No.

IN THE

Supreme Court of the United States

ISAAC SIMEON ACHOBE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant who is retried for an offense may appeal, after final judgment, the erroneous denial of his motion for a judgment of acquittal at the first trial.

PARTIES TO THE PROCEEDINGS BELOW

Otukayode Adeleke Otufale, Chicha Kazembe Combs, André Dion Brown, John David Wiley, III, and Anthony Dwayne Essett were defendants in the district court and appellants in the court of appeals. Their appeals were severed from Mr. Achobe's appeal while the case was pending in the Fifth Circuit. The remaining parties are identified in the caption.

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Isaac Simeon Achobe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals affirming Mr. Achobe's convictions (App., *infra*, 1a-27a) and denying his petition for rehearing (App., *infra*, 38a-40a) are published at 560 F.3d 259 (5th Cir. 2008).

STATEMENT OF JURISDICTION

The court of appeals entered judgment on December 18, 2008, and denied rehearing on February 10, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 28 U.S.C. § 1291 provides in relevant part: "The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * ."

INTRODUCTION

In *Richardson* v. *United States*, 468 U.S. 317 (1984), this Court addressed whether a defendant could seek interlocutory review following a mistrial to prevent his retrial on the ground that it would violate double jeopardy. The defendant there claimed that the evidence at his first trial was insufficient—contrary to the district court's denial of his motion for judgment of acquittal—and argued that his retrial would violate double jeopardy as a result. This Court rejected that challenge, holding that, regardless of whether the district court erred in denying the motion for acquittal, double jeopardy did not bar retrial.

Richardson did not address whether the district court's ruling on the motion for acquittal could be reviewed following final judgment after retrial. The courts of appeals have now divided over that question. The Ninth Circuit has held that *Richardson* does not preclude post-judgment review of a district court's denial of a motion for acquittal at an earlier trial. The Eleventh Circuit has agreed in dicta. And the government itself took the position that review is available in its briefs in *Richardson*. In the decision below, by contrast, the Fifth Circuit expressly rejected the Ninth Circuit's position, joining three other circuits in holding that *Richardson* bars review of such claims. This Court should grant the petition to resolve that express circuit conflict on a recurring and important issue.

STATEMENT

I. BACKGROUND

Petitioner Isaac Simeon Achobe has been a licensed pharmacist since 1983. App., *infra*, 2a n.1. For many years, he operated a pharmacy in Houston, Texas. *Id.* at 2a. Many of the doctors for whom he filled prescriptions were pain-management specialists. *Id.* at 3a. Accordingly, he often dispensed pain medications such as hydrocodone (a painkiller sold under brand names such as Vicodin). See *id.* at 2a, 32a. Because pain medications are susceptible to diversion and abuse, pain-management practices are a recurring source of controversy between the DEA and healthcare professionals. See Noah, *Challenges in the Federal Regulation of Pain Management Technologies*, 31 J.L. Med. & Ethics 55 (2003).

Dr. Callie Herpin operated a pain-management clinic in Houston. App., *infra*, 2a. Although she initially wrote valid prescriptions, her practice evolved into a "script mill" that sold prescriptions to people with no medical need. See *ibid.* Eventually she began selling prescriptions in bulk: Drug dealers would purchase "lists" of 25, 50, or more names that her staff had picked at random out of the phone book, together with corresponding prescriptions. See *id.* at 3a; 4/19 Tr. 105-117. The dealers would then take those lists and prescriptions and present them to pharmacies to fill. See *ibid.*

II. PROCEEDINGS IN DISTRICT COURT

A. The Indictment

After a DEA investigation uncovered Dr. Herpin's operation, the government indicted Dr. Herpin and her staff. App., *infra*, 3a; C.A. R. 57-115. It also charged six pharmacists, including Mr. Achobe, who had filled her prescriptions. See *ibid.* Dr. Herpin pled guilty and cooperated with the prosecution. App., *infra*, 3a.

