26-5258

No. 26-____

IN THE

Supreme Court of the United States

DAVID BREND,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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July 24th, 2026

QUESTIONS PRESENTED

Petitioner David Brend was tried on a single count of conspiracy to commit wire fraud arising from his promotion of IcomTech, a purported cryptocurrency multi-level marketing business that proved to be a Ponzi scheme. The existence of the fraud was conceded. The only contested element at trial was whether Mr. Brend knew of it.

On that lone contested element, the district court permitted the government to introduce evidence that Mr. Brend had promoted several other cryptocurrency schemes that turned out to be fraudulent, as proof of his intent and absence of mistake. At the same time, the district court barred Mr. Brend from introducing evidence that, during the same period, he participated in multi-level marketing businesses that were lawful, offered to negate that same intent. The Second Circuit affirmed in an unpublished summary order, disposing of the issue in a single sentence, five weeks after it reversed a conviction in another case because a trial court excluded defense other-acts evidence bearing on intent.

The questions presented are:

1. Whether a trial court violates a criminal defendant's Fifth and Sixth Amendment right to a meaningful opportunity to present a

complete defense when it admits the government's other-acts evidence to prove the defendant's fraudulent intent while excluding the defendant's contemporaneous lawful conduct offered to negate the same intent.

2. Whether Federal Rule of Evidence 404(b) imposes the same standard of admissibility on a defendant who offers other-acts evidence in his defense as it imposes on the government offering such evidence against him, a question that has divided the courts of appeals.

PARTIES TO THE PROCEEDING

Petitioner is David Brend.

Respondent is the United States of America.

David Carmona and Gustavo Rodriguez were co-appellants in the consolidated proceedings below and are not parties to this petition.

No corporate parties are involved in this case.

RELATED CASES

This case arises from the following proceedings in the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit:

United States v. Carmona, Nos. 24-2784 (L), 24-2977 (Con), 24-3264 (Con) (2d Cir.); and

United States v. Carmona, No. 1:22-cr-551-JLR-5 (S.D.N.Y.).

No other proceedings directly relate to this case.

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PETITION FOR A WRIT OF CERTIORARI

David Brend respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS AND ORDERS BELOW

The summary order of the court of appeals (App. A) is unreported but available at Nos. 24-2784(L), 24-2977, 24-3264 (2d Cir. Apr. 15, 2026). The order of the court of appeals denying panel rehearing and rehearing en banc (App. B) is unreported. The district court's opinion and order denying petitioner's motions for a judgment of acquittal and for a new trial (App. D) is unreported and available at No. 1:22-cr-551-JLR (S.D.N.Y. Oct. 15, 2024), Dkt. 289.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on April 15, 2026. App. A. It denied a timely petition for panel rehearing and rehearing en banc on July 1, 2026. App. B. This petition is filed within 90 days of that denial and is therefore timely under this Court's Rules 13.1 and 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."

Federal Rule of Evidence 404(b) provides in relevant part:

> (1) Prohibited Uses. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

INTRODUCTION

This petition presents a question this Court answered in principle two decades ago but that continues to divide the lower courts in practice: whether a criminal trial remains fundamentally fair when the rules of evidence run in only one direction.

Petitioner David Brend promoted IcomTech, a cryptocurrency multi-level marketing venture that was, in fact, a Ponzi scheme. That the scheme was a fraud was conceded. The sole contested question at his trial was whether he knew it. On that single element, the district court admitted the government's evidence that Mr. Brend had promoted other cryptocurrency ventures that turned out to be fraudulent, as proof of intent and absence of mistake, while excluding Mr. Brend's evidence that he participated in lawful multi-level marketing businesses during the same period, offered to negate the very same intent. The jury that decided what Mr. Brend believed was shown only half of what he did.

A unanimous Court held in *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006), that "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). *Holmes* condemned as "arbitrary" an evidentiary regime that evaluated only one party's evidence, because "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." 547 U.S. at 331. The regime applied to Mr. Brend was arbitrary in precisely that sense: the same category of proof, other acts offered on intent, was a sword in the government's hands and contraband in his.

