No. _____

In the

Supreme Court of the United States

MARK NORDLICHT; DAVID LEVY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL S. SOMMER
MORRIS J. FODEMAN
WILSON SONSINI GOODRICH & ROSATI PC
1301 Avenue of the Americas
New York, NY 10019

STEFFEN N. JOHNSON
KELSEY J. CURTIS
WILSON SOSINI GOODRICH & ROSATI, PC
1700 K Street, NW
Washington, DC 20006
(202) 973-8800

Counsel for Petitioner David Levy

ANDREW J. LEVANDER
STEVEN A. ENGEL
Counsel of Record
MICHAEL H. MCGINLEY
MICHAEL P. CORCORAN
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
steven.engel@dechert.com
(202) 261-3300

Counsel for Petitioner Mark Nordlicht

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QUESTION PRESENTED

Federal Rule of Criminal Procedure 33 provides that the district court "may vacate any judgment and grant a new trial if the interest of justice so requires." That rule preserves the court's common law authority to order a new trial "[i]f, in the opinion of the court, the verdict of the jury should be found against the evidence." *Lee v. Lee*, 33 U.S. 44, 50 (1834); *see also Crumpton v. United States*, 138 U.S. 361, 363 (1891). This Court has not addressed the scope of discretion under the rule, and in the absence of guidance, the courts of appeals have divided over how a district court should review the evidence.

In the decision below, the Second Circuit doubled down on a recent precedent to hold that, absent evidentiary or instructional error, the district court may grant a new trial only where the "evidence was patently incredible or defied physical realities" or was similarly flawed. App. 65 (quoting *United States v. Archer*, 977 F.3d 181, 188 (2d Cir. 2020)). Other courts of appeals, however, take a very different course, allowing the district courts to weigh the evidence, assess credibility, and act as a "thirteenth juror" in considering a motion for a new trial.

The question presented is:

Whether district courts have discretion to weigh the evidence, including the credibility of witnesses, when deciding to grant a new trial under Rule 33, or whether they must defer to the jury's view of the evidence unless the evidence is patently incredible, defies physical realities, or is similarly flawed.

PARTIES TO THE PROCEEDING

Petitioners Mark Nordlicht and David Levy were the defendants before the U.S. District Court for the Eastern District of New York and the appellees before the U.S. Court of Appeals for the Second Circuit.

Respondent the United States of America was the prosecution before the U.S. District Court for the Eastern District of New York and the appellant before the U.S. Court of Appeals for the Second Circuit.

Uri Landesman, Joseph SanFilippo, Joseph Mann, Daniel Small, and Jeffrey Shulse were charged in the indictment before the U.S. District Court for the Eastern District of New York, but they were not involved in the appeal below. The government dismissed charges against Uri Landesman, Joseph Mann, and Jeffrey Shulse. Joseph SanFilippo was acquitted on all counts following a jury trial, and Daniel Small has not yet been tried on the charges against him.

RELATED PROCEEDINGS

United States v. Landesman, No. 19-3207, 17 F.4th 298 (2d Cir. 2021). Judgment entered November 5, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Second Circuit (App. 1-90) is reported at 17 F.4th 298. The relevant opinion of the U.S. District Court for the Eastern District of New York (App. 91-138) is unreported but is available at 2019 WL 4736957.

JURISDICTION

The court of appeals issued its decision on November 5, 2021. App. 1. Petitioners filed a timely petition for rehearing on November 19, 2021, which was denied on December 29, 2021. App. 139. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 33(a) provides in relevant part: "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires."

INTRODUCTION

This case presents an ideal opportunity for the Court to resolve an important and recurring conflict among the circuits over the correct interpretation of Federal Rule of Criminal Procedure 33. Under Rule 33, district courts "may" vacate a conviction and grant a new trial "if the interest of justice so requires." That permissive language differs from Federal Rule of Criminal Procedure 29, which provides that district courts on a defendant's motion "must" enter a

judgment of acquittal when "the evidence is insufficient to sustain a conviction." Rule 33's language thus has long been understood to allow the district judge to act as a "thirteenth juror" with the discretion to "weigh the evidence" and order a new trial when the verdict is against the weight of the evidence. *See Tibbs v. Florida*, 457 U.S. 31, 38-44 (1982).

Although this Court has described weighing the evidence as the practice of "some federal courts," *Tibbs*, 457 U.S. at 38 n.12, the Court has never squarely addressed Rule 33. In the absence of guidance, confusion has developed among the circuits. Twice now in two years, the Second Circuit has held that, absent evidentiary or instructional error, district courts are barred from ordering a new trial unless the government's evidence was "patently incredible or defied physical realities" or was similarly flawed. App. 65; *United States v. Archer*, 977 F.3d 181, 188 (2d Cir. 2020). But that threshold is not tethered to the text of the rule, and would surely require an acquittal under Rule 29 anyway.

In the decision below, the Second Circuit applied this restrictive standard to reverse the grant of a new trial and require near-complete deference to the jury. The Eleventh Circuit takes a similar approach. *See Butcher v. United States*, 368 F.3d 1290, 1297 (11th Cir. 2004). For these courts, the difference between Rule 29 and Rule 33 is vanishingly small, if not completely illusory: regardless of the label, district courts may not overrule a jury unless the verdict was simply irrational.

In sharp contrast with those two circuits, four circuits clearly distinguish Rule 33 from Rule 29 and grant district courts genuine discretion to weigh the evidence under Rule 33. District courts within those circuits—the Fifth, Seventh, Eighth, and Ninth—receive wide latitude and deference if, after sitting through a trial, they decide that the interest of justice requires a new one.[1] In those jurisdictions, district courts may make credibility determinations, draw inferences from the evidence, decide for themselves whether the government has proven guilt beyond a reasonable doubt, and grant new trials even if the witness's "testimony was not inconsistent with physical reality or otherwise incredible." *United States v. Morales*, 902 F.2d 604, 608 (7th Cir. 1990).

In those circuits, the difference between Rule 29 and Rule 33 is plain: Rule 29 concerns whether the evidence is sufficient as a matter of law, whereas Rule 33 concerns the weight of the evidence—a quintessentially factual judgment about whether the government has proved its case. And under that Rule 33 standard, "a court of appeals will only rarely reverse a district judge's grant of a defendant's motion for a new trial, and then only in egregious cases." *United States v. Alston*, 974 F.2d 1206, 1211 (9th Cir. 1992).

