No._____

IN THE SUPREME COURT OF THE UNITED STATES

ABDULLAH KHABIR YUSUF, PETITIONER

V.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

The Court has held that the due process clause requires the government to prove each element of a criminal offense beyond a reasonable doubt. *In re Winship,* 397 U.S. 358 (1970). In *Jackson v. Virginia,* 443 U.S. 307 (1979), the Court ruled that a federal court reviewing a challenge to the sufficiency of the evidence supporting a conviction had to apply the reasonable-doubt standard to determine whether a reasonable fact-finder could have found the elements of the offense had been proved by the government.

The question presented is whether a federal court of appeals reviewing a defendant's challenge to the sufficiency of the evidence supporting his conviction must apply the reasonable-doubt standard articulated in *Jackson v. Virginia.*

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V.

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Abdullah Yusuf asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on January 6, 2023.

PARTIES TO THE PROCEEDING

The caption of the case names all parties to the proceedings in the courts below.

RELATED PROCEEDINGS

United States v. Yusuf, U.S. District Court for the Southern District of Texas, Number 5:21 CR 00617-1, Judgment entered December 14, 2022.

United States v. Yusuf, U.S. Court of Appeals for the Fifth Circuit, Number 21-40926, Judgment entered January 6, 2023.

OPINION BELOW

The opinion of the court of appeals is reported at 57 F.4th 440. A copy of the opinion is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on January 6, 2023. This petition is filed within 90 days after the entry of judgment. *See* Supreme Court Rule 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides in pertinent part that "No person shall be . . . deprived of life, liberty, or property, without due process of law[.]"

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

Federal Rule of Criminal Procedure 29(a) provides that a motion for judgement of acquittal may be made:

> (a) Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

STATEMENT

This case is about whether a federal court of appeals reviewing on direct appeal a federal criminal defendant's challenge to the sufficiency of the evidence supporting a conviction must apply the constitutional reasonable-doubt standard the Court set out in *Jackson v. Virginia,* 443 U.S. 307 (1979). The Fifth Circuit in this case did not do so. It did not do so because it follows the rule that, if a defendant does not renew his motion for judgment of acquittal at the close of all the evidence, then he is deemed to have forfeited the issue.[1] In such circumstances, the Fifth Circuit reviews for what it calls "plain error" under a lesser standard which looks only to whether the record is devoid of evidence. *See* App. A, 57 F.4th at 445; *see also United States v. Delgado,* 672 F.3d 320, 330-31 (5th Cir. 2012) (en banc). This plain-error devoid-of-evidence standard conflicts with the Court's holdings, creating the insupportable situation that the due process right to proof beyond a reasonable doubt is enforceable at trial, In re *Winship,* 397 U.S. 358, *Sullivan v Louisiana,* 508 U.S. 275 (1993) and in a federal habeas proceedings, *Jackson,* 443 U.S. at 316-24, but not on direct appeal from a federal criminal conviction. The Fifth Circuit's approach deprives a criminal defendant of the guarantee that, if convicted, his conviction will stand only if the government has adduced evidence that proves every element of the charged offense

[1] Though not uncommon, this forfeiture interpretation is doubtful under the plain language of Federal Rule of Criminal Procedure 29, which is written in the disjunctive and allows the accused to move for judgment of acquittal at the close of the government's case or after the close of all the evidence.

beyond a reasonable doubt. *See Winship,* 397 U.S. at 364; *Jackson v. Virginia,* 443 U.S. at 317-19.

