No. 20-1644

In the Supreme Court of the United States

DEVON ARCHER

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF PROCEDURE SCHOLARS AS AMICI CURIAE IN SUPPORT OF CERTIORARI

DONALD BURKE
BRANDON L. ARNOLD
Counsel of Record
ANNA L. DEFFEBACH
ROBBINS, RUSSELL, ENGLERT, ORSECK & UNTEREINER LLP
2000 K Street, NW, 4th Floor
Washington, DC 20006
(202) 775-4500
barnold@robbinsrussell.com

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INTEREST OF THE AMICI CURIAE

Amici curiae are law professors who have expertise that bears directly on the issue raised in the certiorari petition: the scope of district court's power to weigh the evidence and grant a new trial in the interest of justice.[1]

[1] Counsel of record for all parties received ten days' notice of and consented to the filing of this brief. No party's counsel authored this brief in whole or in part; no party's counsel contributed money for this brief's preparation or submission; and no person or entity—other than amici and their counsel—contributed money for this brief's preparation or submission.

Amici curiae are professors of criminal and appellate procedure at Case Western Reserve University School of Law.[2] Amici curiae are:

Cassandra Burke Robertson, John Deaver Drinko—BakerHostetler Professor of Law.

Paul C. Giannelli, Albert J. Weatherhead III and Richard W. Weatherhead Professor Emeritus of Law and Distinguished University Professor.

Lewis R. Katz, John C. Hutchins Professor Emeritus of Law.

Andrew S. Pollis, Professor of Law.

SUMMARY OF ARGUMENT

Rule 33 of the Federal Rules of Criminal Procedure authorizes a district court to grant a new trial in a criminal case "if the interest of justice so requires." When adopted, that Rule was understood to incorporate the historical power of trial judges to independently assess the trial evidence and to grant a new trial when the verdict was against the clear weight of that evidence. Even though such weight-of-the-evidence review has, for centuries, been understood to be a critical component of the constitutional right to a jury trial, it has received little scholarly or judicial attention. And, in recent decades, *weight*-of-the-evidence review pursuant to Rule 33 has often been overlooked entirely or confused with a court's power to direct an acquittal based on *insufficient* evidence under Rule 29.

The Second Circuit's opinion in this case continues and exacerbates that doctrinal disarray. It is contrary to the historical practice that informs the proper

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[2] Institutional affiliations are provided for identification purposes only.

understanding of Rule 33's "interest of justice" standard. That common-law tradition—beginning as early as seventeenth-century England and continuing through the adoption of the Criminal Rules in the twentieth century—made clear that trial courts had the power to consider the evidence anew and order a new trial. That power was broad, but its effect was limited. It did not remove a jury from the case; instead, it asked a second jury to weigh in on verdicts that judges thought were questionable. It therefore was conceptually and practically distinct from the limited circumstances in which a judge could direct a verdict, thereby removing juries from the case altogether.

The Second Circuit's decision in this case breaks from that history and, contrary to several other circuits, erases much of the district court's power. Instead of recognizing the traditional power to reweigh evidence independently, the Second Circuit requires a district court to defer to the jury's verdict, except where "the evidence was patently incredible or defied physical realities." Pet. App. 8a (cleaned up).

In so holding, the decision below conflates the judgment-of-acquittal and new-trial standards. That rule will cause doctrinal ripple effects and call into question precedents that relied on the distinction between those two remedies.

The court of appeals' rule also robs district courts of a powerful tool that they have long employed, in exceptional cases, to protect against verdicts that risk undermining confidence in the jury system because they may be grounded in mistake, misconduct, or bias. The power to order a new trial ensures that exceptionally close questions can be put to a new jury. If the second jury agrees that the defendant is guilty,

then that second verdict is the end of the matter. But, if it does not, then a questionable verdict is swept away. In either event, the new-trial power serves as an efficient means of error correction in exceptional cases. And it benefits the justice system as a whole by allowing courts to smoke out wrongful convictions without the time and expense of collateral proceedings, which undermine finality, or efforts to uncover juror misconduct or bias, which undermine the confidentiality of deliberations.

