

No. 25-1236

IN THE

Supreme Court of the United States

JAMES P. ABRAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

**REPLY BRIEF BY PETITIONER
IN FURTHER SUPPORT OF PETITION
FOR WRIT OF CERTIORARI**

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REPLY BRIEF OF PETITIONER

INTRODUCTION

The Government does not dispute the deep disagreement among the courts of appeals on the question presented or the significance of that disagreement to federal criminal practice. Seven circuits hold that a general motion for judgment of acquittal under Federal Rule of Criminal Procedure 29 preserves sufficiency-of-the-evidence challenges for *de novo* review; four, now including the Third Circuit, hold otherwise. As *amici* explain, that split has critical implications for courts and litigants. See Br. for National Association of Criminal Defense Lawyers as *Amicus Curiae* 4–12; Br. for Former Judges as *Amici Curiae* 4–13.

Instead, the Government rests its opposition entirely on two meritless vehicle arguments. The Government’s principal contention is as ironic as it is unpersuasive. In a case about whether a criminal defendant articulated an argument with sufficient specificity, the Government relies on an argument it deliberately chose not to raise at all. Br. in Opp. 12. Fully aware of the procedural history, the Government affirmatively invited the court of appeals to decide whether a general Rule 29 motion preserved Petitioner’s sufficiency challenges. Gov’t C.A. Br. 22–23. The Third Circuit obliged, considered the acknowledged circuit conflict, and adopted the Government’s proposed rule. Pet. App. 12a–23a. Now, having secured that precedential holding, and even as it seeks

to extend that holding to other circuits, the Government seeks to shield the decision below from review—asserting for the first time that Petitioner’s failure to renew his motion at the close of all the evidence independently required plain-error review. Br. in Opp. 12–14. But a litigant may not resurrect an argument intentionally abandoned; that argument is no longer part of the case. The Government cannot use it to defeat review in this Court, and under established Third Circuit precedent, the Government could not rely on it on remand. The Government is therefore incorrect that the standard of review would be unchanged regardless of this Court’s ruling.

The second objection—that the standard of review made no difference to the outcome below—is refuted by the decision below and the Government’s own briefing. Most significantly, the Third Circuit expressly invoked plain-error review in declining to entertain Petitioner’s legal argument concerning Petitioner’s convictions under 18 U.S.C. § 1028A. Pet. App. 34a. And the Government itself urged the Third Circuit to apply the unusually demanding plain-error standard in recognition of the meaningful difference between that standard and *de novo* review. Gov’t C.A. Br. 22–28.

The petition presents an entrenched disagreement about a uniform federal rule, clearly resolved in a published decision. The Court should grant review.

ARGUMENT

I. This Case Concerns an Important Issue of Federal Law on Which the Circuits Are Divided.

The Government does not challenge the petition's showing that the circuits have adopted irreconcilable rules governing a general Rule 29 motion. Br. in Opp. 8–15. In seven circuits, such a motion preserves sufficiency challenges for ordinary review; in the Third, Fifth, Eighth, and Eleventh Circuits, a general motion does not preserve specific grounds. Pet. 8–9. The decision below identified the majority position and expressly declined to follow it. Pet. App. 12a–23a. Further percolation is unlikely to erase a conflict the courts have squarely confronted.

The disagreement has immediate practical consequences. Trial lawyers must decide whether to make a general motion, identify specific deficiencies, or attempt some combination. A motion that is adequate in New York should not be inadequate in Newark because of conflicting interpretations of the Federal Rules. Worse, the competing rules create a particularly precarious situation: a general motion that is sufficient under the majority approach will be deemed a waiver under the minority view, while a particularized motion that is necessary under the minority view might be deemed a forfeiture under the majority position. The national administration of Rule 29 should not turn on such jurisdiction-dependent variations.

The Government offers no answer to these reasons for review.

II. This Is an Appropriate Vehicle to Resolve the Question Presented.

This case squarely implicates the question presented, and there are no obstacles to this Court resolving it.

