No. 21-1319

In the Supreme Court of the United States

MARK NORDLICHT AND DAVID LEVY, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in determining that the district court lacked an adequate factual basis for granting petitioners' motions for a new trial under Federal Rule of Criminal Procedure 33.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-90) is reported at 17 F.4th 298. The decision and order of the district court (Pet. App. 91-138) is not reported in the Federal Supplement but is available at 2019 WL 4736957. A subsequent decision and order of the district court is not yet reported in the Federal Supplement but is available at 2022 WL 1469393.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 2021. A petition for rehearing was denied on December 29, 2021 (Pet. App. 139-140). The petition for a writ of certiorari was filed on March 29, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff; conspiring to commit securities fraud, in violation of 18 U.S.C. 371; and conspiring to commit wire fraud, in violation of 18 U.S.C. 1349. Pet. App. 1-2, 91. The district court granted petitioner Nordlicht's motion for a new trial, and it granted petitioner Levy's motion for judgment of acquittal along with an additional conditional grant of a new trial. *Id.* at 91-138. The court of appeals reversed and remanded for further proceedings. *Id.* at 1-90.

1. This case arises out of a fraudulent scheme conducted by petitioners and others affiliated with Platinum Partners, L.P. Platinum managed several funds, including the Value Arbitrage Fund (PPVA), the Credit Opportunities Master Fund (PPCO), and the Liquid Opportunity Master Fund (PPLO). Pet. App. 3-4, 6-7, 10-11. Petitioners and their associates at Platinum also exercised significant control over a reinsurance company called Beechwood, which was designed to be legally separate from Platinum but was in fact controlled by it. *Id.* at 3-4, 10-12. Nordlicht was a founder of Platinum and the Chief Investment Officer (CIO) at several Platinum funds. *Id.* at 3, 6. Levy was initially a portfolio manager at Platinum before he left to become Beechwood's CIO; then after a short stint at Beechwood, he returned to Platinum as co-CIO with Nordlicht. *Id.* at 4, 7, 11.

Various Platinum funds were heavily invested in a Houston oil and gas company called Black Elk Offshore Energy Operations LLC, holding over 85% of Black Elk's common equity, most of its preferred equity, and

over $90 million in Black Elk bonds. Pet. App. 4, 8, 19. By 2014, after an explosion at one of Black Elk's offshore oil platforms, Black Elk was heading toward bankruptcy. *Id.* at 4. The company still had significant assets, including oil and gas wells that it planned to sell to other companies. *Id.* at 14. Under the terms of a 2010 Black Elk bond offering (the Bond Indenture), the proceeds from any asset sale would be used first to pay bondholders before any preferred or common stock holders like the Platinum funds. *Id.* at 4-5, 9. Petitioners thus set out to change the terms of the Bond Indenture in order to capture the proceeds from the sale of Black Elk's assets for Platinum.

The Bond Indenture could be amended by vote. Pet. App. 9. But under a provision known as the "Affiliate Rule," only those bondholders who were not affiliated with Black Elk—that is, only bondholders who did not have "direct or indirect common control" with Black Elk—were permitted to vote. *Id.* at 9-10 (citation omitted). The Affiliate Rule prohibited Platinum's funds from voting on the Black Elk bonds that they held, because Platinum controlled a majority of Black Elk's stock. *E.g.*, *id.* at 31-32. To overcome that prohibition, petitioners conspired to transfer Platinum's bonds to Beechwood so that those bonds could vote to amend the indenture to benefit Platinum, without disclosing that those bonds were prohibited from voting under the Affiliate Rule. See *id.* at 23-32.

Petitioners first caused Black Elk to initiate a private consent solicitation process to amend the Bond Indenture so that Black Elk could pay Platinum and other preferred equity holders with funds from the asset sale. Pet. App. 17-21. When that strategy failed, petitioners caused Black Elk to initiate a public bond

consent solicitation process. *Id.* at 21-22. Black Elk bondholders had three options in responding to the consent solicitation: (1) tender their bonds at par (thereby consenting to the proposed amendments); (2) consent to the proposed amendments without tendering, thereby continuing to hold their bonds; or (3) neither tender nor consent. *Id.* at 22. The second option "made no financial sense for a bondholder * * * because the bondholder would be giving up protections and allowing the preferred equity holders to have priority over the bondholders' interests without getting anything in exchange for giving up those protections." *Id.* at 45-46.

