No. 21-1319

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

REPLY BRIEF FOR PETITIONERS

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 SONSINI 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
DAVID M. COSTIGAN
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
steven.engel@dechert.com
(202) 261-3300

Counsel for Petitioner Mark Nordlicht

August 10, 2022

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES:

STATUTES:

RULES:

OTHER AUTHORITIES:

REPLY BRIEF

The government admits that "this Court has not directly addressed the Rule 33 issue," BIO 13, but it labors to deny the confusion that has ensued in the absence of this Court's guidance. The government's major premise is that there is no circuit split on the question presented because the circuit courts "have uniformly recognized" that district courts should grant a Rule 33 motion when "the evidence preponderates heavily against the verdict." BIO 11-13. But the courts of appeals are deeply fractured when it comes to determining when that standard is met.

The circuits' agreement on the top-line standard cannot mask their fundamental disagreement over what it means. In four circuits, the district court is expected to act as a "thirteenth juror" in weighing the evidence, including by making credibility determinations. In two others, that approach is viewed as threatening the jury system itself, and the district court is instructed to defer unless the verdict is irrational. And, in several more, the approach has been muddled and panel dependent. The government's ostrich-like failure to cite, let alone discuss, the many cases in the petition does not diminish their significance.

To the contrary, the government's silence speaks loudly. The Fifth Circuit recently granted *en banc* review after a panel divided on the Rule 33 question, yet the government evidently views that case as irrelevant to the question presented. *See United States v. Crittenden*, 26 F.4th 1015 (Mar. 2, 2022) (mem.). The government likewise ignores *United States v. Morales*, 902 F.2d 604 (7th Cir. 1990), which

reversed a district court's denial of a new trial motion because the evidence was "improbable" even though it "was not inconsistent with physical reality or otherwise incredible." *Id.* at 608.

Yet in the decision below, the Second Circuit employed virtually the same phrase to reach the *opposite* conclusion, holding that district courts may set aside a jury verdict *only* when the evidence is "patently incredible or defied physical realities," or is equally flawed:

> [A]bsent a situation in which, for example, the evidence was *patently incredible or defied 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, a district court *must* defer to the jury's resolution of conflicting evidence.

App. 65 (internal quotation marks and alterations omitted; emphases added). The conflict between the Second Circuit's decision below and the Seventh Circuit's decision in *Morales* could not be more clear.

Nor can the government waive away that conflict by suggesting that the Second Circuit's articulation of the "preponderates heavily" standard provides "merely examples, and not an exhaustive list." BIO 20 (quoting App. 66). The Second Circuit has made clear, first in *United States v. Archer*, 977 F.3d 181, 188 (2d Cir. 2020), and now in the decision below, that these examples dictate when a Rule 33 motion may be granted, and that "absent a situation" like these, the district courts "must defer" to the verdict. That is a

far cry from the discretion other courts of appeals afford the district courts in applying Rule 33.

The government's refusal to engage with the divergent legal standards becomes even more pronounced when it dismisses the Eleventh Circuit's similar standard in a footnote. Like the Second Circuit, the Eleventh Circuit requires maximum deference to the verdict, to the point where it candidly observes 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). Instead of explaining how the Eleventh Circuit's decision does not evidence a split, the government again retreats to asserting that all the Eleventh Circuit does is consider whether the evidence "preponderate[s] heavily against the verdict." BIO 20 n.3. But this just confirms that the circuits genuinely disagree over what that means.

Although the government may prefer to play the ostrich, the Second and Eleventh Circuits' strict Rule 33 standard differs markedly from that regularly applied in the Fifth, Seventh, Eighth, and Ninth Circuits. In those circuits, the district courts have broad discretion to weigh the evidence, assess credibility, and order new trials. Without guidance from this Court, federal defendants will continue to be subject to vastly different Rule 33 standards depending on where they are prosecuted.

