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 RETIRED FEDERAL JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, identified below, are former federal district court judges who have collectively spent decades on the bench. *Amici* maintain an interest in the fair administration and public legitimacy of the criminal justice system, and believe that lessons drawn from their experience presiding over hundreds of criminal trials may be of value to the Court as it considers the conditions under which a trial judge may direct a verdict of acquittal.

The Hon. Frank H. McFadden, former United States District Judge for the Northern District of Alabama (1969 to 1982)

The Hon. Abraham D. Sofaer, former United States District Judge for the Southern District of New York (1979 to 1985)

The Hon. Frank W. Bullock Jr., former United States District Judge for the Middle District of North Carolina (1982 to 2006)

The Hon. Stephen N. Limbaugh Sr., former United States District Judge for the Eastern District of Missouri (1983 to 2008)

The Hon. F.A. Little Jr., former United States District Judge for the Western District of Louisiana (1984 to 2006)

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[1] All parties received timely notice of *amici*'s intent to file this brief, and have consented to its filing. No counsel for any party authored this brief in whole or in part and no person or entity other than *amici* or their counsel made a monetary contribution for the preparation or submission of this brief.

The Hon. Richard T. Haik Sr., former United States District Judge for the Western District of Louisiana (1991 to 2016)

The Hon. William G. Bassler, former United States District Judge for the District of New Jersey (1991 to 2006)

The Hon. David W. Hagen, former United States District Judge for the District of Nevada (1993 to 2005)

The Hon. Nancy Gertner, former United States District Judge for the District of Massachusetts (1994 to 2011)

The Hon. Stephen M. Orlofsky, former United States District Judge for the District of New Jersey (1996 to 2003); United States Magistrate Judge for the District of New Jersey (1976 to 1980)

The Hon. A. Howard Matz, former United States District Judge for the Central District of California (1998 to 2013)

The Hon. Faith S. Hochberg, former United States District Judge for the District of New Jersey (1999 to 2015)

The Hon. T. John Ward, former United States District Judge for the Eastern District of Texas (1999 to 2011)

The Hon. Stephen G. Larson, former United States District Judge for the Central District of California (2006 to 2009)

ARGUMENT

I. JUDGES BROADLY DEFER TO JURIES, BUT RULE 29 IS A CRITICAL PROTECTION AGAINST UNCONSTITUTIONAL CONVICTIONS.

In the rare case when a judge has to overturn a guilty verdict supported by insufficient evidence, she does not do so at the expense of a jury's right to find the facts. Rather, she does so to fulfill her constitutional duty to ensure that all criminal convictions are supported by proof beyond a reasonable doubt. By doing so, she ensures that a criminal conviction is not based on the jury's mere flip of a coin between two equally likely possibilities.

Amici have collectively presided over hundreds of federal criminal trials. That experience has ratified for them the wisdom of centuries of common law practice, "traced by many to Magna Carta," of committing the trial of criminal actions to a lay jury "as a protection against arbitrary rule." *Duncan* v. *Louisiana*, 391 U.S. 145, 151 (1968). In almost every criminal case, jurors tasked with passing judgment on a defendant do their work with diligence and care, and in the experience of *amici*, reach the result compelled by the evidence. That experience is consonant with this Court's long-ago recognition that "in most of the cases presented to them," jurors "understand the evidence and come to sound conclusions." *Id.* at 157.

Having come to that conclusion through long service on the bench, *amici* share the view widely held among judges that a jury's decision should not be lightly overturned by the presiding trial judge. Even when the trial judge herself harbors doubt about a jury's verdict, and would have voted to acquit if seated as a juror, the law mandates deference: "[I]t is the

responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." *Cavazos* v. *Smith*, 565 U.S. 1, 2 (2011) (per curiam).

The general practice of judicial deference has, however, a critical and necessary corollary: In those few and rare cases in which a judge is moved to give voice to her own doubts about the sufficiency of the evidence, there is something seriously awry. It cannot be the law that the judge must uphold such a verdict.

But that is precisely what happened in this case. The trial judge noted that the Fifth Circuit's erasure of the equipoise rule was of "some consequence" here, because "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. Then, in upholding one of the counts predicated on fraud—notably the only substantive fraud count the trial judge sustained as to one of the petitioners—the court noted that it was "constrained by the Fifth Circuit" in assessing whether "a rational jury could have" rejected defendants' defenses and that it was upholding those counts of conviction "under the Fifth Circuit case literature that binds this Court." Pet. App. 166a.