When the consent solicitation was circulated, it disclosed only that bonds owned by one of the Platinum funds (PPVA)—but not those owned by PPCO, PPLO, or any Beechwood entities—were owned by companies affiliated with Black Elk and thus ineligible to vote. Pet. App. 27-28. In the month leading up to the bondholder vote, Nordlicht instructed Platinum and Beechwood employees to transfer $30 million of bonds held by Platinum entities to Beechwood entities, and Levy was informed of those transfers. *Id.* at 24-25.

When the vote occurred, $37,017,000 worth of bonds held by the Beechwood funds voted to consent but not tender, even though that option made no financial sense and was selected by only a negligible fraction (<1%) of other bondholders. Pet. App. 32. Those votes, in combination with the minority of bondholders who had voted to tender and consent, allowed the consent solicitation to pass. *Id.* at 32, 46.

Three days after the vote passed, Black Elk's asset sale closed. Pet. App. 34. Within the next three days, Black Elk transferred many of the proceeds to petitioners and the Platinum-related entities, including over

$77 million to Platinum funds, $7.7 million to Nordlicht's parents, and $256,679 to Levy. *Ibid.*

Shortly thereafter, Levy informed Platinum's Chief Financial Officer (CFO) that Platinum would not be providing any more financing to Black Elk. Pet. App. 34. Levy also told Platinum's CFO that Black Elk needed to wait 12 months to declare bankruptcy to avoid the risk that the proceeds from the asset sale could be clawed back during bankruptcy proceedings. *Ibid.* A year later, in August 2015, Black Elk's creditors initiated an involuntary bankruptcy proceeding against the company. *Ibid.*

2. Based on the Black Elk scheme, a federal grand jury in the Eastern District of New York indicted petitioners on one count of securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff; one count of conspiring to commit securities fraud, in violation of 18 U.S.C. 371; and one count of conspiring to commit wire fraud, in violation of 18 U.S.C. 1349. Pet. App. 1-2. A jury found petitioners guilty on each of those counts. *Id.* at 35.[1]

After the verdict, the district court granted Levy's motion for judgment of acquittal under Federal Rule of Criminal Procedure 29, but denied Nordlicht's motion. Pet. App. 91. The court granted Nordlicht's motion for a new trial under Rule 33. *Ibid.* And it also conditionally granted Levy's motion for a new trial in the event that its judgment of acquittal was later vacated or reversed. *Ibid.*

With respect to Levy, the district court granted judgment of acquittal on the theory that the government

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[1] The indictment also charged petitioners with five counts arising from a separate allegedly fraudulent scheme. Pet. App. 35. The jury acquitted petitioners on the counts related to that scheme. *Ibid.*

had presented insufficient evidence of his criminal intent. Pet. App. 126-131. The court took the view that the government had "adduced no evidence that Levy: considered Beechwood to be an affiliate of Platinum; played any role in shifting Black Elk bonds to Beechwood; or played any role in Beechwood voting its bonds." *Id.* at 126, 129. The court conditionally granted Levy's Rule 33 motion for a new trial "[f]or the [same] reasons," asserting that the jury's verdict was "a manifest injustice." *Id.* at 137-138.

With respect to Nordlicht, the district court recognized that the evidence was sufficient to support the jury's finding that Nordlicht knew about the Affiliate Rule, knew (or should have known) that Beechwood was an affiliate, and knew that the disclosures about bonds held by affiliates constituted material misrepresentations. See Pet. App. 114-125. But the court then granted Nordlicht a new trial on the theory that "letting the verdict stand against [him] would be a manifest injustice." *Id.* at 133; see *id.* at 133-137. The court viewed the evidence as "suggest[ing] that, although Nordlicht knew about the Affiliate Rule, he and Beechwood went to great lengths to comply with [it]," *id.* at 133, and the court expressed its corresponding view that "the jury could not fairly conclude that Nordlicht intended to conceal" the Platinum entities' "affiliate status," *id.* at 137.

3. The court of appeals reversed. Pet. App. 1-90.

a. The court of appeals first reversed the Rule 29 judgment of acquittal for Levy. Pet. App. 63. The court reviewed the trial evidence and explained that the jury could rationally find that Levy had participated in the Black Elk scheme with criminal intent. *Id.* at 39-63.

