No.

In the Supreme Court of the United States

MATTHEW JOHN THEILER, PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a clear and acknowledged conflict over an important question of federal criminal law.

Under the rule of equipoise, a jury confronted with circumstantial evidence cannot convict based on an inference of guilt where the evidence equally supports a competing inference of innocent behavior. The en banc Fifth Circuit has flatly rejected the equipoise rule (allowing convictions despite equally compelling innocent inferences), whereas the opposite position is "entrenched" in other circuits (disallowing convictions in the same circumstances).

In proceedings below, petitioner was convicted of a healthcare-kickback conspiracy based on inferences from circumstantial evidence. Under controlling circuit law, the Fifth Circuit was required to ignore the competing innocent inferences from each key piece of evidence. Had the prosecution instead arisen in the First, Sixth, Seventh, Eighth, Tenth, or Eleventh Circuits, the innocent inferences would have been considered and petitioner's conviction presumably would have been reversed.

The question presented is:

Whether, when the evidence gives equal circumstantial support to a theory of guilt and a theory of innocence, courts must reverse because a rational jury would necessarily entertain reasonable doubt.

PARTIES TO THE PROCEEDING BELOW

Petitioner is Matthew John Theiler, the appellant below and defendant in the district court.

Respondent is the United States of America, the appellee below and plaintiff in the district court.*

RELATED PROCEEDINGS

United States District Court (E.D. Tex.):

United States of America v. *Matthew John Theiler*, No. 6:22-CR-3-JDK-JDL(2) (Nov. 21, 2024)

United States Court of Appeals (5th Cir.):

United States v. *Matthew John Theiler, et al.*, No. 24-40779 (July 7, 2026) (panel decision)

United States v. *Matthew John Theiler, et al.*, No. 24-40779 (Aug. 18, 2026) (rehearing denial)

* The Fifth Circuit below sua sponte consolidated petitioner's appeal with separate appeals from defendants-appellants Susan L. Hertzberg, David Weldon Kraus, and Thomas Gray Hardaway. While those parties may independently seek review of the Fifth Circuit's judgment, those parties are not participating in this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Matthew John Theiler respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-44a) is reported at 180 F.4th 806. The opinion and order of the district court (App., *infra*, 45a-100a) is unreported but available at 2024 WL 3730272.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2026. A petition for rehearing was denied on August 18, 2026 (App., *infra*, 101a-102a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the United States Constitution, Amend. V, provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * * .

INTRODUCTION

This petition raises a question of exceptional importance in a key area of federal criminal law. Under the so-called "equipoise rule," a 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."'" *United States* v. *Vargas-Ocampo*, 747 F.3d 299, 300-301 (5th Cir. 2014) (en banc). Although the Fifth Circuit has rejected "the 'equipoise rule'" (*id.* at 301-302), other circuits have not. See, *e.g.*, *United States* v. *Lovern*, 590 F.3d 1095, 1107 (10th Cir. 2009) (Gorsuch, then-J.) ("where, 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'").

This case easily satisfies the traditional criteria for further review. It implicates a direct, acknowledged circuit conflict: "We note our sister circuits are divided on how the equipoise principle informs sufficiency review." *United States* v. *Goldesberry*, 128 F.4th 1183, 1193 n.6 (10th Cir. 2025). The issue is entrenched in multiple circuits. Two of those courts considered the question en banc—underscoring its obvious significance. The issue implicates a fundamental question of federal criminal law in an area generating unnecessary confusion and uncer-

tainty. And the disparate holdings nationwide produce intolerable disuniformity. The constitutional sufficiency standard should not vary by geography. Yet as it now stands, convictions based on circumstantial evidence may survive or fall depending on the happenstance of where a case is prosecuted.

This case perfectly tees up this important legal question. Petitioner was convicted of a single charge under 18 U.S.C. 371 of "conspir[ing]" to violate the Anti-Kickback Statute by "knowingly and willfully" offering or receiving "kickback[s]" involving "a Federal health care program." 42 U.S.C. 1320a-7b(b). As the district court confirmed below, the conviction was based on "circumstantial evidence" supporting an "infer[ence]" that petitioner "knew of and 'perpetrated [the conspiracy].'" App., *infra*, 71a.