Those words should sound an alarm for any reader concerned about the quality of our criminal justice, and signal that the Fifth Circuit's revised rule demands excessive deference to the jury. The standard for assessing when a judge may upend a conviction should afford a substantial zone of protection to the jury's verdict, but must be balanced against the recognition that judges have and should have a large

role to play in ensuring against erroneous convictions. When a judge does detect such a conviction to a high degree of certainty, the rule governing the judge's oversight of juries should permit the judge to overrule the verdict.

Decades of experience reflect that preserving the safety-valve embodied in the equipoise rule does nothing to usurp power from the jury. In the vast majority of cases, judges rightly defer to juries. But when Rule 29 motions are granted, every one of those cases involves, in a sense, a judicial emergency. Each one involves objectively inadequate evidence, with the consequence that, but for the judicial intervention, a defendant would have been convicted and sentenced for conduct that the government failed to prove. Rule 29 review thus plays a limited but vital role in tempering the regime of deference and safeguarding individual liberty.

II. THE EQUIPOISE RULE IS SUPPORTED BY THIS COURT'S CONSTITUTIONAL JURISPRUDENCE, IS ADMINISTRABLE, AND STRIKES AN APPROPRIATE CONSTITUTIONAL BALANCE BETWEEN JUDGES AND JURIES.

The rule of equipoise is the rule that has long applied in cases turning on circumstantial evidence in the First, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits—covering 49 federal district courts—to determine whether a verdict is sufficiently dubious that an acquittal must be entered. As articulated by those Circuits, the rule requires that "if the evidence viewed in the light most favorable to the verdict gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, [a] court must reverse the conviction, because in such a case a reasonable jury must

necessarily entertain a reasonable doubt." See, *e.g.*, *United States* v. *López-Díaz*, 794 F.3d 106, 111 (1st Cir. 2015) (alteration omitted) (internal quotation marks omitted). That rule is supported by this Court's jurisprudence, strikes an appropriate and administrable balance between judges and juries, and secures important constitutional values.

1. The Constitution's Due Process Clause requires that in criminal cases the government must prove guilt beyond a reasonable doubt. *Jackson* v. *Virginia*, 443 U.S. 307, 315-16 (1979); *In re Winship*, 397 U.S. 358, 364 (1970). This Court has long required a judge to do "more than simply" go through the "trial ritual" of furnishing a proper reasonable doubt instruction to the jury. *Jackson*, 443 U.S. at 316-17. Instead, the judge must ensure that the jury "rationally appl[ies]" the reasonable doubt standard to the evidence. *Id.* at 317. That means that the application of the reasonable doubt standard "is not," in this Court's own telling, "irretrievably committed to jury discretion." *Id.* at 317 n.10.

In *Jackson*, it was "readily apparent" to this Court that a doctrine that would allow a judge to sustain a jury's guilty verdict based on a "mere modicum of evidence" could not stand because "such a 'modicum' of evidence" could not "by itself rationally support a conviction beyond a reasonable doubt." *Id.* at 320. When a conviction is supported wholly by direct evidence, there is ordinarily little for a reviewing court to do under *Jackson*. The court is required to assume that the jury credited the testimony supporting the conviction, and cannot second-guess the jury's acceptance of that testimony. *Id.* at 318-19. But when the government's proof of an element of a crime rests on circumstantial evidence, courts have generally agreed that if a judge finds that circumstantial evi-

dence to be in equipoise, such that inferences of guilt and of innocence have equal support, then the judge must direct an acquittal.

The logic behind this majority rule is sound and constitutionally required: If, *after* viewing the evidence in the light most favorable to the prosecution (including making all credibility decisions in the prosecution's favor and abstaining from weighing the evidence), see *Jackson*, 443 U.S. at 319, a judge is still left with evidence that "gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence," she must reverse the conviction, as under those circumstances "a reasonable jury *must necessarily entertain* a reasonable doubt," *United States* v. *Lovern*, 590 F.3d 1095, 1107 (10th Cir. 2009) (emphasis in original).