Petitioner Abdullah Yusuf was arrested at an immigration checkpoint near Laredo, Texas, when Border Patrol agents found undocumented immigrants hidden in the trailer Yusuf had been contracted to pick up in Laredo. Yusuf was charged with conspiracy to transport, in furtherance of their unlawful entries, immigrants who had entered the United States unlawfully and with knowingly transporting, in furtherance of their unlawfully entries and for commercial gain, two of the undocumented immigrants. 8 U.S.C. § 1324(a)(1)(A)(ii), (v)(I); 8 U.S.C. § 1324(a)(1)(A)(ii), (B)(ii) 8 U.S.C. § 1324(a)(1)(A)(ii), (v)(I). Both the conspiracy charge and the substantive charges required the government to prove that Yusuf was aware, or should have been aware, of the immigrants and had sought to further their unlawful presence in the country. 8 U.S.C. § 1324(a)(1)(A)(ii), (v)(I); 8 U.S.C. § 1324(a)(1)(A)(ii), (B)(ii) 8 U.S.C. § 1324(a)(1)(A)(ii), (v)(I); see *United States v. Jimenez-Elvirez,* 862 F.3d 527, 533-34 (5th Cir. 2017); *United States v. Nolasco-Rosas,* 286 F.3d 762, 765 (5th Cir. 2002).

On appeal, argued that the evidence did not prove beyond a reasonable doubt that he knew or had reason to be aware that undocumented immigrants were hidden in the trailer. At trial, Yusuf had testified that he had not knowingly transported immigrants and that he had not agreed with anyone to transport undocumented immigrants. He also testified that he had been unaware that people had been hidden in the trailer he was hired to move, and that he would not have agreed to job had he

known that they were there. The government had no direct evidence that Yusuf was aware of the immigrants or had seen or heard anything that should have alerted him to their presence. Brief and Reply Brief of Defendant-Appellant, Fifth Circuit Case No. 21-40926.

Yusuf had testified that he was a tractor-trailer owner-operator. He obtained loads from companies, from load boards that advertised jobs, from brokers who posted job, and, as he established himself and earned a reputation, from brokers would call him to offer loads for hire. In mid-March 2021, Yusuf was in Oklahoma when he received a call from a brokerage company called YOU. The YOU brokerage had contacted him before, but he had not worked a job for them yet. This time, the brokerage offered him a flatbed load out of Laredo that was to pay $2,700. He accepted the job.

Yusuf told the jury that he drove to the address on Auburn Road in Laredo, Texas, that the broker provided to him. When he arrived, a gate in the fence around the yard was open and a man told him to pull in. The man told Yusuf to "drop," that is to unhitch, his trailer. Yusuf did. In Yusuf's experience, the shipper loads the truck. Some companies want the driver present while a trailer is loaded, and some do not. This shipper did not and the man at the yard asked Yusuf to park his tractor outside the yard until the trailer was loaded.

Yusuf parked and went for a walk with his two dogs.[2] After about 45 minutes, the broker called to say the load was ready. Yusuf returned to the lot, backed his tractor to the trailer, hitched up, and was given a bill of lading. He was told to head toward Dallas. After he pulled out of the yard, he stopped briefly to check that the straps on the load were secure. Satisfied that the load was tied down properly, he headed to Interstate Highway 35 to begin his journey.

Yusuf explained that the job was a blind shipment. That meant that the shipper did not want the buyer of the cargo to know from whom the shipper had obtained the cargo, out of fear that the buyer would eliminate the middleman shipper the next time. On blind shipments, the shipper gives the driver a "dummy" bill of lading with disguised information, so that neither the buyer nor the seller would learn information that might lead them to circumvent the shipper in the future. The broker provides the driver with the actual bill of lading for the shipment during the run, after the driver has picked up the load.

Just up Interstate Highway 35 from Laredo, Yusuf entered the Border Patrol checkpoint. At the primary inspection area, Agent Domingo Lule greeted Yusuf and observed that his rig was a flatbed tractor-trailer combination with a tarp over its load of four boxes. Lule and Agent Ismael Romo both testified that the tarp was pulled taut over the truck's load. Neither thought anything seemed unusual about the load,

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[2] Agent de Arcos thought he remembered Yusuf going to wait at the Flying J after he unhitched. The Fifth Circuit's opinion states that Yusuf's sworn statement was that he had gone to the Flying J. App. A, 57 F.4th at 446. Yusuf did not give such testimony at the trial.

even after Romo felt around on the tarp. Lule inquired whether Yusuf was accompanied. Yusuf, who Lule described as cooperative, answered it was only him and his two dogs. Romo nonetheless signaled Lule to direct Yusuf's truck to the checkpoint's secondary inspection area.