Those four circuits are right, and the Second and Eleventh Circuits are wrong. Rule 33's plain text

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[1] *See United States v. Herrera*, 559 F.3d 296, 302-03 (5th Cir. 2009); *United States v. Washington*, 184 F.3d 653, 657 (7th Cir. 1999); *United States v. Stacks*, 821 F.3d 1038, 1044-45 (8th Cir. 2016); *United States v. Inzunza*, 638 F.3d 1006, 1026 (9th Cir. 2011).

grants district courts the discretion to order a new trial in "the interest of justice," which differs markedly from Rule 29's obligation to enter a judgment of acquittal when the evidence is "insufficient to sustain a conviction." As the Court long ago recognized, "[i]nsufficiency in point of fact may exist in cases where there is no insufficiency in point of law." *See Metro. R.R. Co. v. Moore*, 121 U.S. 558, 568-69 (1887).

Rule 33 thus codified the common law practice—embodied in the Judiciary Act of 1789—recognizing that the district courts' authority to weigh the evidence was part and parcel of the trial by jury. *See Tibbs*, 457 U.S. at 38 & n.11, 44 & n.20; Wright & Miller, Federal Practice and Procedure § 582 (4th ed. 2021). A "[t]rial by jury," as understood "at the common law and in the American constitutions, is not merely a trial by a jury of 12 men." *Cap. Traction Co. v. Hof*, 174 U.S. 1, 9-10 (1899). Rather, the jury includes "the superintendence of a judge empowered . . . to set aside the verdict, if, in his opinion, it is against the law *or the evidence*." *Id.* at 13-14 (emphasis added).

This circuit split on this fundamental question of criminal procedure calls out for resolution. Criminal defendants should not be subject to different standards based on the happenstance of geography. The protections granted in the Federal Rules of Criminal Procedure are necessary to ensure justice and safeguard against erroneous convictions. Rule 33 thus serves as an additional bulwark beyond Rule 29. If the prosecution cannot convince the judge who presided over a lengthy trial that the conviction serves the interest of justice, then Rule 33 expressly provides

the court with the option to order a new trial. This Court should grant certiorari to reinstate that protection in the Second and Eleventh Circuits and to clarify the Rule 33 standard for all circuits.

Finally, this case is a clean vehicle for addressing this question. In the decision below, the experienced district judge (Cogan, J.) sat through a nine-week trial in which the jury acquitted Petitioners on five charges and convicted them on three. On post-trial motions, the district court considered the differences between Rule 29 and Rule 33, and held that the verdict against Levy should be set aside under both Rule 29 and Rule 33, and that the verdict against Nordlicht should be set aside under Rule 33.

On appeal, the Second Circuit reversed, applying the "patently incredible" standard that it adopted in *Archer*. When the *Archer* defendant petitioned for certiorari, the Solicitor General argued that the Second Circuit's decision was fact-bound and in harmony with other circuits. *See* Brief in Opposition, *Archer v. United States*, No. 20-1644 (S. Ct. Sept. 24, 2021). Yet the decision below doubled down on *Archer*. App. 64-66. For one petitioner, the Second Circuit reversed the district court's Rule 33 ruling for the very same reasons it reversed the Rule 29 ruling. App. 66-67. For the other, the circuit court relied on the district court's Rule 29 analysis to reverse its Rule 33 ruling. App. 68-82. The decision thus removes any doubt that the Second Circuit conflates Rule 29 and Rule 33 in a manner conflicting with other circuits. The Court should intervene.

STATEMENT OF THE CASE

A. Federal Rule of Criminal Procedure 33

Federal Rule of Criminal Procedure 33 provides that a district "court may vacate any judgment and grant a new trial if the interest of justice so requires." The Rule's predecessor similarly allowed for criminal defendants to move "for a new trial" under the common law standard. *See United States v. Smith*, 331 U.S. 469, 473 (1947). In the federal courts, that authority dates back to the Judiciary Act of 1789, which gave the courts the "power to grant new trials, in cases where there has been a trial by jury[,] for reasons for which new trials have usually been granted in the courts of law." Judiciary Act of Sept. 24, 1789, § 17, 1 Stat. 83.

This Court has long recognized that such authority includes the discretion to order new trials "[i]f, in the opinion of the court, the verdict of the jury should be found against the evidence." *Lee v. Lee*, 33 U.S. 44, 50 (1834); *Cap. Traction Co. v. Hof*, 174 U.S. 1, 9-10 (1899); *see also Crumpton v. United States*, 138 U.S. 361, 363 (1891). Rule 33 thus allows "the district court [to] weigh the evidence and consider the credibility of the witnesses." Wright & Miller § 582. If the verdict "is contrary to the weight of the evidence" and would result in a "miscarriage of justice," "the court may set aside the verdict and grant a new trial." *Id.* If a district court orders a new trial based on the weight of the evidence, then the Double Jeopardy Clause does not bar re-trial. *Tibbs* 457 U.S. at 45.

B. Federal Rule of Criminal Procedure 29

In contrast with the district court's discretion under Rule 33, Federal Rule of Criminal Procedure

29(a) is mandatory: The district court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Rule 29 thus requires "a substantive determination that the prosecution has failed to carry its burden" as a matter of law. *See Smith v. Massachusetts*, 543 U.S. 462, 468 (2005). Unlike Rule 33, Rule 29 requires the district court to draw all inferences in the government's favor, and granting the motion triggers the Double Jeopardy Clause and bars any re-trial. *See Evans v. Michigan*, 568 U.S. 313, 318 (2013).

C. District Court Proceedings

Mark Nordlicht co-founded a successful hedge fund, Platinum Partners L.P., in 2003. App. 6-7. David Levy worked at Platinum, but joined Beechwood, a reinsurance company, in 2014. App. 7. In 2016, both Nordlicht and Levy, along with several others, were indicted in the Eastern District of New York for two allegedly fraudulent schemes. App. 35. The indictment contained eight separate counts, five of which alleged a scheme to inflate Platinum's assets to defraud its investors, and three of which alleged a scheme to defraud bondholders in Black Elk Energy Offshore Operations, LLC ("Black Elk"), a Texas energy company. App. 35 & n.4. Most of the evidence during the nine-week trial focused on the alleged Platinum fraud, not the Black Elk fraud. Ultimately, the jury acquitted Nordlicht and Levy of the five counts related to Platinum, but convicted them of the three counts related to Black Elk. App. 35.