The government charged the pharmacists with violating the Controlled Substances Act. C.A. R. 85-90. That Act prohibits any person from "knowingly or intentionally * * * distribut[ing] or dispens[ing] * * * a controlled substance" without authorization. 21 U.S.C. § 841(a)(1). Pharmacists are authorized to distribute controlled substances pursuant to a prescription. *Id.* § 829. But regulations state that "[a]n order purporting to be a prescription issued not in the usual course of professional treatment * * * is not a prescription within the meaning and intent of [the Act]" and that "[a] person *knowingly* filling such a purported prescription * * * shall be subject to the [Act's] penalties." 21 C.F.R. § 1306.04(a) (emphasis added). The government contended that the pharmacists had violated the Act by filling Dr. Herpin's prescriptions despite knowing that they were not written for a legitimate medical purpose. See C.A. R. 85-90.[1]

B. The Evidence at the First Trial

The principal issue at trial, therefore, was whether the pharmacists *knew* that Dr. Herpin had written prescriptions for people with no medical need. With respect to the other five pharmacists—but not Mr. Achobe—the government relied on evidence that the defendants had filled prescriptions from Dr. Herpin's "lists." The government argued (with some force) that pharmacists who filled prescriptions for customers who handed them lists with dozens of names of unknown individuals and corresponding prescriptions could not possibly have thought the prescriptions were legitimate. See, *e.g.*, 5/11 Tr. 16. There was substantial evidence that those other five pharmacists had filled prescriptions from Dr. Herpin's

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[1] The government also alleged conspiracy in violation of 21 U.S.C. § 846 and money laundering in violation of 18 U.S.C. § 1956. C.A. R. 71-85, 90-97. Those counts likewise required proof that the pharmacists knew Dr. Herpin's prescriptions were illegitimate. See *ibid.*

lists. Names in the pharmacists' dispensing records matched lists seized from Dr. Herpin's office, often in the same sequential order. See 4/28 Tr. 1652-1659, 1665-1666. Those pharmacies filled massive quantities of Herpin prescriptions—in one instance, 604 in a single day. See Gov't Ex. 93. And the dates were suspicious as well. On May 4, 2003, for example, one pharmacy filled 51 Herpin prescriptions, all dated either February 12 or March 4. 5/11 Tr. 16. As the government pointed out, it was very unlikely that 51 patients would all obtain prescriptions on two particular dates, do nothing for several months (despite having been in enough pain to see a specialist), and then show up at one pharmacy on a single day to have the prescriptions filled. See *ibid.*

By contrast, as the government repeatedly conceded, there was "no evidence" that Mr. Achobe filled prescriptions from Dr. Herpin's lists. App., *infra*, 31a. Mr. Achobe did fill Herpin prescriptions for some *individual* customers—on average, one or two a day over the course of a year. *Id.* at 5a; Gov't Ex. 75. But he did "not fill prescriptions from lists." App., *infra*, 5a.

The government's evidence against Mr. Achobe was thus attenuated at best. Dr. Herpin testified that she discussed pain management as a career option with Mr. Achobe before opening her practice. App., *infra*, 2a-3a. But she said she perceived nothing "odd" about the conversation and "c[ould]n't remember" who brought up the topic. 4/19 Tr. 47-48. She testified that Mr. Achobe warned her not to "write prescriptions for people that didn't exist," "do lists," or write "large quantities." App., *infra*, 7a. She claimed she "assumed" there was an illegal element underlying his advice, but also said she was "surprised" he was being prosecuted because he "[n]ever suggest[ed] [that she] break any laws" and was merely "trying to help a young doctor get started in the business." *Id.* at 6a-7a. "[I]f [she] had followed [his] advice," she

admitted, she "would not be guilty." *Id.* at 7a. Dr. Herpin also noted that, after she began practicing, Mr. Achobe "questioned [her] about the quantities of her prescriptions" and ultimately "refused to fill any more." *Id.* at 6a.

An undercover officer testified that she had gone to Mr. Achobe's pharmacy twice (once with a partner) to fill prescriptions from Dr. Herpin. See 4/22 Tr. 795-800. Mr. Achobe could not dispense one of the medications—promethazine with codeine, an analgesic cough syrup—because he was out. *Ibid.* Although the officer claimed that she and her partner never received that cough syrup, Mr. Achobe's records appeared to indicate that the prescriptions were later filled, a discrepancy the government deemed incriminating. *Id.* at 800; 4/20 Tr. 422-425.