The courts of appeals are openly divided over the governing standard. The Second, Third, Fifth, Seventh, Tenth, and Eleventh Circuits have each held or recognized that other-acts evidence offered *by* a defendant is subject to a more lenient standard than the same evidence offered against him. The Ninth Circuit has expressly rejected that view, and the Sixth Circuit applies Rule 404(b) with identical force regardless of the proponent. And the Second Circuit is now divided against itself: on February 18, 2026, it reversed a conviction because a district court excluded other-acts evidence bearing on the defendant's intent, *United States v. Cardenas*, No. 24-2734, 167 F.4th 569 (2d Cir. 2026); five weeks later, the panel below affirmed the exclusion of Mr. Brend's intent evidence in one sentence, in an unpublished order, without reconciling the two results.

The conflict is real, the constitutional stakes are recurring in the modern wave of cryptocurrency and multi-level marketing prosecutions, and this case presents the question in its purest form: one count, one contested element, and a perfectly symmetrical category of evidence admitted for one side and excluded for the other. The petition should be granted.

STATEMENT OF THE CASE

A. The prosecution and the single contested element.

IcomTech held itself out as a cryptocurrency-focused multi-level marketing business. It was a Ponzi scheme. App. A at 2. A grand jury in the Southern District of New York charged its founder, its website designer, and several promoters, including Mr. Brend, with conspiracy to commit wire fraud, 18 U.S.C. § 1349. Indictment, No. 1:22-cr-551 (S.D.N.Y. Oct. 13, 2022), Dkt. 2; App. C at 1.

At trial, Mr. Brend did not dispute that IcomTech was a fraud. As his counsel framed it below, "[t]he issue was not whether IcomTech was a fraud, which was conceded, but rather whether Mr. Brend had the requisite knowledge at the time." App. A at 3 n.1 (quoting Brend C.A. Br. 31). Knowledge, and knowledge alone, was the battleground. As his trial counsel put it in opposing the government's motions in limine: "The sole issue in this case, as it relates to Mr. Brend is whether he knowingly joined a scheme to defraud with the founders of IcomTech." Def. Opp'n to Gov't Mots. in Limine, Dkt. 129 at 5.

B. The one-way evidentiary rulings.

Before trial, the government sought both halves of the asymmetry in a single motion in limine: it moved to admit evidence of "additional cryptocurrency fraud schemes in which the defendant participated" as direct evidence of the charged conspiracy or under Rule 404(b), and simultaneously to preclude "evidence that the defendants engaged in lawful activity on certain occasions." Gov't Mot. in Limine, Dkt. 123 at 1 (as recited in Dkt. 129 at 2). The five other ventures the government identified were Kuerva, InstaTradex, Bitclub, Sky Blue 90, and BNB Profit. Dkt. 129 at 5.

Mr. Brend's opposition identified the countervailing evidence and its purpose. He proffered the "investments he made in lawful crypto-currency mining operations," Dkt. 129 at 5, and lawful ventures shared with the government's own witnesses: "Some of the same individuals who the Government are labelling 'victims' participated in successful MLM investment strategies with Mr. Brend." Dkt. 129 at 6. He grounded the proffer in Second Circuit law permitting good-acts evidence where the government portrays continuous misconduct. Dkt. 129 at 5-6 (citing *United States v. Damti*, 109 F. App'x 454 (2d Cir. 2004)). The pretrial record also showed his contemporaneous role in Financial Education Services, a lawful multi-level marketing company offering credit-repair and estate-planning services, from which he "never took any money." Dkt. 141 at 2-3.

The district court granted the government both halves. It admitted the government's other-schemes evidence and excluded Mr. Brend's lawful-venture evidence, reasoning that "good acts" character proof was impermissible and that "[t]his is not a case where the government is alleging ceaseless bad acts." Brend C.A. App'x 168; Order, Dkt. 144 (Feb. 28, 2024). The court added that countervailing good-acts evidence answers only what the government alleges, and "[t]his is not what the government is alleging here or what will be presented." Brend C.A. App'x 169 (as quoted in Brend C.A. Reply Br. 7).

