No. 18-50635

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

SAMUEL TANEL CRITTENDEN,

Defendant-Appellee.

On Appeal from the United States District Court for the Western District of Texas

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BRIEF OF *AMICUS CURIAE* PROFESSOR JENNIFER L. MASCOTT IN SUPPORT OF DEFENDANT-APPELLEE ON REHEARING *EN BANC*

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Jennifer Mascott is an Assistant Professor of Law at the Antonin Scalia Law School of George Mason University. *Amicus* has an interest in preserving the U.S. Constitution's constraints on federal authority and the proper allocation of power among the three federal branches and the electorate, consistent with her areas of scholarship. *Amicus*'s academic work examines which institutional actors bear responsibility for governmental decisions in accordance with the Constitution's original meaning. This case raises critical questions of how to best preserve the role of jury verdicts within federal criminal trials and who should decide whether a criminal defendant's challenge to his conviction warrants new trial review.

SUMMARY OF THE ARGUMENT

The Court should affirm the district court's order granting a new trial based on a weight of the evidence standard, which is consistent with

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have indicated that they do not oppose the filing of this brief.

the centuries-old understanding of the proper scope of the new trial protection for criminal jury trials, a critical component of American self-government and an important constraint on federal prosecutorial overreach. Rather than disrupting deference to juries, extensive early federal and state case law suggests that ready availability of new trials promotes the jury trial right. *See* Parts I.B.2–3, *infra*. Over centuries rooted in British common law and the Judiciary Act of 1789, federal and state courts have recognized new trials as a safety valve to correct verdicts contrary to the weight of evidence where the evidence is "doubtful" or a verdict "does not satisfy the conscience of the judge." *See, e.g.*, *United States v. Harding*, 26 F. Cas. 131, 137 (C.C.E.D. Pa. 1846) (Grier, J., Circuit Justice); *State v. Hopkins*, 1794 WL 303, at *2 (S.C. Ct. Com. Pl. & Gen. Sess. 1794).

This Court's precedent acknowledges that district courts have wide latitude and discretion to grant second jury trials if a district court judge determines that the "interest of justice" necessitates a new jury trial. *See, e.g.*, Fed. R. Crim. P. 33; *United States v. Herrera*, 559 F.3d 296, 302–03 (5th Cir. 2009). The Court should decide this case consistent with that

standard, which reflects the historical understanding that new trials were available to address verdicts "contrary to evidence" as applied in an unbroken line of practice extending back through the adoption of the Federal Rules of Criminal Procedure in 1944 to the enactment of the Judiciary Act of 1789 to English practice preceding the time of Blackstone. The historical evidence of the proper Rule 33 standard that this brief describes also formed the basis for *amicus*'s recent brief in support a petition for certiorari in the U.S. Supreme Court challenging the U.S. Court of Appeals for the Second Circuit's recent application of a heightened and atextual "patently incredible" standard. *See* Brief of Professor Jennifer L. Mascott as *Amicus Curiae* in support of Petitioners, *Nordlicht, et al. v. United States*, No. 21-1319, May 4, 2022.

The U.S. Constitution is foundationally a process document, establishing a set of finely grained procedural mechanisms for the exercise of limited federal governmental authority. The State ratifying conventions agreed to subordinate State authority to a national government on the understanding that the Constitution procedurally constrained federal action through institutions like the criminal jury

trial, *see* U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury . . . ."). Like its English antecedents, American law relied upon the jury trial as a "grand bulwark" of liberty. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *342 (1768) ("BLACKSTONE"); *see also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1773 (1833) ("STORY") (The jury "was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties, and watched with an unceasing jealousy and solicitude.").

The critical nature of the jury trial meant that its integrity must be preserved. Therefore, British common law that the Judiciary Act of 1789 subsequently incorporated into American law authorized courts to grant new trials to address convictions that were contrary to evidence. This protection was to sustain the viability and integrity of jury trials, and it is now secured by the Federal Rules of Criminal Procedure.