Because the government had no direct evidence of wrongdoing, it focused instead on petitioner's ordinary corporate activity, each with a facially legitimate objective. Petitioner was the Vice President of Sales and Marketing. He engaged in routine corporate transactions; he supervised a sales team; he met with important corporate clients. Yet because *that* sales team and *those* clients were secretly engaged in a conspiracy, the government *presumed* petitioner was also conspiring—even though the evidence was equally consistent with valid business activity, and despite no basis for excluding each competing innocent inference. Notwithstanding these shortcomings, the jury convicted petitioner and the Fifth Circuit affirmed.

In faithfully applying circuit precedent, the panel did not discuss the (many) competing innocent inferences from each key piece of evidence—literally saying nothing about them. While the panel was correct under circuit law to brush those inferences aside, other circuits would have

featured them in the sufficiency analysis—with the result predictably coming out the other way.

This case now presents an ideal opportunity for this Court to finally decide the correct legal standard and remand for a do-over if the equipoise rule applies. Because it is past time to resolve this important question of federal law, the petition should be granted.

STATEMENT

1. For purposes of this petition, the relevant facts are limited and straightforward. Petitioner was the former Vice President of Sales and Marketing at Boston Heart. Along with multiple co-defendants, he was convicted of a conspiracy to "pay doctors for patient referrals." App., *infra*, 2a-3a. That conspiracy was conducted thousands of miles away at the local level in Texas: it involved rural Texas hospitals, a local Boston Heart Texas-based sales team, local Texas Management Service Organizations (MSOs), and local Texas physicians—who ultimately accepted bribes from the conspirators to refer laboratory testing to Boston Heart. See *id.* at 2a-6a.

Although this conspiracy originated from the bottom, the government also targeted petitioner and other executives at Boston Heart. As the district court recognized, petitioner played a minor role at best. Petitioner was not a "central architect" of the scheme. C.A. ROA.13728. The conspiracy started without him and continued without him. C.A. ROA.13730. He did not "operate or interact directly with any of the MSOs" or "recruit physicians to join the scheme." C.A. ROA.13730. He oversaw the sales representatives (per his actual job), but those employees "were the ones who were at the center of the scheme and stayed involved both before and after [petitioner]." C.A. ROA.13744. And petitioner's reputation and background

were flawless: he otherwise "[n]ever got close to the line of fraudulent activity." C.A. ROA.13755.

The government's core evidence targeted legitimate activities in the ordinary course of business: "[Petitioner] had frequent meetings and communications with his fellow conspirators and received regular updates regarding the progress of the conspiracy." C.A. ROA.7000. In translation (from the face of the government's cited exhibits): petitioner frequently met and communicated *with his sales team* and received regular updates about *their company-related activities*. The government did not cite any evidence that these meetings, contacts, or updates explicitly involved any illicit activity. Each incriminating inference required reading between the lines—while petitioner's conduct is exactly what one would expect from a responsible corporate officer conducting *legitimate corporate business*.

2. After an extensive trial, petitioner was convicted together with four other defendants for engaging in a conspiracy to violate the AKS. The district court subsequently denied petitioner's motion for acquittal (App., *infra*, 45a, 71a-74a). It did not identify any direct evidence of wrongdoing. But it felt "there was enough circumstantial evidence" for a jury to "infer" petitioner joined the conspiracy. *Id.* at 71a.

3. a. A panel of the Fifth Circuit affirmed. App., *infra*, 1a-44a. It recognized petitioner's objection that the verdict rested on inferences from "legitimate activities in the ordinary course of business." *Id.* at 26a. But the panel focused instead on the incriminating inferences—while not even mentioning the competing innocent inferences. The panel ultimately listed six factors supposedly supporting the conviction, without any indication whether some or all were necessary to sustain the conviction. *Ibid.* And the bulk of its analysis turned on guilty inferences inferred

from petitioner's ordinary corporate activity: his "position of authority"; his "experience in the healthcare field"; and his "proximity to fraudulent activities"—largely turning on his work with his sales team (who were conspiring without his knowledge) and his interaction with corporate clients (who happened to be involved in the conspiracy). See *id.* at 26a-31a.

b. Petitioner sought rehearing to give the Fifth Circuit "another opportunity to revisit the [equipoise] rule—or confirm its contrary position is indeed entrenched as law of the Fifth Circuit." C.A. Reh'g Pet. 10. The circuit denied rehearing without a vote or any dissent. App., *infra*, 101a-102a.

