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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The government essentially concedes that district courts must have discretion to reweigh the evidence when evaluating a defendant's motion for a new trial under Federal Rule of Criminal Procedure 33. But rather than agree that the decision below – which deprives district courts of that ability – should be reviewed, the government attempts to re-write it, engaging in a selective misreading that ignores its operative language to try to bring the Second Circuit's new standard into harmony with the other Circuits.

There are no two ways about it. The decision below stripped district courts of any meaningful ability to reweigh the evidence and *requires* them to defer to a jury's verdict except in the vanishingly small class of cases where the evidence of guilt "was patently incredible or defied physical realities." Pet. App. 8a–9a. That is what the Second Circuit's decision says, and it is the way the government itself has wielded the decision in subsequent weight-of-the-evidence cases, going so far as to call the position it advances before this Court "frivolous."

The government's misreading of the Second Circuit's decision infects its entire analysis. Read properly, the decision holds that "a district court has discretion to grant a new trial *only* where 'the evidence was patently incredible or defied physical realities, or where an evidentiary or instructional error compromised the reliability of the verdict,'" Government's Notice of Supplemental Authority, *United States v. Nordlicht*, No. 19-3209-cr (2d Cir. filed Oct. 26, 2020), ECF 104 at 1; *accord* Response and Reply Brief by the United States, *United States v. Hoskins*, No. 20-842-cr (2d Cir. Jan. 12, 2021), ECF 110 at 33–

34 (*Archer* "forbid" district courts from "re-weigh[ing] the evidence" under Rule 33).[1]

In doing so, the Second Circuit split from the other circuits, and from this Court's pre-Rule 33 jurisprudence, on a critical and ever-present feature of a district court's ability to oversee criminal trials.

The government's other reasons for opposing certiorari are without merit. Although the petition arises from an interlocutory order, the appeal here was taken under 18 U.S.C. § 3731, which expressly authorizes interlocutory appeals and does not require finality. The government does not cite a single criminal case on this issue, let alone one involving Section 3731. And this Court has repeatedly granted the writ to petitioner-defendants at interlocutory stages in criminal cases after a successful government appeal on a critical legal issue, including cases where, unlike here, the merits had not yet been tried. *See, e.g.*, *Bates v. United States*, 522 U.S. 23, 29 (1997). If anything, the case for certiorari is stronger here, because the issue presented is a pure question of law that could not possibly be affected by further proceedings on remand.

This Court should therefore grant certiorari now to clarify that district courts *do* have discretion to reevaluate the evidence under Rule 33, and that in appropriate cases where it would be a "manifest injustice" to allow a verdict to stand notwithstanding the legal sufficiency of the evidence, may grant a new trial.

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[1] In case citations, all emphases are added and all internal alterations, citations, and quotation marks are omitted unless otherwise noted.

ARGUMENT

I. The Court Should Grant Certiorari to Settle Whether District Courts Have Discretion To Reweigh the Evidence Under Rule 33.

The government does not disagree that district courts must be able to "set aside a conviction against the weight of the evidence," BIO.7 (quoting *Tibbs v. Florida*, 457 U.S. 31, 39 n.12 (1982)), but seems to argue that the Second Circuit's decision did not strip district courts of that ability. Unfortunately, the government's reading of the decision below is not only at odds with the decision itself, but it is 180 degrees opposite the government's own position in a series of subsequent cases in the Second Circuit. And when the Second Circuit's decision is taken on its own terms, it creates a clear circuit split. This Court should grant certiorari to clarify what the government seems to admit: that district courts are free to reweigh the evidence under Rule 33, and are not constrained to defer to a jury's verdict unless "the evidence was patently incredible or defied physical realities."

A. The Decision Below Conflicts With The Decisions of This Court and Numerous Circuit Courts.

The decision below includes an unambiguous and unsupportable limit on district courts' discretion under Rule 33. According to the standard announced by the Second Circuit, except in cases involving evidentiary or instructional error, a district court "may not reweigh the evidence" on Rule 33 review, but instead "must defer" to the jury's resolution of conflicting evidence' unless "the evidence was patently incredible or defied physical realities." Pet. App. 8a.