The availability of a second jury trial offered a less intrusive means to correct error than the complete repudiation of a jury verdict through a

judgment of acquittal. Early commentators like Blackstone also noted that adequate recourse to the correction mechanism of a new trial would help to ward off attempts to replace the jury trial with an alternate tribunal less friendly to self-governance. *See, e.g.*, 3 BLACKSTONE at *390–91.

The Judiciary Act of 1789 granted federal judges the authority to order new trials based on longstanding common law principles and standards. *See* Amy C. Barrett*, Procedural Common Law,* 94 Va. L. Rev. 813, 857 n.134 (2008). Those standards permitted new trials for the "administration of justice" where criminal convictions were contrary to evidence. *Compare* 4 BLACKSTONE at *355, *with* Fed. R. Crim. P. 33 ("interest of justice"); *see also* Pet. Writ of Cert. 3–5, *Nordlicht, et al. v. United States*, No. 21-1319, Mar. 29, 2022 (urging adoption of the weight of the evidence standard for Rule 33 as adopted by the Fifth, Seventh, Eighth, and Ninth circuits). Federal and state court decisions ranging from the late 18th century to the 20th century just prior to adoption of the federal criminal rules confirm this historical standard, starting with pre-constitutional British practice and then continuing to the time period

of the First Federal Congress and finally the adoption of the modern federal criminal rules.

The availability of new trials has provided protection over centuries for criminal defendants convicted of a wide range of defenses, including some of the most vulnerable members of society such as free people of color convicted under questionable evidence in pre-Civil War southern and border states. *See infra* Part I.B.3. The Court should affirm the district court's interpretation of the "new trial" standard here, consistent with this Court's precedent affirming broad federal district court discretion to grant a second jury trial where a verdict was against the weight of the evidence under the text of Federal Rule of Criminal Procedure 33. This Court's weight of the evidence standard is consistent with an unbroken line of historical context dating back to the First Congress's enactment of new trial authority in the 1789 Judiciary Act. Rule 33 preserved the availability of new trials in the "interest of justice," reflecting the provision of new trials under British and American practice from the time of Blackstone when new jury trial review was provided for convictions contrary to evidence to further the "administration of justice."

ARGUMENT

The common law tradition reflected in Federal Rule of Criminal Procedure 33 authorized new trials in cases of convictions contrary to evidence in order to preserve the jury trial as a reliable bulwark of liberty. Some lower courts, however, have mistakenly viewed this long-established authority as in tension, if not in conflict, with the jury trial right. This case provides the Court with the opportunity to clarify circuit precedent on the proper, broad scope of district court discretion under the Rule 33 "new trial" standard consistent with the core purposes of the criminal jury trial protection.

A ruling here that is consistent with this Court's longstanding, discretionary weight of the evidence standard would ensure that new jury trials are fully available within the terms of Rule 33 to review convictions short of a judge overriding the jury to issue his own judgment. *Compare* Fed. R. Crim. P. 33 (new trials), *with* Fed. R. Crim. P. 29 (judgment of acquittal ("JOA")). Broad availability of new trials places properly significant emphasis on the role of the criminal jury trial within our

federal system and protects that right from encroachment through application of the Rule 29 judgment of acquittal standard.

I. There Was a Common Law Tradition of Courts Granting New Criminal Trials Where the Verdict Was Contrary to the Evidence.

The common law English tradition recognized that courts could grant new criminal trials in the "interests of justice," including where, in the trial judge's opinion, "the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith." 3 BLACKSTONE at *387. Judges thus had discretion to assess and weigh the evidence presented at trial and to order a new trial when the verdict was "contrary to evidence," rather than to simply direct acquittal, which required a much higher evidentiary threshold. *See* Parts I.A, I.C, *infra*.

At the founding, America's federal and state courts followed this English common law tradition. *See* Part I.B.2–3, *infra*. *Cf. Ramos v. Louisiana*, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring in part) (noting U.S. constitutional analysis's generally heavy reliance on Blackstone and incorporation of significant aspects of British practice); *District of Columbia v. Heller*, 554 U.S. 570, 593–94 (2008) (similar).