For the Black Elk scheme, the government's theory was that Nordlicht and Levy had defrauded other holders of Black Elk bonds by rigging a vote to amend

the indenture that governed those bonds. App. 97. The prosecution argued that, under the "affiliate rule" of the Trust Indenture Act, the votes of Platinum and its affiliates (*i.e.*, entities under common control) could not be counted in connection with the bondholder vote because Platinum controlled the majority of Black Elk's equity. App. 94-96. The government claimed that Nordlicht and Levy had concealed Platinum's control over affiliated entities so that the indenture trustee would count those votes towards the amendment. *Id.*

At trial, Nordlicht and Levy demonstrated that, contrary to the indictment and the government's opening statement, the votes of the Platinum funds had not been counted. App. 31-32. The lawyer who counted the votes testified that Petitioners had disclosed to him Platinum's control over two investment funds—Platinum Partners Credit Opportunities Master Fund, L.P. ("PPCO") and Platinum Partners Liquid Opportunity Master Fund L.P. ("PPLO")—and as a result, he had excluded those votes. App. 107.

The government's remaining theory was that Defendants had not disclosed Platinum's purported control over Beechwood, whose votes were counted towards the indenture amendment. App. 112. Nordlicht and Levy argued that Beechwood was independent of Platinum, was run by its own CEO, and had received legal advice to maintain its separation from Platinum. App. 114, 133. Thus, Nordlicht and Levy argued that there was no need to disclose anything related to Beechwood or to prevent Beechwood from voting on the amendment. *Id.*

Nordlicht and Levy also denied that they had the requisite intent to defraud. App. 126, 133-34. Nordlicht argued that he believed Beechwood was legally independent from Platinum and that he had disclosed the PPCO and PPLO votes before they were counted. App. 134-35. He further argued that he had been trying to comply with the complex rules governing the indenture vote but had gotten bad advice from the lawyer counting the votes concerning what should be disclosed. App. 135-36.

Levy argued that he had had no role in Beechwood voting its Black Elk bonds at all. The government's evidence consisted entirely of his having received certain emails, but there was no evidence that Levy read, responded, or acted on any of them. App. 128-29. Moreover, the government's main witness conceded that Levy was told Beechwood's lawyers had made sure that Beechwood was not a Platinum affiliate. App. 129-30.

Following the verdict, Nordlicht and Levy filed motions under Federal Rules of Criminal Procedure 29 and 33. App. 112-13.

For Nordlicht, the district court found that the evidence was legally sufficient under Rule 29, but warranted a new trial under Rule 33. App. 133-37. As the court explained, "[t]he evidence suggests that, although Nordlicht knew about the affiliate rule, he and Beechwood went to great lengths to comply with the affiliate rule." App. 133. Nordlicht had tried to be "fully compliant with the affiliate rule," and there was little "evidence that Nordlicht was on notice of [Beechwood's] affiliate status," especially since the two Beechwood witnesses testified that the company

was independent of Platinum. App. 133-34. Although the government introduced an email where, in another context, Nordlicht had described Beechwood as "controlled" by Platinum, the district court viewed that as too slender a reed to support guilt beyond a reasonable doubt. App. 134-35.

For Levy, the district court granted the motion for an acquittal under Rule 29. The court explained that the government's case rested "on multiple layers of speculation, not reasonable inferences from witness testimony." App. 127. Put simply, there was no evidence that he intended to defraud anyone. App. 127-29. Although Levy was copied on emails discussing the affiliate rule, there was no evidence that he read, understood, or acted on them—let alone that he intended to defraud. *Id.* The district court thus granted an acquittal, and in the alternative, granted the Rule 33 motion. App. 137-38.

D. The Decision Below

The Second Circuit reversed. In a 104-page opinion, the court parsed the record bit by bit, concluding that the district court had not properly "defer[red] to the jury['s]" assessment. App. 65. In so doing, the court relied heavily on *Archer*'s "guidance" that, absent an evidentiary or instructional error, district courts applying Rule 33 "'may not reweigh the evidence'" unless it is "'patently incredible or defie[s] physical realities'" or depends "upon strained inferences drawn from uncorroborated testimony." App. 64-65 (quoting *Archer*, 977 F.3d at 188). Only in those kinds of circumstances, the court held, does the "evidence preponderate[] heavily against the verdict," and thus warrant a new trial. App. 65. But in the

absence of such reality-defying or "incredible" evidence, district courts must "defer to the jury's resolution of conflicting evidence and assessment of witness credibility." App. 64 (citation omitted).

That narrow view of Rule 33 controlled the Second Circuit's entire opinion. Again and again, the court rejected the district court's reasoning since "the jury was entitled to" conclude that Petitioners were guilty. App. 69, 74 n.5, 83. For example, although Nordlicht wrote that Platinum "will be fully compliant with" the affiliate rule, the Second Circuit held that the "jury could have reasonably concluded that" Nordlicht was actually hiding his true intentions. App. 68-69. The Second Circuit thus nitpicked its way through the record to find that a jury could have rationally convicted Nordlicht. *E.g.*, App. 71, 73, 74 n.5, 77-78, 83. But that standard governs Rule 29, not Rule 33.

Were there any doubt, the Second Circuit expressly relied on the district court's Rule 29 analysis to hold that it was wrong to grant Nordlicht a new trial under Rule 33. *E.g.*, App. 68, 69, 73, 77. For Rule 33, the Second Circuit repeatedly stated that, "as the district court found in denying Nordlicht's Rule 29 motion, there was sufficient evidence to support the jury's conclusion" about Nordlicht's verdict. App. 73; *see* App. 77. That conflates Rule 29 with Rule 33.

The Second Circuit was no more forgiving when it came to the district court's assessment of witness testimony. Although the district court credited the testimony of certain witnesses who maintained Beechwood's independence, the Second Circuit found the testimony to be "inconsistent." App. 74 n.5. And so the "jury was entitled to weigh [that] testimony and

discount" any testimony that supported Nordlicht. *Id.* The Second Circuit left the district court no role in assessing credibility where, for instance, one set of statements sounded flustered, confused, or simply untrue.

The Second Circuit's analysis of Levy's Rule 33 motion even more clearly conflated Rule 33 with Rule 29. In reviewing Levy's Rule 29 motion, the Second Circuit "view[ed] the evidence . . . in the light most favorable to the government." App. 40. Through that lens, the court saw Levy's receipt of emails for the amendment vote as suggesting involvement in failing to disclose the Beechwood-owned bonds. App. 48-51. His receipt of another email disclosing Beechwood's acquisition of Platinum bonds could mean that he "understood Beechwood's role in the Black Elk scheme." App. 51. And an email concerning how Beechwood voted on its bonds could mean that he gave the instructions on the vote. App. 52.