REASONS FOR GRANTING THE PETITION

A. There Is A Clear And Intractable Conflict Over A Significant Question Of Federal Criminal Law

The decision below further cements a widespread conflict over a fundamental question of federal criminal law. Under the "equipoise rule," a 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, 300-301 (5th Cir. 2014) (en banc). The Fifth Circuit went en banc to flatly reject the equipoise rule (*id.* at 301-302), whereas the opposite position is now "entrenched" in other circuits. *United States* v. *Simon*, 12 F.4th 1, 32 (1st Cir. 2021) (reaffirming "the equipoise principle"); see also, *e.g.*, *United States* v. *Lovern*, 590 F.3d 1095, 1107 (10th Cir. 2009) (Gorsuch, then-J.) (adopting the rule because "'a reasonable jury *must necessarily entertain* a reasonable doubt'" where "'the evidence * * * gives equal or nearly equal circumstantial support" for guilt or innocence). The conflict is deep and acknowledged, and there

is no chance it will dissipate on its own. *United States* v. *Goldesberry*, 128 F.4th 1183, 1193 n.6 (10th Cir. 2025) ("our sister circuits are divided on how the equipoise principle informs sufficiency review") (detailing extensive conflict).

Until this Court intervenes, a criminal conviction will stand or fall based on the happenstance of where a case is prosecuted. The stark division over such a fundamental question is untenable. Courts need guidance on how to apply this Court's sufficiency standard, and a definitive answer is long overdue. The circuit conflict is undeniable and entrenched, and it should be resolved by this Court.

1. a. The Fifth Circuit's position directly conflicts with settled law in the Tenth Circuit. In *Lovern*, *supra*, the Tenth Circuit confronted the same situation presented here (circumstantial evidence pointing equally in opposite directions), and it applied the equipoise rule to reverse the conviction: "where, 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.'" 590 F.3d at 1107 (quoting *United States* v. *Caseer*, 399 F.3d 828, 840 (6th Cir. 2005)).

In *Lovern*, a pharmacy's computer technician was convicted of a conspiracy to distribute drugs and distributing drugs by "fill[ing] prescriptions issued without a legitimate medical purpose or in defiance of professional standards." 590 F.3d at 1098. The pharmacy's "principal owner-operator" admitted to the conspiracy and pled guilty, but the technician—"a high school drop-out with no experience in the medical or pharmaceutical fields"—maintained that he was unaware of the unlawful conduct. *Id.* at 1097-1098.

Because the government had no "direct evidence that [the technician] possessed the [necessary] *mens rea*," the government instead "s[ought] to rely on inferential proof." 590 F.3d at 1105. As "perhaps [its] strongest piece of evidence," the government identified an "instant message conversation" where the technician stated "he didn't want the expiration to run on several drugs that had been sitting at [the pharmacy]," so he "solicited" "more business with this line: 'Hook a brother up on scripts. I need some fake customers please. Mahahahaha.'" *Id.* at 1106-1107.

The court acknowledged "one could surely infer" from "this message" that the technician "knew that something was fishy" at the pharmacy. 590 F.3d at 1107. But, the court explained, "the instant message leaves a reasonable fact-finder with a number of equally reasonable inferences" regarding "what [the technician] might have thought was illicit"—including problems having nothing to do with the *specific conspiracy charged*. *Id.* at 1107 (detailing plausible alternatives). This failing was dispositive under the equipoise rule: "Even viewing the [instant] 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." *Ibid.* As a result, the court found, "'a reasonable jury *must necessarily entertain* a reasonable doubt'": "the jury simply had no non-speculative reason to favor any one of these explanations over the others." *Ibid.*