Moreover, in *Jackson* this Court all but adopted the equipoise rule and its sound logic by citing approvingly the D.C. Circuit's influential *Curley* decision, noting that that decision established the "prevailing criterion for judging motions for acquittal in federal criminal trials." 443 U.S. at 317-18 & n.11 (citing *Curley* v. *United States*, 160 F.2d 229, 232-33 (D.C. Cir. 1947)); see Irene Merker Rosenberg & Yale L. Rosenberg, *"Perhaps What Ye Say Is Based Only on Conjecture"—Circumstantial Evidence, Then and Now*, 31 Hous. L. Rev. 1371, 1414 (1995) (explaining that the *Jackson* Court "gave its imprimatur" to the "pronouncements" in *Curley*); Robert J. Gregory, *Whose Reasonable Doubt? Reconsidering the Appropriate Role of the Reviewing Court in the Criminal Decision Making Process*, 24 Am. Crim. L. Rev. 911, 935 (1987) ("The Court [in *Jackson*] grounded its sufficiency standard in the criterion developed by the D.C. Circuit in *United States* v. *Curley*.").

In the precise passage that the *Jackson* Court cited, the D.C. Circuit pronounced: "[I]f, upon the whole of the evidence, a reasonable mind must be in balance as between guilt and innocence, a verdict of guilt cannot be sustained." *Curley*, 160 F.2d at 233. Accordingly, a majority of the Circuits has correctly understood the equipoise rule as a constitutional requirement flowing from this Court's directive to judges to do something more than simply enforce the no-evidence doctrine in their sufficiency review.

2. The equipoise rule is essential in effecting the constitutional division of labor between judge and jury. The equipoise rule gives judges meaningful authority to police the validity of guilty verdicts while leaving a wide margin to the jury; it does not usurp the jury's role.

As the petition explains, see Pet. 25, there are two steps in a judge's sufficiency analysis. First, a judge construes the evidence "in the light most favorable to the jury's verdict." *Lovern*, 590 F.3d at 1107. That permits the jury to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences." *Jackson*, 443 U.S. at 319. The equipoise rule does not come into play in that analysis, and so takes nothing away from the jury. The equipoise rule applies only at the second step, where the judge determines if the evidence construed as required in the first step would permit a "rational trier of fact" to find "the essential elements of the crime beyond a reasonable doubt." *Id.*

At the second step, the equipoise rule will prove decisive only in select cases. Where a case turns only on credibility determinations, the equipoise rule will have no role to play. But in cases like this one that turn on *circumstantial* evidence of, for example, a defendant's state of mind, the application of the equi-

poise rule at the second step is the critical difference between reversing and upholding a conviction. See, *e.g.*, *United States* v. *Andujar*, 49 F.3d 16, 20 (1st Cir. 1995) (rule applies when evidence "gives equal or nearly equal *circumstantial* support to a theory of guilt and a theory of innocence" (emphasis added) (internal quotation marks omitted)). Analysis of circumstantial evidence implicates an "intellectual process" requiring "lawyer-like scrutiny" such that, in a circumstantial evidence case, the "ultimate determination of guilt is based . . . on inferences from the evidence." Rosenberg & Rosenberg, *supra*, at 1412, 1416. A judge, in view of her expertise, is "in as good, if not better, position" than a jury "to assess the rationality of these inferences and whether they establish guilt beyond a reasonable doubt." *Id.* at 1416.

Moreover, by focusing on the midpoint in the evidentiary analysis—*i.e.*, the point where the circumstantial evidence gives equal or nearly equal support to a theory of guilt and a theory of innocence—the equipoise rule merely requires judges to engage in a mode of evidentiary assessment with which they are already intimately familiar. For instance, the preponderance of the evidence standard is "the most common standard in the civil law," and it requires the factfinder to assess whether the evidence is adequate to make "the existence of a fact . . . more probable than its nonexistence." *Concrete Pipe & Prods. of Cal., Inc.* v. *Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993). Judges thus routinely scrutinize evidence to determine the point of equipoise. The law's longstanding comfort that the point of equipoise is meaningful and determinable, and judicial familiarity with determining where that point lies are strong reasons for sustaining the equipoise rule.