There, Yusuf was directed to exit the truck, while Agent Romo and his dog again inspected it. The dog alerted to the trailer. Romo loosened the tarp and looked under it. He saw people were sitting in the large, wooden crates strapped to the flatbed. The agents offloaded 84 persons from the truck. Immigration inquiries revealed that all 84 were citizens of countries other than the United States and that none had proper documentation to be in United States.

Homeland Security Investigations Agent Juan de Arcos came to the checkpoint to interview Yusuf, as well as Miguel Manzo and Jose Vega, who were among the immigrants found in the trailer. Vega and Manzo testified for the government at trial.

Manzo admitted that he had entered the United States unlawfully after arranging to be smuggled into the United States. From Nuevo Laredo, Mexico, Manzo had been taken across the Rio Grande to a house in Laredo. On a later night, he and others were taken from the house to a trailer van and told to hurry into it. Manzo remembered the surface at the loading site as not dirt and not rocks. He remembered that, after he boarded and the truck began to move, it stopped briefly. He heard a sound like a tarp being tightened. The truck then drove on. Appendix B.

Garcia also had entered the United States unlawfully, helped by a smuggler who took him across the river and to a trailer home. Vega spent about two weeks in the trailer home before he was driven to a trailer van and told to board it. The ground around the truck felt to him as if it were concrete. Neither Vega nor Manzo saw the driver and neither identified Yusuf at trial. App. B.

Agent de Arcos interviewed Yusuf after obtaining a *Miranda* waiver from him.[3] De Arcos said that Yusuf told him he was on his way to Dallas, and that he did not know what was in the load he was hauling. Yusuf explained that he had been hired to move the load by YOU Brokerage. He provided a phone number for the brokerage, showing de Arcos the number for YOU that was stored in his phone contacts. De Arcos was unable to verify the brokerage and was unable to reach it through the phone number that Yusuf provided. That the phone number was unreachable was not necessarily surprising, de Arcos acknowledged. Smugglers often use burner phones, and commonly have spotters follow their loads to see if the load is passed through the checkpoint.

Agent de Arcos found a bill of lading on the driver's side of Yusuf's tractor. The bill of lading listed the carrier as USA Trucking, contained a trailer number, and a seal number with a load destined for Home Depot. The trailer and seal numbers were not consistent with the flatbed trailer. From USA Trucking, de Arcos obtained a bill of lading that seemed to match the one found in Yusuf's truck. Receipts and payables

[3] *Miranda v. Arizona,* 384 U.S. 436 (1966).

for the load listed on the USA Trucking bill of lading showed that it was associated with a shipment moved by Yusuf's company, Steel on Steel. USA Trucking often hires tractors to pull its vans and de Arcos's investigation discovered that USA Trucking had previously hired Steel on Steel.

Agent de Arcos testified that Yusuf had told him he had picked the load up at 11913 Auburn Road in Laredo and that he was being paid $2,700 for the trip. When de Arcos went to 11913 Auburn Road, he found it was a fenced-off lot where the trucking company Jamco stored van trailers. De Arcos had to approach a security booth to enter the lot. De Arcos initially claimed that he found it suspicious that the yard did not have a loading dock since he thought he remembered Yusuf saying he had backed up to a loading dock. De Arcos eventually admitted that the report he made contemporaneously with Yusuf's arrest did not mention a loading dock.

Agent de Arcos's testimony about what Yusuf told him about the loading process was consistent with Yusuf's trial testimony. De Arcos stated that Yusuf told him that, when he arrived at the lot, he backed up the truck to allow it to be loaded. The man there told him to leave in his tractor and he would be called when the truck had been loaded. When Yusuf returned to the yard, the trailer was loaded, a tarp was fastened onto the load.