C. The government's use of the asymmetry at trial.

The government used its side of the ruling exactly as promised. It introduced evidence that Mr. Brend promoted several other fraudulent cryptocurrency schemes to the same victims, Trial Tr. 1188-95 (cited at App. A at 4), and argued that the sequence itself proved knowledge: "while participating in a single scheme could arguably be a mistake, promoting five in a row was not." Gov't C.A. Br. 38 (quoted in Brend C.A. Reply Br. 6). That syllogism was available to the government only because the jury never learned the rest of the series. As Mr. Brend argued below, if promoting five schemes in a row proves knowledge, then participation in ten ventures, half of them lawful, disproves the premise. Brend C.A. Reply Br. 6. The jury convicted on March 14, 2024. S.D.N.Y. Minute Entry, Mar. 14, 2024.

The district court denied Mr. Brend's post-trial motions under Rules 29 and 33, App. D, and sentenced Mr. Brend, a baptized Jehovah's Witness and the father of a minor child, to 120 months' imprisonment, three years of supervised release, $789,218.94 in restitution, a $195,305 forfeiture money judgment, and a $40,000 fine. App. C.

D. The appeal, the intervening reversal in Cardenas, and the one-sentence affirmance.

On appeal, Mr. Brend argued that the paired rulings, admitting the government's other-acts evidence on intent while excluding his own, were error. Five weeks before oral argument, the Second Circuit decided *United States v. Cardenas*, No. 24-2734 (2d Cir. Feb. 18, 2026), reversing a conviction out of the same district because the trial court had excluded other-acts evidence offered to show the defendant's state of mind on the element of intent, and holding the error was not harmless where intent was the central contested issue. Mr. Brend's counsel promptly brought *Cardenas* to the panel's attention by letter under Federal Rule of Appellate Procedure 28(j). C.A. Dkt. 99 (Mar. 19, 2026).

The panel affirmed by unpublished summary order. App. A. It acknowledged the governing principle, quoting the published version of *Cardenas* itself: evidence of prior good acts may be admitted where it "bears directly on [the defendant's] state of mind," rather than his character. App. A at 6 (quoting *United States v. Roldan*, 167 F.4th 569, 579 (2d Cir. 2026)). It then resolved the issue against Mr. Brend in a single sentence: "On appeal, Brend does not explain what evidence he would have admitted, nor why it would have been relevant." App. A at 6. That sentence is the entire ruling. The court denied panel rehearing and rehearing en banc on July 1, 2026. App. B.

REASONS FOR GRANTING THE PETITION

I. The courts of appeals are divided over the standard governing a defendant's other-acts evidence.

Rule 404(b) bars other-acts evidence offered to prove character and conduct in conformity, but permits it "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). This Court has recognized that such evidence "may be critical to the establishment of the truth as to a disputed issue." See *Huddleston v. United States*, 485 U.S. 681, 685 (1988). What this Court has never resolved, and what the circuits dispute, is whether the rule operates identically when the defendant, rather than the government, is the proponent.

A. Six circuits relax the standard when the defendant offers the evidence.

The Second Circuit announced the defense-favorable rule four decades ago: "we believe the standard of admissibility when a criminal defendant offers similar acts evidence as a shield need not be as restrictive as when a prosecutor uses such evidence as a sword." *United*

States v. Aboumoussallem, 726 F.2d 906, 911 (2d Cir. 1984). The reason is structural: the dangers Rule 404(b) guards against, chiefly the risk that a jury will convict a defendant for who he is rather than what he did, simply are not present when the defendant is the proponent.

The Third Circuit agrees, and gave the doctrine its name. In *United States v. Stevens*, 935 F.2d 1380 (3d Cir. 1991), the court held that "a lower standard of similarity should govern 'reverse 404(b)' evidence because prejudice to the defendant is not a factor," *id.* at 1404, and that "a defendant may introduce 'reverse 404(b)' evidence so long as its probative value under Rule 401 is not substantially outweighed by Rule 403 considerations," *id.* at 1405. The Tenth Circuit adopted *Stevens* in *United States v. Montelongo*, 420 F.3d 1169, 1174 (10th Cir. 2005), reversing where a district court excluded defense-proffered other-acts evidence. The Fifth Circuit reversed a conviction on the same logic half a century ago, holding that a defendant may prove "a systematic campaign of threats and intimidation against other persons" to "show lack of criminal intent." *United States v. McClure*, 546 F.2d 670, 672-73 (5th Cir. 1977). The Seventh Circuit reasons that the dangers animating Rule 404(b) are at their lowest ebb when the defendant, not the government, offers the proof, see *United States v. Seals*, 419 F.3d 600, 606-07 (7th Cir. 2005), and has held that "it is improper to prevent a party from countering possibly false testimony favorable to his opponent even if that testimony should not have been admitted." *United States v. Santos*, 201 F.3d 953, 962 (7th Cir. 2000). The Eleventh Circuit reversed the exclusion of defense other-acts evidence in *United States v. Cohen*, 888 F.2d 770, 776 (11th Cir. 1989).