A. The Government’s Nonrenewal Argument Is No Longer Part of This Case Because the Government Deliberately Waived It

The Government contends for the first time that Petitioner’s failure to renew his Rule 29 motion independently requires plain-error review regardless of how this Court resolves the question presented. Br. in Opp. 12–14. The Government intentionally abandoned any such nonrenewal theory, so that theory is unavailable either as a vehicle objection in this Court or as a basis for asserting plain-error review on remand if this Court rules in Petitioner’s favor. Having secured the very decision it sought, the Government cannot now rely on an abandoned procedural ground to insulate that decision from review, even as it seeks to extend that holding to deny *de novo* review of other convictions in additional circuits.

1. The Government affirmatively invited a decision on the question presented and deliberately waived any nonrenewal argument. The Government’s Third Circuit brief opened its Rule 29 argument by

declaring: “this appeal presents an opportunity for the Court to resolve the ‘open question’ of the ‘standard for preserving an argument on a Rule 29 motion.’” Gov’t C.A. Br. 22 (quoting *United States v. Williams*, 974 F.3d 320, 361 (3d Cir. 2020)). It requested a holding that a “purely general Rule 29 motion” does not preserve sufficiency arguments. *Id.* Its summary likewise urged the court to apply plain-error review because Petitioner made only a general motion. *Id.* at 17. The Government then argued the point over seven pages, acknowledging the divergent circuit approaches and urging the Third Circuit to adopt the more demanding one. *Id.* at 22–28. Its statement of issues listed specificity, not nonrenewal, as the preservation question. *Id.* at 2.

The Government recounted the procedural history in its briefing, *id.* at 22–23, stating that Petitioner “did not file any post-verdict written motion for a judgment of acquittal or new trial,” but the Government never argued that failure to renew after the defense rests its case independently required plain-error review. To the contrary, the Government expressly recognized that the applicability of the plain-error standard depended on the Third Circuit’s adoption of the specificity rule the Government proposed. *Id.* at 28 (“Should the Court so hold” that specificity is required, plain-error would be the applicable standard).

The Third Circuit did as the Government requested. It resolved the threshold specificity question and held that “[b]ecause Abrams articulated no specific arguments,” plain-error review governed. Pet.

App. 23a. That ruling was the ground of decision, not an advisory aside.

2. The Government cannot revive an argument it deliberately abandoned to preclude review in this Court. Waiver differs from inadvertent forfeiture, and is defined as the intentional relinquishment of a known position. *United States v. Olano*, 507 U.S. 725, 733 (1993). In *Wood v. Milyard*, 566 U.S. 463, 473–74 (2012), this Court refused to permit an appellate court to resurrect an argument the State knowingly set aside. The Third Circuit likewise has recognized that “[w]aived claims may not be resurrected on appeal.” *Barna v. Bd. of Sch. Dirs.*, 877 F.3d 136, 146 n.7 (3d Cir. 2017); *see also United States v. Dowdell*, 70 F.4th 134, 140 (3d Cir. 2023). These principles apply to the government as well as criminal defendants. *Dowdell*, 70 F.4th at 139–43.

To be sure, an appellee ordinarily need not present every conceivable alternative ground for affirmance. *See Eichorn v. AT&T Corp.*, 484 F.3d 644, 657–58 (3d Cir. 2007). That principle protects an appellee’s mere omission; it does not erase the distinction between omission and affirmative abandonment. Here the Government did considerably more than remain silent. With full knowledge of the procedural posture and with the preservation squarely contested, the Government selected an “open” and unresolved question as the appropriate basis for decision, devoted its preservation argument to that question, and specifically asked the court to settle it. The court complied, supplying a published precedential decision

adopting the Government’s position. The Government’s deliberate, considered election means that the newly invoked nonrenewal theory was relinquished. Because the Government “knowingly waived” that theory, it “is forever foreclosed, and cannot be resurrected on this appeal.” *United States v. Saucedo*, 226 F.3d 782, 787 (6th Cir. 2000) (citing *Olano*, 507 U.S. at 733). To permit the Government to defeat this Court’s review on such a waived ground would “reward cunning.” *United States v. Wells*, 519 U.S. 482, 489 (1997).