After overruling the district court's grant of acquittal to Levy under Rule 29, the Second Circuit took only three sentences to overrule the district court's Rule 33 decision. App. 67. Although the court paid lip service to the different standards, the Second Circuit relied entirely on its Rule 29 analysis to reverse the Rule 33 ruling, holding that "[i]n light of the wealth of evidence . . . detailed above, there was ample basis for the jury to conclude that Levy acted with the requisite criminal intent." *Id.* The Second Circuit's slim analysis effectively confirms that it sees no real daylight between Rule 33 and Rule 29.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition to clarify the Rule 33 standard and resolve the circuit split. The Second Circuit stands squarely at odds with four other circuits. Those circuits broadly allow district courts to weigh evidence and assess credibility under Rule 33, making the difference between Rule 33 and Rule 29 clear. But the Second Circuit—as well as the Eleventh Circuit—has constrained district courts, giving little deference and allowing the grant of new trials only when the jury verdict is irrational. Meanwhile, three other circuits—the Third, Sixth, and Tenth Circuits—have produced wildly different instructions on Rule 33, highlighting the widespread confusion among the lower courts.

Not surprisingly, all of the circuits recognize Rule 33's textual requirement that the "interest of justice" mandate a new trial. And all agree that the grant of a Rule 33 motion should not be done routinely, but should be reserved for exceptional cases where the evidence "preponderates sufficiently heavily" against the jury's verdict. *Tibbs*, 457 U.S. at 38 n.11 (quoting *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980)).

But the circuits disagree profoundly over how much discretion the district court has in weighing the evidence and disagreeing with the jury. Four circuits allow the district court to act as a "thirteenth juror," *id.* at 42, with the discretion to "weigh the evidence, and, in so doing, evaluate for itself the credibility of the witnesses." *Id.* at 38 n.11 (quoting *Lincoln*, 630 F.2d at 1319). In contrast, two circuits view a court's reweighing of the evidence as a threat to the jury's

prerogative, requiring instead that the district court defer to the jury's findings except where they are irrational. And other circuits have issued internally inconsistent decisions that are all over the map.

This Court has yet to interpret Rule 33. It has recognized the material difference "between the weight and the sufficiency of evidence" for purposes of the Double Jeopardy Clause, *id.* at 44, and observed in civil cases that trial courts have broad discretion to grant a new trial, *see Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). That understanding grounds Rule 33 in its common law roots, which reflect a long tradition of affording district courts discretion in evaluating the weight of the evidence. It also ensures that Rule 33 remains distinct from Rule 29, thereby respecting their separate protections and textual differences.

This case presents an ideal vehicle for certiorari. The disagreement over the Rule 33 legal standard was dispositive, and the Second Circuit plainly conflated Rule 29 and Rule 33 in overturning the district court.

Moreover, the issue is important for criminal defendants everywhere. Given the increasing rarity of criminal trials, it is especially crucial that the government be held to its burden of proof. But, if Rule 33 is collapsed into Rule 29, the government must overcome one less check on its prosecutorial power. Not only is that inconsistent with bedrock principles of criminal justice and due process, but it would nullify a critical provision in the Federal Rules. This Court should grant certiorari to restore that bulwark of

justice in the Second and Eleventh Circuits, and to clarify the Rule 33 standard for all federal courts.

I. Without Guidance from this Court, the Circuits Are Divided Over Rule 33.

The circuits have squarely split over Rule 33. The Fifth, Seventh, Eighth, and Ninth Circuits afford district courts broad discretion to order new trials under Rule 33. In those circuits, district courts may weigh the evidence and receive deference precisely because they saw the evidence firsthand at trial. Yet in the Second and Eleventh Circuits, district courts are far more constrained. Rather than deferring to the district court's judgment, those circuits require that the district judge defer to the jury except when the evidence is "patently incredible." And in three other circuits—the Third, Sixth, and Tenth—the Rule 33 standard has depended on the panel, only underscoring the confusion and unfairness in this area of law. This Court should intervene.

A. Four Circuits Distinguish the Standards Under Rule 33 and Rule 29.

1. The Fifth, Seventh, Eighth, and Ninth Circuits give district courts broad discretion to weigh evidence, assess credibility, and order new trials under Rule 33.

Take the Fifth Circuit. There, Rule 33 requires that "the district court must carefully weigh the evidence and may assess the credibility of the witnesses." *United States v. Herrera*, 559 F.3d 296, 302 (5th Cir. 2009) (quoting *United States v. Tarango*, 396 F.3d 666, 672 (5th Cir. 2005)). Even if "the evidence is sufficient to support a conviction," a district court may order a new trial if it "cautiously reweighed [the evidence] and found it preponderated

heavily against the guilty verdict." *Id.* Thus, "[t]here are significant differences between finding that the evidence was insufficient to support the verdict and granting a new trial." *United States v. Crittenden*, 827 F. App'x 448, 449 (5th Cir. 2020), *withdrawing* 971 F.3d 499 (5th Cir. 2020).[2] For Rule 33, unlike Rule 29, "the court sits as a thirteenth juror." *Hererra*, 559 F.3d at 302 (citation omitted).

Accordingly, in *Crittenden*, the Fifth Circuit initially remanded to the district court for the sole purpose of "clarify[ing] whether it had granted a new trial because . . . despite the sufficiency of the evidence, it preponderated heavily against the verdict." *United States v. Crittenden*, 25 F.4th 347, 349 (5th Cir. 2022) (citation and internal quotations omitted), *reh'g en banc granted*, 26 F.4th 1015 (Mar. 2, 2022) (mem.). After remand, the district court "made clear that, though the evidence was sufficient to support a conviction, the court had cautiously reweighed the evidence and found" that it weighed against a conviction. *Id.* Unlike the Second Circuit, the Fifth Circuit gave the district court broad discretion regarding its decision to "reweigh [the] evidence [and] make credibility assessments"—and affirmed the new trial order in three pages. *Id.* at 350.[3]

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[2] *See also United States v. Collins*, 243 F. App'x 56, 58 (5th Cir. 2007) ("[O]ur review of the district court's determination on a motion for new trial is more deferential than on a motion for a judgment of acquittal.") (citing *United States v. Robertson*, 110 F.3d 1113, 1117 (5th Cir. 1997)).

