

No. _____

IN THE
**SUPREME COURT
OF THE UNITED STATES**

SUSAN MELISSA NICKAS,
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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When reviewing the sufficiency of the evidence to support a federal criminal conviction, must the court consider: Government evidence that exculpates or exonerates the accused, the rationality or reasonableness of the chain-of-inferences required for conviction, or the effect that the prosecutor's misstatements about the law or evidence have on the jury's verdict (which verdict, in turn, receives a high level of deference in sufficiency review)?

If a court does none of those things, then does its sufficiency test amount to no more than the "no evidence" test of *Thompson v. Louisville*, 362 U.S. 199 (1960), which this Court overruled in *Jackson v. Virginia*, 443 U.S. 307, 320 (1979)?

PARTIES TO THE PROCEEDING

Petitioner, the defendant-appellant below, is Susan Nickas.

The Respondent, the appellee below, is the United States of America.

RELATED PARTIES AND PROCEEDINGS

Petitioner Nickas was indicted with one co-defendant: Jeremy Johnson. They were tried jointly in the district court, and their appeals of their criminal convictions were consolidated in the Third Circuit Court of Appeals:

United States v. Jeremy Edward Johnson and Susan Melissa Nickas, 3d Cir. Nos. 22-2512 & 23-1316, 2025 WL 2807763 (3d Cir. Sept. 30, 2025) (non-precedential), appeal from M.D. Pa. No. 3:21-cr-00143.

Co-defendant Jeremy Johnson filed a petition for a writ of certiorari on December 29, 2025, which this Court denied on February 23, 2026. *Jeremy Johnson v. United States*, No. 25-6478 (U.S.).

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Susan Melissa Nickas, petitions this Court for a writ of certiorari to review the final order of the Court of Appeals for the Third Circuit in 3d Cir. No. 23-1316.

OPINIONS BELOW

The opinion of the Third Circuit is unreported at *United States v. Jeremy Edward Johnson and Susan Melissa Nickas*, 3d Cir. Nos. 22-2512 & 23-1316, 2025 WL 2807763 (3d Cir. Sept. 30, 2025) (non-precedential), and included at Petition Appendix (“Pet. App.”) 1a-16a.

The District Court’s ruling on Petitioner’s sufficiency-of-evidence claim is included here at Pet. App. 45a-53a (8/2/2022 Trial Tr. (R.Doc. 184) at 167-73).

JURISDICTION

The Court of Appeals affirmed Petitioner’s conviction on September 30, 2025, and denied rehearing on November 26, 2025. Pet. App. 2a, 42a. Judgment was entered December 4, 2025. Pet. App. 43a.

This petition for writ of certiorari was due on February 24, 2026. The Honorable Justice Alito granted an extension of time to file this petition for writ of certiorari until March 26, 2026. *Nickas v. United States*, No. 25A920 (U.S.).

This Court has jurisdiction over this timely filed petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND. V.

STATUTORY PROVISIONS

[21 U.S.C.] § 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

...

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) . . .

* * *

(C) In the case of a controlled substance in schedule I or II, . . . such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or

serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, . . .

21 U.S.C. § 841(a)(1) and (b)(1)(C).

[21 U.S.C.] § 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 846.

[18 U.S.C.] § 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

18 U.S.C. § 2.

INTRODUCTION

Imagine you sold \$200 of heroin/fentanyl to someone—a friend who routinely acts as a middle-man, connecting drug-users ready to buy with drug-sources ready to sell. The next day, your middle-man friend contacts you again to buy more heroin/fentanyl, but you're out of drugs to supply. He contacts you again the next day, but you're still out. And the next day too, but you're still out. (Your friend's AT&T records show he contacted plenty of other drug dealers in that time-period too, in addition to you.) Then on Day 5, your middle-man friend serves heroin/fentanyl to someone, who dies of an overdose the following day. Imagine your shock when you are convicted (and sentenced to 20 years in prison) for causing that person's death on Day 6, for a distribution you weren't involved in on Day 5, based on your (unrelated) sell on Day 1.

That nightmare is Petitioner Susan Nickas's case. She humbly petitions this Court to wake her from it. After this Court's rebuke in *Coleman v. Johnson*, 566 U.S. 650 (2012) (per curiam), the Third Circuit's sufficiency-of-evidence review has become increasingly hands-off—to the point that it mirrors the “no evidence” test that this Court deemed unconstitutional in *Jackson v. Virginia*, 443 U.S. 307, 320 (1979) (overruling *Thompson v. Louisville*, 362 U.S. 199 (1960)).

The Third Circuit's sufficiency test takes the most Government-friendly approach on each of three axes: the test ignores exculpatory evidence, even when it is *Government* evidence that exonerates the accused; does not probe the reasonableness or rationality of the chain of inferences required for conviction,

particularly in cases built on circumstantial evidence; and does not take into account the role that a prosecutor’s misstatements about the law and evidence have on the jury’s decision. By calibrating sufficiency-review on each axis in a manner least favorable to a criminal defendant, the Third Circuit’s test amounts to little more than the *Thompson v. Louisville* “no evidence” test. Indeed, sometimes the Third Circuit commits a Freudian slip and articulates its test as a “no evidence” test: the defendant “must establish that ‘the record contains no evidence, regardless of how it is weighted,’ from which a ‘rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *United States v. Abrams*, 165 F.4th 784, 802 (3d Cir. 2026) (citing *United States v. Walker*, 657 F.3d 160, 171 (3d Cir. 2011) (citations omitted)); *United States v. Zayas*, 32 F.4th 211, 221 (3d Cir. 2022) (citation omitted).¹

Ironically, this means that asylum-applicants receive more protection from arbitrariness and irrationality in their civil immigration proceedings than criminal defendants in federal court: the alien’s adverse “persecution” determination must be supported by substantial evidence,² while a defendant’s criminal conviction must be supported by merely more than “no evidence” at all. Petitioner humbly protests that federal criminal defendants deserve more.

¹ Problematically, *Zayas* was cited in Petitioner’s Opinion. Pet. App. 7a n.5.

² *Urias-Orellana v. Bondi*, No. 24-777, slip op. at 1-2, 7 (U.S. Mar. 4, 2026).

STATEMENT OF THE CASE

1. Petitioner Susan Nickas and co-defendant Jeremy Johnson were charged by indictment with:

1. Conspiring from January 2020 to March 2021 to distribute heroin and fentanyl, and “death and serious bodily injury of [Joshua Kiernan] resulted from the use of such substances,” under 21 U.S.C. § 841(a)(1), (b)(1)(C), and § 846; and

2. Distributing and possessing with intent to distribute heroin/fentanyl on December 10, 2020, and “death and serious bodily injury of [Joshua Kiernan] resulted from the use of such substances,” under §841(a)(1), (b)(1)(C), and 18 U.S.C. §2.

Indictment (R.Doc. 1), M.D. Pa. 3:21-cr-143.³

The death-results sentencing enhancement elevated Petitioner’s statutory sentencing range (from 0-20 years in prison) to 20 years to life in prison.⁴ The case was tried to a jury on July 25 to August 3, 2022.

The trial evidence showed Joshua Kiernan tragically died of a heroin/fentanyl overdose on December 11, 2020, with two empty glassine drug bags in his vicinity—an unstamped-white bag, and a “Rite Aid” stamped bag.

³ Petitioner Nickas was released from pre-trial detention in July 2021 to attend in-patient treatment for opioid addiction, followed by out-patient treatment while on pre-trial home detention. Nickas Motion for Release (R.Doc. 41), Order (R.Doc. 42), Nickas Motion to Modify Release Conditions (R.Doc. 51), Order Setting Conditions of Release (R.Doc. 55), in M.D. Pa. 3:21-cr-143.

