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

REPLY BRIEF FOR PETITIONERS

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The government concedes that the courts of appeals disagree about whether the courts should apply the equipoise rule to sufficiency of the evidence claims. The government nevertheless argues that this Court should deny review because all courts of appeals recognize that *Jackson v. Virginia*, 443 U.S. 307 (1979), sets the ultimate standard governing such claims. *See* BIO 11–16. Of course it does, but the lower courts have interpreted *Jackson* differently, and those different interpretations produce divergent outcomes in analogous cases. This Court should use this case to resolve this conflict.

The government also appears to agree that, in a fraud case where the truth or falsity of a statement turns on a question of legal interpretation, the prosecution must show that the defendant's interpretation was unreasonable. The government, however, argues that this case does not present that question. Petitioners, the government maintains, were convicted of making "factual" misrepresentations, the truth or falsity of which did not turn on the requirements of Louisiana's tax credit scheme. BIO 20.

That assertion is not credible. The *whole dispute* at petitioners' trial was whether Louisiana law required the actual expenditure of money to seek tax credits (in which case petitioners' statements that they were entitled to credits despite not yet having expended money could be considered misleading), or whether the law instead allowed credits without money having been spent yet (in which case petitioners' statements that they were entitled to credits were

entirely truthful). As the district court expressly held and the Fifth Circuit did not dispute, Louisiana law was ambiguous on that point. The Fifth Circuit nonetheless upheld petitioners' convictions on the ground that this ambiguity was irrelevant. The Fifth Circuit's decision below thus creates a conflict over the second question presented that this Court should resolve.

I. The Court Should Grant Certiorari to Resolve the Propriety of the Equipoise Rule.

A. The split as to whether the equipoise rule properly effectuates *Jackson* is meaningful.

1. The government asks this Court to allow the circuit split over the equipoise rule to persist because all courts of appeals agree that *Jackson* ultimately governs sufficiency-of-the-evidence claims. *See* BIO 13–15. That is a non sequitur. *Jackson* articulates a high-level rule; the courts of appeals have adopted different interpretations of that high-level rule, and those different interpretations are outcome-determinative. That is exactly the sort of circuit conflict that warrants this Court's review.

For example, in *Cage v. Louisiana*, 498 U.S. 39 (1990), the Court addressed a circuit split over the rule that criminal convictions require "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," *In re Winship*, 397 U.S. 358, 364 (1970). One court held that *Winship*'s "reasonable doubt" standard meant "grave uncertainty" and "an actual substantial doubt," and stated that what was required was a "moral certainty"

that the defendant was guilty. *Cage*, 498 U.S. at 40, 41 n.* (quoting *State v. Cage*, 554 So.2d 39, 41 (La. 1989)). Other courts disagreed with that reading of *Winship*. *Id.* at 41 n.*. This Court granted review and resolved the disagreement, holding that the decision below was an incorrect articulation of *Winship*, as it "suggest[ed] a higher degree of doubt than is required for acquittal under the reasonable-doubt standard." *Id.* at 41.

Or take *Elonis v. United States*, 135 S. Ct. 2001 (2015), which resolved disagreement over how to apply this Court's prior holding that the First Amendment does not protect "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). All lower courts agreed *Black* governed the constitutionality of statutes criminalizing true threats. But they disagreed about whether a conviction for threatening another person required proof of the defendant's subjective intent or simply proof that a reasonable person would regard the statement as threatening. *See* Pet. for Cert., *Elonis v. United States*, 2014 WL 654438 (Feb. 14, 2014). This Court thus granted review to resolve that conflict.

Other examples abound. *See, e.g.*, *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018) (resolving lower court disagreement about proper articulation of probable cause standard); *Florida v. J.L.*, 529 U.S. 266 (2000) (resolving disagreement about application of rule articulated in *Alabama v. White*, 496 U.S. 325,

332 (1990), regarding when anonymous tips afford reasonable suspicion).