[3] On its own motion, the Fifth Circuit recently granted rehearing en banc of the panel opinion in *Crittenden*. *See United States v.*

Like the Fifth, the Seventh Circuit has "recognized a fundamental distinction in the standards governing" Rule 29 and Rule 33. *United States v. Washington*, 184 F.3d 653, 657 (7th Cir. 1999). Under Rule 33, a district "court must necessarily consider the credibility of the witnesses" and "may grant a new trial if the verdict is so contrary to the weight of the evidence that a new trial is warranted in the interest of justice." *Washington*, 184 F.3d at 657-58. In square conflict with the Second Circuit, the Seventh Circuit has stated that the question is *not* "whether the testimony is so incredible that it should have been excluded." *Id.* Instead, the court asks "whether the verdict is against the manifest weight of the evidence." *Id.*[4]

The Seventh Circuit has also expressly rejected other aspects of the Second Circuit's framework. For example, the Seventh Circuit has held that a new trial may be warranted even if a witness's "testimony was not inconsistent with physical reality or otherwise incredible." *Morales*, 902 F.2d at 608. In *Morales*, the court thus *reversed* the *denial* of a new trial under Rule 33—explaining that the evidence was "improbable" and did "not permit a *confident*

Crittenden, 26 F.4th 1015, (5th Cir. Mar. 2, 2022) (mem.). The en banc order confirms that the district court's Rule 33 discretion remains a subject of genuine disagreement both among and within the circuits. No matter how the Fifth Circuit resolves *Crittenden*, the circuit split will remain.

[4] *See also United States v. Van Eyl*, 468 F.3d 428, 438-39 (7th Cir. 2006) (Bauer, J., concurring) ("Our standard of review over the decision of the district court to grant a new trial is exceedingly deferential.").

conclusion that the defendant is guilty beyond a reasonable doubt." *Id.* at 607-08. Similarly, in *Washington*, a district court had failed to order a new trial even though it had found a key witness's testimony to be "not clear [or] convincing." *Washington*, 184 F.3d at 658. The Seventh Circuit reversed, holding that a new trial was warranted because it "respected" the district court's "credibility assessment"—which substantially undercut the government's case. *Id.*

The Eighth Circuit is the same. Under Rule 33, "the district court's discretion is quite broad—it can weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict." *United States v. Stacks*, 821 F.3d 1038, 1044 (8th Cir. 2016). Thus, a "district court has broader discretion to grant a new trial under Rule 33 than to grant a motion for acquittal under Rule 29." *Id.* at 1044-45.[5] Unlike Rule 29, district courts may grant new trials even if the evidence is not "physically impossible"—again in sharp contrast to the decision below. *Id.* at 1046.

Applying this standard, the Eighth Circuit has upheld several district court decisions granting new trials. *See id.*; *United States v. Knight*, 800 F.3d 491, 512 (8th Cir. 2015); *United States v. Dodd*, 391 F.3d

[5] In contrast to the Second Circuit, the Eighth Circuit will find that the district court abused its discretion only "if the District Court fails to consider a factor that should have been given significant weight, considers and gives significant weight to an improper or irrelevant factor, or commits a clear error of judgment in considering and weighing only proper factors." *United States v. Dodd*, 391 F.3d 931, 934 (8th Cir. 2004).

930, 935 (8th Cir. 2004). It has done so where a district court disbelieved the government's witnesses, *Stacks*, 821 F.3d at 1045-46, or was left with a "bad taste" about the government's evidence, *Dodd*, 391 F.3d at 935. As the Eighth Circuit has explained, "even though only slight evidence [may be] necessary" to sustain a conviction, "it [is] within the District Court's province to weigh the evidence, disbelieve witnesses, and grant a new trial—even in the face of substantial evidence." *Dodd*, 391 F.3d at 935.

The Ninth Circuit agrees. "A district court's power to grant a motion for a new trial is much broader than its power to grant a motion for judgment of acquittal." *United States v. Inzunza*, 638 F.3d 1006, 1026 (9th Cir. 2011) (citation omitted). Unlike under Rule 29, "[t]he district court need not view the evidence in the light most favorable to the verdict." *Alston*, 974 F.2d at 1211 (citation omitted). To the contrary, "it may weigh the evidence and . . . evaluate for itself the credibility of the witnesses." *Id.* (citation omitted).

Accordingly, the Ninth Circuit's role under Rule 33 is "limited to determining whether the district court clearly and manifestly abused its discretion" when ordering a new trial. *Inzunza*, 638 F.3d at 1026 (citation omitted).[6] That is because "[a]ppellate deference makes sense. Circuit judges, reading the dry pages of the record, do not experience the tenor of

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[6] *See also United States v. Hiley*, 551 F. App'x 420, 422 (9th Cir. 2014) (Watford, J., concurring) ("When a district court concludes that the evidence preponderates heavily against the verdict, after independently weighing the evidence and evaluating for itself the credibility of the witnesses (as it's entitled to do under Rule 33), we owe that determination the highest level of deference.").

the testimony at trial." *Alston*, 974 F.2d at 1212. The Ninth Circuit therefore "will only rarely reverse a district judge's grant of a defendant's motion for a new trial, and then only in egregious cases"—a sharp contrast with the Second Circuit's recent decisions. *Id.*

For example, in *Alston*, the court upheld the grant of a new trial because the district court had concluded that key witnesses "offered alternative explanations for almost everything the government presented." *Id.* at 1212-13. That is the opposite of the decision below. *See* App. 74 n.5 (in the face of "inconsistent" testimony, the district court must defer to the jury). But unlike the Second Circuit's narrow approach, the Ninth Circuit concluded that "[g]iven the district judge's familiarity with the evidence and his ability to evaluate the witnesses," it could not "say the district judge abused his discretion in coming to a different conclusion than did the jury." *Alston*, 974 F.2d at 1213.[7]

B. Two Circuits Impermissibly Conflate Rule 33 with Rule 29.

Contrast those circuits' approach with those of the Eleventh and Second Circuits. Those two courts only nominally allow district courts to weigh evidence and order new trials under Rule 33(a). Although the two

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[7] *See also United States v. Hayden*, 925 F.2d 1471, 1991 WL 17450, at *1 (9th Cir. 1991) (unpub. table op.) (affirming the grant of a new trial that was "predicated in significant part on an evaluation of the credibility of witnesses and on an assessment of the weight of particular evidence," "[b]ecause of the unique vantage of the trial court"); *see also United States v. San Diego Gas & Elec. Co.*, 319 F. App'x 628, 631 (9th Cir. 2009) (same).

circuits mouth the terms "abuse of discretion" and "preponderates heavily" in evaluating Rule 33 motions, those labels reflect a very different standard from that applied by the four circuits above. Rather than giving district courts leeway to weigh evidence and evaluate credibility, both the Second and Eleventh Circuits require deference to the jury on those questions—while themselves giving little deference to the district courts who oversaw the trial and heard all the evidence.