The government attempts to rewrite the Second Circuit's holding, changing the "must" defer to a "should." *Compare* Pet. App. 8a–9a *with* BIO.4. But the decision below says explicitly that district courts "must" defer to the jury's resolution of conflicting evidence, and therefore "must" defer to the verdict in any weight-of-the-evidence case, except where the dispositive evidence of guilt was "patently incredible or defied physical realities." In doing so, the Second Circuit stripped district courts of any meaningful discretion to reweigh the evidence "and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33 (a).

The Second Circuit's standard cannot be reconciled with the holdings of numerous courts of appeals, or of this Court. The Seventh and Eighth Circuits have expressly considered, and rejected, the precise limitation imposed by the Second Circuit. *See United States v. Washington*, 184 F.3d 653, 657 (7th Cir. 1999) (district court may grant new trial even where the evidence was "not contrary to the laws of nature or otherwise incapable of belief"); *United States v. Morales*, 902 F.2d 604, 608 (7th Cir. 1990) (district court may grant new trial where the verdict was against the weight of the evidence, even where that evidence was "not impossible," "inconsistent with physical reality[,] or otherwise incredible"); *United States v. Stacks*, 821 F.3d 1038, 1046 (8th Cir. 2016) (rejecting argument that district court may only grant a new trial "if [the evidence] is physically impossible," and holding that that standard related only to legal sufficiency under Rule 29). And as the full page of citations provided by the government confirms, the other courts of appeals have uniformly held that district courts may reweigh the evidence and grant a new trial under Rule 33. BIO.8; *see also* Pet. 19–22.

The government argues, however, that the clear standard articulated by the Second Circuit did not divest district courts of their ability to assess the totality of the evidence. BIO.10. It instead attempts to dismiss the "patently incredible or defied physical realities" standard as dicta contained in just "a single sentence," or just an "example" of the sort of extraordinary circumstances that would warrant a new trial under Rule 33. BIO.10, 11. It claims that the Second Circuit's "repeated[]" invocation of the "preponderates heavily" standard means that the decision below could not have intended to create as restrictive a test as the "patently incredible" language suggests. BIO.10. But this argument rests on a misreading of the Second Circuit's use of the phrase "preponderates heavily" that is sure to sow confusion in the courts below, and which calls out for this Court's review.

It is certainly true that several Circuits hold that a district court should not grant a new trial under Rule 33 when the weight of the evidence question is a close one. Those courts recognize (as did the district court here, *see* Pet. App. 35a) that a jury's verdict should not be lightly set aside, and that a new trial should be granted on these grounds only when the evidence, taken as a whole, points decisively against the verdict. Those Circuits – which include First, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits – therefore hold that a district court may freely reweigh the evidence on Rule 33 review but may only disturb the verdict and actually order a new trial if the evidence "preponderates heavily" against guilt. BIO.8 (collecting cases); *see also Crumpton v. United States*, 138 U.S. 361, 363 (1891) (new trial appropriate where verdict is "manifestly against the weight of evidence").

The decision below repeatedly invoked the phrase "preponderates heavily," but used it in a totally different way than these other Circuits. The Second Circuit held that under Rule 33, "the 'preponderates heavily' standard circumscribes th[e] discretion" of district courts:.

> We stress that, *under this standard*, a district court *may not* reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable. To the contrary, *absent* a situation in which the evidence was patently incredible or defied physical realities, or where an evidentiary or instructional error compromised the reliability of the verdict, a district court *must defer* to the jury's resolution of conflicting evidence.

Pet. App. 8a–9a.