ARGUMENT

The decision below is wrong, it squarely conflicts with decisions of other circuits, and it presents a frequently recurring issue with significant import for orderly administration of the jury trial system. This Court's review is warranted.

A. The Decision Below is Wrong

Rule 33 empowers trial court judges to "grant a new trial if the interest of justice so requires." Although the rule does not define what constitutes the "interest of justice," courts have long understood it to include the historical power to grant a new trial if the "verdict is against the weight of the evidence." 3 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure Criminal* § 582 (4th ed. 2021). That "foundational reason" for a new trial, *ibid.*, follows directly from centuries of common-law tradition. Indeed, as one influential account of the new-trial power observed, a trial judge's authority to reweigh the evidence has long been understood to be "indispensable to the proper administration of

justice." *Smith* v. *Times Pub. Co.*, 36 A. 296, 309 (Pa. 1897) (Williams, J., concurring).[3]

Decades of practice under the Criminal Rules likewise confirm the conclusion that Rule 33 empowers a district court to independently reweigh the evidence and, in appropriate cases, grant a new trial to prevent a miscarriage of justice. Like their historical antecedents in common-law practice, the Criminal Rules draw clear distinctions between a motion for acquittal under Rule 29 and a new-trial motion under Rule 33. Based on that common-law history, modern courts (federal and state alike) recognize that, when considering a motion for a new trial, the trial court "need not view the evidence in the light most favorable to the verdict; it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses." *Tibbs* v. *Florida*, 457 U.S. 31, 38 n.11 (1982) (quoting *United States* v. *Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980)).

In the decision below, however, the court of appeals held that a trial judge faced with a Rule 33 motion for a new trial "may not reweigh the evidence" and "must defer to the jury's resolution of conflicting evidence" unless the jury's finding was patently incredible or defied physical realities. Pet. App. 8a (cleaned up). That holding is incompatible with longstanding historical practice and improperly imports the stringent test for a judgment of acquittal into the new-trial context. In doing so, it risks

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[3] Justice Williams' opinion, which "traces the history of the exercise of [the new-trial power]," has long been viewed as an influential statement of that history. *E.g.*, *Aetna Cas. & Sur. Co.* v. *Yeatts*, 122 F.2d 350, 353 (4th Cir. 1941).

shutting the door to an important (and efficient) means of correcting questionable convictions.

1. Longstanding historical tradition demonstrates that trial courts may independently reweigh the evidence when resolving a motion for a new trial

a. For centuries, trial judges, in both civil and criminal cases, have had broad authority to reweigh the evidence and order a new trial. That power was well established by the time Blackstone's commentaries on the law were published in 1768. Blackstone explained that it was the "practice of the court to award a new, or second, trial" where "the jury have brought in a verdict without or contrary to evidence, so that [the trial judge] is reasonably dissatisfied therewith." 3 William Blackstone, *Commentaries on the Laws of England* 387 (1768). That rule applied with equal force to criminal trials: "[I]n many instances, where contrary to evidence the jury have found the prisoner guilty, their verdict hath been mercifully set aside, and a new trial granted." 4 William Blackstone, *Commentaries on the Laws of England* 355 (1769); see also James B. Thayer, *The Jury and Its Development III*, 5 Harv. L. Rev. 357, 386 (1892).[4]

By 1790, that "common-law rule" had "been well settled * * * in England for at least 150 years." *Times Pub.*, 36 A. at 309 (Williams, J., concurring). "Trial by jury" meant fact-finding by jurors subject to the supervision of the court; the trial judge had "responsibility for the result no less than the jury" and

[4] In criminal cases, of course, this review has always been one-sided because double jeopardy protects an acquitted defendant from retrial. 4 Blackstone, *supra*, at 355.

"[i]f he [was] not satisfied with the verdict, it [was] his duty to set it aside, and grant a new trial before another jury." *Id.* at 308. "The exercise of this power was then thought to be in aid of trial by jury." *Id.* at 309. As Lord Mansfield explained, granting a new trial did not deny litigants a jury hearing but rather resulted in "'no more than having the cause more deliberately considered by another jury, when there is reasonable doubt, or perhaps a certainty, that justice has not been done.'" *Ibid.* (quoting *Bright* v. *Eynon*, 1 Burrows 390 (1757)). In short, "it was the habit of the judges of England, whence came the common law, to set aside verdicts as against the weight of evidence." *Felton* v. *Spiro*, 78 F. 576, 583 (6th Cir. 1897) (Taft, J.).