Agent de Arcos recalled Yusuf stating that he received the bill of lading from a man in the dark yard, and that he did not yet know where he was going in Dallas. Yusuf told de Arcos that he was anticipating another bill of lading to be sent to him

because the load was a blind shipment. De Arcos admitted at trial that he had only a vague understanding of how blind shipments worked.

The government presented two witness who worked in the trucking industry, George Henry, senior vice-president of USA Truck, and Ricardo Gonzalez, vice-president of operations at Jamco. Henry opined that the bill of lading de Arcos seized looked as if it was created through alterations made to the bill of lading from Steel on Steels' 2021 job for USA. Henry testified that bills of lading carried a unique reference number that would be reused only after several years had gone by. Henry acknowledged that blind shipments occurred. In his opinion, such shipments were not a "great practice," but was a legal one.

Gonzalez testified that testified that Jamco had been leasing lot at 11913 Auburn Road to store vans since November 2020. Jamco did not have a warehouse or loading equipment on the lot. Gonzalez said that Jamco did not load flatbeds at the site, which he described as a caliche lot.[4] The lot was fenced and had a security guard who monitored entry into it from 9:00 a.m. to 9:00 p.m. Jamco's policy was to close and lock the yard after 9:00 p.m., but the company did not have security cameras and could not tell if anyone used the lot after 9:00 p.m. That meant if the security guard left the gate open, Jamco had of way of knowing about it.

The jury found Yusuf guilty as charged. He appealed, contending that the evidence was insufficient to show that he had knowingly or recklessly transported

[4] Caliche is a hard, cement-like surface. https://en.wikipedia.org/wiki/Caliche.

undocumented immigrants with the intent to further their unlawful presence in the United States. No reasonable jury could reach that conclusion because, at most, the government's evidence showed that he had agreed to transport a trailer containing contraband of some sort. But no evidence showed that he knew or should have known what he was transporting, and no evidence showed that he had intended to further the unlawful presence of undocumented immigrants hidden in the load he agreed to transport. He conceded that his trial attorney had not renewed the motion for judgement of acquittal at the close of all the evidence, but argued that the constitution required the court of appeals to review the sufficiency of the evidence under the *Jackson* standard.

The Fifth Circuit rejected that argument. It held that defense counsel's failure to renew the motion for judgment of acquittal meant that Yusuf faced a standard of plain error review that was "doubly difficult." 57 F.4th at 445 (citing *Johnson v. Sec'y DOC,* 642 F.3d 907. 911 (11th Cir. 2011). The court of appeals declared that the *Jackson* "`substantial deference"' standard "that we generally afford verdicts combines with the "`exacting' plain-error standard to create an exponentially more difficult standard of review than either one standing alone." 547 F.4th at 445 (citing *Delgado,* 672 F.3d at 330-31 and *United States v. Cabello,* 33 F.4th 281, 288 (5th Cir. 2022)). The court declared that, under its non-*Jackson* plain-error understanding, "a sufficiency error satisfies the second prong of plain-error review only when `the record is *devoid of evidence* pointing to guilt.'" 57 F.4th at 445 (emphasis added) (citing *Delgado,* 672 F.3d at 331). The court would not let the usual constitutional standard

bind it. It announced that "[m]ere insufficiency doesn't cut it. Rather, the movant must prove that the evidence was so completely, obviously, and *unbelievably* inadequate that allowing the verdict to stand would be a `shocking" and `manifest miscarriage of justice.'" 57 F.4th at 445 (quoting *United States v. Smith,* 878 F.3d 498, 503 (5th Cir. 2017)). Having rejected again the argument that *Jackson* set a required constitutional standard for review, the Fifth Circuit affirmed Yusuf's convictions. App. A, 57 F.4th at 445-47.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT APPELLATE REVIEW OF THE SUFFICIENCY OF THE EVIDENCE SUPPORTING A CONVICTION MUST BE DONE UNDER THE CONSTITUTIONAL TEST ARTICULATED IN *JACKSON.*