Finally, the government called as an expert a pharmacist who worked at a grocery store. 4/27 Tr. 1404. Showing him several Herpin prescriptions Mr. Achobe had filled, it asked whether a responsible pharmacist would have filled them. 4/26 Tr. 1173-1196. The expert opined that such a pharmacist "might" fill the first, "might" fill a second, but would not fill any more because "a flag should be raised at this point" due to the nature and quantities of the medications. *Id.* at 1192-1196.

By contrast, two other experts—including a former State Board of Pharmacy officer with almost five decades of experience—testified that the medications Mr. Achobe dispensed were legitimate pain treatments and that the amounts he dispensed were reasonable. 5/5 Tr. 2025-2044; 5/9 Tr. 2511-2521; Gov't Ex. 75. Other evidence confirmed Mr. Achobe's good faith. Documents showed that he had "called doctors to confirm many prescriptions" and had "cancelled prescriptions and notified doctors when their patients were seeking prescriptions from multiple providers for the same medical problems." App., *infra*, 6a. He had refused to fill prescriptions for one doctor who did not provide adequate documentation.

Ibid. When the undercover officer tried to convince Mr. Achobe to fill a prescription early, he "refused to bend the rules." *Id.* at 5a. Mr. Achobe "had even aided previous federal and state narcotics investigations—DEA once set up a controlled delivery and arrest in his pharmacy." *Id.* at 6a.[2]

Mr. Achobe admitted to the initial conversation with Dr. Herpin, but explained that he had stressed to her the importance of examining every patient and keeping paperwork up to date because pain specialists were subject to "very high scrutiny" by the DEA. 5/5 Tr. 2230-2236. Mr. Achobe also explained the discrepancy in his records regarding the two undercover officers' bottles of cough syrup, testifying that he had entered the dispensing information in his computer because the officers said they were coming back. *Id.* at 2265-2268; 5/6 Tr. 2332-2335.

C. The Motions for Acquittal and Mistrial

At the close of the government's case, petitioner moved for a judgment of acquittal, claiming that the evidence against him was insufficient. App., *infra*, 28a. The government conceded there was "no evidence" that Mr. Achobe filled from lists, *id.* at 31a, and admitted that, while the other pharmacists had dispensed "large quantities," Mr. Achobe "d[id]n't have the numbers," *id.* at 32a. But it claimed the evidence was sufficient nonetheless. *Id.* at 29a-32a.

The government pointed to "Dr. Herpin's testimony that they had the initial conversation where he brought up the issue of pain management, where he gave her advice as to how she should conduct herself." App., *infra*, 29a-30a. It pointed to the "two days where the prometh-

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[2] The government attempted to impeach Mr. Achobe by pointing out that his records contained some errors, 5/6 Tr. 2411-2413, and that several customers had given him written authorizations allowing one individual to pick up their refills, *id.* at 2420-2423.

azine with codeine * * * was on the prescriptions for the undercovers who went to Mr. Achobe," but his "dispensing records indicate that in fact he dispensed those pints * * * to whoever, we don't know." *Id.* at 31a-32a. And it pointed out that Mr. Achobe was "ordering more hydrocodone than the Texas average"—31,366 tablets versus the state average of 27,323. *Id.* at 32a; 4/21 Tr. 458.

The court denied petitioner's motion without explanation, App., *infra*, 33a, and denied his renewed motion at the close of all evidence, *id.* at 34a-37a. The jury deliberated for four days but was unable to reach a verdict. *Id.* at 3a; 5/17 Tr. 2822, 2827-2828. The court declared a mistrial. App., *infra*, 3a. Counsel's post-trial interviews revealed that the jury had deadlocked 8 to 4 in favor of acquitting Mr. Achobe. See 2/28/06 Tr. 3.

D. The Second Trial

The government then retried the case. App., *infra*, 4a. In some respects, the evidence at the second trial was similar. For example, the government presented the same testimony about the two undercover officers' missing bottles of cough syrup, 8/30 Tr. 142-157, and both sides again presented expert testimony from pharmacists, see 9/7 Tr. 50-98; 9/19 Tr. 187-230.