That common-law tradition "traveled to the American colonies and then into the new Republic as a part of the right to trial by jury" secured by the Sixth and Seventh Amendments to the U.S. Constitution. Cassandra Burke Robertson, *Judging Jury Verdicts*, 83 Tul. L. Rev. 157, 165 (2008). State trial courts (like their English forebears) ordered new trials when, in the judge's view, the "preponderance of testimony" was greatly against the verdict. *E.g.*, *State* v. *Wood*, 8 S.C.L. (1 Mill) 29, 32 (Const. App. 1817); *State* v. *Bird*, 1 Mo. 585, 586 (1825); *Grayson* v. *Commonwealth*, 47 Va. (6 Gratt.) 712, 724 (Gen. Ct. 1849); see also *Dewey* v. *Chicago & N.W. R.R. Co.*, 31 Iowa 373, 377 (1871).

Early federal courts exercised that same power.[5] The Judiciary Act of 1789 expressly empowered federal courts to set aside a verdict "for reasons for

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[5] In the pre-Rules era, federal trial courts applied the criminal-procedure rules of the State in which they sat. See *United States* v. *Reid*, 53 U.S. (12 How.) 361 (1851).

which new trials have usually been granted." ch. 20, § 17, 1 Stat. 73, 83. Like their state counterparts, federal courts agreed that, "[i]f the verdict does not satisfy the conscience of the [trial] judge, the prisoner is entitled to a new trial." *United States* v. *Harding*, 26 F. Cas. 131, 136 (C.C.E.D. Pa. 1846) (Op. of Kane, J.); see also, *e.g.*, *United States* v. *Fullerton*, 25 F. Cas. 1225, 1226 (C.C.S.D.N.Y. 1870) (new trial warranted if the court "should be of [the] opinion that the verdict was against the evidence"). Indeed, federal courts made clear that a motion for a new trial "necessarily [] required" a trial judge to "weigh the evidence" and determine "whether or not, in its opinion, the verdict was so opposed to the weight of the evidence." *Felton*, 78 F. at 581–583 (holding that the trial court's refusal to reweigh the evidence had "depriv[ed] the party making the motion of a substantial right").

To be clear, that power has always had its limits. A trial judge cannot set aside a verdict "merely because, if he had acted as the trier of fact, he would have reached a different result." Robertson, *Judging Jury Verdicts*, 83 Tul. L. Rev. at 164. Rather, a new trial is appropriate only when the verdict is "against the clear weight of the evidence." *Ibid.* And the authority to order a new trial has never been understood to authorize a judge to order *successive* new trials until the jury reaches the judge's preferred verdict. "There is a general presumption that if a second jury agrees with the first, it was the trial judge and not the jury who was mistaken about the weight of the evidence." *Id.* at 208–209 (citing authorities). In that way, the judge and the jury complement each other's "fact-finding competencies" in exceptionally close cases. *Id.* at 205.

b. The district court's power to order a new trial has always been conceptually (and practically) distinct from its power to direct a verdict of acquittal. When asked to direct an acquittal, a court is "not authorized to take the case from the jury" where there is *any* evidence that, if believed, would suffice to support a conviction. *Burton* v. *United States*, 202 U.S. 344, 373 (1906). Thus, when called to rule upon a motion for acquittal, the court looks only at the sufficiency of the evidence that might support the verdict "irrespective of any countervailing [evidence] that may have been introduced." *Lincoln*, 630 F.2d at 1316–1317. It does not matter if the judge "believe[s] [that] evidence or [] think[s] that the weight of the evidence is on the other side." *Garrison* v. *United States*, 62 F.2d 41, 42 (4th Cir. 1932). Because an acquittal motion asks only if there is *some* evidence that supports the verdict, it makes sense that courts view the evidence in the light most favorable to the verdict. See *Hodge* v. *United States*, 13 F.2d 596, 596 (6th Cir. 1926).