Section 17 of the Judiciary Act of 1789 expressly codified the power by declaring that "all the said courts of the United States shall have power to grant new trials … for reasons for which new trials have usually been granted in the courts of law," Judiciary Act of 1789, ch. 20, 1 Stat. 73 § 17, and federal courts granted new trials where the verdict was contrary to the evidence. As part of their inherent powers, state courts routinely ordered new criminal trials—at times in cases with especially vulnerable defendants like free people of color in pre-Civil War southern and border states—where the trial evidence was "doubtful." *See* Part I.B.3, *infra*.

The relevant federal statutory language for granting new trials remained unchanged for over 150 years. *See United States v. Smith*, 331 U.S. 469, 472 n.1 (1947) (quoting 28 U.S.C. § 391 (1940)). When the Federal Rules of Criminal Procedure were promulgated in the 1940s, longstanding practice was codified in what would become Rule 33. *See* Part II, *infra*. There is accordingly a largely unbroken historical link between English judges' common-law power to grant new criminal trials where the verdict was contrary to evidence and federal judges' power to do so today under Rule 33.

A. The English Common Law Provided for New Trials to Review Convictions Contrary to Evidence to Further Justice and Preserve the Important Functions of Criminal Jury Trials.

Blackstone traced to the fourteenth century the king's courts' "exertion of the[] superintendent power[] … in setting aside the verdict of a jury and granting a new trial." 3 BLACKSTONE at *387–88. This power came to be defined by a "necessary for justice" standard. 3 *id.* at *391; *see, e.g., Bright v. Enyon* (1757) 97 Eng. Rep. 365 (KB) (allowing the grant of a new trial "when there is a reasonable doubt, or perhaps a certainty, that justice has not been done"); *The Queen v. The Corporation of Helston* (1795) 88 Eng. Rep. 693, 694 (KB) ("[T]he ground and foundation of granting new trials, when either the Judge or the jury are to blame, is one and the same, viz. doing justice to the party.").

Six causes justified granting a new trial including where "it appears by the judge's report . . . that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith." 3 BLACKSTONE at *387. The discretionary powers of the court to grant a new trial on that ground were frequently extended and "very commonly" available. *See* 3 *id.* at *373–75 (emphasis omitted). The broadest

application of this "contrary to the evidence" rationale appeared in the court of common pleas, where the court rested its decision to grant a new trial entirely on the trial judge's opinion of the facts. *See Smith v. Hancock* (1648) 82 Eng. Rep. 592 (C.P.).

The securing of the integrity of jury trials through new trial review was designed to further "[t]he impartial administration of justice." *See* 3 BLACKSTONE at *379. English courts awarded second trials for errors such as verdicts contrary to evidence "in all cases of moment" where justice had not been done upon the first trial. *See* 3 *id.* at *389.

The common law provision of new trials extending from English practice to American law was grounded in deep respect for the jury trial as critical to self-governance and liberty. *See, e.g.*, 3 *id.* at *379 (identifying the "trial by jury" as "the glory of the English law"). The jury trial's effectiveness in safeguarding liberty nonetheless was contingent on its reliability and effectiveness. As much as jury trials were essential to keep convictions out of the exclusive hands of aristocratic judges, unbridled jury power left entirely up to the "multitude" without review was thought to be "capricious." 3 *id.* at *379–80.

Therefore, the common law protected the jury trial system through the backstop of new trials, which perfected the jury trial right by offering a rehearing without prejudice. *See* 3 *id.* at *373–79, 389–91 (assigning questions of law to judges and questions of fact to juries, subject to new trials in cases of error such as verdicts contrary to evidence). *Cf.* STORY § 1758 (noting that early State law at times relied on "one jury to review another jury's determination," waiting for the agreement of two verdicts before ruling on certain issues). In the United States, Justice Joseph Story echoed Blackstone's sentiment that jury verdicts provide a "double security against the prejudices of judges" who may be partial to the government only if there is a means to guard "against a spirit of violence and vindictiveness on the part of the people" of the jury. *See id.*