B. Other circuits apply Rule 404(b) with identical force regardless of the proponent.

The Ninth Circuit has expressly rejected the shield-and-sword distinction where the evidence carries a propensity inference, reasoning that Rule 404(b) by its terms governs the acts of "a person," not merely the accused, and declining to follow *Aboumoussallem*'s more lenient formulation. *United States v. McCourt*, 925 F.2d 1229, 1232-34 & n.8 (9th Cir. 1991). The Sixth Circuit likewise applies the same Rule 404(b) framework to defense-proffered other-acts evidence. *United States v. Lucas*, 357 F.3d 599, 605-06 (6th Cir. 2004). And the Third Circuit itself has policed the line from the other direction, clarifying that *Stevens* affords a defendant "more leeway" only for non-propensity uses; the propensity bar "applies regardless of by whom, and against whom, it is offered." *United States v. Williams*, 458 F.3d 312, 316-17 (3d Cir. 2006).

The result is that identical defense proffers are admitted in Philadelphia and Denver, excluded in San Francisco and Cincinnati, and, as this case shows, treated unpredictably in New York. Whether a federal defendant may answer the government's other-acts case with his own should not depend on geography.

C. The Second Circuit is now divided against itself.

This case supplies the starkest illustration of the disarray, because it comes from the circuit that pioneered the defense-favorable rule. On February 18, 2026, the Second Circuit reversed a conviction and remanded because the trial court had excluded other-acts evidence that corroborated the defendant's account of his state of mind on the element of intent, holding the exclusion was legal error and not harmless where intent was the central contested issue. *United States v. Cardenas*, No. 24-2734, 167 F.4th 569 (2d Cir. 2026). Five weeks later, the panel below acknowledged that very rule, quoting *Cardenas*'s published holding that good-acts evidence is admissible where it "bears directly on [the defendant's] state of mind," App. A at 6 (quoting 167 F.4th at 579), and affirmed the exclusion of Mr. Brend's state-of-mind evidence anyway, in one sentence, in a non-precedential order.

Meanwhile the same circuit's published cases hold that "[a] defendant may not seek to establish his innocence . . . through proof of the absence of criminal acts on specific occasions," because such "'good acts' evidence is only relevant if we assume that a defendant acted in conformity with those prior good acts," *United States v. Dawkins*, 999 F.3d 767, 792 (2d Cir. 2021) (quoting *United States v. Scarpa*, 897 F.2d 63, 70 (2d Cir. 1990)), even as *Aboumoussallem* promises defendants a less restrictive standard and *Cardenas* reverses convictions for exclusions like this one. Defendants in the nation's largest fraud docket cannot know, until the panel is drawn, which line governs. Only this Court can restore uniformity.

II. The decision below is wrong.

A. The Constitution forbids arbitrary, one-sided exclusion of defense evidence.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes*, 547 U.S. at 324 (quoting *Crane*, 476 U.S. at 690, in turn quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). Evidentiary rules may "bow to accommodate other legitimate interests in the criminal trial process," *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973), but they abridge the constitutional guarantee when they "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Holmes*, 547 U.S. at 324-25 (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998)).

Holmes teaches what "arbitrary" means. South Carolina excluded third-party-guilt evidence whenever the prosecution's forensic case was strong, and this Court struck the rule down because "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." 547 U.S. at 331. A rule that measures admissibility by which party is offering the proof, rather than by the proof's probative force on the disputed element, commits the same sin. Here, other-acts evidence on the element of intent was deemed "plainly admissible" when the government offered it, App. A at 5, and categorically improper "good acts" character evidence when Mr. Brend offered its mirror image. The category did not change. Only the proponent did.