In short, the Second Circuit defined the "preponderates heavily" standard to strip district courts of discretion to reweigh the evidence, except where the evidence was patently incredible (and therefore effectively legally insufficient). *Id*. 8a–9a. Far from being dicta, the Second Circuit's patently-incredible test purports to define when, and only when, district courts can avoid being compelled to "defer to the jury's resolution of conflicting evidence." *Id.* at 9a.[2]

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[2] Likewise, the government incorrectly suggests that the patently-incredible test is just an "example" of the

The decision below also split from the other circuits on a related question: whether the evidence on a Rule 33 motion must be viewed in the light most favorable to the government (as the Second Circuit held), or whether the district court is free to draw its own inferences (as every other Circuit holds). *See* Pet. 24–29. The government does not disagree that viewing the evidence in the light most favorable to the government is the wrong legal standard, but once again attempts to dismiss this aspect of the decision below, saying that it rests on a footnote discussing mostly undisputed facts. BIO.12. But the Second Circuit not only explicitly wrote in that footnote that the facts must be viewed "in the light most favorable to the [g]overnment," Pet. App. 3a n.1, the court also plainly employed that lens throughout its analysis. Far from recognizing that it was possible for the district court to draw competing (and far stronger) inferences from the evidence, the Second Circuit held that the district court "must defer" to the jury's resolution of the evidence. *Id.* at 188. And in discussing the evidence, the Second Circuit consistently asked only whether the jury's view of the evidence was legally permissible,

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"extraordinary circumstances" that the Second Circuit has previously held are required to grant a new trial in weight-of-the-evidence cases. BIO.11 (citing *United States v. Ferguson*, 246 F.3d 129, 134, 139 (2d Cir. 2001)). But regardless of what *Ferguson* held twenty years ago, the same just-quoted language from *Archer* makes clear that the decision below recognizes only one situation that qualifies as "extraordinary circumstances," absent instructional or evidentiary error: when the evidence was patently incredible or defied physical realities. Pet. App. 8a–9a.

such that the jury was "entitled" to draw the inferences urged by the government. *See* Pet. 9. This approach is at direct odds with any ability of the district court to evaluate the evidence as a whole, and the government rightly makes no effort to defend it.

B. The Government's Attempt to Harmonize the Decision Below With Other Courts Is Contradicted By Its Own Statements.

The government itself has repeatedly recognized that the decision below stripped district courts of discretion to reweigh the evidence, going so far as to characterize its own position before this Court as "frivolous." That is, the government has elsewhere embraced the (proper) reading of the decision below that creates a clear circuit split. It should not be heard in this Court to pretend that no such split exists.

In *United States v. Nordlicht*, an interlocutory appeal by the government after the district court granted a new trial under Rule 33, the government argued that it was "frivolous" to assert "that *Archer* permits a district court to weigh the evidence itself." Government's Notice of Supplemental Authority, *United States v. Nordlicht*, No. 19-3209-cr (2d Cir. filed Oct. 26, 2020), ECF 104 at 1 ("*Nordlicht* Government Ltr.").[3] The government explained that, under the standard announced in the decision below, "a district court has discretion to grant a new trial *only where* the evidence was patently incredible or defied physi-

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[3] For the Court's convenience, the *Nordlicht* Government Letter is attached as Exhibit 1.

cal realities," or where there is "an evidentiary or instructional error." *Id.* at 2. It elaborated at oral argument:

> [T]he district court did not identify any credibility [problems] with witnesses; did not identify any evidence that was "patently incredible or defied physical reality"; did not identify any legal defect in the instructions or the evidentiary rulings. And therefore, the district court was *bound by the inferences drawn by the jury* in issuing the Rule 33 order . . . .

Nordlicht, Oral Argument at 47:07–50 (2d Cir. Dec. 3, 2020), available at https://www.ca2.uscourts.gov/decisions/isysquery/5ea04d50-f719-443b-8668-f503d9f6527b/51-60/list ("*Nordlicht* Tr.").