⁴ See 21 U.S.C. § 841(b)(1)(C) (“if death or serious bodily injury results from the use of such substance [the defendant] shall be sentenced to a term of imprisonment of not less than twenty years or more than life, . . .”);

The Government’s trial forensic evidence did not delineate which bag killed Mr. Kiernan, and did not demonstrate whether either bag was a but-for or independently-sufficient cause-in-fact of Kiernan’s death.⁵ Instead, the Government’s trial forensic evidence amounted to aggregate-force causation.⁶ So, to sustain the death-results sentencing enhancement, the Government had to prove that Petitioner Nickas participated in distributing both the unstamped-white bag and “Rite Aid” stamped bag.⁷ (The Government has never disputed this premise.⁸)

⁵ See *Burrage v. United States*, 571 U.S. 204, 218-19 (2014).

⁶ 8/1/2022 Trial Tr. (R.Doc. 183), at 53-56, 78-82; *id.* at 82-88 (Government re-direct of forensic toxicologist). Nickas Br. 6-7, 28-32, 49, 54 (3d Cir. 23-1316, filed 8/21/2023).

In *Burrage*, this Court considered, but rejected, watered-down factual causation tests proffered by the Government, including aggregate-force causation. See *Burrage*, 571 U.S. at 214-18; *id.* at 214 (rejecting Government’s request, based on observation that “[a]ddicts often take drugs in combination,” to allow death-results to be met if defendant’s drug “contributes to an aggregate force (such as mixed-drug intoxication) that is itself a but-for cause of death”).

⁷ During the charge conference, the District Court ruled that it would give a chain-of-distribution instruction to the jury. 8/3/2022 Trial Tr. (R.Doc. 186), at 6-13. To find Petitioner guilty of the death-results enhancement, the district court instructed, the Government must “prove[] beyond a reasonable doubt that the defendant was part of the chain of distribution of the mixture or substance that Mr. Kiernan injected or ingested on December 11th, 2020 causing his death,” meaning the defendant “conspired to distribute,” “distributed,” or “aided and abetted another in distributing” that substance. 8/3/2022 Trial Tr. (R.Doc. 186), at 49-50.

The Government did not appeal this instruction, and acknowledged on appeal that “[t]he district court provided a proper but-for causation jury instruction pursuant to *Burrage v. United States*, 571 U.S. 204 (2014), . . .” U.S. Br. 25-26 (3d Cir. 23-1316, filed 11/4/2024).

⁸ The Government waived any argument that linking Nickas to the “Rite Aid”-stamped bag alone would be sufficient to sustain the death-results enhancement. See *generally* U.S. Br. 1-66 (3d Cir. 23-1316, filed 11/4/2024). See *also* U.S. Br. 14 (“Throughout trial, the Government presented a straightforward argument Both

The trial evidence also showed that Petitioner Nickas, co-defendant Jeremy Johnson, decedent Joshua Kiernan, and his fiancée Kaleigh Watson were all addicted to opioids, namely heroin and fentanyl. Kiernan and Watson relied on Johnson (their friend they had met years earlier in high school) to source heroin/fentanyl for them. 7/27/2022 Trial Tr. (R.Doc. 176), at 13-22. Typically, Kiernan and Watson would buy two bundles (20 individual dose bags) at a time, and tip Johnson by giving him two bags. *Id.* Regularly, Johnson’s source for heroin/fentanyl was Petitioner “Sue” Nickas. *Id.*

But Johnson also regularly sourced heroin/fentanyl from other dealers too. Robert Baker (Johnson’s friend and fellow addict) testified about his and Johnson’s process for sourcing heroin/fentanyl: “[T]here was drug dealers unfortunately. So you go down a list.” 7/28/2022 Trial Tr. (R.Doc. 185), at 149-50. Who to buy from and where to go “depend[ed] on who had [heroin] that day.” *Id.* at 147-48. If Baker used Johnson to source one bundle (10 individual dose bags) of heroin/fentanyl, Baker would give Johnson “two or three” of those bags. *Id.* at 149. Baker and Johnson went to “many public areas to meet many different people” to buy heroin/fentanyl in December 2020. *Id.* at 167-68.

types of bags came from Johnson and Nickas.”); U.S. Br. 43-44 (“from the very beginning of the case, the Government contended, and proved beyond a reasonable doubt, that Kiernan obtained both types of bags from Johnson and Nickas Johnson and Nickas both delivered all the heroin/fentanyl that caused his death.”).

Note: The Government’s appeal brief mis-states some of the evidence. For example, it mis-ascribes some of Jeremy Johnson’s words in a written communication as Kaleigh Watson’s words. *Compare* U.S. Br. 17, *with* Nickas Reply Br. 12 (3d Cir. 23-1316 filed 12/9/2024).

Detective Webbe, who extracted from Johnson’s cellphone any data that had not been deleted, walked through text- and instant-messages from Johnson’s cellphone that showed he bought heroin/fentanyl from other contacts saved in his phone—including, “John Q”, “Emily D” (or “Emily De”), “Melissa Chuck”, “Juan Tunawan” (or “Juan Tunowan”), “Connie Tech” (or “Conny Tech”), and “Ex Lipman.” 7/29/2022 Trial Tr. (R.Doc. 182), at 3-34. Melissa Dennis (aka “Melissa Chuck”) testified that her boyfriend Charles/Chuck, with whom she shared a cellphone, could have supplied heroin/fentanyl to Johnson. *Id.* at 81-84.

Petitioner Nickas, in turn, regularly drove to Paterson, New Jersey; bought heroin/fentanyl there; returned to her home near Stroudsburg, Pennsylvania; and used some of that heroin/fentanyl and sold some of that heroin/fentanyl.

On December 6, 2020, at 1:17 p.m., Nickas’s cellphone showed Johnson contacted her to buy heroin/fentanyl: “What can you do for 200? plus the 100 I owe ya.”⁹ Their text-messages—saved on Nickas’s cellphone, and introduced at trial as Government Exhibit 80—showed Johnson went to Nickas’s home around 1:34 p.m. with \$300 to buy an unproven quantity of heroin/fentanyl.¹⁰

Government Exhibit 80 (Nickas’s cellphone messages with Johnson) also showed that Johnson contacted Nickas again on December 7, 8, and 9 to buy more

⁹ Nickas cellphone extraction report, Government Trial Exhibit 80, entries #1927 to #1938 (CA3 Appendix, Volume 3, at Appx1038-1039). *See also* 8/2/2022 Trial Tr. (R.Doc. 184), at 88-89 (CA3 Appendix, at Appx457) (reading text-messages to jury).

¹⁰ *Id.*

heroin/fentanyl, but Nickas was out.¹¹ Government Exhibit 80—the only evidence that shows Nickas sold Johnson \$200 of heroin/fentanyl on December 6—also shows Nickas was out of drugs and did not distribute anything to Johnson on December 7, 8, 9, or the morning of December 10.¹²

On the morning of December 10, Johnson sold Watson two bundles (20 bags) of unstamped-white bag heroin/fentanyl, which Watson shared with Kiernan. 7/27/2022 Trial Tr. (R.Doc. 176), 54-55, 143-44 (Watson testimony). An empty unstamped-white bag of heroin/fentanyl and an empty “Rite Aid”-stamped bag of heroin/fentanyl were found near Kiernan when he overdosed and died on December 11. 8/2/2022 Trial Tr. (R.Doc. 184), at 21-22.

On December 7, 8, 9, and the morning of December 10, Johnson’s AT&T records and cell-site location data showed he contacted numerous drug-dealers, other than Nickas. “Johnson deleted most drug-related communications from his phone [that pre-dated] December 15, 2020.” U.S. Br. 6 n.3. That means, Johnson deleted drug-related communications of December 6, 7, 8, 9, and 10 from his cellphone. *See id.*

The Government presented Johnson’s cell-site location data for December 10, which showed the phone numbers Johnson communicated with the morning of

¹¹ Nickas included screen-shots of Government Exhibit 80 and citations to its location in the record in her Third Circuit brief: Nickas Reply Br. 8-10 (3d Cir. 23-1316, filed 12/9/2024).