But a new-trial motion is "altogether different." *Felton*, 78 F. at 582. In that context, a trial judge can "set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear weight of the evidence * * * even though the evidence be sufficient to preclude the direction of a verdict." *Garrison*, 62 F.2d at 42. It does not infringe the fact-finding role of the jury because "an order directing a new trial leaves the final decision in the hands of the jury." *United States* v. *Kellington*, 217 F.3d 1084, 1097 (9th Cir. 2000). To the contrary, the new-trial power has long been understood to "safeguard the power of the jury by serving as a more moderate check on inaccurate verdicts than decisions that judges

would otherwise * * * make on their own." Andrew S. Pollis, *The Death of Inference*, 55 B.C. L. Rev. 435, 489 (2014) (footnote omitted).

c. At common law and in pre-Rules practice, a defendant's motion for a new trial "vested in the trial court" the power "to overturn a clearly unjust decision." Stephan Landsman, *Appellate Courts and Civil Juries*, 70 U. Cin. L. Rev. 873, 888 (2002). The power to "grant or refuse a new trial in cases of conflicting evidence" was the "exclusive and unassignable function of the trial judge." *Applebaum* v. *United States*, 274 F. 43, 46 (7th Cir. 1921). In exercising that discretion, the trial judge "sit[s] as the thirteenth juror" and must "attentively consider and weigh the evidence as it is being introduced." *Ibid*. That power is appropriately entrusted to the trial judge who "enjoyed nearly all the advantages of the jury," *Wood*, 8 S.C.L. at 32, including hearing "testimony from the mouths of the witnesses" and having the "benefit of observing the[ir] conduct and deportment." *Dewey*, 31 Iowa at 377.

Appellate courts had no such power. In stark contrast to the broad power of trial judges to weigh the evidence, appellate review of new-trial orders was strictly confined. Orders granting a new trial were not appealable at all until the 1984 revisions to 18 U.S.C. § 3731. And appellate review of new-trial denials was "limited" to "clear and manifest abuse of discretion." *Lincoln*, 630 F.2d at 1319. That narrow role reflected the fact that "[c]ircuit judges, reading the dry pages of the record, do not experience the tenor of the testimony at trial" and thus defer to the trial judge when that judge saw the evidence and evaluated the credibility of witnesses firsthand. *United States* v. *Alston*, 974 F.2d 1206, 1212 (9th Cir.

1992). That is why, "at common law, 'reexamination' of the facts found by a jury could be undertaken only by the trial court, and that appellate review was restricted to * * * matters of law." *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 457 (1996) (Scalia, J., dissenting).

2. The Criminal Rules' text and structure carry forward long-settled historical practice

In 1933, in light of the growing docket of federal criminal cases, Congress authorized this Court to promulgate the Criminal Rules.[6] Before the adoption of the Rules, "federal criminal practice was a hodgepodge of judicial elaboration, common law rules, constitutional provisions, and ad hoc legislation." 1 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure Criminal* § 1 (4th ed. 2021). Leading scholars, Congress, and the federal courts themselves recognized "[t]he need for simplified, standardized procedure in a uniform system." *Ibid*. The finished product, which became effective in 1946, contained, among many others, Rules 29 and 33, for motions of acquittal and new trial, respectively.

Then and now, Rule 33 empowered district courts to grant a new trial "if required in the interest of justice." Lester B. Orfield, *The Federal Rules of Criminal Procedure*, 33 Cal. L. Rev. 543, 574 (1945) (quoting original text of Rule 33). That Rule expanded the grounds for a new trial to "any fair or reasonable ground," whereas previously they had been limited to the "reasons [for] which new trials have usually been granted in the courts of law." *Ibid*. (quoting 28 U.S.C.

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[6] See generally Federal Judicial Center, Rules: Federal Rules of Criminal Procedure, https://bit.ly/3arsb5U.

§ 391). And, under that Rule, district courts unquestionably retained the "broad power of a common law judge to grant a new trial on the ground that the verdict is contrary to the weight of evidence." *United States* v. *Robinson*, 71 F. Supp. 9, 11 (D.D.C. 1947). As was the law in the pre-Rules era, Rule 33 gave trial judges "ample power" to "consider and weigh the evidence as it is being introduced" and to grant a single new trial if "the verdict is against the clear weight of the evidence." *United States* v. *Parelius*, 83 F. Supp. 617, 622 (D. Haw. 1949).

