No. 18-1049

In the Supreme Court of the United States

PETER M. HOFFMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether sufficient evidence supported petitioners' convictions for conspiracy to commit mail and wire fraud, wire fraud, mail fraud, and making false statements in connection with cost reports that they submitted to obtain tax credits under Louisiana law.

2. Whether petitioners' convictions for fraud in connection with Louisiana's tax-credit scheme must be vacated on the theory that state law's regulatory requirements were unclear.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-83a) is reported at 901 F.3d 523. The order of the district court (Pet. App. 84a-220a) is not published in the Federal Supplement but is available at 2015 WL 8306094.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 2018. A petition for rehearing was denied on October 10, 2018 (Pet. App. 237a-239a). On December 18, 2018, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including February 7, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner

Peter Hoffman was found guilty on one count of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. 371; 19 counts of wire fraud, in violation of 18 U.S.C. 1343; and one count of mail fraud, in violation of 18 U.S.C. 1341. Pet. App. 110a. Petitioner Michael Arata was found guilty on one count of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. 371; seven counts of wire fraud, in violation of 18 U.S.C. 1343; one count of mail fraud, in violation of 18 U.S.C. 1341; and four counts of making false statements, in violation of 18 U.S.C. 1001. *Ibid.* Petitioner Susan Hoffman was found guilty on one count of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. 371; one count of wire fraud, in violation of 18 U.S.C. 1343; and one count of mail fraud, in violation of 18 U.S.C. 1341. *Ibid.*

The district court granted petitioners' motions for judgments of acquittal on some counts, but denied the motions on other counts. Pet. App. 14a-15a. Peter Hoffman was sentenced to five years of probation; Arata was sentenced to four years of probation; and Susan Hoffman sentenced to three years of probation. *Id.* at 15a; Judgment as to Peter M. Hoffman 2, 4; Judgment as to Michael P. Arata 2-3; Judgment as to Susan Hoffman 2, 4. The court of appeals affirmed in part, reversed in part (reinstating the verdict except as to one false-statement count), and vacated Peter Hoffman's and Arata's sentences. Pet. App. 1a-83a.

1. Louisiana created the motion picture investor tax credit, La. Rev. Stat. Ann. § 47:6007 (2009), to encourage investment in the local motion-picture industry. Pet. App. 3a, 90a, 244a. Under the statute, investors received income-tax credits for expenditures on film infrastructure projects and productions in Louisiana. *Id.*

at 5a-6a. To enable investors who did not owe Louisiana taxes to benefit, the statute allowed recipients to sell their tax credits to others. See *id.* at 10a.

An applicant who sought tax credits had to follow a two-step process. First, he had to obtain a "precertification letter" from the State approving the project. Pet. App. 6a. Then, he had to submit a cost report tallying his expenditures, along with an audit from an independent accountant. *Ibid.* After reviewing those materials, the State would decide whether to issue the credits—which were tied to "the actual investment made and expended." Pet. App. 245a; see *id.* at 252a.

2. Petitioners owned and jointly operated a film company called Seven Arts Pictures Louisiana, LLC (Seven Arts). Pet. App. 4a. Through Seven Arts and other film companies, petitioners bought a dilapidated mansion on Esplanade Avenue in New Orleans, intending to renovate it and turn it into a post-production film studio. *Ibid.* They applied for tax credits for the Esplanade project under Louisiana law. *Ibid.*

Arata submitted Seven Arts' initial film-credit application to the State in October 2007, and the State responded with a precertification letter in May 2008. Pet. App. 7a, 97a. The "purpose of this letter" was to provide "general guidelines" for the receipt of tax credits, "in accordance with statutory law." *Ibid.* (citation omitted). The letter explained that, "to qualify for these credits, all funds invested must actually be expended on the state-certified infrastructure project." *Id.* at 100a (citation omitted). The letter further explained that, although Seven Arts' application had estimated the anticipated expenditures on the project, "final certification and granting of tax credits * * * will be based on * * *

the actual amount expended by the project," verified by an audit conducted by an independent accountant. *Ibid.*