The court of appeals observed that "Levy's dual role working at Beechwood and Platinum, coupled with his

position as Beechwood's CIO and the e-mail correspondence demonstrating that he was apprised of Beechwood's purchases of Black Elk bonds, supports an inference that he" understood and participated in the Black Elk scheme. Pet. App. 51. The court noted e-mail evidence showing that Levy was "aware of Nordlicht's desire to circumvent the bondholders in order to ensure that Black Elk's proposed amendments to the Indenture quickly passed," *id.* at 49; that Levy was responsible for voting Beechwood's bonds in a manner that benefitted Platinum but did not make rational economic sense for Beechwood, *id.* at 52; and that Levy knew that the Beechwood and other Platinum-controlled bonds were not properly disclosed to outside counsel for purposes of compliance with the Affiliate Rule, *id.* at 53-54. The court added that "Levy's role in disbursing the proceeds of the Black Elk Scheme, coupled with his efforts to ensure that these proceeds were protected from a claw-back in Black Elk's bankruptcy proceedings, provide[d] further circumstantial evidence of Levy's knowledge of, involvement in, and intent to further the objectives of the Black Elk Scheme." *Id.* at 55.

b. The court of appeals then reversed the district court's Rule 33 orders granting a new trial for Nordlicht and conditionally granting a new trial for Levy. Pet. App. 63-90.

The court of appeals recognized that Rule 33 gives a district court discretion to "vacate any judgment and grant a new trial if the interest of justice so requires." Pet. App. 63 (quoting Fed. R. Crim. P. 33(a)). The court explained that a district court may grant a new trial "based on the weight of the evidence alone," but only if "the evidence preponderates heavily against the verdict to such an extent that it would be manifest injustice to

let the verdict stand." *Id.* at 64-65 (quoting *United States* v. *Archer*, 977 F.3d 181, 188 (2d Cir. 2020), cert. denied, 142 S. Ct. 425 (2021)). The court of appeals further explained that, under that 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." *Id.* at 65 (quoting *Archer*, 977 F.3d at 188). The court listed "the clearest examples" of when a new trial would be warranted—including where "'the evidence was patently incredible or defied physical realities'" or "where the government's case depends upon strained inferences drawn from uncorroborated testimony"—but emphasized that those are "merely examples and not an exhaustive list." *Id.* at 65-66 (citation and internal quotation marks omitted).

The court of appeals next made clear that its reversal of the Rule 29 judgment of acquittal for Levy did not foreclose his request for a new trial, because the two motions "have different governing legal standards." Pet. App. 66-67; see *id.* at 67 ("[A] Rule 33 motion may properly be granted even where a Rule 29 motion is denied."). The court determined, however, that a new trial was not warranted in this case because the evidence did not "preponderate[ ] heavily" against the jury's verdict. *Id.* at 67. "In light of the wealth of evidence, circumstantial and otherwise," against Levy that the court had considered in reviewing his Rule 29 motion, the court found "ample basis for the jury to conclude that Levy acted with the requisite criminal intent." *Ibid.*

The court of appeals also determined that the district court had "abused its discretion in granting Nordlicht's motion for a new trial." Pet. App. 68. "Applying the 'preponderates heavily' standard here," the court observed "that letting the verdict stand * * * would not

result in manifest injustice" based on the district court's own "factual findings in connection with Nordlicht's Rule 29 motion, as well as the ample record evidence illustrating" Nordlicht's knowledge of the Affiliate Rule and his attempts to conceal Platinum's and Beechwood's failure to comply with it. *Ibid.*; see *id.* at 68-90.

The court of appeals explained why it disagreed with each of the district court's three reasons for concluding that the jury's verdict convicting Nordlicht had produced a manifest injustice. First, whereas the district court had taken the view that Nordlicht and Beechwood "went to great lengths to comply" with the Affiliate Rule, Pet. App. 67 (citation omitted), the court of appeals found that "the jury was entitled to conclude" that the evidence on which the district court had relied "was, in fact, a self-serving exculpatory statement that was intended to conceal, rather than reveal, [Nordlicht's] intentions." *Id.* at 68-69. The court of appeals also found that "the trial evidence as a whole undercuts any notion that Nordlicht was acting in good faith to comply with the Affiliate Rule": E-mails showed that Nordlicht "expressed disdain for the rules" and urged Levy and others "to cut out the lawyers and circumvent the bondholders." *Id.* at 69-70; see *id.* at 68-71.