The court accordingly held that "the evidence [was] legally insufficient to support" the conviction. 590 F.3d at 1109. Had the prosecution instead proceeded in the Fifth Circuit, the court would have reached the opposite result. See, *e.g.*, *United States* v. *Garcia-Martines*, 624 F. App'x 874, 879 n.12 (5th Cir. 2015) ("this court no longer adheres to the so-called 'equipoise rule,' which would require this

court to reverse a conviction if the evidence construed in favor of the verdict provides equal or nearly equal circumstantial support of guilt or innocence") (citing *Vargas-Ocampo*, 747 F.3d at 300-302); contra *United States* v. *Smith*, 135 F.4th 905, 913-914 (10th Cir. 2025) (reaffirming equipoise rule under *Lovern*: "Because each inference was just as likely as the others, it was impossible for a jury to find guilt beyond a reasonable doubt."); *Goldesberry*, 128 F.4th at 1193, 1195 n.7, 1197, 1198-1199 ("we evaluate the parties' arguments by applying the familiar sufficiency standard, including the equipoise principle expressed in *Lovern*"; reversing conviction because the "evidence supports a theory [defendant] acted by mistake at least as much—if not more than—a theory [defendant] acted with knowledge").[1]

b. The Fifth Circuit's position also conflicts with established law in the First Circuit. In *United States* v. *Rodriguez-Martinez*, 778 F.3d 367 (1st Cir. 2015), for example, the court vacated the convictions of two brothers-in-law for drug trafficking and firearms. 778 F.3d at 372-373, 374-375. The defendants were driving together when they were pulled over for a traffic violation, and police ultimately found drugs on one brother (Santini) and a firearm on the other (Rodriguez). *Id.* at 372. But the prosecution had a problem: it had no direct evidence that either was aware of the other's contraband. *Id.* at 372-373 (drugs), 373-374 (firearm).

To fill this gap, the government instead turned to circumstantial evidence. As the court explained, the govern-

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[1] Underscoring the conflict and confusion, not every Tenth Circuit judge agrees with that circuit's own settled authority. See *Goldesberry*, 128 F.4th at 1205-1206 (Eid, J., dissenting) (refusing to "accept[] the equipoise theory as doctrinally correct"; "[s]everal circuits have rejected this doctrine entirely, and for good reason").

ment "point[ed] most strongly to Rodriguez's nervous behavior after he exited the car to support his knowledge of, and involvement in, Santini's drug trafficking." 778 F.3d at 372. But this inference ignored a "competing, alternative explanation for Rodriguez's nervous demeanor": "he was in possession of a firearm that he had purchased, illegally, at a housing project and for which he lacked a permit." *Ibid.* The "evidence of nervous behavior" thus "permit[ted] two equally plausible inferences." *Id.* at 373. "Without additional circumstantial evidence from which the jury could rationally infer that one [inference] was more supportable than the other," the court concluded that "'a reasonable jury must necessarily entertain a reasonable doubt.'" *Ibid.* (quoting *United States* v. *Andujar*, 49 F.3d 16, 20 (1st Cir. 1995)).

Accordingly, like the Tenth Circuit, but unlike the Fifth Circuit, courts in the First Circuit "'must reverse a conviction on the grounds of evidentiary insufficiency where 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 verdict.'" 778 F.3d at 373; accord *United States* v. *Munoz-Martinez*, 79 F.4th 44, 55-56 (1st Cir. 2023) (so holding; reversing conviction); *United States* v. *Lopez-Diaz*, 794 F.3d 106, 111, 118 (1st Cir. 2015) (so holding; reversing conviction); *United States* v. *Burgos*, 703 F.3d 1, 10, 12-13 (1st Cir. 2012) (so holding; reversing conviction); contra, *e.g.*, App., *infra*, 21a ("'the jury is free to choose among reasonable constructions of the evidence'").