During the next several years, petitioners made multiple misrepresentations to trick auditors and state authorities into believing that Seven Arts had made payments that "were not really payments at all." Pet. App. 29a; see *id.* at 9a, 154a-155a. For example, Peter Hoffman and Arata engaged in a series of "circular transactions" that made it appear that Seven Arts had spent money that it had not actually spent. *Id.* at 9a. They began by opening bank accounts in the name of a film-studio owner and a general contractor. *Id.* at 102a. Arata then took out a loan for $400,000, placed the money in Seven Arts' bank account, and "bounce[d] the proceeds of this loan back and forth five times" between Seven Arts' account and the studio-owner's account—making it appear that Seven Arts had paid the studio owner more than $1 million "to pay for film equipment." *Id.* at 102a-103a. Seven Arts conducted similar transactions with the same loan "to make it appear as if" the project's general contractor "had been paid" nearly $1.5 million "for construction." *Id.* at 103a.

Petitioners also altered Seven Arts' general ledger so that it would reflect a "supposed capital contribution" of more than $7 million from Seven Arts' parent company. Pet. App. 30a; see *id.* at 9a. The entry "made it appear to the auditors and the State that the parent company transferred money for equipment and construction into the [Seven Arts] operating account." *Id.* at 103a.

In addition, petitioners created and submitted "fake invoices." Pet. App. 8a. For example, Peter Hoffman sent the auditors an "invoice" that was in reality only a "dream list" of equipment needed for the Esplanade

project. *Id.* at 29a. Similarly, Susan Hoffman convinced a contractor to sign an invoice for "fees [that] were not actually paid" by telling him "that the document 'was just for Peter's own records.'" *Id.* at 11a (brackets omitted). Susan Hoffman also certified "fiction[al]" expenditures on "management fees" and "inflated bill[s]" for "office space." *Id.* at 31a.

Petitioners obtained misleading audits from auditing firms that unwittingly relied on those and other misrepresentations, and then used those audits to obtain tax credits from Louisiana. Arata submitted Seven Arts' first cost report and audit to the State in 2009, claiming roughly $6.5 million in expenditures. Pet. App. 104a. The State certified the expenditures and paid Seven Arts over $1.1 million in tax credits. *Id.* at 10a.

Peter Hoffman then filed Seven Arts' second cost report in 2010, claiming additional expenditures of almost $6 million. Pet. App. 10a. This time, state officials asked a forensic accountant to review the first as well as the second cost reports. *Id.* at 11a-12a. The forensic accountant found irregularities in both reports, prompting Seven Arts' own auditors to withdraw their audits of those reports. *Id.* at 12a. The withdrawal, in turn, led the State to revoke the previously issued tax credits, refuse to issue new credits, and refer the matter to the state inspector general. *Ibid.*

In 2012, Seven Arts filed a third cost report, which had been reviewed by a new auditing firm that Seven Arts did not inform about the circular transactions. Pet. App. 12a; Gov't C.A. Br. 20. Although the new audit did not support the figures in the cost reports that petitioners had submitted, the State relied on its findings in reissuing the tax credits that it had previously revoked,

"thereby avoiding punishment of third-party purchasers of Seven Arts' credits." Pet. App. 13a. In the meantime, however, the state inspector general enlisted the help of the Federal Bureau of Investigation to review Seven Arts' submissions. *Ibid.*

3. A grand jury in the United States District Court for the Eastern District of Louisiana indicted Peter Hoffman on one count of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. 371; 19 counts of wire fraud, in violation of 18 U.S.C. 1343; and one count of mail fraud, in violation of 18 U.S.C. 1341. Second Superseding Indictment 4-15. It indicted Arata on one count of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. 371; 19 counts of wire fraud, in violation of 18 U.S.C. 1343; one count of mail fraud, in violation of 18 U.S.C. 1341; and four counts of making false statements, in violation of 18 U.S.C. 1001. Second Superseding Indictment 4-15. And it indicted Susan Hoffman on one count of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. 371; 15 counts of wire fraud, in violation of 18 U.S.C. 1343; and one count of mail fraud, in violation of 18 U.S.C. 1341. Second Superseding Indictment 4-15.

