supra*. The Court should grant certiorari and reverse the judgment below to restore defendants' due process rights in the Third and Fifth Circuits and to implement the common-sense proposition that, when the government's evidence is in equipoise, by necessity the government has failed to prove guilt beyond a reasonable doubt.

CONCLUSION

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

Respectfully submitted,

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