Although it may have had its origins in civil cases, the same new trial authority extended to criminal cases. The King's Bench could order a new trial when "contrary to evidence[,] the jury have found the prisoner guilty." 4 BLACKSTONE at *354–55; *see R. v. Smith* (1681) 84 Eng. Rep. 1197 (KB) (granting a new trial after defendant found guilty of perjury "against the direction of the [lower court] judge"); *R. v. Simons* (1751) 96

Eng. Rep. 794 (KB) (granting a new trial when the jury verdict was "contrary to the directions of the Judge in a matter of law"). New jury trials guarded against unjust, overzealous prosecution and were available in cases of conviction but not acquittal. *See* 4 BLACKSTONE at *233; *see also, e.g.*, *R. v. Read* (1661) 83 Eng. Rep. 271 (KB) (observing that new trials could be granted "on good cause" to challenge a conviction but not for the government to contest acquittal).

The case here arises in the very context for which new trial motions were originally intended—protection from potential over-conviction contrary to the weight of evidence. *See* Appellee's En Banc Brief at 4–5 (discussing the district court's grant of a new trial to review conviction). The Rule 33 language of "justice" parallels the "administration of justice" purposes of the Blackstone-era new trial motions. *Compare* Fed. R. Crim. P. 33, *with* 3 BLACKSTONE at *379. Rule 33 motions consequently should be tied to a weight-of-the-evidence standard analogous to the contrary-to-the-evidence standard of the common law.

B. Congress Adopted the English Common Law New Trial Standard in the Judiciary Act of 1789.

1. Congressional Authorization of New Trials for Convictions Contrary to Evidence Reflected the Constitution's Adoption of the British Common Law Commitment to the Criminal Jury Trial as Critical for Self-Governance.

The common law jury and new trial practice present at the time of Blackstone heavily influenced the American system. Similar to their English predecessors, Founding-era Americans generally strongly favored jury trials, viewing them as a critical component of self-governance. *See* AKHIL REED AMAR, THE BILL OF RIGHTS 83–84 (1998) (noting, for example, that all state constitutions drafted from 1776 through 1787 uniformly mandated criminal jury trials). *See also* A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 282–83 (Alfred A. Knopf ed., 1951) ("The system of the jury, as it is understood in America, appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage."); STORY § 1762 (the criminal jury trial "is conceded by all to be essential to political and civil liberty").

Article III, section 2 of the Constitution expressly required jury trials in federal criminal cases. The Bill of Rights further secured the grand jury and petit juries for the accused. *See* U.S. CONST. amends. v–

vi. The Seventh Amendment expressly provided for civil jury trials. *See id.* amend. vii.

Neither provision expressly addressed the trial court's rule in supervising the jury and the authority to grant new trials. But the First Congress provided that protection. The Constitution assigned Congress the power to create and regulate inferior tribunals including the power to craft federal rules of procedure. *See id.* art. I, § 8, cl. 9 (inferior tribunals); *id.* art. I § 8, cl. 18 (Necessary and Proper Clause); *id.* art. III, § 1; *see also Hanna v. Plumer*, 380 U.S. 460, 472 (1964); Barrett, *Procedural Common Law*, 94 Va. L. Rev. at 839–40 & n.77 (discussing congressional authority over federal court procedural rules).

In 1789, the same week that it considered the jury trial features of the Bill of Rights, Congress authorized courts to grant new trials in all "cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law." Judiciary Act of 1789, § 17; *see also* AMAR, THE BILL OF RIGHTS at 89, 96–97 (highlighting the jury trial's prominence in the Bill of Rights). Thus, right from the

start, the judge's power to order a new trial was part and parcel of the institution of the federal jury trial.