The Eleventh Circuit, for instance, has expressly stated that "[t]he difference between the two standards of review" governing Rule 29 and Rule 33 "should not be overstated." *Butcher v. United States*, 368 F.3d 1290, 1296 (11th Cir. 2004). As a result, the Eleventh Circuit "accord[s] less deference to a district court's grant of a new trial than the 'abuse of discretion' standard of review implies." *Id.* at 1297 (quoting *United States v. Cox*, 995 F.2d 1041, 1043 (11th Cir. 1993)). And when it comes to the "weight of the evidence," the Eleventh Circuit has held that "the label 'abuse of discretion' belies the standard of review that we actually apply to grants of motions for a new trial." *Id.* (quoting *Cox*, 995 F.2d at 1044). "To be honest about it," the Eleventh Circuit has said, "[t]he grant of a motion for new trial generally is more closely scrutinized than a denial, and the grant of new trial based on the weight of the evidence is more closely scrutinized than the grant of new trial on other grounds." *Id.*

The Eleventh Circuit thus "limit[s] . . . the district court's ability to reweigh the evidence," reasoning that the "'usual deference to the trial judge conflicts with

deference to the jury on questions of fact.'" *Id.* (quoting *Cox*, 995 F.2d at 1044). Thus, "[i]f the evidence is sufficient to convict," then a district court may grant a Rule 33 motion "only in the rare case in which the evidence of guilt . . . is thin and marked by uncertainties and discrepancies." *United States v. Gallardo*, 977 F.3d 1126, 1140 (11th Cir. 2020) (citation omitted). Likewise, district courts may discount witnesses only when they have been impeached and their testimony is "incredible." *Id.* at 1140 & n.11. Otherwise, the "jury [is] entitled to infer" the defendant's guilt. *Id.* at 1141-42. And conflating Rule 33 with Rule 29, the Eleventh Circuit has held that a district court "exceeded its authority" in granting a new trial because it "disregarded its duty to view the evidence in a light most favorable to the jury's verdict." *United States v. Almanzar*, 634 F.3d 1214, 1223 (11th Cir. 2011).

The Second Circuit aligned itself with the Eleventh two years ago in *Archer*, 977 F.3d at 187-88. There, the Second Circuit reversed the grant of a new trial because "the district court inappropriately disregarded the jury's resolution of conflicting evidence." *Id.* The Second Circuit rejected the district court's weighing of witness testimony because "differences in testimony . . . [are] a credibility question for the jury," not a matter for the district court. *Id.* (citation omitted). Except where an evidentiary or instructional error compromised the verdict, the Second Circuit held that district courts "must defer to the jury's resolution of conflicting evidence" unless the evidence is "patently incredible or defie[s] physical realities." *Id.* at 188.

The Second Circuit reinforced that standard in the decision below. App. 64-65. Again and again, the court nitpicked how the district court weighed the evidence—and relied entirely on its Rule 29 analysis in reversing the district court's grant of a new trial to Levy under Rule 33. App. 67-68, 73-77. Thus, rather than deferring to the district court, the Second Circuit required the district court to defer to the jury. App. 64-65, 67-78. And rather than applying the Rules' different standards, the Second Circuit effectively treated them as coextensive. Although the court described the "patently incredible," defy "physical reality," and "strained inference" standards as "examples" rather than "an exhaustive list," each "example" confirms that the district court must defer to the verdict except where it finds it to be irrational. App. 64-66.

Although both *Archer* and this case gesture at abuse-of-discretion review, the opinions exhibit no deference at all. Both lengthy opinions labored to review the cold record, devoting dozens of pages to sifting through the evidence and explaining why the district court was wrong "to second guess the jury's clear choice of a different inference" about specific items of evidence. *Archer*, 977 F.3d at 191; *see also* App. 67-83. That approach tracks the Eleventh Circuit's conceded decision to "accord less deference to a district court's grant of a new trial" than the abuse-of-discretion label implies, *Butcher*, 368 F.3d at 1297—and it sharply conflicts with the deference and discretion afforded to district courts in the Fifth, Seventh, Eighth, and Ninth Circuits.

C. Three Other Circuits Have Taken Internally Inconsistent Approaches to Rule 33.

Although this substantial and clear split among six circuit courts is sufficient for certiorari, the absence of guidance from this Court has also led to confusion in other circuits. The Third, Sixth, and Tenth Circuits have each issued decisions that conflict with each other as to the breadth of Rule 33 and how it differs from Rule 29. The Court's review would thus provide needed clarity to all the circuits on this issue.

For example, in the Third Circuit, one panel held that "under Rule 33 . . . we again view the evidence supporting a conviction in the light most favorable to the government." *United States v. John Baptiste*, 747 F.3d 186, 206-07 (3d Cir. 2014). That case would thus "affirm[] the [Rule 33] judgment if there is substantial evidence from which any rational trier of fact could find guilt beyond a reasonable doubt." *Id.* But that is the Rule 29 standard. *See id.* Yet in another case, the Third Circuit held the opposite: "When evaluating a Rule 33 motion, the district court does not view the evidence favorably to the Government, but instead exercises its own judgment in assessing the Government's case." *United States v. Salahuddin*, 765 F.3d 329, 346 (3d Cir. 2014) (citation and internal quotations omitted). Those standards conflict.

The Sixth Circuit is similarly of two minds. In one case, the Sixth Circuit reversed the district court for having "conflated" Rule 33 with Rule 29. *United States v. Mallory*, 902 F.3d 584, 596-97 (6th Cir. 2018). The court recognized that Rule 33 requires the "trial judge to take on the role of a thirteenth juror, weighing

evidence and making credibility determinations firsthand." *Id.* Yet in another case, the Sixth Circuit reversed the grant of a new trial because the district court had "discredited . . . informants' trial testimony based on contested facts that we generally task juries with resolving." *United States v. Burks*, 974 F.3d 622, 625 (6th Cir. 2020). District courts in the Sixth Circuit must be puzzled as to whether they sit as the thirteenth juror in weighing the evidence, or must defer to the jury's take on contested facts even when the court views the verdict as a miscarriage of justice.