Second, the court of appeals rejected the district court's view that the "evidence that Nordlicht was on notice of [Beechwood's] affiliate status" was "insufficient." Pet. App. 67 (citation omitted; brackets in original). Examining the evidence that the government presented, the court of appeals explained that the jury could have reasonably relied on Nordlicht's own "express statements recognizing that Platinum controlled Beechwood" to find that "Nordlicht understood that Beechwood likely qualified as an affiliate." *Id.* at 78.

Third, while the district court had deemed "insufficient" the evidence that Nordlicht had concealed the Platinum entities' affiliate status from outside counsel, Pet. App. 67 (citation omitted), the court of appeals reviewed the same evidence and found no indication that Nordlicht had "disclosed the [Platinum-controlled] bonds as having a relationship with Platinum and Black Elk that could render them affiliates," *id.* at 81; see *id.* at 79-83.

ARGUMENT

Petitioners contend (Pet. 13-33) that the district court was entitled to set aside the jury's verdict in this case and order a new trial under Federal Rule of Criminal Procedure 33.[2] The petition for a writ of certiorari arises in an interlocutory posture, which itself provides a sufficient reason to deny it. In any event, the court of appeals correctly rejected petitioners' contention, and its decision does not conflict with any decision of this Court or another court of appeals. This Court recently denied another petition presenting similar issues, see *Archer* v. *United States*, 142 S. Ct. 425 (2021) (No. 20-1644), and it should follow the same course here. The court of appeals' intensely fact-bound decision does not warrant further review.

1. As a threshold matter, the decision below is interlocutory; the court of appeals reversed the district court's judgment and remanded the case for further proceedings. The interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see, *e.g.*, *National Football*

[2] The petition does not challenge the court of appeals' reversal of Levy's Rule 29 judgment of acquittal.

League v. *Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020) (statement of Kavanaugh, J., respecting the denial of certiorari).

This Court routinely denies interlocutory petitions in criminal cases. See Stephen M. Shapiro et al., *Supreme Court Practice* 4-55 n.72 (11th ed. 2019). That practice promotes judicial efficiency, because the proceedings on remand may affect the consideration of the issues presented in a petition. It also enables issues raised at different stages of a lower court proceeding to be consolidated in a single petition. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) ("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals."). This case presents no occasion for this Court to depart from its usual practice.

2. In any event, the decision below was correct.

a. Rule 33 provides that a district court may "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). As this Court has observed, the courts of appeals "have interpreted Rule 33 * * * to permit the trial judge to set aside a conviction that is against the weight of the evidence." *Tibbs* v. *Florida*, 457 U.S. 31, 39 n.12 (1982).

As the court of appeals here observed, such a motion is subject to a different standard than a Rule 29 motion for judgment of acquittal. *E.g.*, Pet. App. 66-67 (stating that the two motions "have different governing legal standards"). A district court may grant a judgment of acquittal notwithstanding a jury's guilty verdict only if "the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). In applying the Rule 29 stan-

dard, a court must "view the evidence in the light most favorable to the verdict, giving the prosecution the benefit of all inferences reasonably to be drawn in its favor." *Tibbs*, 457 U.S. at 38 n.11 (citation omitted). But as the decision below explained, "[w]hen a [Rule 33] motion for new trial is made on the ground that the verdict is contrary to the weight of the evidence, the issues are far different." *Ibid.* (citation omitted); see Pet. App. 63-64, 66-67. "The 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 (citation omitted); accord Pet. App. 63 (observing that district courts have "broader discretion" to grant a new trial under Rule 33 than to grant a judgment of acquittal under Rule 29, while stating that the discretion "should be exercised sparingly") (citation omitted).

The courts of appeals have uniformly recognized that a district court should grant a new trial based on the weight of the evidence only in exceptional cases where the evidence preponderates heavily against the guilty verdict. See *United States* v. *Indelicato*, 611 F.2d 376, 387 (1st Cir. 1979) ("evidence preponderates heavily against the verdict") (citation omitted); *United States* v. *Robertson*, 110 F.3d 1113, 1118 (5th Cir. 1997) ("evidence must preponderate heavily against the verdict"); *United States* v. *LaVictor*, 848 F.3d 428, 455-456 (6th Cir.) ("extraordinary circumstances where the evidence preponderates heavily against the verdict") (citation omitted), cert. denied, 137 S. Ct. 2231 (2017); *United States* v. *Reed*, 875 F.2d 107, 113 (7th Cir. 1989) ("evidence must preponderate heavily against the verdict") (citation omitted); *United States* v. *Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980) ("preponderates sufficiently