Also, right from the start of federal practice, the discretion to order new trials incorporated the common law power to weigh the trial evidence. The Judiciary Act of 1789 contained two sections outlining the broad contours of procedural new trial requirements. In addition to section 17's authorization of new trials for all reasons for which courts of law usually granted them, section 18 gave trial judges the discretion to decline to issue certificates permitting new trial petitions in civil cases. *See* Judiciary Act of 1789, 1 Stat. 73, 83, §§ 17-18 (requiring that a petition for a new trial be accompanied by "a certificate thereon from either of the judges of [the deciding court], that he allows the same to be filed, *which certificate he may make or refuse at his discretion*").

As then-Professor Barrett explained, the open-ended text of Section 17 was designed to incorporate the pre-existing common law. *See* Amy C. Barrett*, Procedural Common Law,* 94 Va. L. Rev. at 857 n.134. In exercising this power, federal courts applied the same "interest of justice" standard that had come to define the English common law. Early 19th-

century analysis was consistent with this view. Justice Story had observed that jury factfinding could be reexamined only according to the rules and modes of the common law. *See* STORY § 1764. The Supreme Court in 1807 observed that trial by jury generally is fleshed out by reference to the common law. *See Ex Parte Bollman & Ex Parte Swartwout*, 8 U.S. (4 Cranch) 75, 80 (1807).

2. Early Federal and State Opinions Demonstrated that the American New Trial Standard Reflected the Interest of Justice Standard, Permitting New Trials Where Verdicts Were Contrary to Evidence.

Federal cases specifically applying the new trial standard similarly suggest the understanding that the Judiciary Act's new trial provision embodied an interest-of-justice standard. For example, while riding circuit in 1799, Justice James Iredell granted a new trial in a criminal case for treason. Although the error in that case involved a question of law, Justice Iredell observed that a new trial was warranted wherever "injustice" otherwise would result. *United States v. Fries*, 3 U.S. (Dall.) 515, 518 (C.C.D. Pa. 1799). Judge Richard Peters disagreed with Justice Iredell's view of the evidence but nonetheless "acquiesced" in the grant of a new trial because "the interests of public justice, and the influence of

public example, would not be impaired by the delay of a new trial." *Id.* at 519.

In the mid-19th century, Justice Robert Grier, riding circuit, held that a new criminal trial could be granted "if the principles of accustomed and essential justice invite [the] action." *Harding*, 26 F. Cas. at 137 (Grier, J., Circuit Justice). In ordering a new trial in a murder case, he explained, "The defendant, before sentence can be pronounced on him, has a right to the judicial determination of his guilt by the court, as well as by the jury. If the verdict does not satisfy the conscience of the judge, the prisoner is entitled to a new trial. … The judge, himself, at the very latest moment, may, sua sponte, award a new trial" and there was no record of case law within the circuit "in which a new trial ha[d] been refused for the want of authority in the court to grant it." *Id.* at 136–37.[2]

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[2] Decisions by the U.S. Supreme Court confirm that the 19th-century power to grant a new trial was within the discretion of the trial judge. In multiple 19th-century opinions involving civil jury trials, the Supreme Court refused to issue a writ of error to address a trial court's grant a new trial on the ground that such a decision was within trial judge's discretion. *See, e.g.*, *Crumpton v. United States*, 138 U.S. 361, 363 (1891) (emphasizing that the trial judge's decision whether to grant a new trial motion was a "matter of discretion" and collecting cases that well-settled this principle); *Freeborn v. Smith*, 69 U.S. 160, 176 (1864) ("[O]ur decision

State courts also routinely granted new trials where the verdict was contrary to the evidence. *Cf. Smith v. Times Pub. Co.*, 178 Pa. 481, 509 (1897) (Williams, J., concurring) (describing "the common law rule in 1790" that a "verdict [could be] set aside either by the trial judge" or an appellate court).[3] For example, in 1794 a South Carolina state court granted a new criminal trial in a case involving forgery because "[a]t all events, [the disputed evidence] was a doubtful point; in which case, it was the duty of the Court to lean on the merciful side, and give the prisoner another chance for a fair trial." *Hopkins*, 1794 WL 303, at *2.