Following an 11-day trial, a jury found Peter Hoffman guilty on all 21 counts. Pet. App. 110a. It found Arata guilty on one count of conspiracy, seven counts of wire fraud, one count of mail fraud, and four counts of making false statements. *Ibid.* And it found Susan Hoffman guilty on one count each of conspiracy, wire fraud, and mail fraud. *Ibid.*

Petitioners moved for judgments of acquittal under Federal Rule of Criminal Procedure 29(c), asserting that the evidence was insufficient to support a conviction. Pet. App. 110a. The district court explained that,

under this Court's decision in *Jackson* v. *Virginia*, 443 U.S. 307 (1979), the "relevant question is 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." Pet. App. 112a (quoting *Jackson*, 443 U.S. at 319). Applying that standard, the district court granted Peter Hoffman's motion for judgment of acquittal as to five counts of wire fraud, but denied it as to the remaining counts. *Id.* at 14a-15a. It granted Arata's motion as to six counts of wire fraud, one count of mail fraud, and four counts of making false statements, but denied it as to the remaining counts. *Id.* at 15a. And it denied Susan Hoffman's motion altogether. *Ibid.*

In a footnote, the district court noted that, in *United States* v. *Vargas-Ocampo*, 747 F.3d 299, cert. denied, 135 S. Ct. 170 (2014), the en banc Fifth Circuit had rejected the so-called "equipoise rule"—the rule that a defendant is entitled to a judgment of acquittal if the evidence "gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged." Pet. App. 113a n.18 (quoting *Vargas-Ocampo*, 747 F.3d at 301). The district court further stated that the Fifth Circuit's rejection of the "equipoise formula" was "of some consequence in this case, where the evidence on the defendant's intent as to certain fraud charges gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence." *Ibid.* And in finding sufficient evidence to convict Peter Hoffman and Arata on Count 6, a count of wire fraud, the court noted that it was "constrained by the Fifth Circuit," although it did not specifically refer to the equipoise rule. *Id.* at 166a.

The district court imposed sentences that were "far below" the ranges recommended by the Sentencing Guidelines. Pet. App. 15a. The Guidelines recommended roughly 14-17 years in prison for Peter Hoffman, 9-11 years in prison for Arata, and four to five years in prison for Susan Hoffman. *Ibid.* The district court instead sentenced all of them to probation: five years for Peter Hoffman, four years for Arata, and three years for Susan Hoffman. *Ibid.*

4. The court of appeals affirmed in part, vacated in part, and reversed in part. Pet. App. 1a-83a.

a. The court of appeals rejected petitioners' contention that their prosecution denied them fair notice because of the "lack of clarity in the administration of Louisiana's tax credit program." Pet. App. 26a. The court observed that the "government did not have to prove violations of state law," because petitioners were indicted for "federal" offenses that did not turn on state law. *Ibid.* The court emphasized in a later portion of its opinion that "the indictment did not charge them with violating state law. It charged them with making various misrepresentations—lies about the company's expenditures, the creation of purchase invoices, and the purpose of circular transactions." *Id.* at 54a.

b. The court of appeals next reviewed the sufficiency of the evidence on the counts of conviction—the counts on which the district court had refused to enter judgments of acquittal (subjects of petitioners' appeals), as well as the counts on which the district court had agreed to enter judgments of acquittal (subjects of the government's cross-appeal).

The court of appeals explained that, when reviewing the sufficiency of the evidence, it "must affirm the ver-

dict unless no rational juror could have found guilt beyond a reasonable doubt." Pet. App. 27a-28a (citation omitted). The court noted that, in the course of that inquiry, it must view "the evidence in a light most deferential to the jury verdict and give the party that convinced the jury the benefit of all reasonable inferences." *Id.* at 27a (citation and internal quotation marks omitted). Applying that standard, the court of appeals upheld or reinstated every count of conviction, except for one count of making false statements against Arata. *Id.* at 47a-48a, 51a.