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It is a well settled constitutional rule that for criminal liability to be found the government must prove the charges brought against a defendant beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 358-64 (1970); *Jackson v. Virginia,* 443 U.S. 307, 315 (1979); *Sullivan v. Louisiana,* 508 U.S. 275, 277-78 (1993). It is also settled that, when a federal court is assessing on habeas review whether the evidence was sufficient under the due process clause a sustain a conviction, it must determine if any reasonable finder of fact could have found the elements of the charged offense beyond a reasonable doubt. *Jackson,* 443 U.S. at 316-19. Though it is settled that due process requires the use of the reasonable-doubt standard at trial and on habeas review, the Court has never explicitly addressed the standard to be used by a federal

court of appeals reviewing the sufficiency of the evidence supporting a conviction on direct appeal.

Given that both the trial rule and the habeas rule require proof beyond a reasonable doubt of all elements of a charged offense, it would seem that the rule must also apply to appellate review. *Jackson*'s statement that the question it was answering went "to the basic nature of the constitutional right recognized in the *Winship* opinion," 443 U.S. at 313, and its decision that reasonable-doubt review was required on habeas in light of the *Winship* holding would seem inevitably to require that reasonable-doubt review be the standard to be used on direct review of a challenge to the sufficiency of the evidence. As *Jackson* explained, the "fundamental" reasonable-doubt standard "give[s] 'concrete substance' to the presumption of innocence to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding . . . [and] symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself." *Jackson*, 443 U.S. at 315 (quoting *Winship,* 397 U.S. at 363). If reasonable-doubt review does not apply on direct appeal, a curious lacuna exists: due process makes stringent demands at trial and on habeas review, but skips over direct appeal.

Despite the unlikelihood that due process skips steps of the criminal process, the Fifth Circuit has held that such a lacuna does exist. In some circumstances, it reviews challenges to the sufficiency of the evidence supporting a conviction only to see if the record is devoid of evidence of guilt. *See, e.g.,* App. A 57 F.4th at 444-45; *United States v. Delgado,* 672 F.3d 320, 330-31 (5th Cir. 2012) (en banc). The Fifth Circuit regularly

reviews sufficiency challenges under this devoid-of evidence standard, a standard that the Court specifically rejected falling below the demand of due process. *Jackson,* 443 U.S. at 316 (rejecting standard articulated in *Thompson v. City of Louisville,* 362 U.S. 199 (1960). The Fifth Circuit has reached the conclusion that devoid-of-evidence review is permissible, though it falls below the constitutional minimum recognized in *Winship* and *Jackson* because of its reading of Federal Rules of Criminal Procedure 29 concerning motions for judgment of acquittal and of Federal Rule of Criminal 52(b) concerning plain-error review. To the Fifth Circuit, these rules demote the *Jackson*-articulated standard from a constitutional requirement to a mere standard of review. That standard of review may be discarded by the court of appeals to penalize a criminal defendant for failing to do what the court of appeals believes Rule 29 requires of a criminal defendant. *See, e.g.,* App. A, 57 F.4th at 444-45.

This reading is untenable. It ignores the Court's teachings in *Winship* and *Jackson.* It permits convictions to stand if there is merely some evidence against the defendant, removing the concrete substance the reasonable-doubt standard ensures. And, while those reasons alone are enough to conclude that the Fifth Circuit has misunderstood the required standard, further reason to reject the Fifth Circuit's interpretation is found in its misunderstanding of Rules 29, 51, and 52(b), a misunderstanding that brings it into conflict with this Court's teaching about Rule 51 and preservation of error. *See, e.g., Holguin-Hernandez v. United States,* 140 S. Ct. 762 (2020) (error preserved when defendant makes known to court ruling he seeks).

The Fifth Circuit's mistake has been to treat the reasonable-doubt standard not as a constitutional requirement on direct appeal, but as a standard of review. *See, e.g.,* App. A , 57 F.4th at 444-45; *United States v. Cabello,* 33 F.4th 281, 288 (5th Cir. 2022); *Delgado,* 672 F.3d at 330-32. Thus, the Fifth Circuit has repeatedly held that, if a defendant did not renew his motion for judgment of acquittal to the trial court after presenting a defensive case, reasonable-doubt review falls out of the case, replaced by a plain-error standard of review that is "super-deferential" and can lead to reversal only when "the record is *devoid of evidence* pointing to guilt or [that] the evidence is so tenuous that a conviction is shocking." *Cabello,* 33 F.4th at 288 (quoting *Delgado,* 672 F.3d at 331) (emphasis in *Cabello*); *see also* App. A, 57 F.4th at 444-45.