¹² *Id.*; Gov. Exh. 80, entries #1927 to #2004 (CA3 Appendix, Volume 3, at Appx1038–Appx1043).

December 10.¹³ Right after Kaleigh Watson asked Johnson to set something up (source/procure heroin/fentanyl for her),¹⁴ Johnson called or texted with at least 6 different dealers/sources of heroin/fentanyl¹⁵ and 2 individuals whose contact information he deleted off his cellphone.¹⁶ *See* Government Exhibit 60, FBI Agent John Orlando Cell-Site Report, p.13 (CA3 Appendix, Volume 3, at Appx856); Nickas Br. 16-23 (3d Cir. 23-1316, filed 8/21/2023).

Government case-agent Tpr. De La Iglesia admitted Johnson contacted multiple other “source[s] of distributing narcotics” the morning of December 10, including: Emily De, Ex Lipman, “Melissa Chuck” (Melissa Dennis and boyfriend Chuck), “John Lee Woodyly,” “Ms. DeAngelis”, and Juan Tunawan. 8/2/2022 Trial Tr. (R.Doc. 184), at 144-48. Tpr. De La Iglesia admitted that we don’t know the content of Johnson’s communications with those other drug dealers “Because they were deleted on the device” (Johnson’s cellphone). *Id.* at 129-31.

Nickas introduced Johnson’s cellphone call log—which the Government obtained from AT&T but did not analyze or introduce into evidence—to show Johnson repeatedly communicated with those same drug-dealers on December 7, 8, and 9

¹³ Government Trial Exhibit 60, FBI Special Agent Orlando’s Cellular Analysis Survey Team report (CA3 Appendix, Volume 3, at Appx844, Appx856). *See also* Nickas Br. 16-17 (3d Cir. 23-1316, filed 8/21/2023).

¹⁴ 7/27/2022 Trial Tr. (R.Doc. 176) at 44; Government Exhibit 14.14 (CA3 Appendix, at Appx833-834).

¹⁵ John Q, Emily De, “Melissa Chuck” (either Melissa or her boyfriend Chuck), Ex Lipman, Juan Tunowan, and Crispy. It’s unclear who Paulio is.

¹⁶ Unknown 1 and Unknown 2. Those numbers did not belong to Watson or Kiernan.

(when Nickas was out of drugs to sell).¹⁷ Nickas demonstrated these phone numbers were associated with heroin/fentanyl suppliers.¹⁸ Johnson communicated with these drug-dealers when he was having no success getting drugs from Nickas on December 7, 8, 9, and 10.

2. After the Government rested its case-in-chief, Petitioner Nickas moved for judgment of acquittal under Fed. R. Crim. P. 29. Pet. App. 45a-53a (8/2/2022 Trial Tr. (R.Doc. 184), at 167-73). In response, the Government argued that after Johnson's December 6, 2020 deal with Nickas for "\$300," Johnson "could have had plenty of bundles to distribute between the 7th of December and the morning of the 10th of December 2020." Pet. App. 51a (8/2/2022 Trial Tr. (R.Doc. 184), at 171). The Government argued that the content of the Nickas-Johnson text messages on December 6, 7, 8, and 9 was self-serving ("That's just based upon the defendant's own words")—ignoring that the Government's only proof that Nickas supplied Johnson anything on December 6 was those same text messages. Pet. App. 52a (8/2/2022 Trial Tr. (R.Doc. 184), at 172). The District Court denied Petitioner Nickas's Rule 29 motion, construing Nickas's arguments as ones that went to weight of the evidence and credibility of witnesses. Pet. App. 52a-53a (8/2/2022 Trial Tr. (R.Doc. 184), at 172-73).

¹⁷ 7/29/2022 Trial Tr. (R.Doc. 182), at 39-53 (voice-calls), Defense Trial Exhibit 408, pp.10-20 (voice-calls); 7/29/2022 Trial Tr. (R.Doc. 182), at 53-57 (text-messages), Def. Exh. 408, pp.29-52, 218-248 (text-messages); 8/3/2022 Trial Tr. (R.Doc. 186), at 113-15 (Nickas closing argument discussing Johnson's AT&T call-log, Def. Exh. 408).

¹⁸ 7/29/2022 Trial Tr. (R.Doc. 182), at 3-31; Nickas Br. 17-24 & footnotes.

The District Court instructed the jury that, to find Petitioner guilty of the death-results enhancement, the Government must “prove[] beyond a reasonable doubt that the defendant was part of the chain of distribution of the mixture or substance that Mr. Kiernan injected or ingested on December 11th, 2020 causing his death,” meaning the defendant “conspired to distribute,” “distributed,” or “aided and abetted another in distributing” that substance. 8/3/2022 Trial Tr. (R.Doc. 186), at 49-50.¹⁹

During closing argument, among other things, the prosecutor told the jury that Nickas sold Johnson 250 bags of heroin/fentanyl on December 6, so Johnson would have plenty to re-sell to Watson/Kiernan on December 10. Pet. App. 15a (CA3 Opinion, at 15); 8/3/2022 Trial Tr. (R.Doc. 186), at 73-74. That was wild speculation: On appeal, the Government and Third Circuit agreed the number should have been “50 bags (not 250).” Pet. App. 15a (CA3 Opinion, at 15). No prosecutor or judge ever corrected this for the jury. See 8/3/2022 Trial Tr. (R.Doc. 186), at 73-137.

The jury returned verdicts of guilty as charged against Petitioner Nickas and co-defendant Johnson, including finding Petitioner guilty of the death-results sentencing enhancement on both counts. Verdict (R.Doc. 154), M.D. Pa. 3:21-cr-143;

¹⁹ The Government did not appeal this instruction, and acknowledged on appeal that “[t]he district court provided a proper but-for causation jury instruction pursuant to *Burrage v. United States*, 571 U.S. 204 (2014), . . .” U.S. Br. 25-26 (3d Cir. 23-1316, filed 11/4/2024).

8/3/2022 Trial Tr. (R.Doc. 186), at 137-40. Nickas was sentenced to the statutory minimum of 20 years in prison.²⁰ Judgment (R.Doc. 220), M.D. Pa. no. 3-21-cr-143.

3. On appeal, Petitioner presented the issue that the trial evidence was insufficient to establish the death-results sentencing enhancement against her, under 21 U.S.C. § 841(b)(1)(C) and *Burrage v. United States*, 571 U.S. 204 (2014). Specifically, (1) the forensic evidence did not establish that the “Rite Aid” bag was a but-for or independently-sufficient cause-in-fact of Mr. Kiernan’s death; and (2) the evidence did not establish that Nickas distributed, conspired to distribute, or aided and abetted Johnson’s morning-of-December 10 distribution of unstamped-white bag heroin/fentanyl to Watson/Kiernan. Nickas Br. 48-55; *id.* at 4-41; Nickas Reply Br. 1-33.

The Government conceded that, to sustain the death-results enhancement, its evidence had to establish that Nickas participated in distributing both sets of bags: the unstamped-white bag and the “Rite Aid” bag. The Government argued that the trial evidence had established that “[b]oth types of bags came from Johnson and Nickas.” U.S. Br. 14-20.²¹ “Because all the heroin/fentanyl in Kiernan’s possession at the time of his death came from both Johnson and Nickas, their distribution

²⁰ 21 U.S.C. § 841(b)(1)(C) (“if death or serious bodily injury results from the use of such substance [the defendant] shall be sentenced to a term of imprisonment of not less than twenty years or more than life”).

²¹ Note: The Government’s appeal brief mis-ascribes some of Johnson’s words in a written communication as Watson’s words. *Compare* U.S. Br. 17, *with* Nickas Reply Br. 12 (3d Cir. 23-1316 filed 12/9/2024).

resulted in his death whether the unstamped bag, Rite-Aid bag, or a combination of the two caused him to overdose.” U.S. Br. 6-7.

