No. 23-414

IN THE

Supreme Court of the United States

DEVON ARCHER,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The Petition should be granted to resolve an important circuit split concerning when district courts may grant new criminal trials. In the decisions below, the Second Circuit imposed a threshold test, not found anywhere else, before a district court can weigh evidence under Rule 33. It holds that courts must defer to any inference that the "jury was entitled to conclude." App. 28a n.3.[1] This test "does not permit a district court to elevate its own theory of the evidence above the jury's clear choice of a reasonable competing theory," no matter how strongly the court disagrees with the jury's inferences. App. 49–50a. The Fourth Circuit in *United States v. Rafiekian*, 68 F.4th 177 (4th Cir. 2023), the law professor amici from Yale and Case Western, and even the Government itself (in other cases) all read the Second Circuit's decisions as foreclosing district courts from disagreeing with the jury's inferences.

Before this Court, however, the Government argues that the Second Circuit applies the same "preponderates heavily" test that it claims is used "uniformly." Opp. Br. at 4, 9. That argument—besides being in explicit tension with the Government's reading of the Second Circuit's decisions in other cases—is sophistry, for while many courts use the words "preponderates heavily," they do not agree on what that means. As *Rafiekian* explained, the Second Circuit requires "that a serious vulnerability in the evidence must exist" before granting Rule 33 relief, while in the Fourth Circuit, a "disagreement with the jury's inferences regarding the evidence can support the district court's decision to grant a new trial." 68 F.4th at

1. All emphases are added and all citations and quotations are omitted, unless otherwise noted.

188. Mere months ago, the Eighth Circuit held that it was reversible error to defer to a jury verdict in precisely the way that the Second Circuit now requires. *See United States v. De La Cruz Nava*, 80 F.4th 883, 889 (8th Cir. 2023). Contrary to the Government, the law is far from "uniform[]" on this important question.

The Government's attempt to characterize the Petition as fact-bound likewise fails. The Second Circuit's factual analysis depended entirely on the threshold question of "whether the jury was *entitled* to conclude that Archer knowingly participated in the scheme," a question that is moot if this Court adopts a test consistent with the text, history, and interpretation of Rule 33 in the majority of circuits, as well as this Court's own pre-Rules decisions. App. 28a n.3.

The Court should also grant the Petition to confirm that local rules cannot defeat the rights afforded to defendants under the plain error standard. Because the Second Circuit's practice of disregarding forfeited claims of plain error flouts Rule 52(b), this Court should clarify that Rule 52(b) controls.

ARGUMENT

I. This Court Should Clarify District Courts' Authority to Assess the Weight of the Evidence Under Rule 33.

A. *Archer* Split from Other Circuits By Imposing a Threshold Test.

The Second Circuit's decisions hold that a district court on a Rule 33 motion "must defer to the jury's

resolution of conflicting evidence," accepting all inferences that the "jury was entitled to conclude," unless "evidentiary or instructional error" or other "extraordinary circumstances" call the verdict into doubt. App. 28a n.3, 30–31a; *see United States v. Landesman*, 17 F.4th 298, 331 (2d Cir. 2021) (interpreting *Archer I*). While the court below did not provide an "exhaustive list" of what circumstances permit weight-of-the-evidence review, App. 4a, it was categorical about what *does not*: *Archer*'s "preponderates heavily standard does not permit a district court to elevate its own theory of the evidence above the jury's clear choice of a reasonable competing theory," App. 49–50a. That is, if the jury's inferences were permissible, the district court has no authority to reweigh the evidence.

Among all courts of appeals, "the decision below stands alone in requiring district courts to defer across-the-board to the jury's resolution of conflicting evidence," as confirmed by the amici criminal procedure scholars. Brief of Procedure Scholars at 15 (Nov. 20, 2023) ("[T]he Fourth, Seventh, and Eighth Circuits have considered, and rejected, the precise test adopted by the court below . . . ."). While two circuits require "exceptional circumstances" before "a trial judge may intrude upon the jury function of credibility assessment," *United States v. Burks*, 974 F.3d 622, 628 (6th Cir. 2020); *see United States v. Merlino*, 592 F.3d 22, 32–33 (1st Cir. 2010), only the Second Circuit imposes that threshold requirement on reweighing *all* inferences drawn by the jury, App. 30–31a.