In short, "the equipoise principle is entrenched in th[e First] [C]ircuit's jurisprudence." *Simon*, 12 F.4th at 32. Contrary to the Fifth Circuit's approach, "[w]hen a jury is confronted, as here, with equally persuasive theories of guilt and innocence it cannot rationally find guilt beyond

a reasonable doubt." *Andujar*, 49 F.3d at 20, 22 (reversing conviction).

c. In *United States* v. *Johnson*, 592 F.3d 749 (7th Cir. 2010), the Seventh Circuit also embraced the equipoise rule: the government cannot ask a "jury * * * to choose between two equally plausible inferences" without violating "a fundamental principle of criminal law: the requirement that the government prove the defendant guilty beyond a reasonable doubt." 592 F.3d at 755. "In th[at] situation," the court determined, "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." *Ibid.* (citing, *e.g.*, *Lovern*, *supra*). The Fifth Circuit, by contrast, takes the opposite approach: the jury is free to credit any competing inference so long as the inference itself is plausible; the alternative inference (even where "equally plausible") becomes irrelevant. *Vargas-Ocampo*, 747 F.3d at 301, 303 (even where "each incriminating inference" had "a benign explanation," "the jury was entitled to weigh this circumstantial evidence, drawing inferences for or against" defendant); App., *infra*, 21a (permitting the jury to "'choose among reasonable constructions'").[2]

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[2] The *Johnson* panel applied the equipoise rule in the context of deciding whether a defendant engaged in "a drug-distribution conspiracy" or "nonconspiratorial drug dealing." 592 F.3d at 752. As the court explained, a drug-distribution conspiracy "cannot be sustained *solely* on circumstantial evidence" without some basis for "distinguish[ing] the alleged conspiracy from the underlying buyer-seller relationship." *Id.* at 755. The prosecution thus cannot rely on circumstantial proof generating "two equally plausible inferences": "On the 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

d. The Eleventh Circuit has likewise long followed the majority approach: "if the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, then a reasonable jury must necessarily entertain a reasonable doubt." *Cosby* v. *Jones*, 682 F.2d 1373, 1383 (11th Cir. 1982); accord *United States* v. *Louis*, 861 F.3d 1330, 1333 (11th Cir. 2017).

In *Cosby*, the Eleventh Circuit rejected a burglary conviction where the government relied on the defendant's "unexplained possession" of stolen goods as circumstantial proof of the burglary itself. 682 F.2d at 1379. The court declared that proof insufficient: "Absent some type of corroborating evidence or circumstances, the most that we can say from the bare fact of possession and pawning of the stolen camera a day or two after the burglary is that it gives equal support to an inference of burglary and an inference that Cosby was fencing stolen goods." *Id.* at 1383. Faced with those "conflicting inferences," "a reasonable jury must necessarily entertain a reasonable doubt." *Ibid.*

In so holding, the court directly squared its rationale with *Jackson*'s sufficiency standard. 682 F.2d at 1383 & n.21. As the court explained, "[t]his is not to say that whenever the evidence supports a reasonable inference consistent with innocence the jury must acquit" (*id.* at 1383), just as "the simple fact that the evidence gives some support to the defendant does not demand acquittal" (*id.*

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drugs to others." *Ibid.* The Seventh Circuit later rejected this specific holding, declaring that "repeated, distribution-quantity drug transactions alone can sustain a conspiracy conviction." *United States* v. *Page*, 123 F.4th 851, 856-857 (7th Cir. 2024) (en banc). But in choosing between the viability of those *specific* contrary inferences, the en banc court did not cast doubt on the equipoise rule itself.

at 1383 n.21). The court must first "view[] the evidence in its most favorable light" and "mak[e] all credibility decisions in favor of the state." *Id.* at 1383. But "when the choice between guilt and innocence from 'historical' or undisputed facts reaches a certain degree of conjecture and speculation, then the defendant must be acquitted"—and "this degree of inferential attenuation is reached at the least when the undisputed facts give equal support to inconsistent inferences." *Id.* at 1383 n.21. Any lesser standard would mean "the prosecution would only fail in its proof where there was a total absence of probative evidence, which is the 'no evidence' standard rejected in *Jackson*" itself. *Ibid.*

The Eleventh Circuit has consistently followed this approach for decades. See, *e.g.*, *Louis*, 861 F.3d at 1333-1334 (rejecting narcotics conviction where circumstantial evidence gave rise to equal inference of alternative conduct).