heavily against the verdict"); *United States* v. *Pimentel*, 654 F.2d 538, 545 (9th Cir. 1981) ("only in exceptional cases in which the evidence preponderates heavily against the verdict") (citation omitted); *United States* v. *Evans*, 42 F.3d 586, 593-594 (10th Cir. 1994) ("exceptional cases in which the evidence preponderates heavily against the verdict") (citation omitted); *United States* v. *Brown*, 934 F.3d 1278, 1297 (11th Cir. 2019) ("evidence must preponderate heavily against the verdict") (citation omitted), cert. denied, 140 S. Ct. 2826 (2020); *United States* v. *Rogers*, 918 F.2d 207, 213 (D.C. Cir. 1990) (Thomas, J.) ("extraordinary circumstances where the evidence preponderates heavily against the verdict") (citation omitted); see also *United States* v. *Pritt*, No. 99-4581, 2000 WL 1699833, at *5 (4th Cir. Nov. 14, 2000) (per curiam).

Although this Court has not directly addressed the Rule 33 issue, it has quoted a court of appeals decision stating that a district court may grant a new trial if "the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred." *Tibbs*, 457 U.S. at 38 n.11 (citation omitted). The court of appeals in this case applied that standard. It stated that a "district court may not grant a Rule 33 motion based on the weight of the evidence alone unless the evidence preponderates heavily against the verdict to such an extent that it would be manifest injustice to let the verdict stand." Pet. App. 64-65 (quoting *United States* v. *Archer*, 977 F.3d 181, 188 (2d Cir. 2020), cert. denied, 142 S. Ct. 425 (2021)). And as the court previously observed, that "'preponderates heavily' standard" "is in accord with the standard used by several of [its] sister circuits." *Archer*, 977 F.3d at 188.

b. Applying the Rule 33 standard to the specific record in this case, the court of appeals correctly determined that the district court abused its discretion in granting petitioners a new trial because "the evidence did not preponderate heavily against the [jury's] verdict[s]" and those verdicts did "not result in manifest injustice." Pet. App. 68; see *id.* at 67. The court of appeals reviewed at length the "ample" evidence that supported the jury's findings of each petitioner's guilt. *Id.* at 67-68.

As to Levy, the court of appeals emphasized that its reversal of his Rule 29 judgment of acquittal did not "necessarily" mean that he was not entitled to a new trial under Rule 33. Pet. App. 66. But the court found a "wealth of evidence, circumstantial and otherwise," that provided "ample basis for the jury to conclude that Levy acted with the requisite criminal intent." *Id.* at 67. That evidence included (a) Levy's knowledge of Black Elk's pending bankruptcy and its negative ramifications for Platinum; (b) Levy's ongoing involvement in managing Platinum's investment in Black Elk management even after he left Platinum to become Beechwood's CIO; (c) multiple e-mails showing Levy's knowledge of the Affiliate Rule; (d) Levy's involvement in the failed private consent solicitation process, which showed his knowledge of Black Elk's efforts to amend the bond indenture; (e) e-mails showing Levy's personal involvement in the public consent solicitation process; (f) e-mails showing that Levy was aware of the Beechwood purchases of Black Elk bonds, the amount of bonds owned by Platinum and Beechwood entities, and Beechwood's vote on the consent solicitation process, which "support[ed] an inference that [Levy] understood Beechwood's role in the Black Elk scheme"; and (g)

Levy's "role in disbursing the proceeds of the Black Elk Scheme, coupled with his efforts to ensure that these proceeds were protected from a claw-back in Black Elk's bankruptcy proceedings." *Id.* at 51, 55; see *id.* at 44-57.

As to Nordlicht, the court of appeals explained why the strong evidence "illustrating Nordlicht's knowledge and intent[] undermine[d] the district court's conclusions" when granting the Rule 33 motion. Pet. App. 68; see *id.* at 68-83. First, the evidence that the district court had relied on to conclude that Nordlicht had "'a good faith desire to comply with the affiliate rule'" could instead have supported a finding by the jury that Nordlicht simply attempted "to create a 'favorable paper trail.'" *Id.* at 69 (citations omitted). That evidence included (a) an e-mail that the jury could view as a "self-serving exculpatory statement that was intended to conceal, rather than reveal, [Nordlicht's] intentions[,]"; (b) e-mails in which Nordlicht urged colleagues "to cut out the lawyers and circumvent the bondholders"; and (c) Nordlicht's "habit of labeling sensitive emails relating to Black Elk's impending bankruptcy 'attorney client privilege' even when they did not involve advice of counsel." *Id.* at 69-70.