The Government makes no attempt to justify this new test and instead misreads *Archer* to deny any circuit split. Its analysis puts labels over substance, insisting *Archer*

applied the same "preponderates heavily" standard used "uniformly" in other courts. Opp. Br. at 4, 9. However, one of the cases that the Government cites in support of this supposed uniformity is *Rafiekian*, which "did not view the other circuits as being so unanimous" on Rule 33, and which placed the Second Circuit firmly on the opposite side of that split. 68 F.4th 177, 188 (4th Cir. 2023); *see* Opp. Br. at 9, 15 (citing *Rafiekian*).

Rafiekian, like *Archer*, states that Rule 33 requires evidence to "preponderate[] sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred," but *Rafiekian* rejected *Archer*'s definition of that standard. 68 F.4th at 189. *Rafiekian* cited *Archer* as an example of how "some of our sister circuits" require a "serious vulnerability in the evidence . . . to warrant a new trial based on the weight of the evidence." *Id.* at 188. *Rafiekian* contrasted that strict test with the Fourth Circuit's own preponderates heavily standard: "*this* Court has already determined that disagreement with the jury's inferences regarding the evidence can support the district court's decision to grant a new trial." *Id.* (emphasis in original).

Rafiekian bluntly criticized the threshold test imposed by *Archer* and advanced by the Government in *Rafiekian*. While *Archer* states that a district court cannot "elevate its own theory of the evidence over the jury's," App. 49–50a, *Rafiekian* held that "prohibiting the court from granting a new trial based solely on disagreement with the jury's inferences would make little sense," particularly in cases involving "circumstantial evidence":

> Barring the district court from granting a new trial based solely on disagreement with

> the jury's inferences of guilt would place this class of cases beyond the reach of the new-trial standard, which would mean that when the government has introduced less direct evidence, district courts are more constrained in their ability to grant a new trial. That can't be right. The government is entitled to rely on circumstantial evidence, but it is not entitled to special deference when it does so.

68 F.4th at 189–190. These passages refute the Government's claim that *Rafiekian* and other circuits "agree that . . . a district court may not grant a new trial simply because it disagrees with the verdict." Opp. at 15–16 (citing *Rafiekian*, 68 F.4th at 189). *Rafiekian* confirmed that Rule 33 permits "granting a new trial based solely on disagreement with the jury's inferences of guilt." 68 F.4th at 190. Likewise, the Eighth Circuit recently reversed a denial of a new trial because the district court had, consistent with *Archer*, determined there was "sufficient evidence" and declined "to weigh the evidence anew." *De La Cruz Nava*, 80 F.4th at 889.

The Government attempts to sidestep the split recognized in *Rafiekian* by arguing that the Fourth Circuit "did not consider this case in particular, and it predated the clarification in the decision below." Opp. Br. at 15 n.2. But while *Rafiekian* was decided before *Archer II*, *Rafiekian* quoted *United States v. Landesman*, 17 F.4th 298 (2d Cir. 2021), which is where the Second Circuit first offered its "clarification" of *Archer I*. *Landesman* stated that *Archer*'s references to "evidentiary or instructional error" and evidence that was "patently incredible or defied physical realities . . . were merely examples, and

not an exhaustive list," of the kinds of "extraordinary circumstances" required before a court can reweigh evidence under Rule 33. 17 F.4th at 331. *Archer II* merely repeated *Landesman*'s statement that *Archer I* did not provide an "exhaustive list." App. 4a. *Rafiekian* therefore did consider the asserted clarification of *Archer I* and concluded that the Second Circuit *still* requires "appropriate circumstances" before a district court can begin to disagree with a jury's inferences. 68 F.4th at 188.

Rafiekian, as with the other circuits in some fashion, refused to follow that approach and instead held that "disagreement with the jury's inferences regarding the evidence can support the district court's decision to grant a new trial." *Id.* at 188. These cases (and others) are squarely at odds, and only this Court can resolve the dispute.