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has always been, that the granting or refusing a new trial is a matter of discretion with the court below . . . ."); *see also* Amy C. Barrett, *The Supervisory Power of the Supreme Court,* 106 Colum. L. Rev. 324, 382 n.227 (2006) (observing that the "decision whether to grant new trial [wa]s within [the] discretion of [the] inferior [federal] court").

[3] Justice Williams's opinion, which "traces the history of the exercise of [the new-trial power]," has long been viewed as an influential statement of the broad power to order new trials. *E.g., Aetna Cas. & Sur. Co. v. Yeatts*, 122 F.2d 350, 353 (4th Cir. 1941) (citing both English and early American cases for the proposition that the power to grant a new trial in civil cases "is not in derogation of the right of trial by jury but is one of the historic safeguards of that right") (overruled on other grounds in *Gasperini v. Center for Humanities*, 518 U.S. 415, 433 (1996), which nonetheless cited *Aetna*'s new trial description to support the proposition that the Fed. R. Civ. P. 59(a) "authority is large").

In 1817, another South Carolina court granted a new trial after evaluating whether the "verdict was against the weight of evidence." *State v. Wood*, 1817 WL 584, at *1 (S.C. Const. App. 1817). The judge observed that "in cases of conviction … it will be sometimes the duty of the court to give the prisoner the advantage of another trial." *Id.* at *11 (reasoning that "the preponderance of testimony, being, in my opinion, greatly against the conviction, and the judge who tried the case, and enjoyed nearly all the advantages of the jury, being also of that opinion, I am of opinion a new trial ought to be granted").

A number of other state courts during that same era ordered new trials in civil and criminal cases on the ground that the weight of the evidence was decidedly against the verdict. The cases involved offenses ranging from intent to steal to forcible entry to grand larceny. *See, e.g., State v. Bird*, 1 Mo. 585, 586 (1825) ("remand[ing] for a new trial" "because the court thinks the weight of evidence is greatly in favor of the plaintiff," who had been convicted of "marking hogs, with intent to steal"); *Bird v. Bird*, 2 Root 411, 413 (Conn. 1796) (every court authorized to provide a jury trial can set aside the verdict "for just cause"). *Cf.*

Inhabitants of Durham v. Inhabitants of Lewiston, 4 Me. 140, 142 (1826) (describing counsel's argument in a civil case that the court had "inherent power . . . to grant new trials at common law"). *See also* Barrett, *Procedural Common Law*, 94 Va. L. Rev. at 869 n.169 (collecting and describing these cases).

3. The Early Case Law Granting New Trials Reveals this Category of Review Was Particularly Critical for Vulnerable Defendants, Such As Defendants of Color in Pre-Civil War Southern and Border States.

On several significant occasions, 19th-century state courts granted new trials in cases involving particularly vulnerable defendants who had been convicted for high-profile crimes. For example, in *Ball v. Commonwealth*, the trial judge believed he could not grant a new trial for the defendant, "a free woman of colour" convicted "for the murder of a white man." 35 Va. 726, 726 (Va. Gen. Ct. 1837). The appellate court reversed, holding that new trials "have been often granted on the circuits, where the evidence did not warrant the finding." *Id.* at 729.

Then in *Grayson v. Commonwealth*, the General Court of Virginia ordered a new trial for an African-American convicted of murder and

sentenced to death. 47 Va. 712 (Va. Gen. Ct. 1849). The court held that "[w]here the evidence is contradictory, and the verdict is against the weight of evidence, a new trial may be granted by the Court which presides at the trial." *Id.* at 724. The court noted that motions for new trials are subject to the same rules in both criminal and civil cases. Three grounds were listed for the grant of new trials under state law-legal error, a verdict that "is contrary to the evidence," or a verdict that is "without evidence." *Id.* at 723.

In *Jerry v. State*, 1 Blackf. 395 (Ind. 1825), the Supreme Court of Indiana granted a new trial for "Jerry, a man of color," who had been sentenced to death for murder. *Id.* at 396. The prisoner had moved "for a new trial, on the ground that the verdict was contrary to evidence," which the trial court had overruled. *See id.* In this particular case, the court had given "every fair inference in favor of the verdict and judgment" and had found that "strong doubts must remain whether the testimony supports the verdict," justifying a new verdict "in a case of so much doubt." *Id.* at 398.