e. Finally, both the Sixth Circuit and Eighth Circuit have adopted the equipoise rule. See, *e.g.*, *United States* v. *Caseer*, 399 F.3d 828, 840 (6th Cir. 2005) ("All conflicts in testimony are resolved in the government's favor, and every reasonable inference is drawn in favor of the government. As the [pre-en banc] Fifth Circuit has accurately overserved, 'If the evidence, however, 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.'") (citation omitted); *United States* v. *Wright*, 835 F.2d 1245, 1249 n.1 (8th Cir. 1987) (same; citing, *e.g.*, the Eleventh Circuit's decision in *Cosby*, *supra*); see also *United States* v. *Davis*, 103 F.3d 660, 667 (8th Cir. 1996) ("'[W]here the government's evidence is equally strong to infer innocence as to infer

guilt, the verdict must be one of not guilty and the court has a duty to direct an acquittal.'").

2. a. The Fifth Circuit's position is diametrically at odds with the legal standard applied in these circuits. Although the Fifth Circuit originally adopted the equipoise rule, it repudiated its prior decisions sitting en banc in *Vargas-Ocampo*. 747 F.3d at 301 (expressly "abandon[ing] use of the 'equipoise rule'"). It now restricts courts to reviewing "whether the inferences drawn by a jury were rational" (*id.* at 302) and, unlike other circuits, precludes any consideration of competing "benign" inferences (*id.* at 303). Under the Fifth Circuit's approach, juries alone are "entitled to weigh" "circumstantial evidence" and "draw[] inferences for or against" a defendant. *Id.* at 303; see also *id.* at 301 (requiring courts to accept "all reasonable inferences in the light most favorable to the prosecution").[3]

The Fifth Circuit has since consistently "reiterate[d]" that it "no longer adheres to the so-called 'equipoise rule,' which would require this court to reverse a conviction if the evidence construed in favor of the verdict provides equal or nearly equal circumstantial support of guilt or innocence." *United States* v. *Garcia-Martines*, 624 F. App'x 874, 879 n.12 (5th Cir. 2015); see also, *e.g.*, *United States* v. *Meyer*, 63 F.4th 1024, 1035 & n.7 (5th Cir. 2023) (same); *United States* v. *Milton*, 670 F. App'x 341, 341-342 (5th Cir. 2016) (same); cf. *United States* v. *Williams*, 796 F. App'x 848, 849 (5th Cir. 2020) ("'[w]here there are two permissible views of the evidence, the factfinder's choice be-

[3] In so holding, the Fifth Circuit did not explain how a jury could rationally accept one inference without an articulable basis for excluding a competing inference. It simply directed courts to presume the jury alone was empowered to choose between any plausible inferences from circumstantial evidence.

tween them cannot be clearly erroneous'"; invoking *Vargas-Ocampo* for support). This cemented holding cannot be squared with the contrary rule in the First, Sixth, Seventh, Eighth, Tenth, or Eleventh Circuits.

b. Like the Fifth Circuit, however, the Third Circuit has rejected the equipoise rule. In *United States* v. *Caraballo-Rodriguez*, 726 F.3d 418 (3d Cir. 2013) (en banc), the court initially framed the importance of the general inquiry: "The way courts—our Court and district courts—review challenges leveled at the sufficiency of the evidence in criminal trials is a fairly basic topic upon which many courts have expounded." 726 F.3d at 424. Then in "grappl[ing] with how to faithfully adhere" to a proper sufficiency analysis (*id.* at 425), the court deemed the equipoise rule inappropriate: "Reversing the jury's conclusion simply because another inference is possible—or even equally plausible—is inconsistent with the proper inquiry for review of sufficiency of the evidence challenges." *Id.* at 432.

In the Third Circuit's view, unlike the majority approach, "[i]t is up to the jury—not the district court judge or our Court—to examine the evidence and draw inferences. Unless the jury's conclusion is irrational, it must be upheld." 726 F.3d at 432.