Second, the court of appeals identified evidence that enabled the jury to find that Nordlicht was on notice of the Beechwood entities' affiliate status, including (a) Nordlicht's admissions "that Platinum exercised control over Beechwood"; (b) the evidence that, "[u]pon the creation of Beechwood, Nordlicht filled several critical positions at Beechwood with Platinum employees"; (c) the evidence that "Nordlicht and Levy directed Beechwood's investments into portfolio companies and securities in which Platinum had already invested, and

transferred certain investments from Platinum to Beechwood to benefit Platinum"; and (d) evidence that "Nordlicht had sufficient control over Beechwood to be able to direct the trading of over $37 million in Black Elk bonds from the Platinum funds to Beechwood over a three-month period prior to the public consent solicitation process." Pet. App. 73, 75. And third, the court of appeals identified evidence that supported the jury's ability to find that Nordlicht had concealed Platinum's ownership of Beechwood, including evidence that he "affirmatively concealed information related to PPCO, PPLO, and Beechwood in response to [outside counsel's] inquiries related to the Affiliate Rule." *Id.* at 82.

3. The court of appeals' determinations that the evidence did not preponderate so heavily against the jury's verdicts as to produce a manifest injustice are highly fact-bound and do not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). Petitioners, however, urge this Court to grant review on the theory that the court of appeals' decision "[i]mpermissibly conflate[d] Rule 33 with Rule 29" and refused to allow district courts to order a new trial except where the evidence was "'patently incredible or defie[d] physical realities.'" Pet. 20-23, 26-27 (citations and emphasis omitted). Petitioners further claim that those interpretations of Rule 33 conflict with decisions of this Court and other courts of appeals. Pet. 15-23. Petitioners' asserted reasons for further review are unsound.

a. Most fundamentally, petitioners misdescribe the court of appeals' opinion. The court did not "effectively treat[]" Rules 33 and 29 "as coextensive," as petitioners assert. Pet. 23. To the contrary, the court expressly stated that, "[w]hile both the Rule 29 and Rule 33 analyses in this context require an assessment of evidentiary sufficiency, they have different governing legal standards." Pet. App. 66-67. The court recognized that, whereas a district court considering a Rule 29 motion views the evidence "in the light most favorable to the government, crediting any inferences that the jury might have drawn in its favor," *id.* at 6 n.1 (quoting *United States* v. *Rosemond*, 841 F.3d 95, 99-100 (2d Cir. 2016)), on a Rule 33 motion, "'all facts and circumstances' must be examined to 'make an objective evaluation,'" *ibid.* (quoting *United States* v. *Aguiar*, 737 F.3d 251, 264 (2d Cir. 2013), cert. denied, 574 U.S. 959 (2014)). The court of appeals also explained that, whereas a Rule 29 assessment requires upholding the verdict if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *id.* at 40 (citation omitted), "the Rule 33 inquiry requires an objective evaluation of the evidence and an assessment of whether the evidence preponderates heavily against the verdict," *id.* at 67. The court thus recognized that "a Rule 33 motion may properly be granted even where a Rule 29 motion is denied." *Ibid.*

Moreover, the court of appeals expressly and repeatedly adjudicated petitioners' Rule 33 motions by applying the same "preponderates heavily" standard that petitioners themselves appear to view as correct—not the "any rational trier of fact" test that applies to a Rule 29 motion. Compare Pet. 15-16 (favorably quoting the Fifth Circuit's statement in *United States* v. *Herrera*,

559 F.3d 296, 302 (2009), that a Rule 33 motion should be granted only if the evidence "preponderated heavily against the guilty verdict"), with Pet. App. 64-65 ("[A] district court may not grant a Rule 33 motion based on the weight of the evidence alone unless the evidence preponderates heavily against the verdict to such an extent that it would be manifest injustice to let the verdict stand.") (citation omitted; brackets in original); see Pet. App. 67 ("[T]he Rule 33 inquiry requires an objective evaluation of the evidence and an assessment of whether the evidence preponderates heavily against the verdict."); *ibid.* (determining "that application of the 'preponderates heavily" standard does not warrant a new trial [for Levy]"); *id.* at 68 ("Applying the 'preponderates heavily' standard here, we conclude that letting the verdict stand as to Nordlicht would not result in manifest injustice."); *id.* at 79 ("The trial evidence, taken together, does not preponderate heavily against the conclusion that Nordlicht knew Beechwood was an affiliate and acted with criminal intent in concealing this information from the bondholders.").