Both federal and state courts therefore applied the discretionary English common law standard for ordering a new criminal trial where the evidence conflicted with the verdict. And both federal and state courts recognized that the availability of new trials constituted a critical jury trial protection for all defendants.

C. Federal Case Law Preceding the Adoption of the Federal Rules of Criminal Procedure Identified the Power to Grant a New Trial as Significantly More Discretionary than the Power to Direct Verdicts.

Early federal practice further confirms that even preceding the promulgation of the JOA and new trial standards in Federal Rules of Criminal Procedure 29 and 33, courts applied distinct standards to assess a judge's power to grant a new trial versus the power to issue a directed verdict. The new trial standard was significantly more discretionary than the directed verdict requirement that facts stand against the verdict as a matter of law assessed by the judge. *See, e.g.*, *United States v. Fullerton*, 25 F. Cas. 1225, 1226 (C.C.S.D.N.Y. 1870) (new trial warranted where a "verdict was against the evidence" but acquittal may be directed only if "a verdict of guilty would not be warranted by the

evidence"). *See also Sparf v. United States*, 156 U.S. 51, 100 (1895) (overruled on other grounds) (collecting cases and noting that standards in civil cases generally also apply in criminal cases).

Although courts used varying language, the new trial standard authorized judges to weigh the evidence in deciding whether the verdict was in the "interest of justice." As noted above, Blackstone listed a verdict "contrary to evidence" as a ground for a new trial, 4 BLACKSTONE at *354–55, and federal and state courts routinely granted new trials where the verdict was based on "doubtful" evidence or did "not satisfy the conscience of the judge," *see* Part II.B–D, *supra*. The availability of granting a new trial, with a lower standard for doing so, avoids needless intrusion on the right to trial by jury. *See Sparf*, 156 U.S. at 99 (noting that the alternate form of jury trial review—a directed verdict—"impair[s] the constitutional right of trial by jury"). Unlike a directed verdict, which takes the matter completely out of the hands of the jury and thus was disfavored, granting a new trial simply puts the matter in the hands of a different jury. The lower discretionary, contrary to

evidence standard for granting a new trial is consistent with the significantly less intrusive nature of that remedy.

II. The Federal Rules of Criminal Procedure Codified Historic Practice, Incorporating the Contrary to Evidence Standard of the 1789 Judiciary Act and British Common Law.

The language of section 17 of the Judiciary Act of 1789 continued materially unchanged for over 150 years. *See, e.g.*, 28 U.S.C. § 391 (1940). But in the early 1940s, to address a complex web of federal criminal procedural statutes and rules, the United States Supreme Court Advisory Committee on Rules of Criminal Procedure developed the uniform Federal Rules of Criminal Procedure. *See* Lester B. Orfield, *The Federal Rules of Criminal Procedure*, 33 Cal. L. Rev. 543, 543 (1945) (member of the U.S. Supreme Court Advisory Committee on Rules of Criminal Procedure).

The first draft of the Rules required that "existing grounds for new trial be continued." Lester B. Orfield, *New Trials in Federal Criminal Cases*, 2 Vill. L. Rev. 293, 293–94 (1957). Every subsequent draft included language providing that a "new trial might be granted 'whenever required in the interests of justice.'" *Id.* at 294–304.

The "interest of justice" standard tracked the common law terminology. And 1943 drafting notes cited several cases illustrating various grounds justifying a new trial including where, after "a careful consideration of th[e] record," the court is "not satisfied as to the guilt of the defendants." FED. R. CRIM. P., PRELIMINARY DRAFT: WITH NOTES AND FORMS, at 135–37 (1943) (discussing *Edwards v. United States*, 7 F.2d 357, 362 (8th Cir. 1925)). Cases following that standard were still common in the years leading up to issuance of the Rules.