The Criminal Rules' structure reinforces the same point. By codifying motions for acquittal and motions for new trial in two separate rules, the new Rules preserved the traditional distinction between the two remedies. Rule 29 authorizes a trial court to enter a judgment of acquittal where "the evidence is insufficient to sustain a conviction." In applying this inquiry, the court must ask whether, even when viewing the evidence in the light most favorable to the verdict, *any* reasonable fact-finder could have voted to convict. See *Jackson* v. *Virginia*, 443 U.S. 307, 318 (1979). So long as there is some evidence that could support a guilty verdict, a Rule 29 motion must be denied "no matter how strong the countervailing evidence may be." Robertson, *Judging Jury Verdicts*, 83 Tul. L. Rev at 169.

Weight-of-the-evidence review under Rule 33 is an entirely different exercise. It asks district courts to consider *all* the evidence and then determine whether the evidence favoring guilt is clearly outweighed by contrary evidence. See *id*. at 187. In conducting that inquiry, "[t]he district court need not view the evidence in the light most favorable to the verdict; it may weigh the evidence and in doing so evaluate for

itself the credibility of the witnesses." *Tibbs*, 457 U.S. at 38 n.11 (quoting *Lincoln*, 630 F.2d at 1319). Drawing that distinction is the only way that the inquiry works. The entire point of the inquiry is to "determine if the evidence preponderates heavily against the verdict." Robertson, *Judging Jury Verdicts*, 83 Tul. L. Rev. at 187. If a court views the "evidence in the light most favorable to the verdict, it is presuming the answer to the very question it seeks to answer." *Ibid*.

So, even where there is *some* evidence to support the verdict—such that the court could not direct an acquittal under Rule 29—Rule 33 still allows the trial judge to consider the evidence and grant a new trial if it weighs against the verdict. See *Robinson*, 71 F. Supp. at 12. That difference makes sense. Ordering a new trial preserves the role of the jury in rendering a verdict, so it is natural that the standard for granting a new trial would be more forgiving than the strong medicine of a directed acquittal. See *id*. at 10.

The Rules' sharp distinction between new-trial motions and directed-acquittal motions also makes sense in light of the constitutional consequences of each. In *Tibbs*, this Court considered the implications of a directed acquittal and a new-trial order vis-à-vis the Double Jeopardy Clause of the Fifth Amendment. 457 U.S. at 40–45. A verdict set aside based on the insufficiency of the evidence bars retrial because "it means that no rational factfinder could have voted to convict the defendant." *Id*. at 41. There is no such bar when a district court grants a new trial because, as this Court explained, there the judge could "disagree[] with the jury's resolution of the conflicting testimony," and that "difference of opinion no more signifies

acquittal than does a disagreement among the jurors themselves." *Id*. at 42.

3. The court of appeals erred in rejecting the longstanding approach to new-trial motions

In the decision below, the court of appeals departed from the historically grounded understanding of a district court's authority to independently reweigh the evidence when resolving a motion for a new trial. In doing so, it erroneously conflated petitioner's new-trial motion with one for a directed verdict of acquittal. It held that the district court "must defer to the jury's resolution of conflicting evidence" unless "the evidence was patently incredible or defied physical realities" and that the district court could not grant a new trial if the "jury was entitled to conclude" that the defendant was guilty. Pet. App. 7a n.3, 8a (cleaned up).

The Second Circuit's rule rejects hundreds of years of common-law history recognizing the broad power of trial court judges to independently reweigh the evidence when deciding new-trial motions. And it disregards the important distinction between the Rule 29 test and the Rule 33 test. Under the former, the district court must "view[] the evidence in the light most favorable to the prosecution" (*i.e.*, defer to the verdict) and it can grant relief only if "no rational factfinder could have found the defendant guilty" (*i.e.*, the jury was "entitled" to find guilt). *Tibbs*, 457 U.S. at 37. Put differently, if after deferring to the jury's resolution of conflicting evidence, the trial court concluded that the jury was not "entitled" to convict, it should order an acquittal—not a new trial. But, under the Second Circuit's rule, that distinction is illusory. That rule also undermines the foundation of

this Court's decision in *Tibbs* because the Double Jeopardy distinctions between new-trial and directed-acquittal orders would evaporate, highlighting the impropriety of conflating the two standards.