Likewise, in *United States v. Hoskins* – another appeal by the government following a grant of a new trial – the government argued that the district court "did exactly what th[e Second Circuit] *forbid* in *Archer*, that is, it re-weighed the evidence" but "noted no 'patently incredible' or reality-defying evidence, or any 'evidentiary or instructional error that compromised the reliability of the verdict.'" Response and Reply Brief at 33–34, *United States v. Hoskins*, No. 20-842-cr (2d Cir. Jan. 12, 2021), ECF 110 ("*Hoskins* Br.").[4]

The government's argument in these cases – that the decision below holds that a district court is "forbid[den]" from reweighing the evidence under Rule 33, *id.*, and is "bound by the inferences drawn by the

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4 The *Hoskins* Brief is excerpted at Exhibit 2.

jury," *Nordlicht* Tr. at 47:07–50, except where the evidence is patently incredible or defies physical realities – rests on an objectively correct reading of the Second Circuit's decision. That reading is entirely consistent with this petition, and with the decision below. And it is that reading, which the government has repeatedly invoked to try to reinstate jury verdicts that district courts have held are against the weight of the evidence, that is contrary to Rule 33 and created a split with the other Circuits.

This Court should therefore grant certiorari to clarify that a district court *is* permitted to reweigh the evidence under Rule 33.

II. Review is Proper at this Stage, as the Question Presented is Purely Legal and the Only Proceedings on Remand are Sentencing.

The "interlocutory posture" of this case is not a reason to deny the petition, which presents a pure and important issue of law that has no chance of being further developed (or mooted) by proceedings on remand.

This Court has not hesitated to grant certiorari in situations where, as here, the government itself initiated an interlocutory appeal on an important legal issue. *See* Stephen M. Shapiro et al., *Supreme Court Practice* 4.18 n.72 (10th ed. 2013) (citing cases).[5] For

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5 The government does not argue that the writ should be denied on jurisdictional grounds. Its appeal to the Second Circuit was made under 18 U.S.C. § 3731, which "provides a statutory exception to the final judgment rule." *Flanagan v. United States*, 465 U.S. 259, 265 n.3 (1984).

example, in *Bates v. United States*, the government appealed the district court's order dismissing an indictment charging the defendant with willfully misapplying federally-guaranteed student aid funds. The Court of Appeals reversed and reinstated the conviction. Rather than allow the trial to play out on remand, however, this Court granted certiorari to clarify the elements of the offense. 522 U.S. 23, 29 (1997); *dee also, e.g., Oliver v. United States,* 466 U.S. 170, 174 (1984) (interlocutory appeal of pre-trial order suppressing evidence); *Sanabria v. United States*, 437 U.S. 54, 61–62 (1978) (interlocutory appeal of mid-trial order excluding government evidence). These cases confirm that interlocutory review is appropriate where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." *Shapiro* § 4.18.

Here, the usual reasons why this Court may be reluctant to grant certiorari in an interlocutory posture are absent. For example, each of the cases cited by the government involved interlocutory appeals in civil cases, where substantial merits issues remained on remand. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (holding that "decree" "was not a final one" when it involved remand for "an injunction and an accounting"); *Nat'l Football League v. Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020) (statement of Kavanaugh, *J.*, respecting the denial of certiorari) (noting that antitrust case "comes to us at the motion-to-dismiss stage").

This case, in contrast, has already been tried to verdict, and all that is left on remand is sentencing. This is not a case where "the proceedings on remand

may affect the consideration of the issues presented in a petition." BIO.7.

Nor does the petition present a "fact-bound" question at all. *Id*. at 10. While any weight-of-the-evidence *decision* is necessarily fact-intensive – which is why district courts are supposed to have wide discretion to evaluate those motions in "the interest of justice," Fed. R. Crim. P. 33(a) – this *petition* presents a pure issue of law: whether a district court on Rule 33 review is permitted to reweigh the evidence, or whether (absent evidentiary or instructional error) it "*must defer* to the jury's resolution of conflicting evidence," unless the "the evidence was patently incredible or defied physical realities," as the Second Circuit held in this case. Pet. App. 8a–9a.

Further proceedings in the courts below have no prospect of developing the record on that important issue, which affects literally every criminal case tried to verdict and which, if not addressed by this Court, will "increase the likelihood of wrongful convictions and [] push error correction into alternative procedures that are more burdensome, costly, and disruptive." Brief of Procedure Scholars at 21.

CONCLUSION

The petition for a writ of certiorari should be granted.

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