More, the final Committee Notes explained that Rule 33 "substantially continues existing practice. FED. R. CRIM. P. 33: NOTES OF ADVISORY COMMITTEE ON RULES–1944. That practice had enabled courts to order new trials for verdicts against the weight of the evidence. *See also, e.g., United States v. Robinson*, 71 F. Supp. 9, 11 (D.D.C. 1947) (collecting authorities). Federal district court judges evaluating new trial motions had even reached the conclusion that they had a "duty to grant a new trial" unless they were "satisfied beyond a reasonable doubt that the verdict [was] justified under the evidence." *United States v. Kaadt*, 31 F. Supp. 546, 547 (N.D. Ind. 1940).

* * *

The Federal Rules of Criminal Procedure codified the long practice, dating back to English common law, of allowing courts to weigh the evidence and order a new trial where a verdict is against its weight. Both historically and under the Rules, that power is distinct from the courts' authority to direct a verdict of acquittal, which requires a stronger showing and is less frequently satisfied.

III. The Court Should Affirm the District Court's Reliance on a Discretionary Weight of the Evidence Standard Consistent with Fifth Circuit Precedent.

Despite the relatively longstanding and consistent framework for granting new criminal trials, recent judicial opinions have demonstrated uncertainty in certain federal courts such as the Second Circuit about the proper scope of Rule 33 authority to grant new trials. The Second Circuit's application of a "patently incredible" standard is contrary to extensive historical practice and the textual underpinnings of federal authority to preserve the integrity of jury determinations through the granting of new trials. The Eleventh Circuit, like the Second Circuit, applies an improperly crabbed view of the scope of the new trial

authority, in contrast to the Seventh, Eighth, and Ninth Circuits. Courts in the Third, Sixth, and Tenth circuits have applied internally inconsistent standards. *See* Pet. Writ of Cert. at 15, *Nordlicht, et al. v. United States,* No. 21-1319, Mar. 29, 2022.

This Court's precedent is consistent with the Seventh, Eighth, and Ninth Circuit's application of a weight of the evidence standard and the historical understanding of the district court judge as a thirteenth juror. The Court here should decline to embrace the Government's position that this Court should apply a heightened, atextual Rule 33 standard analogous to the Second' Circuit's patently incredible standard. The grant of a second jury trial where verdicts are contrary to the evidence preserves the viability of federal criminal jury trials and wards off encroachment on new trials via the improper conflation of Rule 29 and Rule 33 standards.

The criminal jury trial right has steadily diminished in prominence and application since its ratification. *See, e.g.*, STORY § 1763 (noting that the trial by jury is "justly dear to the American people" and every encroachment of it is "watched with great jealousy"); AMAR, THE BILL OF

RIGHTS at 98. The Court should affirm the district court's Rule 33 interpretation here and decline the Government's invitation to whittle away federal authorization for new trials to rehear jury verdicts against the weight of the evidence. By eviscerating the distinction between the new trial and JOA standards, the standard requested by the Government would remove the incentive for parties to request a new trial, thereby expanding the likelihood that parties will instead pursue the more intrusive remedy of requesting a judgment of acquittal. This Court's continued application of the proper, textually based historical standard for granting new trials would help ensure that the jury trial retains its vaunted role in criminal trials and the American system of self-governance.

CONCLUSION

The Court should affirm the district court's interpretation of a broad, discretionary Rule 33 standard.

Respectfully submitted,

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May 10, 2022

CERTIFICATE OF SERVICE

I certify that on May 10, 2022, I caused the foregoing motion and *amicus* brief to be filed with the Court electronically using the CM/ECF system, which will send a notification to all counsel of record.

/s/ Jennifer L. Mascott
JENNIFER L. MASCOTT

CERTIFICATE OF COMPLIANCE

1. This *amicus* brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(a)(5) because it contains **5,901** words, as counted by Microsoft Word, excluding the parts of the brief excluded by Fed. R. App. P. 32(f).

2. This *amicus* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook 14-point font.

/s/ Jennifer L. Mascott
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Dated: May 10, 2022