The Third Circuit affirmed the death-results enhancement against Petitioner Nickas. Pet. App. 7a-9a. The Third Circuit found that Nickas had sold Johnson “\$300 worth of drugs” on December 6—while simultaneously acknowledging that Johnson’s text messages with Nickas (the only evidence of that sale) indicated that \$100 was money that Johnson owed Nickas, and so only \$200 was for drugs. Pet. App. 8a & n.6, 3a (CA3 Opinion, at 8 & n.6, 3).

The court reasoned that the jury could reasonably infer that the 20 unstamped-white bags that Johnson sold Watson on the morning of December 10 were bags Johnson had received from Nickas on December 6—despite Johnson’s communications with Nickas and other drug dealers on December 7, 8, 9, and 10, and despite that Johnson had deleted those communications from his cellphone. Pet. App. 7a-9a (CA3 Opinion, at 7-9). The court reasoned that Nickas had not sufficiently proven her innocence: “Johnson’s desire to buy more drugs [on December 7-9] does not establish as a factual matter that he had run out of the drugs he bought from Nickas [on December 6]. A reasonable jury could find that he had not.” Pet. App. 9a.

In a different part of its opinion addressing prosecutorial misconduct, the Third Circuit acknowledged that the Government incorrectly told the jury during closing argument that Nickas’s December 6 sell to Johnson involved “250 bags” of heroin/fentanyl; the number should have been “50 bags (not 250).” Pet. App. 15a (CA3 Opinion, at 15). The court ruled that this error did not deny Due Process to

Petitioner Nickas, because the error occurred once and did not infect the trial with unfairness. Pet. App. 15a. The court did not acknowledge nor consider, however, how this mis-statement on a key issue affected the jury’s verdict on that issue, which verdict in turn receives a high level of deference in the court’s sufficiency-of-the-evidence review. Pet. App. 7a-9a (CA3 Opinion, at 7-9).

REASONS FOR GRANTING THE PETITION

1. This Court’s test for sufficiency of the evidence in federal criminal cases is unclear

This Court has intermittently spoken on sufficiency-of-evidence review, but primarily in the habeas context under 28 U.S.C. § 2254.²² This has left questions unanswered in the direct appeal context. So lower federal court judges are left threading the needle, without really being supplied the thread or the needle. Petitioner’s case is an excellent vehicle to fix that.

On the one hand, this Court has said that sufficiency review is highly deferential. “Sufficiency review essentially addresses whether ‘the government’s

²² *E.g.*, *Jackson*, 443 U.S. at 312; *Cavazos v. Smith*, 565 U.S. 1, 2, 8 (2011) (per curiam) (reiterating that federal habeas court may overturn “a state court decision rejecting a sufficiency of the evidence challenge” “only if the state court decision was ‘objectively unreasonable’”); *Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (per curiam) (*Jackson* claims in §2254 face “two layers of judicial deference”—deferential review of the jury’s decision, and deferential review of the state-court’s determination); *Parker v. Matthews*, 567 U.S. 37, 38 (2012) (per curiam) (observing this case is a “textbook example” of federal habeas court failing to accord deference to state court’s reasonable merits decision). *Cf. McDaniel v. Brown*, 558 U.S. 120, 129-30 (2010) (per curiam) (“We granted certiorari ... to consider ... the proper standard of review for a *Jackson* claim on federal habeas,” but merits briefing rendered that issue moot).

case was so lacking that it should not have even been submitted to the jury.” *Musacchio v. United States*, 577 U.S. 237, 243 (2016) (quoting *Burks v. United States*, 437 U.S. 1, 16 (1978)). Such review ensures the defendant received “the minimum that due process requires: a ‘meaningful opportunity to defend’ against the charge against him and a jury finding of guilt ‘beyond a reasonable doubt.’” *Musacchio*, at 577 U.S. at 243 (quoting *Jackson*, 443 U.S. at 314-15). “The reviewing court considers only the ‘legal’ question ‘whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *Musacchio*, 577 U.S. at 243 (quoting *Jackson*, 443 U.S. at 319 (original emphasis)). “That limited review does not intrude on the jury’s role ‘to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.’” *Id.*

Thus, judges should affirm convictions, even in cases that don’t sit right with them: “Because rational people can sometimes disagree, the inevitable consequence of this settled law is that judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold.” *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (per curiam).

But on the other hand, Due Process (and this Court) compel that some convictions must be vacated—despite the existence of some evidence supporting an inference of guilt. In *In re Winship*, after all, “the record ... was not totally devoid of evidence of guilt.” *Jackson*, 443 U.S. at 314-15 (analyzing *In re Winship*, 397 U.S. 358 (1970)). “Although trial records at times contain only small amounts of

circumstantial and highly speculative evidence, virtually every record contains ‘some’ evidence, in an absolute sense, that tends to establish the guilt of the accused.” *Speigner v. Jago*, 603 F.2d 1208, 1211-12 (6th Cir. 1979). This Court requires lower-court judges to weed out convictions that are based on some—but scant—evidence of guilt: A “mere modicum of evidence” has a “tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence,” “[b]ut it could not seriously be argued that such a ‘modicum’ of evidence could by itself rationally support a conviction beyond a reasonable doubt.” *Jackson*, 443 U.S. at 320.

Lower courts have the difficult task of navigating this dividing line or threading this needle (and their rulings are inconsistent). In federal criminal cases, sufficiency review used to be simpler—review was to determine if *substantial* evidence supported the conviction:

It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.

Glasser v. United States, 315 U.S. 60, 80 (1942) (citation omitted).

The prevailing rule has long been that a district judge is to submit a case to the jury if the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt. Obviously a federal appellate court applies no higher a standard; rather, it must sustain the verdict if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision.

Burks v. United States, 437 U.S. 1, 16-17 (1978) (citations omitted).

Petitioner Nickas asks this Court to clarify the process here, by ruling that: Substantial evidence is required to sustain a federal criminal conviction, and the analysis should consider (1) evidence of innocence, especially if it is evidence developed or presented by the prosecution or law enforcement, (2) the rationality or reasonableness of the chain of inferences required for conviction, especially in circumstantial evidence cases, and (3) the role that the prosecutor’s mis-statements about the law or evidence have on the jury’s verdict (which otherwise ordinarily receives highly deferential review).

2. As a result, there are entrenched circuit splits on the test

Due to *Jackson*’s broad standard, entrenched circuit splits have developed on how to apply *Jackson* on direct appeal (and in the district court) in federal criminal cases.

a. Axis 1: Circuits are split on whether to consider exculpatory evidence, including *Government* evidence that exonerates the accused

The circuits are split on whether, and how, to account for exculpatory evidence in sufficiency review. Should it be considered (a plausible conclusion under fundamental fairness and Due Process), or instead ignored (under *Jackson*’s directive to review the record in the light least favorable to the accused)?

On the one hand, it would appear that exculpatory evidence must be taken into account. After all, “*all of the evidence*” must be considered. *Jackson*, 443 U.S. at 318-19 (original emphasis). “*Jackson* . . . requir[es] only that jurors ‘draw reasonable inferences from basic facts to ultimate facts.’” *Coleman v. Johnson*, 566 U.S. at 655-

56 (quoting *Jackson*, 443 U.S. at 319). The more facts there are, the more context there is for evaluating the reasonableness or rationality of an ultimate conclusion.²³ This ensures jurors have an evidence-based, “non-speculative reason to favor [the Government’s] explanations over the others.” *United States v. Lovern*, 590 F.3d 1095, 1107, 1109 (10th Cir. 2009) (Gorsuch, J., majority opinion).