The court of appeals began with the conspiracy counts. It found "abundant evidence" that Peter Hoffman "was part of, indeed the leader of, the fraud conspiracy": He "opened [the] bank accounts" involved in Seven Arts' circular transactions, "created invoices" for payments that had never been made, and misled auditors so that they "would not 'get any more suspicious.'" Pet. App. 29a-30a. The court also found "more" than "enough" "to support the jury's view that Arata was part of the conspiracy": He took out the loan to "facilitate circular transactions," provided misleading information (such as the company's doctored general ledger) to an auditor, and had his "fingerprints" "all over" Seven Arts' first cost report. *Id.* at 30a-31a. Finally, the court found that a "rational juror could infer" Susan Hoffman's involvement in the conspiracy: She certified "fiction[al]" expenses for management fees and office space, and she "knew as much when she certified" them. *Id.* at 31a-32a.

The court of appeals then turned to the fraud counts. The court found that the same evidence that established petitioners' participation in the conspiracy "also estab-

lishe[d] the intent to defraud necessary for the substantive fraud offenses." Pet. App. 32a. In addressing this element, the court stressed that the district court had improperly required "intent to defraud particular to each wire" (or mailing). *Id.* at 42a. The court of appeals explained that, contrary to the district courts' view, the fraud statutes did not require "intent to defraud particular to each wire but only with respect to the overall scheme." *Ibid.* The court of appeals further found sufficient evidence on the remaining elements of mail and wire fraud (such as use of interstate mails or wires). *Id.* at 38a-47a.

Finally, the court of appeals addressed Arata's conviction on four counts of making false statements. Pet. App. 47a-51a. The court found sufficient evidence to convict on three counts, but not on the fourth count. *Id.* at 47a-48a.

c. The court of appeals also addressed a range of contentions that are not at issue here. The court rejected petitioners' contentions that the Louisiana tax credits are not "property" protected by the federal fraud statutes. Pet. App. 16a-26a. It also rejected their contention that the district court abused its discretion by declining to grant petitioners new trials. *Id.* at 52a-57a. Turning to sentencing, the court found that Peter Hoffman's sentence was unreasonably lenient, vacated his sentence, and remanded his case for resentencing; vacated Arata's sentence and remanded his case for resentencing in light of the reinstatement of certain counts; and affirmed Susan Hoffman's sentence. *Id.* at 58a-71a. Finally, the court affirmed the district court's forfeiture award. *Id.* at 71a-72a.

d. Judge Dennis concurred in part and dissented in part. Pet. App. 74a-83a. He would have affirmed Peter

Hoffman's sentence, but he concurred in the remainder of the court's judgment. *Id.* at 83a.

ARGUMENT

Petitioners contend (Pet. 17) that the court of appeals erred in failing to apply the so-called "equipoise rule," under which a court will vacate a conviction "where evidence of guilt and innocence is in equipoise." That contention does not warrant this Court's review. The court of appeals properly applied the settled standard for evaluating sufficiency claims in *Jackson* v. *Virginia*, 443 U.S. 307 (1979) to the facts of this case. In addition, the circuit conflict that petitioners allege (Pet. 17) is illusory. Although the Fifth Circuit has wisely rejected the equipoise rule as a rule of thumb for applying the *Jackson* standard, and some other circuits treat the rule as a useful guidepost, the circuits agree that *Jackson* supplies the ultimate standard for reviewing sufficiency claims. In all events, this case is an unsuitable vehicle for resolving any disagreement, because petitioners failed to preserve their contentions below, and because the court of appeals never found that the evidence in this case was in equipoise.

Petitioners separately contend (Pet. 33) that their fraud convictions must be vacated because their actions were allegedly consistent with a reasonable interpretation of the Louisiana statute creating the motion picture investor tax credit. The court of appeals correctly recognized that the clarity or ambiguity of Louisiana law is beside the point in this case, because petitioners' convictions rest on their representations' inconsistency with the facts, not on the representations' inconsistency with Louisiana law. That fact-specific determination does not conflict with the decision of any other court of appeals. The Fifth Circuit agrees with other courts of

appeals that, in a fraud case where the truth or falsity of a statement turns on a question of legal interpretation, the government may have to show that the defendant's interpretation was unreasonable. But it did not find this to be such a case.

