

No. 25-1236

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IN THE

**Supreme Court of the United States**

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JAMES P. ABRAMS,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

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**On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit**

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**BRIEF OF THE NATIONAL ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS AS *AMICUS  
CURIAE* IN SUPPORT OF PETITIONER**

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June 1, 2026

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**INTEREST OF *AMICUS CURIAE*\***

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal-defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members and approximately 40,000 affiliated members. NACDL members include private criminal-defense lawyers, public defenders, military-defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal-defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the United States Supreme Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal-defense lawyers, and the justice system as a whole.

NACDL members routinely rely on Federal Rule of Criminal Procedure 29 to enforce the constitutional requirement that the government prove every element of an offense beyond a reasonable doubt in

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\* Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* or its counsel made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2, *amicus* certifies that it timely notified Petitioner and Respondent of *amicus*'s intent to file this brief.

order to secure a conviction. Because NACDL members regularly litigate criminal cases at trial and on appeal, they have a particular interest in ensuring de novo review of defendants' claims that evidence was legally insufficient to support their convictions. The Third Circuit's approach to Rule 29 in this case unreasonably burdens the ability of defendants and their counsel to ensure such review and to guard against convictions that are unsupported by sufficient evidence. The decision below also entrenches a mature circuit split that subjects NACDL members and their clients to inconsistent preservation standards across jurisdictions, heightening the risk of inadvertent forfeiture.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

This case implicates a foundational principle of criminal adjudication: the government must prove guilt beyond a reasonable doubt, and the defendant bears no burden to identify gaps in the government's proof during trial. Federal Rule of Criminal Procedure 29 reflects that allocation of responsibility. It permits a defendant to move for a judgment of acquittal after the government presents its case or after the close of all evidence whenever "the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). By its plain text, the Rule asks whether the government's evidence is legally sufficient, not whether defense counsel, in the midst of trial, has catalogued each element on which the prosecution fell short.

The Third Circuit's decision in this case, and the circuit split it entrenches, distorts that framework in

two distinct ways. First, the conflict among the courts of appeals imposes substantial and unjustified burdens on defendants and defense counsel. Because the circuits apply incompatible preservation rules, a Rule 29 motion that fully preserves sufficiency challenges in one jurisdiction forfeits them in another—including in neighboring jurisdictions where defense counsel routinely practice across States and circuits. That lack of uniformity has the predictable effect of unnecessarily inducing forfeiture of meritorious sufficiency claims, to no obvious benefit.

Second, the minority rule adopted below is both incompatible with the realities of criminal trial practice and inequitable. By conditioning *de novo* appellate review on a defendant's ability to "preserve every specific sufficiency argument" during trial, Pet. App. 13a, that rule requires defense counsel—on pain of forfeiture—to identify and articulate every deficiency in the heat of trial, often without a transcript or a meaningful opportunity to consider the government's cumulative evidence. That dynamic exacerbates inequities built into the system as defendants without the resources to order costly next-day transcripts to support such a detailed analysis are distinctly disadvantaged. Thus, the minority rule not only inverts the burden of proof but creates a regime in which legally insufficient convictions are more likely to stand, and similarly situated defendants face materially different risks depending solely on both economics and the happenstance of geography.

This Court should grant the petition for a writ of certiorari to resolve the entrenched conflict and to restore Rule 29 to its proper role.

## ARGUMENT

The decision below aligns the Third Circuit with a minority of circuits in adopting an atextual and fundamentally flawed view of Federal Rule of Criminal Procedure 29. The status quo creates significant and unwarranted risks for federal criminal defendants in at least two respects. First, the fact of the circuit split alone creates the serious and unnecessary risk that defendants will inadvertently forfeit de novo appellate review of meritorious arguments that the government failed to introduce sufficient evidence to sustain a conviction. Second, defendants subject to the minority view embraced by the court below face a materially greater risk than defendants in other circuits of being stuck with criminal convictions that rest on legally insufficient evidence. That risk is particularly acute for defendants in the minority-rule circuits who lack sufficient resources to order next-day transcripts. This Court should grant the petition for a writ of certiorari to resolve the circuit conflict and restore a uniform, sensible understanding of Rule 29.

### **I. The Circuit Split Creates Unwarranted Preservation Traps for Criminal Defendants and Their Counsel.**

The existing circuit split leaves defendants and their counsel in an untenable position. In the circuits that adhere to the majority rule, a general Rule 29 motion preserves for de novo review for all challenges to the sufficiency of the government's evidence. *See, e.g., United States v. Hammoude*, 51 F.3d 288, 291 (D.C. Cir. 1995). Most of those circuits also apply a corollary rule that, when a defendant specifies only

certain grounds in a Rule 29 motion, all other specific grounds are forfeited and subject to plain-error review on appeal. *See, e.g., United States v. Hosseini*, 679 F.3d 544, 550 (7th Cir. 2012). In contrast, the circuits that apply the minority rule have adopted essentially the opposite approach: because a general Rule 29 motion preserves no arguments, a defendant must identify every possible challenge to the sufficiency of the government’s evidence to secure de novo review. *See, e.g., United States v. Clarke*, 564 F.3d 949, 953–54 (8th Cir. 2009). As explained below, the minority rule, standing alone, imposes unreasonable burdens on criminal defendants and their counsel. But in addition, the existence of the circuit split itself creates unjustifiable risks for defendants.