3. For its part, the Second Circuit has alternated between both sides of the split. On the one hand, it has endorsed the equipoise principle: "*Jackson* requires that a rational juror be able to find the defendant guilty beyond a reasonable doubt," and "if the evidence viewed in the light most favorable to the prosecution gives 'equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence,' then 'a reasonable jury must necessarily entertain a reasonable doubt.'" *United States* v. *Glenn*, 312 F.3d 58, 70 (2d Cir. 2002) (citing, *e.g.*, *Andujar*, *supra* (First Circuit), *Wright*, *supra* (Eighth

Circuit), *Cosby*, *supra* (Eleventh Circuit)); see also, *e.g.*, *United States* v. *Hawkins*, 547 F.3d 66, 71 (2d Cir. 2008) (same; quoting *Glenn*).

On the other hand, other panels have minimized or rejected the equipoise principle: "the equipoise rule 'is of "no matter to sufficiency analysis because it is the task of the jury, not the court, to choose among competing inferences."'" *United States* v. *White*, 7 F.4th 90, 103 (2d Cir. 2021) (faulting the district court for invoking *Glenn*); see also *United States* v. *Aquart*, 912 F.3d 1, 45 & n.31 (2d Cir. 2018) (same and citing *Vargas-Ocampo*, *supra* (Fifth Circuit) and *Caraballo-Rodriguez*, *supra* (Third Circuit) as "abandoning equipoise-rule equivalent").

And yet still other panels have acknowledged the government's efforts to dislodge the equipoise rule and left the question for another day. See, *e.g.*, *United States* v. *Spencer*, 646 F. App'x 6, 11 (2d Cir. 2016) (sidestepping issue after noting "[t]he government maintains that *Glenn* cannot be construed to impose a stricter review standard than that pronounced by the Supreme Court in *Jackson* v. *Virginia*, and that our sister circuits have expressly rejected the equipoise standard"); *United States* v. *Cannon*, 636 F. App'x 30, 32 (2d Cir. 2016) (same).

Parties in the Second Circuit thus have no real clue which standard (on a case-dispositive constitutional question) will be applied in criminal actions. Like the broader circuit conflict, this rampant uncertainty—over an issue that arises frequently in criminal prosecutions nationwide—is intolerable.

* * *

The conflict over this fundamental criminal-law issue is as clear as it gets. The circuits are in complete disarray. Multiple circuits have firmly adopted and applied the equipoise rule; two other circuits (sitting en banc) have expressly rejected the rule. The Second Circuit alternates

back and forth. The debate has been fully exhausted at the circuit level, and additional percolation is pointless: one approach is correct and the other is wrong, and the few remaining circuits are left to simply pick sides. There is no realistic prospect that this conflict will somehow resolve itself.

Until this Court intervenes, the deep confusion over this important question will persist, and criminal convictions will turn on the geographic location of the prosecution. The constitutional sufficiency standard should not turn on the happenstance of where a dispute arises. This Court's immediate review is warranted.

B. The Question Presented Is Exceptionally Important And Warrants Review In This Case

1. The question presented is of obvious legal and practical importance. The sufficiency standard is the constitutional check on unlawful convictions. *In re Winship*, 397 U.S. 358, 361-362 (1970). It "'plays a vital role in the American scheme of criminal procedure.'" *Jackson* v. *Virginia*, 443 U.S. 307, 315 (1979). The circuits are squarely divided over the proper application of that critical standard. The Fifth Circuit went en banc to reject the equipoise rule, and it has since refused to reconsider its position. *E.g.*, *Meyer*, 63 F.4th at 1035 & n.7. The opposite rule is "entrenched" in other circuits. *Simon*, 12 F.4th at 32. This issue affects the validity of convictions in countless cases—as confirmed by the extensive sweep of circuit law on this subject. The existing uncertainty and confusion unduly distracts courts and parties alike. *E.g.*, *United States* v. *Stavrakis*, No. 20-4149, 2022 WL 563242, at *7 (4th Cir. Feb. 24, 2022) ("The parties spend much of their briefing addressing [the equipoise] doctrine and a purported disagreement among the circuits as to its vitality."). So long

as this conflict persists, it will continue inviting the untenable situation where federal convictions stand or fall based entirely on the location of the prosecution.