This dovetails with this Court’s observation that the hypothetical reasonable juror gives fair-minded consideration to all of the evidence:

the *Carrier* standard requires a petitioner to show that it is more likely than not that “no reasonable juror” would have convicted him. The word “reasonable” in that formulation is not without meaning. It must be presumed that a reasonable juror would consider fairly all of the evidence presented.

Schlup v. Delo, 513 U.S. 298, 329 (1995). If “a reasonable juror *must* have a reasonable doubt,” then the “motion for judgment of acquittal must be granted.” *United States v. Foster*, 783 F.2d 1087, 1088 (D.C. Cir. 1986) (panel: Bork, Scalia, Hogan; granting defendant’s sufficiency-of-evidence challenge), *simultaneous en banc opinion*, 783 F.2d 1082 (D.C. Cir. 1986) (Scalia, J., for en banc court).

But on the other hand, this Court instructs courts to view all of the evidence “in the light most favorable to the prosecution,” “presume ... that the trier of fact resolved any [evidentiary] conflicts in favor of the prosecution,” and “defer to that resolution.” *Jackson*, 443 U.S. at 319, 326. Deference to a jury’s verdict requires

²³ See, e.g., *Speigner*, 603 F.2d at 1212 n.3 (“if ... it is necessary to prove that a defendant was in a given Cincinnati motel room at a particular time in question, testimony that he was in the State of Ohio would clearly be ‘no evidence’ as to the critical fact,” but testimony he was in the building or on the right floor “would properly support a jury’s finding”).

arbitrary rejection of defense evidence. After all, *Jackson's* “deferential standard does not permit the type of fine-grained factual parsing”²⁴ that might be necessary in some cases (spanning multiple pages in the federal reporter) to reveal that the Government’s chosen theory rests on speculation, not evidence.²⁵ And this Court rebukes sharply when deference is not done to satisfaction, even in close cases. *E.g.*, compare *Cavazos v. Smith*, 565 U.S. at 2, 8 (“the Ninth Circuit plainly erred in concluding that the jury’s verdict was irrational,” “Court of Appeals in this case substituted its judgment for that of a California jury”), *with id.* at 9-17 (Ginsburg, Breyer, and Sotomayor, JJ., dissenting).²⁶

So how is this supposed work? The circuits are split.

The Third Circuit ignores evidence of innocence, then asks only if the jury’s verdict is a plausible inference from the evidence. *See* Pet. App. 7a-9a (CA3 Opinion, at 7-9). Watch. The Third Circuit ignores evidence of innocence: Johnson’s communications with other drug dealers and “desire to buy more drugs” on December 7, 8, 9, and 10 “does not establish as a factual matter that he had run out of the drugs

²⁴ *Coleman v. Johnson*, 566 U.S. at 655.

²⁵ *E.g.*, *Lovern*, 590 F.3d at 1104-09 (10th Cir. 2009) (Gorsuch, J., majority opinion); *Foster*, 783 F.2d at 1088-91 (D.C. Cir. 1986) (panel: Bork, Scalia, Hogan; reversing conviction for insufficient evidence). *Cf. United States v. Moody*, 915 F.3d 425, 427-28, 430-31 (7th Cir. 2019) (Barrett, J., court’s opinion; holding that sentencing enhancement rested on speculation, not evidence).

²⁶ This may send the wrong message: it appears easier for a reviewing judge to downplay record evidence of innocence and err on the side of affirming a conviction, rather than straying too close to or just beyond Due Process and provoking this Court’s rebuke.

he bought from Nickas” on December 6. Pet. App. 8a-9a (CA3 Opinion, at 8-9).²⁷ The Third Circuit then asks only if the jury’s verdict is a plausible inference from the evidence: “we cannot reverse this jury’s verdict ‘simply because another inference is possible—or even equally plausible.’” Pet. App. 9a (CA3 Opinion, at 9) (citing *United States v. Jacobs*, 21 F.4th 106, 113 (3d Cir. 2021), and *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 432 (3d Cir. 2013) (en banc)).

Indeed, the Third Circuit’s last *en banc* opinion defining the circuit’s sufficiency-of-evidence test does not account for exculpatory evidence or evidence of innocence anywhere. *See United States v. Caraballo-Rodriguez*, 726 F.3d 418, 424-25, 430-32 (3d Cir. 2013) (en banc). Instead, if exculpatory evidence supports a competing inference, the jury’s conclusion should not be reversed “simply because another inference is possible—or even equally plausible.” *Caraballo-Rodriguez*, 726 F.3d at 432; Pet. App. 9a. “[W]e do not draw inferences in the defendant’s favor when reviewing for sufficiency of the evidence.” *United States v. Garner*, 915 F.3d 167, 169 (3d Cir. 2019). It’s “only when the record contains no evidence, however it is weighed, from which the jury could find guilt beyond a reasonable doubt, will we overturn a verdict.” *Zayas*, 32 F.4th at 221 (3d Cir. 2022) (citing *United States v. McNeill*, 887 F.2d 448, 450 (3d Cir. 1989)); CA3 Opinion, at 7 n.5 (citing *Zayas*).

²⁷ And even though trial testimony proved that Johnson’s typical practice was to broker drug transactions between buyers ready to buy and sellers ready to sell—not hold drugs himself. *See, supra*, pp. 8-9.

The Ninth Circuit, in contrast, explicitly accounts for exculpatory evidence.

Judge Ikuta, late, masterfully described *Jackson's* two-step test *en banc*:

First, a reviewing court must consider the evidence presented at trial in the light most favorable to the prosecution. This means that a court of appeals may not usurp the role of the finder of fact by considering how it would have resolved the conflicts, made the inferences, or considered the evidence at trial. Rather, when "faced with a record of historical facts that supports conflicting inferences" a reviewing court "must presume--even if it does not affirmatively appear in the record--that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution."

Second, after viewing the evidence in the light most favorable to the prosecution, the reviewing court must determine whether this evidence, so viewed, is adequate to allow "*any* rational trier of fact [to find] the essential elements of the crime beyond a reasonable doubt." This second step protects against rare occasions in which "a properly instructed jury may . . . convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt[.]" More than a "mere modicum" of evidence is required to support a verdict....

.... Only after we have construed all the evidence at trial in favor of the prosecution do we take the second step, and determine whether the evidence at trial, ***including any evidence of innocence***, could allow *any* rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. At this second step, we must reverse the verdict if ***the evidence of innocence***, or lack of evidence of guilt, is such that all rational fact finders would have to conclude that the evidence of guilt fails to establish every element of the crime beyond a reasonable doubt.

United States v. Nevils, 598 F.3d 1158, 1164-65 (9th Cir. 2010) (en banc) (citations omitted, emphasis added). This is still the Ninth Circuit's test, even after *Cavazos v. Smith* (2012). See, e.g., *United States v. Katakis*, 800 F.3d 1017, 1023 (9th Cir. 2015).

Accounting for exculpatory evidence does not necessarily mean convictions will be overturned. See, e.g., *United States v. Latu*, 2022 U.S. App. LEXIS 24657, at *3, 2022 WL 3974593 (9th Cir. 8/31/2022) (ruling the "arguably exculpatory evidence"

did not merit reversal under *Jackson*). But this measured approach allows deference to jury fact-finding in step 1, while asking in step 2 if the entire trial record rationally supports conviction.

This Court should clarify that exculpatory evidence must be considered in some form or fashion in the analysis, and Judge Ikuta’s approach is the ideal framework.

b. Axis 2: Circuits are split on whether to consider the reasonableness or rationality of the chain of inferences required for conviction

The circuits are split on whether to analyze for rationality/reasonableness the chain of inferences required for conviction. Must the chain be examined to determine if the inference of guilt reasonably/rationally rests on evidentiary fact, or instead does the generic observation that convictions can rest on circumstantial evidence end the inquiry?