Review is warranted for the same reason here. Over the past four decades, the courts of appeals have become increasingly divided over whether *Jackson* requires recognition of the specific principle that when "the evidence . . . gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, [a court] must reverse the conviction, as under these circumstances a reasonable jury *must necessarily entertain* a reasonable doubt." *United States v. Lovern*, 590 F.3d 1095, 1107 (10th Cir. 2009) (internal quotation marks omitted). Only this Court can resolve that conflict.

2. Falling back, the government argues that even if the majority rule exemplified by then-Judge Gorsuch's opinion in *Lovern* is consistent with *Jackson*, *see, e.g., Lovern*, 590 F.3d at 1107 (Gorsuch, J.), applying that rule does not "produce different outcomes than the unadorned *Jackson* standard." BIO 14–16. This contention is belied by the government's own previous arguments, as well as empirical evidence.

When asking the en banc Fifth Circuit in *United States v. Vargas-Ocampo*, 747 F.3d 299 (5th Cir. 2014), to abandon the equipoise rule, the government explained that the decision whether to apply the equipoise rule can be outcome-determinative. As proof, the government cited *United States v. Ortega Reyna*, 148 F.3d 540 (5th Cir. 1998), which had reversed a conviction based on the equipoise rule. The government observed that the conviction there would have been upheld if the court had not applied the equipoise

rule. Gov't Supp. Br. 51–54, *United States v. Vargas-Ocampo*, No. 11-41363 (5th Cir. Dec. 9, 2013).

But there is no reason to take just the government's word for it. A distinguished group of retired federal judges—who collectively have decades of experience presiding over criminal trials—has explained that the equipoise rule is not only "meaningful and determinable," but also often outcome-determinative. Amicus Br. for Retired Federal Judges 9–10. Numerous real-world cases—which the government makes no effort to distinguish—confirm this point. *See* Amicus Br. for Nat'l Ass'n of Criminal Defense Lawyers 7–12 (discussing the cases).

This case further illustrates the point. The district court determined that the evidence was in equipoise. It also expressly said it would have entered a judgment of acquittal if it were not "constrained" by the Fifth Circuit's rejection of the equipoise rule. App. 166a; *see id.* 232a–233a.

The government protests that it is not "clear" that the district court felt constrained by "the unavailability of the equipoise rule." BIO 19. But there is no room for confusion: The district court expressly stated that the fact 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." App. 113a n.18. And at sentencing, the district court reiterated that petitioners "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 Criminal Procedure," i.e., because the

Fifth Circuit had rejected the equipoise rule. *Id.* 232a–233a.

The government also notes that the Fifth Circuit believed there was "abundant evidence" from which a jury could have convicted. BIO 17. But the Fifth Circuit never disagreed with the district court that the *totality* of the evidence was in equipoise. The Fifth Circuit's "abundant evidence" remark, therefore, only reinforces why the equipoise rule matters: In any case in which the equipoise rule is implicated, there will be circumstantial evidence of *both* guilt and innocence.[1] A court that rejects the equipoise rule will focus only on the former and ignore the latter. And as the district court explained, that will result in the affirmance of convictions that would be reversed under the equipoise rule.

B. The equipoise question presented is properly preserved.

The government also argues that the equipoise issue is not properly presented here. Not so.

As the government concedes, this Court's practice "precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.'" *United States v. Williams*, 504 U.S. 36, 41 (1992). This rule "operates (as it is phrased) in the

[1] Here, for example, the government cites petitioners' use of circular cash transfers as "abundant evidence" of their guilt. BIO 17. But the government ignores the equally abundant evidence that that petitioners were engaged in entirely lawful attempts to provide the customary audit evidence under Louisiana law, App. 155a–157a (district court findings).

disjunctive," *id.*; an issue is preserved for review if it was *either* pressed *or* passed upon below.