B. The Decision Below Warrants this Court's Review

1. The courts of appeals are divided

The trial court's power to review the weight of the evidence has fallen into a state of doctrinal disorder and inconsistency. The question presented—whether a district court can independently weigh the evidence on a motion for a new trial—has split the courts of appeals. That conflict is real and intractable. Indeed, two circuits have expressly considered and rejected the "physical impossibility" test adopted by the court of appeals below. This Court should grant the petition to resolve that divide and restore uniformity to this important question of federal criminal law. See S. Ct. Rule 10(a).

a. As petitioner correctly explains, the Seventh and Eighth Circuits have considered, and rejected, the precise test adopted by the court below: namely, that district courts must defer to the jury unless the evidence is "incredible" or "physically impossible." See Pet. 20 (citing *United States* v. *Washington*, 184 F.3d 653 (7th Cir. 1999)); *id.* at 22 (citing *United States* v. *Stacks*, 821 F.3d 1038 (8th Cir. 2016)).

b. The other circuits are divided too. While the decision below stands alone in requiring district courts to defer across-the-board to the "jury's resolution of conflicting evidence," Pet. 29 (quoting Pet. App. 8a), the other circuits are split on whether a trial court can consider credibility.

At least six circuits (the Fourth, Fifth, Sixth, Ninth, Tenth, and Eleventh) have held that a district court *must* "consider the credibility of witnesses and the weight of the evidence" in deciding whether to grant a new trial. *United States* v. *Paulus*, 894 F.3d 267, 278 (6th Cir. 2018) (vacating order for failure to do so); see also *United States* v. *Hernandez*, 433 F.3d 1328, 1335 (11th Cir. 2005) (error to "view[] all the evidence, [make] all inferences, and resolve[] all credibility issues in the light most favorable to the government"); *United States* v. *Tarango*, 396 F.3d 666, 671–672 (5th Cir. 2005) ("district court must carefully weigh the evidence and may assess the credibility of the witnesses") (cleaned up); *United States* v. *Garcia*, 182 F.3d 1165, 1170 (10th Cir. 1999) (similar); *Alston*, 974 F.2d at 1211–1212 (similar); *United States* v. *Arrington*, 757 F.2d 1484, 1486 (4th Cir. 1985) (similar); see also Pet. 25 (noting that most of those circuits have relied on the thirteenth-juror analogy when articulating that rule).

But, as petitioner notes, two circuits (the First and Sixth) have taken a different approach. Pet. 23–24 (citing *United States* v. *Burks*, 974 F.3d 622 (6th Cir. 2020) & *United States* v. *Merlino*, 592 F.3d 22, 32–33 (1st Cir. 2010)).[7] In those circuits, district courts can

[7] The Sixth Circuit is itself split. *Burks* recently concluded that (absent exceptional circumstances) district courts must defer to the jury's credibility findings. 974 F.3d at 628, cert. denied, 141 S. Ct. 1722 (2021). But the dissent maintained that holding had no precedential effect because it directly contradicted the Sixth Circuit's "well-established rule that in deciding a new-trial motion, a district court must 'act as the 'thirteenth juror' to 'consider the credibility of witnesses and the weight of the evidence.'" *Id.*

reweigh *evidence*, but cannot consider credibility. When it comes to credibility, those circuits (like the decision below) held that district courts must "defer to a jury's credibility assessment[]" absent "exceptional circumstances," such as testimony that is "incredible or insubstantial on its face." *Merlino*, 592 F.3d at 32–33.