In other respects, however, the evidence was very different. Most notably, the government announced shortly before trial that it had "had an opportunity to spend more time with Dr. Herpin" and that she was going to "elaborate" on her prior testimony. 8/15 Tr. 8-9. And "elaborate" she did. "At the first trial she was uncertain over who brought up pain management during her first conversation with Achobe, but at the second trial she expressed certainty that it was Achobe." App., *infra*, 8a. While her earlier account of the conversation was largely innocuous, she now testified that Mr. Achobe told her that pain specialists prescribed promethazine with co-

deine because "'[i]t made people high * * * and they put it in soda.'" *Ibid.* "She said that Achobe had told her not to allow payment by insurance, although she had first testified that [someone else] gave her this advice." *Ibid.* "She also testified, as she had not done in the first trial, that some of her early patients said they were sent by Achobe." *Ibid.* Finally, "she recounted a phone conversation, not reported her first time on the stand," in which Mr. Achobe called her a "'rogue doctor'" but then "continued to fill her prescriptions for several months" before finally refusing to fill any more. *Id.* at 8a-9a.

The government also presented new testimony from two cooperating drug dealers who had filled prescriptions at Mr. Achobe's pharmacy. Those witnesses did not claim they had done or said anything explicit to indicate that they had obtained the prescriptions unlawfully. But they testified that they sometimes had one to three companions with them, each with his own individual Herpin prescription. 8/25 Tr. 248-260; 9/12 Tr. 245-264; 9/13 Tr. 5-23. And the companions sometimes signed authorizations allowing the dealers to pick up refills for them. 8/25 Tr. 260-264; 9/12 Tr. 250-252; 9/13 Tr. 6, 23-30.

The government also called an additional expert—a pain specialist with a lengthy resume. 9/12 Tr. 14-37. He testified that one of the medications Mr. Achobe dispensed was not normally prescribed for pain, although he admitted that one article in a medical journal advocated that use. See *id.* at 48-53, 85; 9/16 Tr. 118-122.

The jury found Mr. Achobe guilty on all counts. App., *infra*, 4a. Mr. Achobe again moved for a judgment of acquittal, C.A. R. 3559, which the court denied, *id.* at 4829. The court imposed a sentence of 63 months' imprisonment and monetary penalties. App., *infra*, 4a.

III. THE COURT OF APPEALS' DECISION

Petitioner appealed, arguing (among other things) that the evidence was insufficient to prove beyond a reasonable doubt that he knew Dr. Herpin's prescriptions were illegitimate. See App., *infra*, 5a-14a. Recognizing that the government had significantly strengthened its case on retrial, he did not limit his challenge to the sufficiency of the evidence at the second trial. He also separately challenged the sufficiency of the evidence at the first trial. See *id.* at 9a. Consistent with then-existing Fifth Circuit precedent, he urged that the district court's erroneous denial of his motion for acquittal at the first trial, while not appealable on an interlocutory basis, was reviewable following the entry of final judgment after retrial and independently required reversal. See Def. C.A. Br. 30 (citing *United States* v. *Wilkinson*, 601 F.2d 791, 794 (5th Cir. 1979); *United States* v. *Rey*, 641 F.2d 222, 225-226 & n.8 (5th Cir. 1981); and *United States* v. *Becton*, 632 F.2d 1294, 1296 (5th Cir. 1980)).

The government did not defend on the merits the district court's ruling that the evidence at the first trial was sufficient. Instead, it argued that the ruling was unreviewable and that petitioner could challenge only the sufficiency of the evidence at his second trial. See Gov't C.A. Br. 32-51 & n.25.

The Fifth Circuit agreed with the government. It held that the evidence at the second trial was sufficient, relying largely on Dr. Herpin's testimony. See App., *infra*, 5a-9a. And it refused to address whether the district court had erred in denying the motion for acquittal at the first trial, holding that that ruling was unreviewable. See *id.* at 9a-14a.

In reaching that conclusion, the court of appeals stated that its analysis was "guide[d]" by this Court's decision in *Richardson* v. *United States*, 468 U.S. 317 (1984). App.,

infra, 9a. In *Richardson*, the defendant sought interlocutory review of the district court's denial of his motion to acquit after his first trial ended in a mistrial, claiming that a retrial would violate double jeopardy. 468 U.S. at 318-319. This Court rejected the challenge, concluding that, whether or not the ruling on the motion to acquit was correct, double jeopardy did not bar the retrial. *Id.* at 322-326.