That is particularly true given the Government’s conduct elsewhere. Even as it seeks to shield the decision below from this Court’s review by resurrecting an argument abandoned below, the Government is actively pressing the decision in circuits that follow the majority approach. In the Seventh Circuit, the Government has cited *Abrams* and urged adoption of a similar rule. Br. for United States at *45–46, *United States v. Jordan*, Nos. 24-3343, 25-1002, 2026 WL 1223283 (7th Cir. Apr. 23, 2026). And in the Fifth Circuit, the Government acknowledged precedent holding that a general Rule 29 motion preserves all sufficiency challenges but argued that “plain-error review would be more appropriate” and criticized that precedent as “turn[ing] error preservation upside down.” Br. for United States at *41 n.10, *United States v. Williams*, No. 24-50745, 2026 WL 676341 (5th Cir. Mar. 9, 2026) (quoting *United States v. Kieffer*, 991 F.3d 630, 640 (5th Cir. 2021) (Oldham, J., concurring)). The Government should not be permitted to invite a

court of appeals to decide a case based on one ground, obtain a precedential decision on that basis, then simultaneously seek to expand that precedential decision while insisting that abandoned arguments preclude this Court from reviewing it.

This Court has refused to permit the government to derail review by asserting a new ground that it failed to pursue below. In *Steagald v. United States*, 451 U.S. 204, 208–11 (1981), the Court rejected a threshold objection inconsistent with the government’s litigation position below. And in *Bloate v. United States*, 559 U.S. 196, 214–15 (2010), the Court declined to consider an alternative ground for affirmance that the government first advanced in its opposition to certiorari. The same result is appropriate here.

3. The Government’s vehicle argument necessarily assumes that, after a ruling for Petitioner in this Court, the Third Circuit would permit the Government to argue for a plain-error standard based on a nonrenewal theory it deliberately abandoned when the case was first before that court. Third Circuit law refutes that assumption. The court has stated categorically that “[w]aived claims may not be resurrected on appeal.” *Barna*, 877 F.3d at 146 n.7. And in *United States v. Dowdell*, the Third Circuit explained that courts “cannot reach waived arguments,” distinguished the limited discretion to revive arguments inadvertently forfeited, and applied preservation principles to the government in a criminal prosecution. 70 F.4th at 140–41. *Dowdell* upheld a refusal to consider

even a forfeited alternative theory advanced by the government. *Id.* at 139–45.

The Government’s central contention—that its nonrenewal argument renders the decision below advisory—is thus incorrect.

B. The Standard of Review Dictated the Decision Below

The Government’s second vehicle objection fares no better. The Government contends that review is unwarranted because the Third Circuit would have rejected Petitioner’s sufficiency challenges even under *de novo* review. Br. in Opp. 14. But that is not what the Third Circuit held. The court expressly adopted the Government’s proposed specificity rule, applied plain-error review as a result, and declined to resolve a disputed legal question on that basis. The Government thus asks this Court to assume that the standard of review made no difference when the decision below affirmatively demonstrates otherwise. Indeed, the Government’s own insistence on plain-error review in the Third Circuit belies its suggestion that the distinction is inconsequential to this case.