1. This Court should deny the petition for a writ of certiorari on the question whether a court should use the "equipoise rule" to evaluate challenges to the sufficiency of the evidence. The court of appeals applied the correct legal standard; the disagreement among the courts of appeals over the utility of the equipoise rule lacks practical significance; and this case is an unsuitable vehicle for resolving that disagreement. The Court denied certiorari on the same issue in *Vargas-Ocampo* v. *United States*, 135 S. Ct. 170 (2014) (No. 13-10737), and the same result is appropriate here.

a. The court of appeals applied the correct legal standard for reviewing challenges to the sufficiency of the evidence. In *Jackson*, this Court held that a defendant has a due-process right not "to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." 443 U.S. at 316. The Court further held that a reviewing court must affirm a criminal conviction when, "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 (emphasis omitted). Under *Jackson*, this Court has since explained, "the mere existence of sufficient evidence to convict [is] determinative." *Schlup* v. *Delo*, 513 U.S. 298, 330 (1995). "This deferential standard does not permit * * * fine-grained factual parsing" of the record

supporting conviction. *Coleman* v. *Johnson*, 566 U.S. 650, 655 (2012) (per curiam).

The court of appeals correctly applied *Jackson* in the circumstances of this case. The court explained that, when reviewing the sufficiency of the evidence, it must view "the evidence 'in a light most deferential' to the jury verdict," must "give the party that convinced the jury the benefit of all reasonable inferences," and "'must affirm the verdict unless no rational juror could have found guilt beyond a reasonable doubt.'" Pet. App. 27a-28a (citations omitted). It then found that, for all but one of the counts of conviction, there existed sufficient evidence for a rational juror to find guilt beyond a reasonable doubt. *Id.* at 28a-51a.

The court of appeals underscored a number of incriminating facts in making that determination. For example, Peter Hoffman "opened [the] bank accounts" involved in Seven Arts' circular transactions, "created invoices" for payments that had never been made, and misled auditors so that they "would not 'get any more suspicious.'" Pet. App. 29a. Arata took out a loan to "facilitate circular transactions," provided misleading information to an auditor, and had his "fingerprints" "all over" Seven Arts' first cost report. *Id.* at 30a. And Susan Hoffman certified "fiction[al]" expenses for management fees and office space, and she "knew as much when she certified" them. *Id.* at 31a-32a.

b. Contrary to petitioners' contention (Pet. 22-26), the court of appeals was not required to apply the equipoise rule instead of or in addition to *Jackson*. The equipoise rule posits that 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, 301 (5th Cir.) (en banc) (citation and internal quotation marks omitted), cert. denied, 135 S. Ct. 170 (2014). Some courts applying *Jackson* have articulated that approach in attempting to translate the beyond-a-reasonable-doubt requirement into a functional standard. See, *e.g.*, *United States* v. *Glenn*, 312 F.3d 58, 70 (2d Cir. 2002).

The equipoise rule is not necessarily inconsistent with *Jackson* so long as a reviewing court first construes all conflicting inferences "in the light most favorable to the Government" before evaluating whether the sum total of prosecution-favoring inferences and defendant-favoring inferences are "in equipoise." *United States* v. *Christian*, 452 Fed. Appx. 283, 287 n.2 (4th Cir. 2011) (per curiam). In addition, the equipoise rule does not mean that the evidence is insufficient if a jury might have found support in the record for either conviction or acquittal. The fact that "the jury could have reasonably reached either conclusion based on the evidence" does not make the evidence insufficient to support conviction. *United States* v. *Hunt*, 526 F.3d 739, 746 (11th Cir. 2008). Rather, "if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make." *United States* v. *Taylor*, 464 F.2d 240, 243 (2d Cir. 1972) (Friendly, J.).