The Fifth Circuit acknowledged that there was a "key difference" between *Richardson* and this case. App., *infra*, 11a. "*Richardson* arose on an interlocutory appeal before the second trial commenced." *Ibid.* By contrast, "[r]ather than seeking to prevent re-trial by interposing his double jeopardy claims, [petitioner] looks to renew his challenge to the district court's ruling on a motion that has only now become appealable, since judgment is final." *Ibid.* The court admitted that "*Richardson* might not foreclose an appeal of the denial of a motion for directed verdict for insufficiency of the evidence at the *first* trial when the *second* trial has concluded and the defendant has an appealable final judgment in hand." *Ibid.* The court also conceded that its pre-*Richardson* precedent permitted such challenges "in a situation directly analogous to the instant case." *Ibid.* (citing *Wilkinson*, 601 F.2d 791).

Nonetheless, the court of appeals held that its precedents were no longer good law because their "reasoning conflicts with *Richardson*." App., *infra*, 12a. "Where a conviction is actually overturned for [in]sufficiency," the court explained, "there can be no second trial." *Ibid.* "But where the conviction is not finally attained, for instance with a hung jury, * * * there is no jeopardy bar, because in such cases, as *Richardson* teaches, jeopardy never ceased." *Ibid.* The First, Third, and Tenth Circuits, the court noted, had also held that *Richardson* bars review in "identical" or "directly analogous" circumstanc-

es. *Id.* at 12a-13a (citing *United States* v. *Coleman*, 862 F.2d 455 (3d Cir. 1988); *United States* v. *Willis*, 102 F.3d 1078 (10th Cir. 1996); and *United States* v. *Julien*, 318 F.3d 316 (1st Cir. 2003)).

The Fifth Circuit acknowledged that the Ninth Circuit had reached the opposite result in *United States* v. *Recio*, 371 F.3d 1093 (9th Cir. 2004), which also arose in a posture "analogous to the instant case." App., *infra*, 13a-14a & n.25. The Ninth Circuit "distinguished between the situation in *Richardson*, in which an interlocutory appeal *on Double Jeopardy Clause grounds* was the basis for the challenge," and cases where a defendant seeks review of the earlier sufficiency-of-the-evidence ruling "after a final judgment ha[s] been rendered." *Id.* at 14a (emphasis added). Interpreting *Richardson* more "narrowly," the Ninth Circuit "decided that it could review the first-trial sufficiency." *Ibid.*

The Fifth Circuit expressly rejected the Ninth Circuit's approach: "We decline to follow the *Recio* court." App., *infra*, 14a. Instead, following the other circuits, the court of appeals held that, "where a first trial has ended in a mistrial due to a hung jury and a second trial leads to a conviction, the sufficiency of the evidence presented at the first trial cannot then be challenged on appeal." *Ibid.* The court accordingly affirmed petitioner's convictions, *id.* at 27a, and later denied rehearing, *id.* at 38a-40a.[3]

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[3] The court reversed two of petitioner's six money-laundering convictions after the government conceded, for unrelated reasons, that the evidence was insufficient to support them. See App., *infra*, 16a-17a. The court vacated the sentences relating to those counts and remanded for resentencing. *Id.* at 27a. The court rejected petitioner's other grounds for appeal, which are not relevant here. See *id.* at 15a-27a.

REASONS FOR GRANTING THE PETITION

This case concerns an express conflict among the courts of appeals over whether a defendant who is retried for an offense may appeal, after final judgment, the erroneous denial of his motion to acquit at the first trial. The Ninth Circuit has expressly held, and the Eleventh Circuit has stated in dicta, that defendants may pursue such claims. The United States has previously endorsed that position as well. By contrast, in the decision below, the Fifth Circuit "decline[d] to follow" the Ninth Circuit's approach and joined three other circuits in holding that such rulings are completely unreviewable. App., *infra*, 12a-14a. Like those other circuits, the Fifth Circuit believed that this Court's decision in *Richardson* v. *United States*, 468 U.S. 317 (1984), forecloses review. The courts of appeals are thus squarely divided.

The issue, moreover, is recurring and important. It has regularly arisen in the past and has the potential to arise in myriad contexts in hundreds of cases each year. The issue is also of substantial importance to defendants—who, under the decision below, lose *any* opportunity for review of their claims. Finally, this case is an ideal vehicle. The government's substantially weaker case at the first trial underscores the importance of preserving a defendant's traditional right to challenge all prejudicial interlocutory rulings on appeal once the trial court enters final judgment.