That evidence-but-not-credibility rule, while more modest than the sweeping deference required by the decision below, suffers from similar defects. Nothing in Rule 33's text draws a distinction between credibility determinations and other factual findings that a jury must make in reaching a verdict. Nor is there any principled reason for a district court to treat them differently when assessing whether the verdict is against the clear weight of the evidence. This second conflict further demonstrates the pervasive confusion in the lower courts over how to apply weight-of-the-evidence review

c. Those conflicting decisions justify this Court's review. While the history of the new-trial power reaches back centuries, a decision granting a new trial was, until relatively recently, "not reviewable upon appeal." *Aetna Cas.*, 122 F.2d at 354; see also *Gasperini*, 518 U.S. at 457–458 (Scalia, J., dissenting); Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1206, 98 Stat. 1837, 2153 (authorizing appeals of new-trial orders). Now that appellate review has been available for several decades, the courts of appeals have had ample opportunity to review such decisions. But this Court has never weighed in on the issue. That lengthy period of

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at 637 (White, J., dissenting) (quoting *Paulus*, 894 F.3d at 278).

percolation in the lower courts has resulted in inconsistent and contradictory rules across (and within) the circuits. This Court should grant the petition to provide guidance and restore a measure of uniformity to this important question of federal criminal procedure. See 1 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure Criminal* § 31 (4th ed. 2021) (uniformity was one of the driving factors that led to the promulgation of the Criminal Rules).

2. The question presented is recurring and important

This Court's review is also warranted because the question presented arises with frequency and has important implications for the operation of the criminal justice system. Over 1,400 federal criminal jury trials result in conviction each year.[8] Of those convicted defendants, many choose to pursue motions for acquittal and new trial after the verdict. See, *e.g.*, Wayne R. LaFave et al., *Criminal Procedure* § 24.11(a) (4th ed. 2020).

a. The power to grant a new trial acts as an important procedural safeguard in all those cases (as well as in countless civil jury cases). Early American courts characterized it as an indispensable feature of the jury right, "without which the jury system would be a capricious and intolerable tyranny, which no people could long endure." *Times Pub.*, 36 A. at 298 (Op. of Mitchell, J.).

"Like all human institutions, the jury system has its flaws[.]" *Peña-Rodriguez* v. *Colorado*, 137 S. Ct.

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[8] Table 5.4—U.S. District Courts–Criminal Judicial Facts and Figures (Sept. 30, 2019), https://bit.ly/2RNFjvT.

855, 861 (2017). While the jury-trial process reaches fair-minded and rational results in most cases, there are exceptions to that rule. Jurors can reach an erroneous verdict as the result of innocent misunderstandings as to the judge's instructions or the content of testimony, undisclosed biases, or egregious misconduct. But the rules protecting the jury's deliberative secrecy make such errors difficult, if not impossible, to identify and correct. See Cassandra Burke Robertson, *Invisible Error*, 50 Conn. L. Rev. 161, 163 (2018).

Those are the circumstances in which weight-of-the-evidence review does its most important work. Allowing the trial judge to review the weight of the evidence independently provides an indirect means to address those errors. Where a verdict is tainted by improper considerations, the evidence for that outcome is presumably weaker. "After all, if the evidence alone were strong enough to support the ruling, jurors would not need to look elsewhere for arguments to buttress their position." *Id*. at 193. While trial judges often do not know why a jury ruled as it did (and typically cannot ask), "weight of the evidence acts as a safety valve." *Ibid*. It "allows the trial judge to grant a new trial when the judge believes, but does not know for certain, that the jury based its verdict on something other than a rational review of the evidence." *Ibid*. (cleaned up).

Take *Peña-Rodriguez*, for example. It is a textbook example of conflicting evidence. The two teenage victims identified the defendant as the man who assaulted them in a racetrack bathroom. 137 S. Ct. at 861. A coworker provided an alibi, testifying that the defendant was with him elsewhere at the time of the assaults. See Amended Opening Br. at 1–2, *Peña-*

Rodriguez v. *People*, 350 P.3d 287 (Colo. 2015) (No. 13SC9), 2013 WL 12140027. The jury convicted. Ultimately, this Court overturned the conviction based on evidence that a juror "relied on racial stereotypes or animus" to convict. 137 S. Ct. at 869–870. But had those statements not come to light, a new trial may still have been appropriate. Robertson, *Invisible Error*, 50 Conn. L. Rev. at 165. Because the eyewitness testimony was rebutted by an alibi witness who had no incentive to lie, the trial judge could have concluded that the verdict was contrary to the weight of the evidence. *Id*. at 165–66. In that way, weight-of-the-evidence review can help to smoke out erroneous verdicts, including those premised on improper biases, without needing to pierce the secrecy of the jury's deliberations.

b. Under the court of appeals' approach, by contrast, district courts will be required to uphold questionable verdicts that otherwise would have justified a new trial.