Although the equipoise rule need not invariably lead courts astray, the Fifth Circuit wisely abandoned the equipoise rule in its en banc decision in *Vargas-Ocampo*. The court explained that, for three reasons, the equipoise rule "is not helpful in applying the Supreme Court's standard prescribed in *Jackson*," and is in "tension, in practical if not theoretical terms, with the

Jackson standard." 747 F.3d at 301-302. First, the rule is difficult to apply. "[N]o court opinion has explained how a court determines that evidence * * * 'in equipoise.' Is it a matter of counting inferences or of determining qualitatively whether inferences equally support a theory of guilt or innocence?" *Id.* at 301. Second, the "'type of fine-grained factual parsing' necessary to determine that the evidence * * * was in 'equipoise'" makes it all too easy "to usurp the jury's function." *Ibid.* (citation omitted). Third, application of the equipoise rule may cause reviewing courts to overlook *Jackson*'s requirement that they discount any defendant-favoring inferences that conflict with rational inferences that favor the prosecution. *Ibid.* In short, the equipoise rule can create confusion in applying the *Jackson* standard and does not offer adequate countervailing benefits.

c. Petitioners err in contending (17-18) that disagreement among the circuits about the equipoise rule merits this Court's review. Although multiple circuits have applied or favorably cited the equipoise rule as one method for detecting the presence of reasonable doubt, no circuit disputes that the *Jackson* standard ultimately governs challenges to the sufficiency of the evidence. See, *e.g.*, *United States* v. *Ridolfi*, 768 F.3d 57, 61 (1st Cir. 2014); *United States* v. *Cox*, 871 F.3d 479, 490 (6th Cir. 2017), cert. denied, 138 S. Ct. 754 (2018); *United States* v. *Edwards*, 869 F.3d 490, 503 (7th Cir. 2017); *United States* v. *Shelabarger*, 770 F.3d 714, 716 (8th Cir. 2014); *United States* v. *Lovern*, 590 F.3d 1095, 1107 (10th Cir. 2009) (Gorsuch, J.); *United States* v. *Miranda*, 666 F.3d 1280, 1282 (11th Cir.) (per curiam), cert. denied, 566 U.S. 1002 (2012); *United States* v. *Sitzmann*, 893 F.3d 811, 821 (D.C. Cir. 2018) (per curiam).

Moreover, disagreement about the utility of the equipoise rule is not an issue of sufficient practical significance to warrant this Court's intervention. "In truth," "very few cases will be in evidentiary equipoise." *Schaffer* v. *Weast*, 546 U.S. 49, 58 (2005). And petitioners have not demonstrated that, in those few cases, the equipoise rule would produce different outcomes than the unadorned *Jackson* standard.

d. In any event, this case is a poor vehicle for reviewing the Fifth Circuit's rejection of the equipoise rule.

First, no petitioner has properly preserved the issue. Peter and Susan Hoffman failed to preserve their equipoise argument in the court of appeals. A litigant in this Court "forfeit[s]" an argument by failing to "raise it below." *United States* v. *Jones*, 565 U.S. 400, 413 (2012). The Court has excused litigants from the obligation to raise arguments barred by "squarely applicable, recent circuit precedent" where (1) the court of appeals "expressly" "passed upon" the issue in the current case, (2) the litigant contested the issue "as a party" to the recent case on which the court relied, and (3) the litigant "did not concede * * * the correctness of the precedent" in the current case. *United States* v. *Williams*, 504 U.S. 36, 44-45 & n.5 (1992); see *United States* v. *Vonn*, 535 U.S. 55, 58 n.1 (2002). Here, Peter and Susan Hoffman forfeited any contentions that rest on the equipoise rule, because they failed to invoke the rule in their opening briefs in the court of appeals. See Peter and Susan Hoffman C.A. Br. 69-90. And the Fifth Circuit's previous decision in *Vargas-Ocampo* is not grounds for excusing the forfeiture. The court in this case did not "expressly"—or even implicitly—pass on the equipoise issue; quite the contrary, it did not cite *Vargas-Ocampo*, did not mention the equipoise rule, and did not find that

the evidence in this case was in equipoise. *Williams*, 504 U.S. at 44. And Peter and Susan Hoffman were not parties to *Vargas-Ocampo*, so they could not have contested the issue "as a party" to that case. *Id.* at 45. In these circumstances, this Court's "traditional rule" "precludes a grant of certiorari." *Id.* at 41.