The due process dimension is equally settled. "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991); see *Andrew v. White*, 604 U.S. ___ (2025) (per curiam) (reaffirming that this principle is clearly established). A trial in which the jury hears a curated series of the defendant's failed ventures, and is forbidden to hear the lawful ones interleaved among them, is prejudicial in exactly that structural sense: the prejudice flows not from any single exhibit but from the court-ordered incompleteness of the picture.

B. The asymmetry was outcome-determinative on the only contested element.

Intent was not one issue among many; it was the only issue. App. A at 3 n.1. The government's summation logic depended entirely on an unbroken series: "while participating in a single scheme could arguably be a mistake, promoting five in a row was not." Gov't C.A. Br. 38 (quoted in Brend C.A. Reply Br. 6). That inference has force only if the series was in fact unbroken. Evidence that Mr. Brend simultaneously worked in lawful multi-level marketing ventures would have shattered the premise, showing a man drawn to a business model, not to fraud, and mistaken about which ventures were which. The exclusion did not trim marginal proof; it deleted the defense.

Nor can the error be dismissed as harmless. *Cardenas* itself holds that excluding state-of-mind evidence is not harmless where intent is the central contested issue. 167 F.4th 569. The government's need to resort to other-acts inference at all confirms that its direct proof of knowledge was contestable; the jury deliberated over a case in which knowledge was, in counsel's words below, the whole trial.

C. The panel's one-sentence rationale cannot sustain the judgment.

The panel gave a single reason for rejecting the claim: "On appeal, Brend does not explain what evidence he would have admitted, nor why it would have been relevant." App. A at 6. The record refutes that rationale twice over. The substance of the excluded evidence was identified below with specificity: the "investments he made in lawful crypto-currency mining operations," Dkt. 129 at 5, and the "successful MLM investment strategies" he shared with "[s]ome of the same individuals who the Government are labelling 'victims,'" Dkt. 129 at 6, alongside his role in Financial Education Services, a lawful venture from which he took no money, Dkt. 141 at 2-3. Its relevance was supplied by the government itself: if "promoting five in a row" proves knowledge, Gov't C.A. Br. 38, then lawful ventures interleaved among the five destroy the inference. The argument was renewed on appeal, Brend C.A. Reply Br. 5-7, and tied to *Cardenas* by letter under Rule 28(j), C.A. Dkt. 99.

Second, even taken on its own terms, a one-sentence forfeiture rationale in a non-precedential order is no answer to a constitutional claim the same court had sustained, in a published opinion, five weeks earlier. When a circuit's published law reverses convictions for excluding intent evidence and its unpublished orders affirm identical exclusions without analysis, review by this Court is the only remaining corrective.

III. This case is an ideal vehicle.

The question arrives cleanly. There is one count, one contested element, and one paired set of rulings admitting the government's other-acts evidence and excluding the defendant's on that element. The issue was pressed at every stage: in limine, Dkt. 129, 141; in post-trial motions, App. D; on appeal, Brend C.A. Br., Point II; by Rule 28(j) letter, C.A. Dkt. 99; and on rehearing, C.A. Dkt. 103. No waiver, harmlessness finding, or alternative holding obstructs the question; the panel's sole stated ground is itself part of what warrants review.

The issue is recurring and important. Multi-level marketing and cryptocurrency prosecutions now fill the federal fraud docket, and in each one the defendant's knowledge is proved, if at all, by inference from his other ventures. Whether the defendant may answer in kind determines the fairness of an entire category of trials. This Court's recent practice confirms its continued vigilance over the constitutional limits on one-sided evidentiary prejudice: in *Andrew v. White*, 604 U.S. ___ (2025) (per curiam), the Court summarily reaffirmed that the Due Process Clause forbids the admission of evidence so unduly prejudicial that it renders a trial fundamentally unfair, and in *Holmes* itself a unanimous Court struck down an evidence rule that silenced the defense side of a contested issue. 547 U.S. at 331. The one-way evidence regime applied to Mr. Brend presents the same structural defect, on a record that isolates it perfectly.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 24th, 2026