Michael Arata clearly satisfies this test. The government concedes he pressed the equipoise issue in the Fifth Circuit. BIO 17. But the government suggests that contention was eligible only for "plain error" review because Arata did not previously press it in the district court. *Id.* This is nonsense. When a defendant raises a general objection in the district court and the court rejects that objection on some specific ground, the defendant may refine his claim by challenging that specific reasoning on appeal. *See, e.g.*, *United States v. Garcia-Perez*, 779 F.3d 278, 282 (5th Cir. 2015); *United States v. Neal*, 578 F.3d 270, 272–73 (5th Cir. 2009). That is what happened here. Arata argued in the district court that there was insufficient evidence to support his conviction, BIO 17, and the district court rejected that argument on the ground that the evidence was in equipoise. *See supra* Part I.A.2. Arata was therefore entitled to renew his sufficiency-of-the-evidence claim on appeal and to attack the district court's specific reasoning.

Arata's preservation of the equipoise issue is enough to put the question to this Court for de novo review. But if it mattered, Peter and Susan Hoffman have preserved the issue too. The Hoffmans raised the issue in their Rule 29 motions, DE506-1:6–7; DE514-1:2, and the government successfully objected based on *Vargas-Ocampo*, DE523:7; DE527:2–3. On appeal, the Hoffmans continued to challenge the sufficiency of the evidence; they "did not concede in [the Fifth Circuit] the correctness of" *Vargas-Ocampo*, *Williams*, 504 U.S. at 44–45. And the Fifth Circuit

rejected their sufficiency claims without disagreeing with the district court that the evidence was in equipoise. *See, e.g.*, *Stevens v. Dep't of Treasury*, 500 U.S. 1, 8 (1991) (rejecting government's argument that issue had not been presented to the court of appeals, as that court, "like the District Court before it" necessarily "decided the substantive issue presented").

II. This Court Should Grant Review on The Ambiguity Question Presented.

The government does not dispute that a federal fraud conviction cannot stand 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. Law professors writing as amici in this case agree with this rule and confirm the significance of this issue. They explain that allowing convictions in these circumstances "makes a major inroad into a domain traditionally left to the States," "exacerbates the effect of facially sweeping laws like the mail and wire fraud statutes," "threatens to upset the" distinction "between the wire fraud and the tax laws," and creates room for problematic exercises of prosecutorial discretion. Amicus Br. for Criminal Law Professors 15–17. The government nevertheless argues that certiorari should be denied because this case does not turn on the ambiguity question. The government is wrong.

1. The government argues this "is a case where the truth or falsity of the statement turns on the facts—not 'on an interpretive question of law.'" BIO 20 (quoting *United States v. Whiteside*, 285 F.3d 1345, 1351 (11th Cir. 2002)). But the government cites

nothing in the Fifth Circuit's opinion for that proposition—because that is not what the Fifth Circuit said. Rather, the Fifth Circuit held—contrary to the law in other circuits—that any ambiguity in Louisiana's tax credit scheme was irrelevant because petitioners were charged with federal fraud, and thus the "government did not have to prove violations of state law." App. 26a.

The government's effort to paint that reasoning as keyed merely to factual misstatements is an exercise in misdirection. As the petition explained, petitioners' tax credit submissions were fraudulent only if petitioners submitted them with a specific intent to defraud. Pet. 33. And petitioners cannot have submitted their tax credit applications with a specific intent to defraud if Louisiana tax credit regulations were ambiguous and petitioners acted consistently with a reasonable interpretation of them. *Id.* 33–36. It is true, as the government says, that the government charged petitioners with "misrepresentations" with respect to "the company's expenditures, the creation of purchase invoices, and the purpose of circular transactions." BIO 20 (citing App. 54a). But as the petition explained at length, Pet. 28–30, 32–33, these statements could plausibly be described as "misrepresentations" only if the government were right that Louisiana law required "that funds be expended before the granting of tax credits." BIO 21. If petitioners' reading of Louisiana law as *not* requiring actual expenditures before seeking tax credits were correct, then there would be nothing false or misleading

about, for example, presenting "circular transactions" to support the tax credits. *See* Pet. 32–33.[2]