The Tenth Circuit is similarly confused. In one case, it explicitly held that "[s]ufficiency-of-the-evidence challenges made in a Rule 29 or Rule 33 motion are adjudicated and reviewed under the same standard." *United States v. Dewberry*, 790 F.3d 1022, 1028 (10th Cir. 2015). Yet in others, it has read Rule 33 to give district courts discretion to "weigh the evidence and assess witness credibility." *United States v. Quintanilla*, 193 F.3d 1139, 1146 (10th Cir. 1999); *see also United States v. Cesareo-Ayala*, 576 F.3d 1120, 1126 (10th Cir. 2009); *United States v. Gonzalez-Hernandez*, No. 18-cr-00266, 2019 WL 1922081, at *3 n.4 (D. Colo. Apr. 30, 2019) (noting that the Tenth Circuit's decisions "conflict with" each other regarding Rule 33).[8] This Court's intervention could

[8] The First Circuit has similarly conflicting decisions. *Compare United States v. Rothrock*, 806 F.2d 318, 321-22 (1st Cir. 1986) (Rule 33 gives district courts "broad power to weigh the evidence and assess the credibility of the witnesses" (citation omitted)) *with United States v. Merlino*, 592 F.3d 22, 32-33 (1st Cir. 2010) (requiring district courts to "defer to a jury's credibility assessments" under Rule 33).

resolve this uncertainty and confusion and prevent disparate outcomes based solely on geography.

II. The Decision Below Is Wrong.

The circuits are not only divided, but the decision below is wrong. The Second Circuit's standard conflates Rule 33 with Rule 29 and thus leaves Rule 33 as little more than a hollowed-out shadow of Rule 29. Such an interpretation conflicts with the plain text, purpose, and history of Rule 33.

A. Start with the obvious. Rule 33 is a *different rule* from Rule 29. That alone requires a different standard lest Rule 33 be surplusage. It is a "basic interpretive canon" that laws "should be construed so that effect is given to all [their] provisions, so that no part will be inoperative or superfluous, void, or insignificant"—a canon that should apply no less to the federal rules than to federal statutes. *See Corley v. United States*, 556 U.S. 303, 314 (2009) (citation omitted). Rule 29 even requires district courts to "conditionally determine whether" to order a new trial under Rule 33 when they order an acquittal under Rule 29—only underscoring that the rules are distinct.

The plain text of Rule 33 affords district courts more discretion. Per Rule 29, on a defendant's motion, a district court "*must* enter a judgment of acquittal" if "the evidence is insufficient to sustain a conviction." Under Rule 33, a district court "*may* vacate any judgment and grant a new trial if the interest of justice so requires." Those textual differences should be respected. And both leading federal practice treatises agree that "[t]he power of the district court is much broader when deciding a Rule 33 motion for a new trial." Wright & Miller § 582; *see also* 26 Moore's

Fed. Practice § 629.30[2] (2022) ("A reversal as against the weight of the evidence permits the reviewing court to consider the credibility of the witnesses and in effect sit as a juror.").

B. Rule 33's history further confirms that it grants broad discretion to district courts to order new trials if they conclude that the verdict was against the weight of the evidence. Rule 33 grew out of "the power of a court over its judgments at common law," which included the "power to grant a new trial." *See United States v. Smith*, 331 U.S. 469, 472-73 (1947).[9] As Justice Story put it, "according to the rules of the common law the facts once tried by a jury are never re-examined, unless a new trial is granted in the discretion of the court." *United States v. Wonson*, 1 Gall. 5, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812). That common law tradition was embodied in the Judiciary Act of 1789, which provided federal courts with the "power to grant new trials, in cases where there has been a trial by jury, for reasons which new trials have usually been granted in the courts of law." *Cap. Traction Co. v. Hof*, 174 U.S. 1, 10 (1899) (quoting Judiciary Act of Sept. 24, 1789, § 17, 1 Stat. 83).

Under the common law, if the jury's verdict "should be found against the evidence," then the trial court could "grant[] a new trial." *Lee v. Lee*, 33 U.S. 44, 50 (1834). That was true in both civil and criminal cases. *See Crumpton v. United States*, 138 U.S. 361, 363 (1891). Accordingly, "[t]he jury was not absolute master of fact in 1791." *Galloway v. United States*, 319

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[9] *See also United States v. Spaulding*, 802 F.3d 1110, 1125 (10th Cir. 2015) ("[A]s a general matter, the provisions of Rule 33 are a codification of the common law.").

U.S. 372, 390 (1943). Trial courts "weighed the evidence, not only piecemeal but in toto for submission to the jury, by at least *two procedures*, the demurrer to the evidence and the motion for a new trial." *Id.* (emphasis added). Those two vehicles are codified now in Rule 29 and Rule 33.

At common law, appellate courts gave great deference to trial courts' new-trial rulings. A "motion for [a] new trial" was properly "addressed to the discretion of the court that tried the case," but "the action of that court in granting or refusing such a motion [could not] be assigned for error" in an appellate court. *See Ry. Co. v. Heck*, 102 U.S. 120, 120 (1880). In marked contrast with the decision below, appellate courts refused to review decisions regarding new trials, because they were "a matter of discretion with the court below." *Freeborn v. Smith*, 69 U.S. 160, 176 (1864); *see also Ry. Co.*, 102 U.S. at 120.

That deference reflected the fact that the trial judge was not a mere moderator, but was a critical part of the trial by jury. *Cap. Traction Co.*, 174 U.S. at 13. A "[t]rial by jury," as understood "at the common law and in the American constitutions, is not merely a trial by a jury of 12 men." *Id.* Rather, the jury includes "the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and . . . to set aside the verdict, if, in his opinion, it is against the law *or the evidence*." *Id.* at 13-14 (emphasis added). And even after Rule 33 was adopted, this Court continued to recognize that principle: "it is not the province of this Court or the Circuit Court of Appeals to review orders granting or denying motions for a new trial when such review is

sought on the alleged ground that the trial court made erroneous findings of fact." *United States v. Johnson*, 327 U.S. 106, 111 (1946). The decision of the district judge who "watched the case . . . unfold from day to day" should be upheld so long as it was not "wholly unsupported by evidence." *Id.* at 111-12.

C. More recently, this Court has reiterated these principles in various contexts. The Court has noted that "[t]he authority to grant a new trial" in a civil case "is confided almost entirely to the exercise of discretion on the part of the trial court." *Allied Chem. Corp.*, 449 U.S. at 36 (1980). And under the Seventh Amendment, "[t]he exercise of the trial court's power to set aside the jury's verdict and grant a new trial is not in derogation of the right to trial by jury but is one of the historic safeguards of that right." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 433 (1996) (citation omitted).