I. THE COURTS OF APPEALS ARE DIVIDED

In *Richardson*, this Court addressed whether a defendant can seek interlocutory review following a mistrial to prevent his retrial on the ground that it would violate double jeopardy. The district court in that case had denied the defendant's motion for acquittal at his first trial and then declared a mistrial after the jury deadlocked. 468 U.S. at 318-319. When the government sought to re-

try the defendant, he appealed, claiming that his retrial would violate double jeopardy. *Id.* at 319-320. He invoked *Abney* v. *United States*, 431 U.S. 651 (1977), which allows interlocutory appeals under the collateral-order doctrine to prevent double-jeopardy violations. 468 U.S. at 320. This Court concluded that the court of appeals had jurisdiction over the double-jeopardy claim under *Abney*. 468 U.S. at 321-322. But the Court rejected the claim on the merits. *Id.* at 322-326. Because there had been no judgment of acquittal or other event terminating jeopardy at the first trial, the Court explained, retrying the defendant would not subject him to "double" jeopardy, whether or not the trial court's ruling on the motion for acquittal was correct. See *id.* at 325-326.

Richardson makes clear that a retrial following the erroneous denial of a motion to acquit does not violate double jeopardy. But the Court did not address whether a defendant can seek review of the sufficiency ruling in its own right on appeal from the final judgment following retrial. In the wake of *Richardson*, courts have divided over that issue. Some permit such claims, reasoning that *Richardson*'s double-jeopardy holding does not preclude review of a sufficiency ruling following final judgment. Others, like the court below, read *Richardson* more broadly to preclude such review.

A. The Ninth and Eleventh Circuits Permit Post-Judgment Review of a Sufficiency Ruling at an Earlier Trial

1. In *United States* v. *Recio*, 371 F.3d 1093 (9th Cir. 2004), the Ninth Circuit held that *Richardson* does *not* bar post-judgment review of a sufficiency ruling at an earlier trial. The district court there had denied the defendants' motion for acquittal at their first trial but then granted a new trial because of instructional error. *Id.* at 1096-1097. At the second trial, the government present-

ed new evidence, and the jury convicted. *Id.* at 1097. The Ninth Circuit reversed because of unrelated errors at the second trial. *Id.* at 1099-1103. The court then turned to whether the evidence was sufficient to support the convictions. *Id.* at 1103-1107. Absent sufficient evidence, the court would direct a judgment of acquittal, which would preclude another retrial. See *Burks* v. *United States*, 437 U.S. 1, 17-18 (1978).

Because the defendants claimed insufficiency at both their first and second trials, the Ninth Circuit first addressed whether the district court's denial of the motion to acquit at the first trial was reviewable. See 371 F.3d at 1103-1105. The court concluded that it was. The court noted that "we ordinarily allow appellants to challenge interlocutory orders on appeal from a final judgment." *Id.* at 1104. "'A necessary corollary to the final judgment rule is that a party may appeal interlocutory orders after entry of final judgment because those orders merge into that final judgment.'" *Ibid.* Although the denial of the motion for acquittal at the first trial was an "interlocutory order [that] could not have been immediately appealed," that order had since "merged into a final judgment." *Ibid.* As a result, the defendants "should be allowed to appeal the evidentiary sufficiency ruling made after the first trial" in order to seek a judgment of acquittal that would bar another retrial. *Ibid.*

The court considered and rejected the argument that *Richardson* required a different result. 371 F.3d at 1104-1105. "*Richardson* held that a second trial following a hung-jury mistrial does not violate the Double Jeopardy Clause * * * ." *Id.* at 1104. But the Ninth Circuit explained that it was not "consider[ing] appellants' first-trial insufficiency argument in order to decide whether the second trial violated the Double Jeopardy Clause."

Ibid.[4] Rather, "appellants' first-trial insufficiency argument is now properly raised on appeal from a final judgment." *Id.* at 1104-1105. The court accordingly addressed the claim on the merits and found the government's evidence sufficient. *Id.* at 1105-1106.