B. The Petition Presents a Pure Question of Law.

This Petition presents an ideal vehicle to resolve the circuit split between the Second Circuit, on the one side, and the Fourth, Seventh, and Eighth explicitly on the other—and to clarify the appropriate standard of review under Rule 33 more generally. The Second Circuit reversed the grant of a new trial because "the district court applied the incorrect standard," holding that under the correct standard, the threshold question was whether "the jury was entitled to conclude that Archer knowingly participated in the scheme." App. 28a n.3. But what *Archer* called the "incorrect standard" is the same standard applied in *Rafiekian* and other courts: whether the evidence weighed so heavily against the verdict that letting Petitioner's "guilty verdict stand would be a manifest injustice." App. 79a; *accord Rafiekian*, 68 F.4th at 189.

Therefore, if *Rafiekian* is correct and a district court may order a new trial based on serious disagreement with the jury's inferences, even when there was evidence for a "reasonable jury to convict," then the district court should have been affirmed. 68 F.4th at 186; *see also De La Cruz Nava*, 80 F.4th at 889 (Rule 33 relief appropriate "even if there is substantial evidence to sustain the verdict"). While the Government claims that *Archer* is fact-bound, it ignores that the Second Circuit's factual analysis was rooted in whether the jury was "entitled to" draw the inferences that it did, an analysis that would be irrelevant if this Court agreed that district courts have authority to disagree with the jury's inferences.

For each of the "five categories of evidence" that the Government claims *Archer* examined, Opp. Br. at 4, the Second Circuit's reasoning turned not on whether the district court's inferences were an abuse of discretion, but whether the court had the right to weigh that evidence in the first place:

> *Category 1*—"It was not for the district court to second guess the jury's clear choice of a different inference" and "not the province of the district court to reweigh the evidence, App. 35–36a;
>
> *Category 2*—the "jury was entitled to credit the circumstantial evidence," *id.* at 38a;
>
> *Category 3*—"the jury was certainly entitled to endorse the government's view," and "was not required to conclude that" Petitioner lacked knowledge, *id.* at 41a;

> *Category 4*—"the jury was the factfinder, and the district court was not permitted to create a different narrative by crediting inferences that the jury clearly rejected"; "a trial court must defer to the jury's resolution of the weight of the evidence and may not weigh the competing inferences," *id.* at 45–46a;
>
> *Category 5*—"the jury was certainly entitled to infer that Archer's transfer of $250,000 . . . reflected his knowledge of the scheme," *id.* at 47–48a.

While the Government claims that *Archer* should not be taken seriously when it claimed to take the evidence "in the light most favorable to the government," Opp. Br. at 13 (quoting App. 19a n.1), *Archer's* analysis repeatedly confirms it did just that: asking whether the jury's finding was "reasonable," and if so, deeming it outside the discretion of the trial court to revisit, App. 49–50a.

This type of analysis has no place in the Fourth, Seventh, and Eighth circuits' tests. There, the question of whether a jury was entitled to draw an inference is left to "Rule 29 motion[s] for judgment of acquittal," not Rule 33. *See, e.g.*, *United States v. Stacks*, 821 F.3d 1038, 1046 (8th Cir. 2016); Pet. 19–21.

Archer's extended focus on what the jury was "entitled to" find also puts to rest the Government's claim (at 16) that the district court engaged in a piecemeal analysis. The district court's meticulous analysis can only be considered piecemeal when set against a test that, much like Rule 29, requires it to search the record for *any* "reasonable competing theory"

advanced by the Government. App. 49–50a. By contrast, if the Second Circuit's Rule 33 standard is wrong—and it is—then *Archer*'s factual analysis is irrelevant.

C. The Government Cannot Advance Competing Interpretations of *Archer* Here and in the Lower Courts.

As discussed above, *Archer* strips district courts of their discretion to weigh the evidence under Rule 33, and *Archer*'s split from other circuits has been recognized by *Rafiekian* and amici. But they are not alone. The Government itself has repeatedly expounded the very same reading of *Archer* it disavows here.

In *United States v. Hoskins*, for example, the Government challenged a conditional new trial order, arguing that the district court "did exactly what th[e Second Circuit] forbid in *Archer*, that is, it re-weighed the evidence" but "noted no 'patently incredible' or reality-defying evidence, or any 'evidentiary or instructional error that compromised the reliability of the verdict.'" Reply Br., *United States v. Hoskins*, 2021 WL 151839, at *33–34 (2d Cir. Jan. 12, 2021).