The Fifth Circuit's contrary conclusion that there is no reliable method for determining when the evidence "is 'in equipoise,'" *United States* v. *Vargas-Ocampo*, 747 F.3d 299, 301 (5th Cir. 2014) (en banc), is wholly unjustified and could well have implications beyond the Rule 29 context. It would suggest, for instance, that judges are somehow incapable of determining whether reasonable jurors could find by a preponderance of the evidence that a plaintiff is entitled to a verdict in a civil case, undermining the entire framework of pre-trial summary judgment, as well as of judgment as a matter of law. See *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) ("If the defendant in a . . . civil case moves for summary judgment or for a directed verdict . . . , [t]he judge's inquiry [is] whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict . . . ."). Indeed, as the petition explains, evidentiary equipoise is the precise turning point in a number of contexts, including review for harmless error and application of the rule of lenity. See Pet. 21. Frank recognition that judges are capable of applying the extant summary judgment and directed verdict standards in the civil context and similar standards in various other contexts throughout the law requires the corollary recognition that judges can assess equipoise in the criminal Rule 29 context. Moreover, it makes no sense to suggest that when mere civil damages are at issue in a case judges are capable of applying the equipoise standard but that they are incapable of doing so when liberty interests are at issue.

3. The equipoise rule, as opposed to some more watered standard, is further warranted because, far from undermining jury justice, it furthers the core purpose of the jury system. In *Curley*, the D.C. Cir-

cuit explained that the judge must give "full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact," but *then* enter a judgment of acquittal if the evidence so viewed leaves "a reasonable mind . . . in balance as between guilt and innocence." 160 F.2d at 232-33. The D.C. Circuit's *Curley* decision rightly has become the "prevailing criterion for judging motions for acquittal," *Jackson*, 443 U.S. at 318 n.11 (citing 2 C. Wright, *Federal Practice and Procedure* § 467 (1969 and Supp.1978)), because this criterion elaborates no more than the minimum that is tautologically entailed by the reasonable doubt standard. Where the evidence "gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence," a judge "*must necessarily*" conclude that a rational jury would be unable to find the essential elements of the crime beyond a reasonable doubt. *Lovern*, 590 F.3d at 1107 (emphasis in original). The Fifth Circuit discarded that rule based on misplaced concerns about its administrability and without explaining how it could be consonant with the reasonable doubt standard for a criminal conviction to be sustained based on a record of circumstantial evidence that equally supports innocence and guilt.

Moreover, as this Court has repeatedly recognized, the jury's "function, in criminal trials, [is] as a check against arbitrary or oppressive exercises of power by the Executive Branch." *United States* v. *Powell*, 469 U.S. 57, 65 (1984); accord *United States* v. *Gaudin*, 515 U.S. 506, 510-11 (1995) ("Th[e jury trial] right was designed 'to guard against a spirit of oppression and tyranny on the part of rulers' . . . ." (quoting 2 J. Story, *Commentaries on the Constitution of the United States* 540-41 (4th ed. 1873))); *Duncan*, 391 U.S. at 156 (describing the right to a jury trial as "necessary

to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority"). And as the Advisory Committee on Rules of Criminal Procedure has recognized, the government has no "legitimate interest" in protecting a jury's guilty verdict from Rule 29 review, because "the constitutional requirement of a jury trial in criminal cases is primarily a right accorded to the defendant," not to the government. Fed. R. Crim. P. 29(c) advisory committee's note to 1966 amendment. Thus, in the rare case where a jury is wrongly persuaded to convict, the judge who overturns the guilty verdict is ensuring that the jury hews to its purpose of "prevent[ing] oppression by the Government." *Duncan*, 391 U.S. at 155. The equipoise rule is an appropriate, limited check on a jury's reasonable doubt determination. Allowing reversal in that circumstance allows a judge to fulfill her constitutional duty to only permit convictions based on proof beyond a reasonable doubt, while giving substantial deference to the jury. There is simply no good reason that constitutional promise remains unfulfilled in the Fifth Circuit while it remains properly fulfilled in a majority of the Circuits.

The equipoise rule has proved to be administrable, respects the constitutional role of the jury as ultimate factfinder, and enforces the constitutional underpinnings of our criminal justice system. *Amici* therefore urge the Court to take review and upon review affirm the validity of that rule.

CONCLUSION

The writ should be granted.

Respectfully submitted,

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