Having refused to acknowledge any division, the government makes no attempt to defend the Second Circuit's departure from Rule 33's text, purpose, and history. But as the *amicus curiae* explains, ever since there have been juries, judges have played a crucial

role in protecting criminal defendants by weighing the evidence where justice requires. *See* Amicus Br. of Professor Jennifer L. Mascott ("Mascott Br.") at 7-10. This power is particularly important to ensure that juries convict defendants based on the weight of the evidence, not personal biases. *See id.* at 16. Rule 33 codified courts' ability to safeguard criminal defendants and imported longstanding common law norms. *Id.* at 19-21. By effectively stripping trial courts of their discretion to grant new trials, the opinion below contravenes centuries of practice.

Finally, the government is mistaken in arguing that the interlocutory posture should prevent review. A Rule 33 order will always be interlocutory, but Congress granted the government an appeal as of right, *see* 18 U.S.C. § 3731, and this Court has reviewed cases in a similar posture, *see* Pet. 33; *United States v. Cooley*, 141 S. Ct. 1638, 1642 (2021).

This petition presents a clear, important, and recurring question of law, and the sentencing proceedings will have no impact on this question. The Court should grant review and resolve the disagreement among the circuits on the appropriate standard under Rule 33.

I. The Circuits Are Divided Over Rule 33.

A. In the decision below, the Second Circuit reversed the district court's grant of a new trial by holding that, absent instructional or evidentiary error, a district court may not set aside a jury verdict unless the government's evidence was "patently incredible," "defied physical realities," or was similarly flawed. App. 65. The Second Circuit has applied that standard to reverse district courts twice in as many years, and

it cannot be squared with the standard applied in four other circuits, which recognize that "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, 1212 (9th Cir. 1992).

The government does not even acknowledge *Alston*, just as it ignores *Morales*, *Crittenden*, and most of the other cases reflecting the circuit split. Instead, the government seizes on the Second Circuit's more generalized discussion concerning the standard of review, where the court explains the distinction between Rule 29 and Rule 33 and cites the "preponderates heavily" test. BIO 11; App. 66-67. But just as there can be no dispute over what the Second Circuit said at the front of its analysis, there can also be no dispute about the actual test that the Second Circuit employed while reversing the district court.

In arguing that the court below understood Rule 29 and Rule 33 to embody "different governing legal standards," BIO 11, the government portrays the Second Circuit as saying things it never did. For example, the government suggests that *this Court's* observation in *Tibbs v. Florida*, 457 U.S. 31, 38 n.11 (1982)—that the Rule 29 and Rule 33 standards are "far different"—appeared in the opinion below. *See* BIO 11 (beginning a sentence with "But as the decision below explained," then quoting from *Tibbs*). Yet the Second Circuit did not cite *Tibbs* at all, so it could hardly have "explained" the distinction that the Court emphasized in *Tibbs*.

Although the Second Circuit acknowledged that the Rule 29 and Rule 33 standards are not identical, it

went on to hold that the district court's discretion under Rule 33 "should be exercised sparingly," and "only in the most extraordinary circumstances." App. 63. Since the district court "must defer" to the jury unless the evidence was "patently incredible," "defie[d] physical realities," or was similarly flawed, App. 65, the Second Circuit leaves little meaningful difference between the rules. Indeed, the fact that the Second Circuit repeatedly cross-referenced Rule 29 rulings to short-circuit its Rule 33 analysis belies any notion that it viewed the standards as "far different" from each other. App. 67-69, 73, 77.

The Eleventh Circuit has taken the same narrow approach to Rule 33. It too says that the "preponderates heavily" standard governs, but it sees the difference from Rule 29 as vanishingly small. *Butcher*, 368 F.3d at 1296-97 (observing that the standards are "not much different" and "should not be overstated"). And the government claims that the fact that the Eleventh Circuit recites the "preponderates heavily" language must mean that this restrictive standard governs in other circuits as well. BIO 20 n.3.