After *Landesman* held that *Archer*'s list of exceptional circumstances was "not exhaustive," 17 F.4th at 331, the Government has continued to cite *Archer* for the proposition that a "district court [i]s not permitted to create a different narrative by crediting inferences that the jury clearly rejected." Reply Br., *Rafiekian*, 2022 WL 16861579, at *11 (Nov. 3, 2022); *see id.* at *18 n.5 (arguing that under *Archer*, "it was not the province of the district court to adopt an exculpatory reading" of evidence under Rule 33).

Just three months ago, the Government argued against Rule 33 relief where the defendant could "[]not identify a single witness whose testimony was incredible, nor does he identify any portion that demonstrates the testimony was patently incredible or defied physical realities." Br., *United States v. Poncedeleon*, 2023 WL 6461243, at *29 (W.D.N.Y. Sept. 28, 2023).

Simply stated, when the Government wants to avoid a new trial, it reads *Archer* the same way that this Petition, amici, and the Fourth Circuit do. Only by granting the Petition can this Court ensure that criminal defendants are treated the same way, and that district courts are afforded the same discretion, when determining whether a new trial is appropriate. The Court should grant the Petition and clarify the scope of weight-of-the-evidence review under Rule 33.

II. The Court Should Clarify that Local Rules Cannot Supersede the Plain Error Rule.

The Court should also grant the Petition to confirm defendants' rights under Rule 52(b)'s plain error standard. The district court made a plain, and conceded, miscalculation of the Guidelines, but the Second Circuit deemed Petitioner's claim "forfeited" and declined to consider it. App. 14a n.2. This contradicts Rule 52(b), which mandates that a "Court of Appeals *should correct* a plain forfeited error affecting substantial rights." *United States v. Olano*, 507 U.S. 725, 734 (1993).

The Government insists (at 19) that "this Court does not often review the circuit courts' procedural rules," but "[p]rocedural rules of course must yield to constitutional

and statutory requirements," *Joseph v. United States*, 574 U.S. 1038, 1038 (2014) (statement of Kagan, *J.*, respecting the denial of certiorari). Local rules "must be consistent with . . . rules adopted under 28 U.S.C. § 2072," *i.e.*, the Rules Enabling Act. Fed. R. App. Proc. 47(a)(1). This Court has invalidated local practices that threaten the "nationwide uniformity" Congress intended for federal procedure, *Miner v. Atlass*, 363 U.S. 641, 649–50 (1960), or that "disregard the considered limitations of the law [the court] is charged with enforcing," *United States v. Payner*, 447 U.S. 727, 737 (1980).

Per those principles, *Archer II* conflicts with Rule 52(b)'s requirement to correct plain errors "in those circumstances in which a miscarriage of justice would otherwise result." *Olan*o, 507 U.S. at 736. The Tenth Circuit has shown that courts can manage their dockets while adhering to Rule 52(b): that court considers belated plain error claims if they were "a product of mistake (more akin to a forfeiture, not a waiver)," which is indisputably what happened here. *United States v. Courtney*, 816 F.3d 681, 684 (10th Cir. 2016). While *Courtney* involved an argument raised on reply, rather than at argument, its analysis applies regardless. Ordinarily, an assertion first raised at argument is likely to be the product of waiver, and thus properly disregarded, but here *Archer II* determined that Petitioner had not waived, but instead forfeited, the miscalculation claim.

By refusing to consider that claim, the Second Circuit created a category of forfeiture that does not qualify for plain error, even though Rule 52(b) "do[es] not purport to shield any category of errors from plain-error review." *Davis v. United States*, 140 S. Ct. 1060, 1061 (2020).

Finally, there can be no denying that the error affected substantial rights:

> Where [] the record is silent as to what the district court might have done had it considered the correct Guidelines range, the court's reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substantial rights.

Molina-Martinez v. United States, 578 U.S. 189, 200–01 (2016). Here, the district court repeatedly invoked the Guidelines and never suggested it would have sentenced the same under different Guidelines. App. 139–140a. The plain error should therefore not have been disregarded.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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