The facts in *Tibbs* illustrate how that different standard leads to different results. In that case, jury convicted Delbert Tibbs of rape and murder based on the testimony of the victim and a jailhouse informant. See *Tibbs*, 457 U.S. at 33 & n.3. That testimony, "although sufficient to support the jury's verdict," *id*. at 46, was subject to "considerable doubt," *Tibbs* v. *State*, 337 So. 2d 788, 790 (Fla. 1976). The informant was "substantially discredited * * * on cross-examination" based on "inconsistencies in his testimony" and his desire to "obtain[] leniency" in his own case. *Tibbs*, 457 U.S. at 33 n.3. In addition, "several factors undermined [the victim's] believability," including that she testified that the crimes occurred "during daylight" even though "other

evidence suggested that the events occurred after nightfall" and she had "smoked marihuana shortly before the crimes and had identified Tibbs during a suggestive photograph session." *Id.* at 36. "Rather than risk the very real possibility that Tibbs had nothing to do with [those] crimes," the Florida courts granted a new trial. *Tibbs*, 337 So. 2d at 791. The state declined to retry Tibbs, having concluded "that the police investigation of the crime was tainted from the beginning * * * and the investigators involved knew it." Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21, 163 (1987) (cleaned up). Indeed, the "original prosecutor said if there was a retrial, he would appear as a witness for Tibbs." *Ibid.*

Under the rule applied by the court of appeals below, however, the Florida courts would have had no choice but to affirm Tibbs' conviction. The testimony of the government's witnesses, while "discredited" or subject to "considerable doubt," *Tibbs*, 457 U.S. at 33 n.3, 36, did not defy physical reality. And that evidence was legally "sufficient"—*i.e.*, the jury was entitled to find guilt. See *id.* at 46.

c. The result of the court of appeals' approach will be to increase the likelihood of wrongful convictions and to push error correction into alternative procedures that are more burdensome, costly, and disruptive. Under the Rules and at common law, the new-trial motion allowed a judge to correct a verdict that appeared grossly unfair but did not reveal any obvious procedural error. See Robertson, *Judging Jury Verdicts*, 83 Tul. L. Rev. at 160. Where a judge believes that the verdict was the product of something other than reason, she could order a new trial—without needing to identify any particular bias,

misunderstanding, or misconduct on the part of the jury that led its decision astray. *Id.* at 160–161. Restricting the new-trial right cranks up the pressure for litigants to seek proof of jury bias or other misconduct. See, *e.g.*, *Peña-Rodriguez*, 137 S. Ct. 855. Because such evidence will only rarely be present in the trial record, any error correction on direct appeal is generally impossible, and must instead occur via collateral vehicles (such as habeas review) that are more costly for all involved.

Traditional weight-of-the-evidence review, by contrast, is far less burdensome and disruptive. If a new trial is warranted, holding it as soon as possible after the conclusion of the first trial promotes both the defendant's interest in a speedy resolution of the case, and the prosecution's interest in retrying the case while witness memories and evidence are still fresh.

In most cases, the judge will reach the same verdict as the jury or, at a minimum, will conclude that the jury's verdict was reasonable. Neil Vidmar & Valerie P. Hans, *American Juries: The Verdict* 148–151 (2007) (finding that judges would have reached the same verdict in four out of five cases). But when the trial court has serious doubts about the verdict, it can place the decision in the hands of a second jury, which increases the reliability of the ultimate outcome. If the second jury reaches the same conclusion, that confirmation should alleviate the judge's concern and may make the verdict less vulnerable to subsequent challenge. And if the second jury reaches a different conclusion, society avoids the tremendous cost of a wrongful conviction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD BURKE
BRANDON L. ARNOLD
Counsel of Record
ANNA L. DEFFEBACH
ROBBINS, RUSSELL, ENGLERT,
ORSECK & UNTEREINER LLP
2000 K Street, NW, 4th Floor
Washington, DC 20006
(202) 775-4500
barnold@robbinsrussell.com

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