The government will predictably downplay the issue's significance. But the fact remains that the government itself has repeatedly pressed courts to revisit their precedent and follow the contrary standard applied in a minority of circuits. *E.g.*, *Spencer*, 646 F. App'x at 11; *Cannon*, 636 F. App'x at 32. The government would not waste its time if the question were not consequential in a meaningful way. Nor would multiple circuits devote their limited bandwidth to en banc proceedings were the question of doubtful significance. And the question in fact warrants obvious attention: prosecutions often turn on circumstantial evidence, and that evidence can indeed give rise to competing inferences. There is a profound need for this Court's guidance in this critical area. *E.g.*, *Goldesberry*, 128 F.4th at 1191 (the general sufficiency "standard is well settled and oft stated, but what does it mean, *really*?"); *Burgos*, 703 F.3d at 10 ("'Despite the importance of the reasonable doubt standard in safeguarding the rights of criminal defendants, the term has eluded clear definition.'").

And this case perfectly illustrates that need. The panel below focused on the government's (proffered) reading of each event, while ignoring entirely petitioner's competing explanations—as the panel was required to do under existing Fifth Circuit precedent. *Vargas-Ocampo*, 747 F.3d at 300-302; App., *infra*, 21a. Yet had this case arisen in other circuits, the government would have lost: petitioner's conduct was equally consistent with legitimate business activity in a corporate environment. No rational juror, beyond a reasonable doubt, could look at the evidence "'giv[ing] equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence'" and

still convict (*e.g.*, *Lovern*, 590 F.3d at 1107 (Gorsuch, then-J.))—with no direct evidence of any wrongdoing and no basis for excluding the innocent inference.[4]

It is "important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty." *Winship*, 397 U.S. at 364. Per its ordinary practice, the Fifth Circuit below assessed sufficiency under a constitutionally defective standard. Further review is now imperative to restore the proper constitutional backstop.

2. This case is a sound vehicle for deciding this significant question. The dispute turns on a pure question of law: the validity of the equipoise rule in assessing constitutional sufficiency. Petitioner raised the issue below (App., *infra*, 26a (so acknowledging)),[5] and it is squarely presented on these facts: the district court found petitioner's conviction turned on "circumstantial evidence" permitting an "infer[ence]" that petitioner "knew of and 'perpetrated

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[4] Indeed, if this case arose in an analogous civil context (looking at alleged illicit agreements), the government would again lose: "the Supreme Court has cautioned against drawing an inference of conspiracy from evidence that is equally consistent with independent conduct." *United States* v. *Apple, Inc.*, 791 F.3d 290, 315 (2d Cir. 2015) (citing *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 597 n.21 (1986)). An "inference of conspiracy [must be] reasonable in light of the competing inferences of independent action" (*Matsushita*, 475 U.S. at 588), and the government must proffer "evidence that tends to exclude the possibility" of innocent behavior. *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). There is little reason the government should prevail under a *higher* criminal standard when it would fail under a lower civil threshold.

[5] Indeed, petitioner expressly preserved this issue in his opening brief and reiterated the challenge at the rehearing stage. See C.A. Opening Br. 11 n.1; C.A. Reh'g Pet. vii-viii, 1, 8-10.

[the conspiracy].'" *Id.* at 71a. The panel recognized petitioner's challenge without once suggesting the evidence was not in equipoise or competing innocent inferences did not exist. It instead listed a series of circumstantial factors and ignored petitioner's competing inferences of equal strength—as it was required to do under binding circuit authority. *Id.* at 26a-31a.

The government will predictably seek to avoid review by insisting the evidence supports the verdict—while citing its preferred inferences and ignoring each competing alternative. Yet the government will have no answer for the reality that the Fifth Circuit necessarily applied the minority standard in conducting its sufficiency analysis. If the government believes it can win without the Fifth Circuit's incorrect rule, it can always make its case on remand. But that is no reason not to decide the controlling legal standard in this case.

In short: there is no need for this Court to waste any time wading into the record. It need only decide whether the equipoise rule applies and remand for a proper analysis if it does. But it is past time to resolve the intractable conflict over the equipoise rule. And there is no obstacle to deciding that important legal question in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2026