Petitioners themselves observe (Pet. 20-21) that the Second Circuit—like the other courts of appeals—reviews district court orders granting new trials under Rule 33 for "'abuse of discretion,'" allows district courts to "weigh evidence" (including witness credibility), and asks whether the evidence "'preponderates heavily'" against the verdict. See, *e.g.*, Pet. App. 39 ("Rule 33 'confers broad discretion upon a trial court to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice.'") (quoting *United States* v. *Polouizzi*, 564 F.3d 142, 159 (2d Cir. 2009)) (brackets omitted); *id.* at 64 (recognizing that a district court considering a Rule 33 motion "may weigh the evidence and

credibility of witnesses") (quoting *United States* v. *Coté*, 544 F.3d 88, 101 (2d Cir. 2008)). Petitioners assert, however, that in the course of "appl[ying]" that standard, the court of appeals below and in the precedent that it followed, *Archer* v. *United States*, *supra*, gave insufficient "deference to the district courts who oversaw the trial and heard all the evidence." Pet. 21; see Pet. 23 (criticizing the court of appeals for "devoting dozens of pages to sifting through the evidence and explaining why the district court was wrong"); see also Pet. 22 (criticizing the court of appeals' disagreement with the district court's "weighing of witness testimony" in *Archer*). That factbound assertion illustrates that petitioners' principal disagreement with the court of appeals is not in the legal principles that it applied, but in how the court applied them. This Court typically does not grant writs of certiorari to review such fact-bound objections.

Petitioners err in claiming (Pet. 11-12) that the court of appeals "conflate[d] Rule 29 with Rule 33" by "rel[ying] entirely on [the court's] Rule 29 analysis to" resolve the Rule 33 motions. As described above, the court expressly emphasized that motions under the two Rules are governed by different legal standards. See p. 17, *supra*. The court surveyed the record at length, identifying a wealth of evidence to establish every element of the offense—including every point that the district court had deemed wanting in granting Nordlicht's and Levy's motions—and found that the evidence did not preponderate heavily against the jury's verdicts and that the verdicts were not a miscarriage of justice. The court of appeals was not required to further expand on an already lengthy opinion by exhaustively repeating its discussion of all of the evidence that it had identified in

its Rule 29 analysis in order to justify its analysis of the same body of trial evidence under Rule 33, which it emphasized was subject to a different standard.

Finally, petitioners err in asserting (Pet. 2, 5, 10, 15, 22, 23, 30) that the court of appeals diverged from other circuit courts by "barr[ing]" district courts "from ordering a new trial unless the government's evidence was 'patently incredible or defied physical realities.'" Pet. 2 (quoting Pet. App. 65). As shown above, the court repeatedly explained that a district court may grant a motion for a new trial when the evidence preponderates heavily against the verdict. See pp. 17-18, *supra*. Elaborating on the "'preponderates heavily'" standard, the court noted some of "the clearest examples of when it would be appropriate to grant a Rule 33 motion," such as where "'the evidence was patently incredible or defie[d] physical realities'"; "'where an evidentiary or instructional error compromised the reliability of the verdict'"; "or where the government's case depends upon strained inferences drawn from uncorroborated testimony." Pet. App. 65-66 (quoting *Archer*, 977 F.3d at 188) (brackets in original; internal quotation marks omitted). But the court emphasized that those were "merely examples, and not an exhaustive list," *id.* at 66—as petitioners themselves acknowledge (Pet. 23).[3]

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[3] Petitioners also object (Pet. 21-22) to various decisions of the Eleventh Circuit that petitioners view as having taken an unduly narrow view of Rule 33. But as discussed, the court of appeals here did not take such a restrictive view. In any event, the Eleventh Circuit, like the other courts of appeals, has explained that district courts should resolve Rule 33 motions by asking whether the evidence "preponderate[s] heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." *Butcher* v. *United States*, 368 F.3d 1290, 1297 (2004) (citation omitted) (cited at Pet. 21-22).

b. Petitioners' contention (Pet. 20-24) that the decision below conflicts with decisions of this Court and other courts of appeals rests on their mistaken description of the court of appeals' opinion.