Yet this Court has not directly interpreted Rule 33. The Court came closest in *Tibbs v. Florida*, 457 U.S. 31 (1982), which held that the Double Jeopardy Clause did not bar a retrial after the grant of a new trial based on the weight of evidence. *Id.* at 42-45. In so holding, this Court distinguished a Rule 33 order from the entry of acquittal based on insufficient evidence, explaining that "trial and appellate judges commonly distinguish between the weight and the sufficiency of the evidence." *Id.* at 44. The Court reasoned that, when ordering a new trial, a reviewing court "sits as a 'thirteenth juror' and disagrees with the jury's resolution of the conflicting testimony." *Id.* at 42. Thus, district courts "need not view the evidence in the light most favorable to the verdict" under Rule 33;

they "may weigh the evidence and in so doing evaluate for [themselves] the credibility of the witnesses." *Id.* at 38 n.11 (quoting *United States v. Lincoln*, 630 F.2d 1313, 1316 (8th Cir. 1980)).

That reasoning is consistent with the common law tradition, but it stands in stark contrast with the decision below. Rather than treating the district court as the "thirteenth juror," the Second Circuit has now twice demanded that the district court defer to the jury. *See Archer*, 977 F.3d at 188; App. 64-65. Instead of recognizing the district court as an important check in weighing the evidence, the Second Circuit has bound the district court's hands unless the evidence was "patently incredible" or similarly irrational. *Archer*, 977 F.3d at 188; App. 64-65. And in contrast with the constitutional distinction between the grant of an acquittal and a new trial under the Double Jeopardy Clause, the Second Circuit has conflated the standards under Rule 29 and Rule 33. App. 64-83. The Second Circuit's decision is mistaken.

III. The Issue Is Important.

This Court has yet to issue clear guidance regarding Rule 33, even though the issue arises in every circuit and is vital to our criminal justice system. By the plain terms of Rule 33, the district court's power to grant a new trial is an extra layer of protection for defendants above and beyond Rule 29. But the Second Circuit has eviscerated that protection. In doing so, the court lowered the bar for prosecutors to obtain convictions and weakened district judges' ability to ensure justice—which is especially troubling in an era when the government's

advantages have made criminal trials increasingly rare.

With fewer criminal trials, it is all the more important to ensure that the prosecution is held to its burden of proof. The requirement of proof beyond a "reasonable doubt . . . lies at the foundation of the administration of our criminal law." *In re Winship*, 397 U.S. 358, 362-63 (1970). When overseeing a criminal case, the "courts must carefully guard against [its] dilution." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). Yet this Court has recognized that the overwhelming majority of convictions today come not from trials, but from guilty pleas. *See Missouri v. Frye*, 566 U.S. 134, 143-44 (2012).[10] Given that rarity, it is crucial that the few criminal trials that happen hold the prosecution to its burden of proof. Rule 33 helps do so by allowing district courts to overturn verdicts that are against the weight of the evidence.

It is equally critical that every trial fully safeguards the right to a jury. The lower court seemed to view the district court's role in weighing the evidence as standing in tension with our commitment to a trial by jury. But that is an anachronism. The trial court's authority to grant a new trial "is one of the historic safeguards of" the jury trial right. *Gasperini*, 518 U.S. at 433 (citation omitted). Criminal defendants are not simply tried before "a jury of 12 men" and women. *Cap. Traction Co.*, 174

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[10] By one recent estimate, only two percent of federal criminal defendants ever go to trial. *See* John Gramlich, *Only 2% of Federal Criminal Defendants Go To Trial, and Most Who Do Are Found Guilty*, PEW RESEARCH CENTER (June 11, 2019), https://pewrsr.ch/36gkBMq.

U.S. at 13-14. They are put "under the superintendence of a judge" who instructs on the law, advises of the facts, and can "set aside [the] verdict" if not convinced of guilt. *Id.*

That provides a substantial protection, particularly where, as here, the government sought to prosecute Petitioners based on an arcane and complex area of the law—namely the scope of the affiliate rule in an indenture amendment proceeding governed by the Trust Indenture Act. Here, both the district court and the jury sat through a nine-week trial involving complicated financial transactions and an esoteric area of the law, and the jury voted to acquit on the bulk of the government's case. There is a real risk that after nine weeks of hearing the government cast aspersions against Petitioners, the jury threw up its hands up and split the difference. Yet if after nine weeks, the prosecution could not convince the experienced trial judge that the convictions should stand, then the interest of justice weighs strongly in favor of a new trial.

Accordingly, it is crucial for this Court to weigh in and uphold that longstanding protection for criminal defendants. The question is plainly a recurring one. Twice in two years, the Second Circuit has told district judges that they have next to no discretion to grant new trials under Rule 33. Other circuits have continued to struggle with the appropriate standard, including the Fifth Circuit, which just recently went en banc on this very question. *See supra* n.3. This Court should grant certiorari to correct the Second Circuit's mistake and confirm the appropriate standard.

IV. This Case Is a Clean Vehicle.

This case presents a clean vehicle to address the proper interpretation of Rule 33. That issue is a pure question of law that has generated confusion and contradictory decisions. It turns not on the application of Rule 33 to the facts here, but on the governing legal standard. And the decision below confirmed, through its three-sentence review of the issue as to Levy, that the Second Circuit has left little daylight between Rule 29 and Rule 33. App. 67.

Moreover, this appeal was taken by the Government pursuant to 18 U.S.C. § 3731, which explicitly authorizes interlocutory appeals after a decision "granting a new trial after verdict or judgment." This Court has repeatedly taken up cases in similar postures. Just last Term, for example, this Court granted certiorari in a case involving an interlocutory appeal by the Government under § 3731. *See United States v. Cooley*, 141 S. Ct. 1638, 1642 (2021) (reviewing an evidence-suppression determination); *see also Bates v. United States*, 522 U.S. 23, 29 (1997) (reviewing a case where the defendant's indictment was dismissed, then reinstated by the Seventh Circuit). And if Nordlicht and Levy are entitled to new trials, then they should find out sooner rather than later. No good purpose would be served by delay and another round of duplicative appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

MICHAEL S. SOMMER
MORRIS J. FODEMAN
WILSON SONSINI GOODRICH & ROSATI PC
1301 Avenue of the Americas
New York, NY 10019

STEFFEN N. JOHNSON
KELSEY J. CURTIS
WILSON SOSINI GOODRICH & ROSATI, PC
1700 K Street, NW
Washington, DC 20006
(202) 973-8800

Counsel for Petitioner David Levy

ANDREW J. LEVANDER
STEVEN A. ENGEL
Counsel of Record
MICHAEL H. MCGINLEY
MICHAEL P. CORCORAN
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
steven.engel@dechert.com
(202) 261-3300

Counsel for Petitioner Mark Nordlicht