And although Arata raised the equipoise rule in his opening brief, see Arata C.A. Br. 31-33, he had failed to preserve such an argument in the district court. Even where an objection is foreclosed "by existing precedent," a criminal defendant must timely raise it in the district court in order to preserve it; if he fails to do so, it is reviewed only for plain error. *Johnson* v. *United States*, 520 U.S. 461, 468 (1997); see Fed. R. Crim. P. 52(b). Arata's memorandum supporting his motion for judgment of acquittal asked the district court to review the sufficiency challenge only under *Jackson*; it did not ask the court to apply the equipoise rule, and it did not argue that the evidence in this case was in equipoise. D. Ct. Doc. 511-1, at 3-4 (May 27, 2015); cf. Doc. 514-1, at 7-8 (May 27, 2015) (Peter Hoffman Memorandum—invoking equipoise rule); Doc. 506-1, at 6-7 (May 26, 2015) (Susan Hoffman Memorandum—same).

Second, this case does not in fact present any equipoise issue. The evidence here, far from being in or near equipoise, strongly supported petitioners' convictions. The court of appeals thus found "abundant evidence that allowed the jury to conclude that Peter [Hoffman] was part of, indeed the leader of, the fraud conspiracy." Pet. App. 30a. It found "more" than "enough" evidence "to support the jury's view that Arata was part of the conspiracy." *Id.* at 31a. And it found that "a rational juror could infer" Susan Hoffman's guilt as well. *Id.* at 32a.

Petitioners erroneously argue (Pet. 21) that this case is a good vehicle for resolving the equipoise issue because "[t]he district court explicitly noted that it would have entered a judgment of acquittal were it not 'constrained' by the Fifth Circuit's rejection of [the equipoise] rule." As an initial matter, the court of appeals, whose judgment this court would review, did not mention or rely upon that comment by the district court. In addition, the district court's statement that it was "constrained by the Fifth Circuit" in the course of analyzing Count 6, a wire-fraud count against Peter Hoffman and Arata, Pet. App. 166a, did not explicitly refer to the equipoise rule; instead, the district court emphasized that Count 6 "highlights the jury's power to make credibility calls," *id.* at 167a—a circumstance in which petitioners acknowledge (Pet. 25) that "the equipoise rule will never be triggered." And the district court's statement that the rejection of the equipoise rule is "of some consequence" with respect to "the defendants' intent on certain fraud charges," Pet. App. 113a n.18, was shaped by its misunderstanding of the substantive law. In analyzing intent, the district court "imposed an unnecessary element," requiring fraudulent intent with respect to each particular wire or mailing. *Id.* at 42a. The court of appeals explained—in a portion of its opinion that petitioners do not contest here—that the fraud statutes do not in fact require "intent to defraud particular to each wire" (or mailing) "but only with respect to the overall scheme." *Ibid.*

In any event, petitioners' analysis of the district court's opinion is unconvincing on its own terms. The district court stated that it was "constrained by the Fifth Circuit" in the course of analyzing Count 6, a wire-fraud count against Peter Hoffman and Arata. Pet.

App. 166a. Petitioners interpret that statement to mean that the district court "would have entered a judgment of acquittal" on Count 6 "were it not 'constrained' by the Fifth Circuit's rejection of [the equipoise rule]." Pet. 21 (citation omitted). But it is far from clear that the district court's decision on Count 6 turned on the unavailability of the equipoise rule. The court stated that Count 6 "highlights the jury's power to make credibility calls." Pet. App. 167a. On petitioners' own understanding (Pet. 25), "the equipoise rule will never be triggered" "when the case turns on witness credibility," "because once all inferences are granted the government, the evidence necessarily will be sufficient."

2. This Court should also deny certiorari on petitioners' second question, which asks (Pet. i) whether a fraud conviction can stand if it rests on "claims for benefits under an ambiguous regulatory scheme and the defendant acted consistently with an objectively reasonable interpretation of that scheme." The court of appeals' decision was correct; it does not conflict with the decisions of other courts; and petitioners' challenge boils down to a disagreement not with the court's rule but with its application of that rule to the facts of this case.

a. The court of appeals correctly rejected petitioners' contention that alleged ambiguity in Louisiana's regulatory scheme precluded their convictions for mail and wire fraud.