The Third Circuit ruled that the rationality of the chain of inference would not be probed in Petitioner Nickas’s case. The Third Circuit ruled that one could reasonably conclude Nickas’s December 6 sell to Johnson—based on no evidence about the quantity of heroin/fentanyl sold, no evidence that it was for \$300 of drugs (instead of for \$200 “plus the 100 I owe ya”²⁸), no evidence about Johnson’s purpose

²⁸ See Nickas cellphone extraction report, Government Trial Exhibit 80, entries #1927 to #1938 (CA3 Appendix, Volume 3, at Appx1038-1039). See also 8/2/2022 Trial Tr. (R.Doc. 184), at 88-89 (CA3 Appendix, at Appx457) (reading text-messages to jury).

The Third Circuit’s Opinion appears to make an appellate factual finding that this December 6 deal involved Nickas selling Johnson \$300 worth of drugs, even though the Government’s exhibit—which is the only evidence of this December 6 deal at all—indicates Johnson paid Nickas \$200 for drugs plus \$100 that he previously owed her. Pet. App. 8a & n.6, 3a (CA3 Opinion, at 8 & n.6, 3).

(immediate redistribution, or holding to distribute later), and no evidence about the content of Johnson’s communications with other drug dealers on December 7, 8, 9, and 10—were the same drugs Johnson sold Watson on December 10. Pet. App. 8a-9a. Nickas presented (in numbered/lettered paragraphs in her Reply Brief) at least 10 links in this chain of inferences which went totally unsupported. See Nickas Reply Br. at 6-11, ¶¶ a.-j.

The First, Second, Sixth, Seventh, Ninth, and Tenth Circuits, in contrast, ask whether the chain-of-inferences required for conviction rests rationally or reasonably on evidentiary fact:

United States v. Lopez-Diaz, 794 F.3d 106, 111, 113-14 (1st Cir. 2015) (when “jury draws inferences from circumstantial evidence, a reviewing court should refrain from second-guessing the ensuing conclusions as long as (1) the inferences derive support from a plausible rendition of the record, and (2) the conclusions flow rationally from those inferences”);

United States v. Guerrero-Narvaez, 29 F.4th 1, 9 (1st Cir. 2022) (“just as ‘a judge may not pursue a ‘divide and conquer’ strategy in considering whether the circumstantial evidence adds up..., neither may a judge ‘stack inference upon inference in order to uphold the jury’s verdict’” (cleaned up));

United States v. Pauling, 924 F.3d 649, 656-57 (2d Cir. 2019) (articulating difference between inference and speculation, which “occurs when the finder of fact concludes that a disputed fact exists that is within the realm of possibility, but the conclusion reached is nevertheless unreasonable because it is not logically based on another fact known to exist”; “we must defer to a jury’s reasonable inferences, we give no deference to impermissible speculation”);

United States v. Ouedraogo, 531 Fed. Appx. 731, 739-40 (6th Cir. 2013) (non-precedential) (“Substantial and competent circumstantial evidence may support a verdict. Although the evidence need not eliminate all reasonable hypotheses except that of guilt, we must guard against ‘piling inference upon inference.’”);

Newman v. Metrish, 543 F.3d 793, 796-97 (6th Cir. 2008) (“Although circumstantial evidence alone can support a conviction, there are times that it amounts to only a reasonable speculation and not to sufficient evidence.”)²⁹;

United States v. Garcia, 919 F.3d 489, 503 (7th Cir. 2019) (“Although a jury may infer facts from other facts that are established by inference, each link in the chain of inferences must be sufficiently strong to avoid a lapse into speculation. In making this assessment, a judge must take special care to guard against the possibility that a defendant might be found guilty by either speculation or mere association.”);

United States v. Jones, 713 F.3d 336, 352 (7th Cir. 2013) (“If a necessary inference relies on speculation, it is not reasonable and not permitted.”);

United States v. Katakis, 800 F.3d 1017, 1024-25, 1028 (9th Cir. 2015) (“reasonable inference is one that is supported by a chain of logic, rather than mere speculation dressed up in the guise of evidence”; Government “invited the jury to do what *Nevils* forbids: engage in mere speculation on critical elements of proof”);

United States v. Goldesberry, 128 F.4th 1183, 1192-93 (10th Cir. 2025) (“[W]e do not give the government the benefit of *every potential* inference but rather, only those inferences reasonably and logically flowing from the other evidence adduced at trial.’ An inference is unreasonable if it requires the jury ‘to engage in a degree of speculation and conjecture that renders its findings a guess or mere possibility.’”);

United States v. Rodriguez, 93 F.4th 1162, 1165-66 (10th Cir. 2024) (“We thus can't ‘uphold a conviction obtained by piling inference upon inference.’”);

United States v. Lovern, 590 F.3d 1095, 1104-05, 1107 (10th Cir. 2009) (Gorsuch, J.) (acquittal is required when “jury simply had no non-

²⁹ The Sixth Circuit still applies *Newman*, even after this Court’s decisions in *Cavazos v. Smith* (2011) and *Coleman v. Jonson* (2012). See *United States v. Reverand*, 2025 WL 637438 (6th Cir. 2/27/2025) (“this is not a case where the prosecution asked the jury to speculate from an absence of proof. *Contra Newman*”).

speculative reason to favor any one of these explanations over the others”).³⁰

This Court should clarify that courts must examine the rationality of the chain-of-inferences required for conviction. After all, jurors have a *responsibility* to *fairly* draw *reasonable* inferences³¹—they do not have *carte blanche*. A “mere modicum of evidence” or “one slender bit of evidence” can, if bolstered by speculation, erroneously appear sufficient. *Cf. Jackson*, 443 U.S. at 320 & n.14. Probing whether the jury has non-speculative evidence supporting its chain of inferences prevents these “mere modicum” convictions. Probing the chain-of-inferences also prevents the Government—and court—from slipping into fallacious burden-shifting logic that the defendant did not do enough to prove her/his innocence. *E.g.*, Pet. App. 8a-9a (CA3 Opinion, at 8-9) (“Nickas argues that Johnson must have run out of the drugs she sold him on December 6 before December 10, [because] he was looking to buy more in the intervening days. But Johnson’s desire to buy more drugs does not establish as a factual matter that he had run out of the drugs he bought from Nickas.”).³²

³⁰ Internal citations omitted in all.

³¹ “This familiar standard gives full play to the *responsibility* of the trier of fact *fairly* to resolve conflicts in the testimony, to weigh the evidence, and to draw *reasonable* inferences from basic facts to ultimate facts.” *Jackson*, 443 U.S. at 319 (emphasis added).

³² Nickas implored the Third Circuit to avoid the precise burden-shifting logic that it relied on. Nickas Reply Br. 18-23; Pet. App. 32a-36a (Nickas Petition for Rehearing En Banc and By Panel).

c. Axis 3: Circuits are split on how to treat Government misstatements about the law or evidence, which can improperly influence the jury verdict (which verdict then receives extremely high deference in sufficiency-of-evidence review)

The circuits are split on whether and how Government misstatements interact with sufficiency review. Should prosecutorial misconduct and sufficiency review remain in their separate lanes, or must the two concepts merge or inform one another so that Due Process might exist somewhere between them?

Sufficiency review is highly deferential to the jury's verdict. *See Jackson*, 443 U.S. at 326. That deference gives "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.* at 319. When reviewing "a record of historical facts that supports conflicting inferences," the court "must presume . . . that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Id.* at 326.

But what if those inferences are clouded by Government mis-statements about the law, evidence, or both? Is that to be ignored? This Court should clearly signal that the answer is no. Government misstatements to the jury about a particular issue call into question the reliability of the jury's verdict on that issue. *E.g., United States v. Williams*, 836 F.3d 1, 10-11 (D.C. Cir. 2016) (panel: Henderson, Griffith, Kavanaugh; although evidence was sufficient to sustain verdict that defendant "acted with the mental state required for murder," conviction was reversed due to

“prosecutorial misstatement of law during closing argument” that “implicated [that] central issue”).