This is impossible to square with *Winship* and *Jackson. "Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson,* 443 U.S. at 316. *Jackson* found it "clear" that "the due process standard recognized in *Winship* constitutionally protects an accused against conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt." *Id.* at 314. The Court held that reasonable-doubt was required in habeas because even "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as

a jury." *Id.* at 317. Driving home why the constitution required reasonable-doubt review, *Jackson* observed that "[i]n a federal trial, such an occurrence has traditionally been deemed to require reversal of the conviction." *Id.* (citing *Glasser v. United States,* 315 U.S. 60, 80 (1942)).

Jackson's statement that the reasonable-doubt standard was required by due process for the same reasons that reversal would be required on direct appeal of a federal conviction if a jury convicted without proof of the elements beyond a reasonable doubt all but pronounced that the constitutional standard set in *Winship* and *Jackson* applies to direct review in the federal system. Soo too did the Court's statement that "[a]fter *Winship* the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. 443 U.S. at 318. The Fifth Circuit's resistance to the constitutional necessity of reasonable-doubt review of the sufficiency of the evidence cannot be reconciled with *Winship* and *Jackson.*

The significance of the Fifth Circuit's misreading is underlined by standard it uses instead. It is true that other circuits have held that a failure by a defendant to renew a motion for judgment of acquittal at the close of all the evidence can be said to trigger plain-error review. See, e.g., *United Stats v. Flyer,* 633 F.3d 911, 917 (9th Cir. 2011); *United States v. Bowie,* 892 F.2d 1494, 1496-97 (10th Cir. 1990). But those other circuits also recognize that, despite their use of the plain error" nomenclature, the ultimate question is whether the government proved the offense beyond a

reasonable doubt. *See United Stats v. Flyer,* 633 F.3d 911, 917 (9th Cir. 2011) ("plain-error review of a sufficiency-of-the-evidence claim is only theoretically more stringent than the standard for a preserved claim.") (internal quotation omitted); *United States v. Bowie,* 892 F.2d 1494, 1496-97 (10th Cir. 1990) (under plain-error review, "[w]hen considering the sufficiency of the evidence to support the verdict,. . . the standard actually applied is essentially the same as if there had been a timely motion for acquittal.").

The Fifth Circuit does not apply the same standard when using its version of plain-error review of a challenge to the sufficiency of the evidence. It uses a vastly different standard, one specifically rejected by this Court as constitutionally infirm. The Fifth Circuit reviews, in a case in which the motion for judgement of acquittal was not renewed at the close of all the evidence, to see if the record was devoid of evidence. App. A, 57 F.4th at 445; *Cabello,* 33 F.4th at 288; *Smith,* 878 F.3d at 503. *Jackson* specifically and roundly rejected the no-evidence test of *Thompson* as "simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt[.] 443 U.S. at 320. The Court stated that "a mere modicum of evidence may satisfy a 'no evidence' standard" and observed that "it could not seriously be argued that such a`modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." *Id.* The no-evidence test failed to "supply a workable or even a predictable standard for determining whether the due process command of *Winship* ha[d] been honored" and thus failed to "require that the factfinder [had] rationally apply that standard to the facts in evidence." *Id.* The Fifth

Circuit's devoid-of-evidence test is simply the banished *Thompson* no-evidence test worded a bit differently. As before, it is not a workable test and it is not a test that satisfies the due process clause.