To establish mail or wire fraud, the government must show that the defendant (1) "devised or intend[ed] to devise a scheme to defraud (or to perform specified fraudulent acts)" and (2) used the mails or the wires "for the purpose of executing, or attempting to execute, the scheme (or specified fraudulent acts)." *Schmuck* v.

United States, 489 U.S. 705, 721 (1989). Ordinarily, those elements do not turn on state law.

Some courts of appeals have concluded 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 doubt that the defendant's statement is not true under a reasonable interpretation of the law." *United States* v. *Whiteside*, 285 F.3d 1345, 1351 (11th Cir. 2002). For example, in *Whiteside*, the government argued that a hospital's classification of interest in a cost report was fraudulent because the classification was "inconsistent with the Medicare regulations." *Ibid.* The Eleventh Circuit concluded that, because the government's theory of falsity "center[ed] on an interpretive question of law" (the meaning of the Medicare regulations), it bore the burden of proving that the hospital's classification did not reflect "a reasonable interpretation of ambiguous [regulations]." *Ibid.*

As the Fifth Circuit recognized, however, this is a case where the truth or falsity of the statement turns on the facts—not "on an interpretive question of law," *Whiteside*, 285 F.3d at 1351. The government charged petitioners with making "misrepresentations" about factual matters—"the company's expenditures, the creation of purchase invoices, and the purpose of circular transactions." Pet. App. 54a. The government's evidence showed that the "expenditures" for which petitioners sought tax credits were "fiction[s]," "inflated bill[s]," and "not really payments at all." *Id.* at 29a, 31a; see *id.* at 153a ("The government's account is that the * * * film equipment was a mere fiction and the construction payments * * * were grossly inflated."). Petitioners' representations about these matters were

false because the sums that petitioners claimed to have paid "were not actually paid," *id.* at 11a—not simply because the representations were inconsistent with Louisiana law.

Petitioners nonetheless contend (Pet. 9) that the "core dispute" in this case was whether petitioners' claims "complied with state law," not whether the claims misrepresented the facts. The court of appeals, however, correctly found otherwise, and its fact-specific determination does not warrant this Court's review. Specifically, the court observed that, "[c]ontrary to the Hoffmans' contention, the indictment did not charge them with violating state law." Pet. App. 54a. "Although [petitioners] focus on a lack of clarity in the administration of Louisiana's tax credit program," the court emphasized, "[t]he government did not have to prove violations of state law." *Id.* at 25a-26a. Rather, "[u]sing such lies in furtherance of a scheme to defraud violates federal law regardless whether they independently violate state law." *Id.* at 55a.

Furthermore, even if it were relevant, Louisiana law was clear on the points that matter here. State law *did* contain a requirement that funds be expended before the granting of tax credits: It authorized tax credits only for "the actual investment made and expended" by an applicant. Pet. App. 245a. And the State provided guidance confirming this requirement: The precertification letter, which contained "general guidelines" for the receipt of tax credits "in accordance with statutory law," stated that "final certification and granting of tax credits" would be based on "the actual amount expended by the project" at the time of the application, and not on the amount "anticipated" to be spent. *Id.* at 97a, 100a.

b. Petitioners contend (Pet. 26-30) that the court of appeals' decision creates a circuit conflict on the second question presented. In its published opinion in *United States* v. *Jones*, 664 F.3d 966 (2011), cert. denied, 566 U.S. 1035 (2012), the Fifth Circuit *agreed* with the rule that petitioners seek and that some other courts of appeals have adopted. In that case, where the truth or falsity of the statement at issue did center on a point of law, the Fifth Circuit ruled that the government must show that the defendant's "interpretation of the law was not reasonable." *Id.* at 977. And in reaching that conclusion, the court cited *Whiteside*, 285 F.3d at 1351, and *United States* v. *Migliaccio*, 34 F.3d 1517, 1525 (10th Cir. 1994)—two cases on which petitioners rely (Pet. 26) in asserting a conflict. The outcome of this case is accordingly a reflection of the absence of any issue of state-law interpretation in the specific crimes charged. And even if an intra-circuit conflict existed, this Court's review would be unwarranted. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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