The First, Ninth, and Tenth Circuits account for the reality that the prosecutor’s mis-statements about the law or evidence “explain how a jury could mistakenly convict” with insufficient evidence. *See Lopez-Diaz*, 794 F.3d at 114 (1st Cir. 2015). *See also Katakis*, 800 F.3d at 1030 (9th Cir. 2015) (concluding evidence was insufficient, declining to rule on prosecutor’s closing-argument misstatements/misconduct); *Goldesberry*, 128 F.4th at 1186 n.1 (10th Cir. 2025) (panel-majority granted defendant’s sufficiency claim, without ruling on prosecutorial-misconduct claim), *id.* at 1207-08 (Eid, J., dissenting) (Government conceded prosecutor mis-stated evidence in closing-argument, which defendant argued increased likelihood of conviction without evidence).

More importantly, Justice Kavanaugh has recognized that a small misstatement (eleven words) about a discrete, important issue can undermine the reliability of the jury’s verdict on that issue—even if appellate *acquittal* under sufficiency review is not quite warranted. *See Williams*, 836 F.3d at 10-11; *id.* at 21 (Henderson, J., dissenting) (“My colleagues reverse Rico Williams’s murder conviction because of eleven words the prosecutor uttered in her rebuttal closing argument.”).

The Third Circuit, in contrast, insulates the verdict with highly deferential sufficiency-of-evidence review—then simultaneously insulates Government misstatements to the jury from meaningful review, reversing only if misconduct is so

severe or rampant that it infects the whole trial with unfairness. Take Petitioner’s case as an example.

First, the prosecutor represented that Nickas sold Johnson \$300 worth of heroin/fentanyl on December 6, even though the text-messages—the only evidence of this transaction—says the deal was for \$200 of drugs, plus a \$100 payment of money that Johnson owed Nickas.³³ 8/3/2022 Trial Tr. (R.Doc. 186), at 73-74. Worse, the Third Circuit adopted the Government’s misstatement as fact: “messages showed that Johnson bought \$300 worth of drugs from Nickas on December 6, 2020.” Pet. App. 3a, 8a & n.6 (CA3 Opinion, at 3, 8 & n.6). The Third Circuit did this even while quoting the text-message’s content (it was \$200 of drugs, “plus the 100 I owe ya”³⁴).
Id.

Second, and independently, the Third Circuit also agreed with Petitioner that the prosecutor mis-stated in closing argument how many individual-dose bags of heroin/fentanyl Nickas sold Johnson on December 6. Pet. App. 15a (CA3 Opinion, at 15). The prosecutor told the jury that that December 6 deal was for “250 bags,” but the prosecutor should have said “50 bags (not 250).” Pet. App. 15a (CA3 Opinion, at 15); 8/3/2022 Trial Tr. (R.Doc. 186), at 73-74. The prosecutor then said those (250) bags of heroin/fentanyl are the same bags Johnson sold Watson 20 bags of on the morning of December 10—despite Johnson’s December 7, 8, 9, and 10

³³ Nickas cellphone extraction report, Government Trial Exhibit 80, entries #1927 to #1938 (CA3 Appendix, Volume 3, at Appx1038-1039). *See also* 8/2/2022 Trial Tr. (R.Doc. 184), at 88-89 (CA3 Appendix, at Appx457) (reading text-messages to jury).

³⁴ *Id.*

communications with Nickas trying to buy more drugs and communications with other drug dealers:

So what we know from their own communications is that on December 6th, 2020 Jeremy Johnson got a substantial supply from Susan Nickas that he had to sell to get rid of before their next travel to New Jersey. When he told Kaleigh in the morning of December 10th, I'm good for now, and then Kaleigh said, he gave me what I had left, he did so in anticipation of re-upping. That's his supply. There's no credible evidence at all of any other source for Jeremy Johnson during those few days leading up to December 10th.

8/3/2022 Trial Tr. (R.Doc. 186), at 74 (Government closing argument).

Deferential review of the jury's verdict under *Jackson* cannot be paired with deferential review of the Government's misstatements about the law and evidence. A small misstatement about an important issue can have a tremendous effect. *See Williams*, 836 F.3d at 10-11. Sometimes leading to conviction without evidence. *See Lopez-Diaz*, 794 F.3d at 114. But if sufficiency-review does not account for Government mis-statements about the law or evidence, and prosecutorial misconduct must be rampant or sever to require reversal, then where does Due Process exist?

This Court should clarify that it must exist somewhere: courts should consider Government mis-statements about the law or evidence when conducting sufficiency-of-evidence review.

3. This Court's intervention is necessary

- a. **By taking the most Government-friendly approach on each sufficiency-review axis, the Third Circuit's test resurrects the "no evidence" test of *Thompson v. Louisville* (which this Court overruled in *Jackson v. Virginia*)**

In the Third Circuit, the smallest quantum of proof—a mere modicum of evidence—apparently can sustain a verdict and 20-year prison sentence. *See* Petl App. 7a-9a (CA3 Opinion, at 7-9). Nickas selling Johnson an unknown quantity of heroin/fentanyl on December 6,³⁵ for an unknown purpose (immediate redistribution during a brokered transaction with Johnson as middle-man, or instead for redistribution to other people later that week)—and despite Johnson's activities in the following days (trying to buy drugs from Nickas but she was out, contacting other drug-dealers, and deleting those communications from his cellphone)—can support a verdict against Nickas for Johnson distributing 20 bags of someone's drugs on the morning of December 10. A ruling from this Court, on any axis of sufficiency review, should spell remand and relief for Petitioner Nickas.

But more problematically, by taking the Government-friendly approach on each axis, the Third Circuit's test mirrors the "no evidence" test of *Thompson v. Louisville* (which this Court overruled in *Jackson v. Virginia*). *See Jackson*, 443 U.S. at 320. Indeed, sometimes the Third Circuit commits a Freudian slip and articulates its test as a "no evidence" test: the defendant "must establish that 'the record

³⁵ Although, the Third Circuit concluded it was 50 individual dose bags. Pet. App. 15a (CA3 Opinion, at 15).

contains no evidence, regardless of how it is weighted,’ from which a ‘rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *Abrams*, 165 F.4th at 802 (citing *Walker*, 657 F.3d at 171) (citations omitted)); *Zayas*, 32 F.4th at 221 (citation omitted).³⁶

This isn’t hyperbole from a public defender. A panel of the Sixth Circuit has identified this problem too: the “no evidence” formulation of sufficiency-review violates Due Process for the same reasons *Thompson v. Louisville* did. In the Sixth Circuit, defendants who have not properly preserved their sufficiency-of-evidence challenge face a similar, daunting “no evidence” test. A panel of that court has questioned whether their circuit’s “no evidence” test for *unpreserved* sufficiency challenges violates Due Process.

The Sixth Circuit reviews preserved sufficiency-of-evidence challenges (cases in which a Fed. R. Crim. P. 29 motion was raised in district court) under the *Jackson* test, but reviews unpreserved sufficiency challenges only for a miscarriage of justice, which “occurs only if the record is devoid of evidence pointing to guilt.” *United States v. Burris*, 999 F.3d 973, 976-78 (6th Cir. 2021) (citations omitted). In *Jackson*, “[t]he [Supreme] Court rejected the ‘no evidence’ rule of *Thompson v. City of Louisville*, [] (1960), under which a conviction would be reversed only when there was no evidence to support it.” *Burris*, 999 F.3d at 977 (citing *Jackson*, 443 U.S. at 320). The Sixth Circuit acknowledged that its “miscarriage-of-justice/devoid-of-evidence standard of review mirrors the [*Thompson*] ‘no evidence’ rule and is likely

³⁶ Problematically, *Zayas* was cited in Petitioner’s Opinion. Pet. App. 7a n.5.

inadequate for the same reasons [*Thompson* was].” *Id.* Bound by circuit precedent, the *Burris* panel expressed “concern[] that our court may have chosen the wrong side of this circuit split.” *Burris*, at 978.