The district court found that the Louisiana tax credit scheme was ambiguous. *See* App. 231a–232a. The Fifth Circuit did not disagree; it just thought that legal ambiguity was irrelevant. *Id.* 25a–26a. And that conclusion conflicts with the law in every other circuit to consider the issue, which holds that in a fraud case "where the truth or falsity of a statement centers on an interpretive question of law, the government bears the burden of proving beyond a reasonable

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[2] The government's suggestion that Louisiana law was unambiguous on this actual-expenditures point is simply wrong. Louisiana law did not contain this requirement until 2009, *after* petitioners submitted their challenged tax credit applications. *See* Pet. 4–5. Neither the prior, controlling version of the law nor petitioners' precertification letter contained the expenditure requirement. As the district court put it: "What qualified as an 'expenditure' and other spend requirements were at best unclear, inexact, carelessly administered, and confusing . . . (compounded by the discretion yielded by State administrators)." DE673:3 n.3; *see also* Pet. App. 93a n.8. Moreover, in 2009 the Louisiana legislature passed Act 530, confirming the Legislature's earlier designation of non-monetary contractual commitments as "expenditures" in House Concurrent Resolution 181. Act 530 specified that (i) only the 2007 law applied to any infrastructure credit applications, and (ii) contractual commitments were deemed eligible "expenditures" for determining base investment in infrastructure projects. *See* Hoffman Br., *United States v. Hoffman*, No. 16-30104, 2016 WL 7046238, at *10 & n.19 (5th Cir. Nov. 30, 2016); Supp. App. A & B (reproducing Act 530 and Resolution 181). The government ignored this law at trial and on appeal, and it repeats that error here. *See* DE549:71 (district court chastising the government for "talking about what's *now*" the law rather than the law applicable to petitioners, noting that this was "a very central issue" in the case (emphasis added)).

doubt that the defendant's statement is not true under a reasonable interpretation of law." *Whiteside*, 285 F.3d at 1351.

2. The government also argues that the law in the Fifth Circuit does not contradict the law in other courts because of its prior decision in *United States v. Jones*, 664 F.3d 966 (5th Cir. 2011), *cert. denied*, 566 U.S. 1035 (2012). *See* BIO 22. According to the government, *Jones* shows that the Fifth Circuit previously "*agreed* with the rule that petitioners seek and that some other courts of appeals have adopted." *Id.* But *Jones* is distinguishable: Unlike the cases petitioners cited as creating a circuit conflict, *Jones* rejected the same jury instructions that the district court and Fifth Circuit rejected below—i.e., petitioners' request to make clear that petitioners' good faith basis for their tax submissions was a complete defense to the charges. *See* Pet. 35–36. *Compare Jones*, 664 F.3d at 978–79; *with United States v. Migliaccio*, 34 F.3d 1517, 1523–24 (10th Cir. 1994). In other words, the Fifth Circuit believes, contrary to other courts of appeals, that someone can commit fraud even if they act consistently with a reasonable, good faith view of an ambiguous law. That is a square circuit conflict warranting this Court's review.

In any event, *Jones* concerned a federal fraud conviction based on statements made under an allegedly ambiguous *federal* law. Whatever the Fifth Circuit thinks about that circumstance, this case concerns a federal fraud conviction based on misstatements under an ambiguous *state* regulatory scheme. And the Fifth Circuit's rule is that the ambiguity of the Louisiana regulatory scheme at issue is irrelevant because

the federal fraud statutes under which petitioners were convicted were not themselves vague. App. 25a–26a. The government does not attempt to defend that legal rule, nor could it: There is no basis to hold that statements made under an ambiguous *state* regulatory scheme can support a federal fraud conviction while statements under an ambiguous federal scheme cannot. Yet that is exactly what the Fifth Circuit held. This Court should grant certiorari and reverse the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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