The difference between the *de novo* and plain-error standards is important to appellate review of sufficiency challenges. Under *de novo* review, an appellate court must determine whether the evidence was sufficient to permit a rational jury to find every element of the offense beyond a reasonable doubt. As this Court has noted, plain-error review imposes a more demanding burden. *See Dubin v. United States*,

599 U.S. 110, 116 n.3 (2023) (recognizing that plain-error review presents a “higher bar” than ordinary review of a sufficiency challenge). On plain-error review, “[m]ere insufficiency doesn’t cut it.” *United States v. Yusuf*, 57 F.4th 440, 445 (5th Cir. 2023). “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.” *Id.* (cleaned up); *see also United States v. Delgado*, 672 F.3d 320, 332 (5th Cir. 2012) (en banc) (“[T]o satisfy the second prong of the plain-error test, [a defendant] must demonstrate not just that the government’s evidence of conspiracy was insufficient, but that it was *obviously* insufficient.”); *United States v. Cabello*, 33 F.4th 281, 288 (5th Cir. 2022) (plain-error review of sufficiency is “super-deferential”); *Kieffer*, 991 F.3d at 638 (Oldham, J., concurring) (“The whole point of plain-error review is to make it more difficult to win on appeal using an unpreserved error.”).

That distinction is especially consequential where, as here, the sufficiency challenge turns on whether the statute requires proof of an element the Government failed to establish. Under *de novo* review, the court must resolve that statutory question to determine whether the Government proved every element of the offense. Under plain-error review, by contrast, even a meritorious statutory argument will afford no relief unless existing law already establishes the error. Indeed, when a defendant cannot identify “binding caselaw—either from the Supreme Court or

from our court—that plainly answers the question,” *United States v. Johnson*, 157 F.4th 1309, 1323 (10th Cir. 2025), that failure ordinarily “sounds the death knell . . . on plain-error review,” *id.* (alteration in original) (quoting *United States v. Garcia*, 946 F.3d 1191, 1210 (10th Cir. 2020)).

That is precisely what happened below. Petitioner advanced a limiting interpretation on the extraordinarily broad coverage of the aggravated identity theft statute, 18 U.S.C. § 1028A. The Third Circuit noted skepticism about that interpretation but expressly declined to decide the legal question because the court was applying plain-error review. “At all events,” the court explained, “even if we were inclined to entertain [Petitioner’s] novel requirement, we decline to do so here under plain-error review.” Pet. App. 34a. The court explained that it had “never endorsed” Petitioner’s interpretation and that Petitioner had identified “no authority that clearly does so.” *Id.* That absence of controlling authority was thus dispositive under plain-error review. On *de novo* review, however, the Third Circuit would need to test its skepticism by confronting the statutory argument on its merits rather than setting it aside because the answer was not already settled.

The Third Circuit’s reliance on plain-error review is particularly apparent because in other cases, that court has explicitly declined to resolve disputes over the applicable standard of review when the outcome would be the same under either standard. In *United States v. Jones*, 833 F.3d 341, 343 (3d Cir. 2016), for

example, the court explained that “[b]ecause we would reach the same result under either standard of review, we will apply *de novo* review, which is more favorable to [the defendant].” *See also United States v. Goldner*, No. 22-3183, 2023 WL 8469760, at *2 (3d Cir. Dec. 7, 2023) (not precedential) (concluding that the jury’s guilty verdict “easily clears the bar” of sufficiency “under either standard”). The Third Circuit pointedly did not take that approach here. Instead, it resolved the contested preservation question, adopted the Government’s proposed plain-error standard, and rested its rejection of Petitioner’s statutory argument on that standard. Had the court concluded that the standard of review was immaterial, it would have said so. The Government’s assertion that the result necessarily would have been the same under *de novo* review is an attempt to rewrite the Third Circuit’s decision.

In any event, Petitioner need not establish that he will ultimately prevail on remand to obtain this Court’s review. The question presented is whether a general Rule 29 motion preserves sufficiency challenges for *de novo* review—not whether Petitioner’s convictions must be vacated. The Third Circuit squarely resolved that question against Petitioner, and its ruling governed the review he received. Whether the court would ultimately affirm his convictions when applying the correct standard is a question for remand, not a reason to leave unresolved an acknowledged circuit split with manifest impact on defendants and courts alike.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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