Yet four other circuits—the Fifth, Seventh, Eighth, and Ninth—understand the "preponderates heavily" standard to reflect a truly meaningful distinction from Rule 29. In ruling on Rule 33 motions, district courts in these circuits may reweigh the evidence and grant a new trial even if witness "testimony was not inconsistent with physical reality or otherwise incredible." *Morales*, 902 F.2d at 608. And the circuits "will only rarely reverse a district judge's grant of a defendant's motion for a new trial, and then only in egregious cases." *Alston*, 974 F.2d at 1211. On its

face, the Second and Eleventh Circuits' test is fundamentally at odds with the analysis employed by these four circuits.

B. The government also minimizes the confusion plaguing other circuits by noting that "any intra-circuit tension . . . would not warrant this Court's review." *See* BIO 23 n.4. But the point is not that this Court should grant review to resolve an intra-circuit split, but that its lack of guidance has produced not only a clean circuit split, but also continuing uncertainty within several other circuits.

Absent this Court's guidance, there are decisions in, say, the Third Circuit that apply completely different standards. *Compare United States v. John Baptiste*, 747 F.3d 186, 206-07 (3d Cir. 2014) ("[U]nder Rule 33 . . . . we again view the evidence supporting a conviction in the light most favorable to the government"), *with United States v. Salahuddin*, 765 F.3d 329, 346 (3d Cir. 2014) ("When evaluating a Rule 33 motion, the district court does not view the evidence favorably to the Government, but instead exercises its own judgment."); *see also* Pet. 24-26 (detailing similar inconsistencies in the Sixth and Tenth Circuits). And that is why the Fifth Circuit recently went en banc in *Crittenden*. 26 F.4th at 1015. Unless this Court weighs in, criminal defendants will continue to face differing Rule 33 standards not only based on where they are prosecuted but also based on the panels they draw.

Finally, the government attempts to argue that, even if the circuits apply vastly different standards, "petitioners have not shown that the outcome of this case would be different under any other standard."

BIO 23. But it does so by patently overstating the Second Circuit's holding. The government says the court found "the evidence supporting the jury's verdict against petitioners . . . was 'substantial,'" which precludes a new trial under any Rule 33 standard. BIO 23 (quoting App. 62-63, 80). But the Second Circuit's use of the word "substantial" on two discrete points involving two different defendants hardly constitutes a generalized finding that the evidence was "substantial." And, even if it had, other circuits have recognized that a district court may grant a new trial "even where there is substantial evidence to sustain the verdict." *E.g.*, *United States v. Stacks*, 821 F.3d 1038, 1044 (8th Cir. 2016).

Here, the evidence was hardly "substantial," and the experienced district judge carefully exercised his discretion to weigh the evidence after sitting through a nine-week long trial in which the jury acquitted Petitioners on five charges and convicted them on three. The government's theory about the indenture vote shifted during the trial, and the defendants were ultimately convicted of concealing whether Beechwood qualified as an "affiliate" under the Trust Indenture Act, even though substantial evidence showed that Beechwood had sought to maintain its legal separation from Platinum.

In a lengthy opinion, the district court carefully discussed the evidence, then concluded that the verdict should be set aside against Levy under both Rule 29 and Rule 33 and against Nordlicht under Rule 33. Had the Second Circuit applied the standard from other circuits, there is every reason to think that the

court would have deferred to the careful district judge who heard the witnesses and viewed the evidence.

II. The Second Circuit's Rule 33 Standard Conflicts with the Original Understanding and the History of the Jury.

Because the government insists that the Second Circuit applies the same standard as every other circuit, it spends little time justifying the restrictive reading of Rule 33. Yet the Second Circuit's rule conflicts with the centuries-long understanding of the judge's role in a jury trial, a power discussed by Blackstone and acknowledged under federal law since the Judiciary Act of 1789.