In many areas of the country, defense counsel—including many NACDL members—routinely practice in neighboring jurisdictions that fall in different circuits. As part of that practice, they move for acquittal as a matter of course, often more than once in a single trial. In light of the ubiquity of Rule 29 practice, the incompatibility of the two approaches creates an obvious risk of inadvertent forfeiture for such defense lawyers, many of whom are under-resourced (to put it mildly). A general motion preserves everything in majority-rule circuits but forfeits everything in minority-rule circuits. And the sort of highly particularized motions required by minority-rule circuits risk unnecessary forfeiture in most majority-rule circuits. Lawyers who practice across circuit lines must therefore navigate opposite preservation regimes for the same federal Rule.

The burdens created by the existing division of authority are particularly acute where neighboring

jurisdictions in cross-circuit regional legal markets follow opposite rules. A general motion that fully preserves sufficiency arguments in Manhattan, where the majority rule applies, may forfeit them on the other side of the river in New Jersey, which applies the minority rule. A highly particularized Rule 29 motion may seem prudent in Kansas City, Missouri, where the minority rule applies, but the same approach may create needless forfeiture risk in a case tried across the river. Such divergence injects unnecessary risk that a defendant will inadvertently forfeit meritorious challenges to the sufficiency of the government's evidence.

Rule 29 is designed to protect defendants from convictions on insufficient evidence by allowing defendants and courts to test whether the government has met its essential burden to prove every element of every offense. *See United States v. Gjurashaj*, 706 F.2d 395, 399 (2d Cir. 1983) (recognizing that “the very nature of such motions is to question the sufficiency of the evidence”). To be sure, it is not easy to succeed on a Rule 29 motion: a defendant must persuade a court that, even after viewing the evidence and crediting every inference in the government's favor, no rational juror could vote to convict. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). But the rule plays an important role in preventing injustice in the criminal system. Requiring defendants to specify in detail each failing in the government's proof would undermine the purpose of the rule.

This Court's intervention is needed to restore uniformity to this pivotal aspect of federal criminal practice. And, as discussed below, the Court should resolve the circuit conflict by adopting the majority

rule, thereby eliminating unreasonable burdens on defendants and their counsel.

## **II. The Minority Rule Imposes Unwarranted Burdens on Criminal Defendants and Their Counsel and Undermines Meaningful Sufficiency Review.**

Rule 29 serves the critical function of ensuring that a defendant is not convicted unless the government has proved every element of the charged offense. By its terms, the Rule directs a district court—on motion of a defendant or on its own before a case is submitted to a jury—to enter “a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.” Fed. R. Crim. P. 29(a). Such a judgment of acquittal is “a substantive determination that the prosecution has failed to carry its burden.” *Smith v. Massachusetts*, 543 U.S. 462, 468 (2005). Rule 29 does not set out any particular form a defendant’s motion for acquittal must take. And, in contrast to its civil counterpart, Rule 29 does not require that a motion specify “the law and facts that entitle the movant to the judgment” of acquittal. Fed. R. Civ. P. 50(a)(2).

In its decision below, the Third Circuit adopted the minority view that a criminal defendant does not preserve his objections to the sufficiency of the evidence presented against him by making a general motion for entry of acquittal based on insufficient evidence. Pet. App. 13a. As a consequence, any sufficiency argument a defendant asserts on appeal after lodging a general sufficiency objection at trial is subject only to plain-error review, rather than *de novo* review. Pet. App. 23a. In contrast, as noted above, a

majority of circuits holds that a defendant who makes a general sufficiency objection at trial is entitled to de novo review of any more specific articulation of that objection on appeal. *See* Pet. 8–9. The minority rule should be rejected because it is impractical, unfair, and inconsistent with the Rule’s text and function.

1. The minority view imposes untenable burdens on defense counsel and is not compatible with ordinary criminal practice. Defense counsel file Rule 29 motions every day, often after days or weeks of testimony and usually without transcripts or any meaningful opportunity for a cumulative review of the evidence presented. They frequently make these motions orally, in general terms, and at the close of the government’s case, at a time when they are simultaneously managing witness examinations, evidentiary objections, jury instructions, and the strategic decision of whether to present a defense. Those pressures are magnified in complex, multi-count prosecutions with overlapping elements and sprawling factual records.