2. The Eleventh Circuit reached the same result in *United States* v. *Gulledge*, 739 F.2d 582 (11th Cir. 1984). There, the district court denied the defendant's motion for acquittal at a trial that ended in a mistrial. *Id.* at 583-584. The defendant sought interlocutory review, challenging the sufficiency ruling and claiming that his retrial would violate double jeopardy. *Id.* at 584. The court of appeals rejected the double-jeopardy claim in light of *Richardson*. *Id.* at 584-585. But it made clear that the sufficiency ruling could be reviewed after final judgment: "[T]he purported insufficiency of the evidence in the first trial is reviewable by this court only on appeal from a conviction after a second trial * * *." *Id.* at 584. Although that statement was dicta given the posture of the case, the conclusion is consistent with the Ninth Circuit's holding in *Recio*.

B. The United States Has Previously Agreed with the Ninth and Eleventh Circuits' Position

Like the Ninth and Eleventh Circuits, the government has previously taken the position that a sufficiency ruling at a prior trial is reviewable after final judgment following retrial. In its brief to the D.C. Circuit in *Richardson*, the government argued that prior-trial sufficiency rulings should not be immediately appealable *precisely because* post-judgment review was available. "Of course,"

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[4] In a footnote, the court likewise stated that it "need not decide whether [defendants] could also use their first-trial insufficiency argument to challenge their second trial *on double jeopardy grounds*." 371 F.3d at 1104 n.9 (emphasis added). Under *Richardson*, however, it is clear that such a claim would fail. See 468 U.S. at 322-326.

the government explained, "appellant's claim of insufficiency of the evidence at his first trial is not lost [i]f it is not reviewable at this time; in the event he is convicted, he can raise it on appeal from that conviction." U.S. Br. in No. 81-2029, at 14 n.3 (D.C. Cir. Apr. 14, 1982). The court of appeals noted that concession: "[T]he government concedes that Richardson's insufficiency claim will not be lost if it is not reviewed at this time, noting that 'in the event he is convicted, [Richardson] can raise [the insufficiency claim] on appeal from that conviction.'" *United States* v. *Richardson*, 702 F.2d 1079, 1081-1082 (D.C. Cir. 1983).

The government took the same position before this Court in opposing the petition for a writ of certiorari. Barring interlocutory review, the government stressed, would not deny a defendant "substantial and valuable relief," because he could obtain "reversal of any conviction obtained at the retrial on the ground that the evidence at the first trial was legally insufficient." U.S. Br. in Opp. in No. 82-2113, at 7 n.5 (Aug. 1983). The case presented only the "common, if lamentable, situation in which the accused must bear 'the discomfiture and cost of a prosecution' before his claim may properly be 'reconsider[ed] by an appellate tribunal.'" *Id.* at 11. In its brief on the merits, the government acknowledged that it had "conceded in the court of appeals and in [its] Brief in Opposition that any conviction obtained at the retrial could be reversed if the reviewing court found that the evidence at the first trial was legally insufficient"—although at that point it equivocated and noted that the Court did not need to resolve the issue. U.S. Br. in No. 82-2113, at 31-32 n.25 (Dec. 1983) (citation omitted).

C. The First, Third, Fifth, and Tenth Circuits Construe *Richardson* To Foreclose Review

1. In the decision below, by contrast, the Fifth Circuit reached the opposite result. The court recognized that *Recio*—a case it described as procedurally "analogous to the instant case"—held that a court of appeals "could review the first-trial sufficiency" following final judgment. App., *infra*, 13a-14a & n.25. But the Fifth Circuit "decline[d] to follow the *Recio* court," criticizing the Ninth Circuit for adopting what it considered an unduly "narrow[]" interpretation of *Richardson*. *Id.* at 14a.

Unlike the Ninth and Eleventh Circuits, the Fifth Circuit viewed *Richardson*'s double-jeopardy holding as precluding any review of the earlier sufficiency ruling. It invoked "the simple proposition that there must be a termination of the first jeopardy before there can be a second." App., *infra*, 9a. "[W]here [a] conviction is not finally attained, for instance with a hung jury, * * * there is no jeopardy bar, because in such cases, as *Richardson* teaches, jeopardy never ceased." *Id.* at 12a. This double-jeopardy principle, the court held, foreclosed review of not merely a double-jeopardy claim but also the sufficiency ruling itself: "[W]here a first trial has ended in a mistrial due to a hung jury and a second trial leads to a conviction, the sufficiency of the evidence presented at the first trial cannot then be challenged on appeal." *Id.* at 14a. The court did not explain why the reviewability of the sufficiency ruling after final judgment depended on whether the retrial violated double jeopardy.