Contrary to petitioner's suggestion, nothing in the decision below conflicts with this Court's precedent. Petitioners acknowledge (Pet. 29) that "this Court has not directly interpreted Rule 33," and they principally rely (Pet. 29-30) on this Court's decision in *Tibbs*, which observed that "trial and appellate judges commonly distinguish between the weight and the sufficiency of the evidence," 457 U.S. at 44; see *id.* at 33 n.11. The Court stated that, when considering the sufficiency of the evidence under Rule 29, federal courts "view the evidence in the light most favorable to the verdict, giving the prosecution the benefit of all inferences reasonably to be drawn in its favor," but "[w]hen a motion for a new trial [under Rule 33] is made on the ground that the verdict is contrary to the weight of the evidence * * * [t]he district court need not view the evidence in the light most favorable to the verdict." *Id.* at 38 n.11 (citations omitted). That is the precise difference between Rule 29 and Rule 33 that was articulated by the court of appeals below. See Pet. App. 6 n.1; *id.* at 66-67. And petitioners' factbound assertion that the court of appeals, in "stark contrast" to this Court's dicta in *Tibbs*, "demanded that the district court defer to the jury," Pet. 30, disregards the court of appeals' considered determination that, in light of the wealth of evidence against petitioners, the evidence did not preponderate heavily against the verdict, with the result that the district court had abused its discretion in deciding that the verdict would produce a manifest injustice. See Pet. App. 67-68.

Moreover, as explained above, the court of appeals applied the same "preponderates heavily" standard used by the other circuits. See pp. 17-18, *supra*. Petitioners err in asserting (Pet. 20-23) that the decision below conflicts with decisions of the Fifth, Seventh, Eighth, and Ninth Circuits. Those courts, like the Second Circuit, allow a district court to grant a new trial based on the weight of the evidence only when the evidence preponderates heavily against the verdict. See, *e.g.*, *Robertson*, 110 F.3d at 1118 (5th Cir.); *Reed*, 875 F.2d at 114 (7th Cir.); *Lincoln*, 630 F.2d at 1319 (8th Cir.); *Pimentel*, 654 F.2d at 545 (9th Cir.). And while petitioners observe (Pet. 15) that the Fifth, Seventh, Eighth, and Ninth Circuits "[d]istinguish the [s]tandards [u]nder Rule 33 and Rule 29," the decision below likewise distinguished the standards governing those two rules. See p. 17, *supra*.

Petitioners' reliance on decisions from the Fifth, Sixth, and D.C. Circuits describing a district court deciding a Rule 33 motion as a "thirteenth juror," Pet. 13-14, 16, 24-25 (citations omitted), is similarly mistaken. Those courts have used the term "thirteenth juror" only as an analogy, not as a governing legal standard. Those courts agree that the ultimate legal standard under Rule 33 is whether the evidence preponderates heavily against the verdict, and that, whatever the usefulness of the "thirteenth juror" analogy, a district court may not grant a new trial simply because it disagrees with the verdict. See *Robertson*, 110 F.3d at 1118 (5th Cir.); *LaVictor*, 848 F.3d at 455-456 (6th Cir.); *Rogers*, 918 F.2d at 213 (D.C. Cir.). Those explanations of Rule 33 are consistent with the decision below. See Pet. App. 65 (stating that a district court abuses its discretion under Rule 33 where it grants a new trial

"simply because it feels some other result would be more reasonable").[4]

c. The petition should be denied for the additional reason that, even if petitioners could show that the court of appeals' formulation of the "preponderates heavily" differs in some way from the formulation used by other circuits, petitioners have not shown that the outcome of this case would be different under any other standard. As the court explained, the evidence supporting the jury's verdict against petitioners—though circumstantial in some respects—was "substantial." Pet. App. 62-63, 80. In light of that wealth of evidence against them, petitioners offer no sound basis for concluding that any other court of appeals would have concluded that the evidence preponderated so heavily against the verdict as to warrant a new trial.

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[4] Petitioners also assert (Pet. 24) that some courts of appeals—though not the Second Circuit—"[h]ave [t]aken [i]nternally [i]nconsistent [a]pproaches to Rule 33." See Pet. 24-26. But any intra-circuit tension in other courts of appeals would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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