In the midst of a busy trial, district courts expect brevity: counsel makes the Rule 29 motion, the court rules, and the trial proceeds. *See United States v. Navarro Viayra*, 365 F.3d 790, 792 (9th Cir. 2004) (recognizing acquittal motions are often made orally and that “[t]he realities of trial practice support” not requiring a written motion). When a district court wants a greater degree of detail, it can request it, in keeping with the court’s own duty under Rule 29 to enter a judgment of acquittal if the government has not met its evidentiary burden. A rule that conditions preservation on exhaustive specificity would transform what is often a streamlined motions

practice into an extended mid-trial exercise in issue spotting, intruding upon the “traditionally broad discretion accorded to the trial judge in conducting” motions practice as a byproduct. *Ham v. South Carolina*, 409 U.S. 524, 528 (1973).

The rule adopted by a minority of circuits also undermines the role of appellate courts in reviewing an entire trial record to assess whether the government met its evidentiary burden. By construing general motions as general forfeitures of insufficiency arguments, the minority rule makes the availability of such meaningful appellate review turn on the ability of trial counsel to identify all evidentiary deficiencies without the benefit of a written record or time to review it. The purpose of Rule 29 is to ensure that the *government* has satisfied *its* burden. See *United States v. Cox*, 593 F.2d 46, 48 (6th Cir. 1979) (explaining that a Rule 29 motion “is a challenge to the Government in the presence of the court that the Government has failed in its proof”) (citation omitted). But requiring defense counsel to identify every possible defect in the government’s evidence mid-trial upends that allocation of burdens by placing too great an onus on the defendant to disprove the government’s case.

2. In addition to these practical points, the balance of equities plainly favors allowing defendants to preserve sufficiency objections through general Rule 29 motions. The government always bears the burden of proof on every element of a criminal charge, and the government decides when to rest its case. The government therefore suffers no prejudice from having to defend the sufficiency of its presentation on appeal, even when the defendant has not first

identified point by point the holes in the government’s case. Criminal defendants, in contrast, suffer extraordinary prejudice when a conviction lacking an adequate evidentiary basis is insulated from de novo appellate review because counsel failed to specify the deficiency with sufficient specificity in the course of trial.

For NACDL members, who try criminal cases in courts across the country, maintaining Rule 29 as a practical tool for holding the government to its burden is critical. Nor does the majority rule create a perverse incentive for counsel to intentionally withhold arguments at trial and save them for appeal, as the court of appeals suggested. *See* Pet. App. 21a; *see also United States v. Kieffer*, 991 F.3d 630, 638 (5th Cir. 2021) (Oldham, J., concurring in the judgment) (expressing the view that the majority approach “encourages defendants to say as little as possible in the district court and to save their good arguments as ‘gotchas!’ for appeal”). The premise of that concern—that defense counsel will intentionally hold back identifying evidentiary holes in a general motion and hope to prevail on appeal—ignores the reality of criminal proceedings. In practice, the incentive to raise particularized sufficiency objections is overwhelming and self-evident. Counsel who can identify a specific evidentiary gap will, consistent with their ethical obligations, nearly always press it, because doing so maximizes the chance of an immediate acquittal rather than gambling on reversal years later. Moreover, the record is complete at that stage, eliminating any motive for withholding specific rationales for acquittal.

The logic underlying ordinary preservation rules also does not translate to Rule 29 motions. Preservation rules often incentivize a litigant to promptly identify for the district court perceived errors that the *court* is making in the course of proceedings so that the court may correct those errors while the proceedings are ongoing. But Rule 29 determinations occur after the close of the government's case in chief or the close of all evidence. Fed. R. Crim. P. 29(a). In most cases, the government has no opportunity at that point to cure a failure of proof; and defense counsel thus has no incentive not to identify for the district court any apparent evidentiary holes.

3. Because the majority rule is faithful to the allocation of burdens in the criminal system, this Court should grant the petition and reverse. The majority rule is also faithful to the text of Rule 29, which directs the court to enter a judgment of acquittal on any offense "for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). In keeping with the irrevocable allocation to the government of the burden of proof in criminal cases, the text of the rule focuses on the adequacy of the government's evidence, not on the adequacy of a defendant's showing that the government's evidence falls short.

The contrast with the civil rules underscores the point. Rule 50 (Rule 29's civil analogue) requires the movant to "specify the judgment sought and the law and facts that entitle the movant to the judgment." Fed. R. Civ. P. 50(a)(2). The absence of similar language in Rule 29 is telling, and courts should not override the rule's text by importing a specificity

requirement that the drafters chose to omit. *See United States v. Maez*, 960 F.3d 949, 959 n.6 (7th Cir. 2020); *see also* Pet. 12–13.

**CONCLUSION**

For these reasons, this Court should grant the petition for a writ of certiorari.

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June 1, 2026

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