It's the Fifth Circuit's reliance on the devoid-of-evidence test and its reduction of the *Jackson* test to a mere standard of review that merits certiorari in this case. Still, it should be noted that two important underlying premises of the Fifth Circuit's reasoning are quite doubtful. The Fifth Circuit arrived at its modern day no-evidence test by positing (1) that a defendant is required by Federal Rule of Criminal Procedure 29 to renew his motion for judgement of acquittal at the close of all the evidence and (2) insisting that Rule 52(b) applies when no renewed motion is made. App. A, 57 F.4th at 444-45; *Delgado,* 672 F.3d at 330-32. But Rule 29 is best read as setting out the power of the trial court to grant a motion for judgment of acquittal. The Rule allows a defendant to make a motion at various times and grants the courts the power to grant an acquittal for insufficient evidence on motion or on its own consideration of the evidence. Fed. R. App. P. 29(a)-(c). Nowhere does the Rule require a defendant to make a motion, let alone to renew a motion once made, to preserve his right to conviction only upon proof beyond a reasonable doubt.

And the Fifth Circuit's reliance on Rule 52(b) and plain-error precedent is misplaced. As this Court has explained, federal practice requires a defendant to make clear to the trial court what he is asking for. Fed. R. Crim. P. 51; *Holguin-Hernandez,* 140 S. Ct. at 766. By seeking a judgment of acquittal at the close of the government's evidence, Yusuf informed the trial court of the action he wished it to take. He insisted

on that proof throughout closing argument of the case. No one could mistake what Yusuf sought: a judgment of acquittal. The insistence of the court of appeals that Yusuf had somehow given up that goal because he did not renew his motion after presenting evidence, but before arguing for a verdict of not guilty, denies reality. The point of a trial is to put the government to its constitutional burden of proof. One who does so, has not waived his right to challenge the constitutional sufficiency of the evidence. Still, even if the Fifth Circuit's premises about the Federal Rule of Criminal Procedure were accepted, its application of the devoid-of-evidence test and its refusal of the *Jackson* standard are profoundly wrong and at odds with the constitution and the Court's precedent. Certiorari is warranted to correct that wrong.

Yusuf's case is the right vehicle for fixing the Fifth Circuit's incorrect approach. At most, the evidence placed Yusuf in a climate of suspicious activity of some sort, whether shady business practices or something more, but it did not show that Yusuf had knowingly participated in an agreement to transport undocumented immigrants or that he was aware that undocumented immigrants were hidden in the load he hired on to drive. *Cf. United States v. Maltos,* 985 F.2d 743 (5th Cir. 1992) (reversing conviction because foul climate alone is insufficient to support conviction). Under the reasonable-doubt standard, the government's burden was not to prove Yusuf did something suspicious, it was to prove, for the substantive counts, that he knew of and furthered the presence of the hidden immigrants and, for the conspiracy count, that he agreed to transport them in furtherance of their presence here. *See, e.g., United States v. Chon,* 713 F.3d 812, 818 (5th Cir. 2013).

The evidence did not show those elements beyond a reasonable doubt. Neither of the two undocumented immigrants testified that Yusuf knew what the trailer contained. Neither testified that Yusuf had seen them. Neither identified Yusuf as a person they had seen while being smuggled. Additionally, the record did not show Yusuf was nervous at the checkpoint. *see United States v. Becerra,* 648 Fed. Appx. 488, 489 (5th Cir. 2016), and the record did not show that Yusuf drove an odd or suspicious route after picking up his load, *see United States v. Mata,* 839 Fed. Appx. 862, 869 (5th Cir. 2020). The absence of such evidence points up what is lacking: proof the Yusuf had knowledge of the immigrants or an agreement to transport them. *United States v. Chon,* 713 F.3d 812, 818 (5th Cir. 2013). Had the Fifth Circuit engaged in reasonable-doubt review of the evidence, the outcome of Yusuf's appeal likely would have been different. The Fifth Circuit's clear statement of its devoid-of-evidence test and the likelihood that the result of the appeal would have been different under the reasonable-doubt standard warrants review of this case.

Conclusion

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

/s/ PHILIP J. LYNCH
Counsel of Record for Petitioner

DATED: March 28, 2023.