Ironically, Sixth Circuit defendants with *unpreserved* sufficiency arguments face the same test as Third Circuit defendants with *preserved* ones: whether the record contains no evidence, regardless how it is weighed, from which a rational fact-finder could convict.

Federal criminal defendants deserve more under Due Process. *See Jackson*, 443 U.S. at 320 (“mere modicum of evidence may satisfy a ‘no evidence’ standard,” “[b]ut it could not seriously be argued that such a “modicum” of evidence could by itself rationally support a conviction beyond a reasonable doubt” (citations omitted)). Petitioner respectfully suggests her case is the appropriate case for this Court to say so.

b. This is an important and recurring issue

This test is incredibly important. “[I]ndependent review of the sufficiency of the evidence undertaken by the trial and appellate courts” affords federal criminal defendants “protection against jury irrationality or error.” *United States v. Powell*, 469 U.S. 57, 67 (1984) (citing, *inter alia*, *Glasser*, 315 U.S. at 80).

Sufficiency review is the *sole* check on jury irrationality or error. Even inconsistent jury verdicts are not examined for rationality. *See Powell*, 469 U.S. at 66-69. Or symmetry. *See Standefer v. United States*, 447 U.S. 10, 25-26 (1980). Even prosecutorial discretion or clemency are “mercy”—not justice and not

protection from injustice (irrationality or error). *See Cavazos v. Smith*, 565 U.S. at 8-9.

“If the clemency power is exercised in either too generous or too stingy a way, [then] that calls for political correctives, not judicial intervention.” *Id.* But if sufficiency review is broken, who fixes that? The answer is this Court.

Because the test is unsettled and relies on *Jackson*’s broad and contradictory guidance, the outcome in any case is driven: (1) in part, by the circuit’s caselaw interpreting *Jackson*’s broad standard and, (2) in part, by the luck of the draw on which judge or judges are assigned to the case. Without this Court’s intervention, every defendant’s Due Process-based sufficiency-of-evidence review is driven by happenstance: which circuit and which judges review the case.

Without this Court’s intervention, what was true about *Thompson*’s “no evidence” test remains true about *Jackson*: “When a federal court denies . . . relief, the court can simply cite the language of the [*Jackson*] standard and refer to an ‘iota of evidence’ found in the [] trial record.” *See Speigner*, 603 F.2d at 1212. Petitioner humbly protests that federal criminal defendants deserve more than this before being deprived of their liberty.

4. Petitioner’s case is an ideal vehicle

Petitioner’s case is an ideal vehicle for clarifying sufficiency-of-evidence review of federal criminal convictions on direct appeal.

The Government conceded the speculative nature of its December 6 theory in its Rule 29 argument:

we know that at midnight on December 6th, 2020 into 2000 -- I'm sorry -- December 7th of 2020 [sic³⁷] Jeremy Johnson had \$300 to give to Susan Nickas to get everything she had left.

And when Susan Nickas thereafter said on December 8th that she was out, at no time did Jeremy Johnson say that he was out. He had -- **he could have had** plenty of bundles to distribute between the 7th of December and the morning of the 10th of December 2020.

Pet. App. 51a (8/2/2022 Trial Tr. (R.Doc. 184), at 171) (emphasis added).

There is no *Musacchio* problem.³⁸ The Government conceded on appeal that the jury instructions were correct³⁹; did not cross-appeal any adverse rulings from trial; and did not argue that Petitioner Nickas's death-results sufficiency-of-evidence claim was somehow harmless.

After Nickas's significant efforts (in the district court and on appeal) trying to get the Government to pin-down and articulate its theory, it finally has on appeal: to sustain the death-results sentencing enhancement against Nickas, its evidence must prove she participated in distributing the unstamped-white bag that Johnson gave

³⁷ The Government's own exhibit—the only evidence of this December 6 drug-deal—shows it happened around 1:17 p.m. to 1:34 p.m. on December 6, 2020. See Nickas cellphone extraction report, Government Trial Exhibit 80, entries #1927 to #1938 (CA3 Appendix, Volume 3, at Appx1038-1039). See also 8/2/2022 Trial Tr. (R.Doc. 184), at 88-89 (CA3 Appendix, at Appx457) (reading text-messages to jury).

³⁸ *Musacchio v. United States*, 577 U.S. 237, 240-41, 243 (2016) (holding, in a case where the Government preserved objection that the jury instruction incorrectly added an element and “[t]he parties agree[d] that this instruction was erroneous,” that sufficiency-of-evidence review is “assessed against the elements of the charged crime, not against the erroneously heightened command in the jury instruction”).

³⁹ The Government conceded on appeal that “[t]he district court provided a proper but-for causation jury instruction pursuant to *Burrage v. United States*, 571 U.S. 204 (2014), . . .” U.S. Br. 25-26 (3d Cir. 23-1316, filed 11/4/2024).

Watson the morning of December 10.⁴⁰ This Court can cleanly decide that issue by applying, clarifying, or modifying the sufficiency-of-evidence test to be applied in federal criminal direct appeals.

Relatedly, there is a percolating issue surrounding the standard of review and steps necessary to preserve sufficiency-of-evidence arguments for appellate review.⁴¹ Petitioner Nickas’s Rule 29 motion was properly preserved and was reviewed de novo.⁴² However, it would be appropriate for this Court to speak on the substantive test district and appellate courts must apply in conducting sufficiency-of-evidence review, while speaking on preservation and standard of review. That is, Petitioner’s case is an ideal vehicle for clarifying the sufficiency-of-evidence test in a preserved case, while also clarifying preservation and standard-of-review issues in other cases with petitions (or forthcoming petitions) before the Court.⁴³

⁴⁰ U.S. Br. 14-20; U.S. Br. 14 (“Throughout trial, the Government presented a straightforward argument . . . Both types of bags came from Johnson and Nickas.”); U.S. Br. 43-44 (“from the very beginning of the case, the Government contended, and proved beyond a reasonable doubt, that Kiernan obtained both types of bags from Johnson and Nickas . . . Johnson and Nickas both delivered all the heroin/fentanyl that caused his death.”).

⁴¹ See, e.g., *Ralph Tovar v. United States*, No. 25-6344, Petition at *i* (filed 12/8/2025) (Question Presented: “I. Whether a general challenge to the sufficiency of the evidence, pursuant to Rule 29(a), preserves for de novo review the full range of sufficiency challenges, stated or unstated.”) (response requested from Solicitor General); *United States v. Abrams*, 165 F.4th 784, 796-801 (3d Cir. 1/30/2026) (“we must resolve a threshold question: whether Abrams's generalized Rule 29 motion preserved the specific sufficiency arguments he presses now” on appeal) (certiorari petition due April 30, 2026).

⁴² Pet. App. 45a-53a (8/2/2022 Trial Tr. (R.Doc. 184), at 167-73); Pet. App. 7a n.5 (CA3 Opinion, at 7 n.5).

⁴³ See, *supra*, n.41.

CONCLUSION

“The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless. Under our system of criminal justice even a *thief* is entitled to complain that he has been unconstitutionally convicted and imprisoned as a *burglar*.” *Jackson*, 443 U.S. at 323-34 (citations omitted, emphasis added).

Petitioner Nickas’s argument isn’t an exoneration: “even when the prosecution is unable to prove but-for causation, the defendant will still be liable for violating § 841(a)(1) and subject to a substantial default sentence under § 841(b)(1).” *Burrage*, 571 U.S. at 217. But Nickas’s conduct was not the but-for or independently-sufficient cause-in-fact of Mr. Kiernan’s tragic death. Her statutory-minimum 20-year prison sentence is unjust.

For all these reasons, Petitioner humbly asks this Honorable Court to grant her petition for a writ of certiorari.

Respectfully submitted,
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