This Court has long recognized that "[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 of 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) (internal quotation omitted). That deference reflects the fact that the trial judge is not a mere moderator, but is part of the trial by jury, which is put "under the superintendence of a judge" who instructs on the law, advises on the facts, and can "set aside [the] verdict if, in his opinion, it is against the law or the evidence." *Capital Traction Co. v. Hof*, 174 U.S. 1, 13-14 (1899).

Jury trials safeguard liberty only when their verdicts are reliable. The community's participation in the jury promotes self-governance and checks arbitrary government power, but the judge acts as a check against community prejudice. At common law, the court's ability to order a new trial in the "interest of justice" did not undermine the jury's verdict, but

limited "unbridled jury power." Mascott Br. 8. Preventing meaningful review of convictions—the effect of the Second Circuit's approach—"was thought to be 'capricious.'" *Id.* (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *379-80 (1768)). If judges could not grant new trials when justice required, the public might lose faith in the jury altogether and replace it with "an alternate tribunal less friendly to self-governance." *Id.* at 3 (citing 3 BLACKSTONE *390-91).

Courts have long wielded this power to ensure the integrity of the courts, safeguard the jury system, and protect unpopular and vulnerable defendants. Thus, in the South before the Civil War, judges used that discretion to grant new trials to African-American defendants to ensure they were convicted based on evidence, not the jury's prejudice. *See id.* at 16-17.

Historically, the court's discretion to weigh the evidence was distinct from its power to direct the verdict. *See id.* at 18-19; Pet. 27-28. Even when the evidence was sufficient to support a conviction, courts could grant new trials when it was "doubtful" or the verdict did "not satisfy the conscience of the judge." *United States v. Harding*, 26 F. Cas. 131, 136 (C.C.E.D. Pa. 1846) (Kane, J.); *see* Mascott Br. 13-14, 18-19; Pet. 28-29.

Federal Rule of Criminal Procedure 33 incorporated the "interest of justice" standard, which decidedly did not restrict trial courts to allowing new trials only where the evidence was "patently incredible" or "defied physical realities." Mascott Br. at 19-21; Pet. 27. In reading Rule 33 to require maximum deference, the Second Circuit's decision

conflicts with an unbroken, centuries-long understanding of the jury system. In view of the critical importance of the district court's role in supervising criminal trials, the Court should grant certiorari to correct that mistake.

III. This Case Is a Clean Vehicle for Review.

That this case arises from an interlocutory appeal is no reason to deny review. *See* BIO 10-11. Every grant of a Rule 33 motion is necessarily interlocutory, yet Congress authorized the government to appeal as of right under 18 U.S.C. § 3731. The same considerations supporting appeals under § 3731 weigh in favor of review by this Court. If anything, judicial efficiency weighs in favor of considering the Rule 33 issue now, *before* sentencing proceedings that would be unnecessary if this Court were to reverse.

This Court in fact has granted certiorari in criminal cases arising in a similar posture, *see* Pet. 33; *United States v. Cooley*, 141 S. Ct. 1638, 1642 (2021), undercutting the government's contention that granting would "depart from its usual practice," BIO 11. When, as here, "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." Stephen M. Shapiro et al., *Supreme Court Practice* 4.18 & n.72 (11th ed. 2019).

The government offers the generalized concern that "proceedings on remand may affect the consideration of the issues presented," but it provides no details on what those could be. BIO 11. The only remaining issues concern sentencing, yet the sentence

will have no impact on the question before this Court. In fact, the opposite is true: If this Court grants and reverses, then Petitioners should *not* be sentenced under the verdicts that the district court had set aside.

This petition thus presents a clean question of law, which will not be affected or mooted by future proceedings. As the government admits, the Court has not "directly addressed the Rule 33 issue," BIO 13, and the question is ripe, important, and recurring—fully warranting this Court's review now.

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 SONSINI
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
DAVID M. COSTIGAN
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
steven.engel@dechert.com
(202) 261-3300

Counsel for Petitioner
Mark Nordlicht