2. Nonetheless, three other circuits have reached the same result. In *United States* v. *Coleman*, 862 F.2d 455 (3d Cir. 1988), the defendant was convicted on retrial after his first trial ended in a mistrial. *Id.* at 456. He then challenged the sufficiency of the evidence at his first trial on appeal from that final judgment. *Id.* at 460. The Third Circuit rejected the claim. Quoting *Richardson*, it

observed that "'a mistrial following a hung jury is not an event that terminates the original jeopardy'" and that, "'[r]egardless of the sufficiency of the evidence at petitioner's first trial, he has no valid double jeopardy claim to prevent his retrial.'" *Ibid.* (quoting 468 U.S. at 326). From that principle, the court deduced that it was "limited to considering the sufficiency of the evidence at the second trial." *Ibid.*

The Tenth Circuit's decision in *United States* v. *Willis*, 102 F.3d 1078 (10th Cir. 1996), is to the same effect. The district court there similarly denied the defendant's motion to acquit at his first trial, which ended in a mistrial. *Id.* at 1080. The defendant sought review of that ruling following his conviction on retrial. *Ibid.* The court of appeals acknowledged that its pre-*Richardson* precedent permitted such claims, but opined that *Richardson*'s double-jeopardy holding "effectively overruled" that precedent. *Id.* at 1081. Under *Richardson*, the court held, a defendant cannot "resurrect his motion for acquittal at his first trial" on appeal from a final judgment following his retrial. *Ibid.*

The First Circuit agreed in *United States* v. *Julien*, 318 F.3d 316 (1st Cir. 2003). Citing *Willis* and *Coleman*, the court first held that *Richardson* bars any review on double-jeopardy grounds: "Because jeopardy does not terminate when the court declares a valid mistrial based on the inability of the jury to agree, defendant's claim of insufficiency of the evidence at the first trial presents 'no valid double jeopardy claim to prevent his retrial.'" *Id.* at 321 (quoting 468 U.S. at 326). The court then went on to "consider whether there is a due process or non-constitutional claim, separate from the double jeopardy claim, that [the defendant] is entitled to have the sufficiency of the evidence at the first trial determined at some point." *Ibid.* It explained:

> Under *Richardson*, a denial of a motion to dismiss for insufficiency of the evidence is an interlocutory order; it is not appealable after a mistrial and before a second trial except on double jeopardy grounds (grounds which the Supreme Court has rejected on the merits). The defense argument would be that there is a final appealable judgment after a conviction at the second trial, and [the defendant] may then appeal otherwise non-final rulings when he appeals from that judgment of guilt.

Ibid. The court asserted that, "[a]lthough *Richardson* does not expressly foreclose this point, there is language in both Justice Rehnquist's majority opinion and Justice Stevens' dissent which tends to demonstrate that the Supreme Court's majority would be inhospitable to such a claim." *Ibid.* (citing 468 U.S. at 326; *id.* at 334-335 (Stevens, J., dissenting)). The court thus held that a defendant could not claim, even after final judgment, that he was "wrongly denied his motion for acquittal on insufficiency of the evidence at the first trial." *Ibid.*

There is thus an express and well-defined circuit conflict over whether a defendant may seek review of the denial of his motion to acquit at an earlier trial following final judgment. The Ninth Circuit has held, and the Eleventh Circuit has indicated, that such review is available. Other circuits have read *Richardson* to preclude such review. The Fifth Circuit expressly recognized that conflict below, "declin[ing] to follow" the Ninth Circuit's decision. App., *infra*, 14a. And the fact that even the government has taken positions inconsistent with its current stance confirms the confusion over this issue and the pressing need for this Court's review.

II. THE DECISION BELOW IS ERRONEOUS

The decision below is also incorrect. Parties have long been entitled to seek review of interlocutory rulings after

final judgment. Nothing in *Richardson* abrogates that settled rule.

A. Parties Can Obtain Post-Judgment Review of Prejudicial Interlocutory Rulings

Because federal appellate courts' jurisdiction generally extends only to "final decisions," 28 U.S.C. § 1291, parties normally cannot seek immediate review of rulings that do not terminate the litigation. See *Cunningham* v. *Hamilton County*, 527 U.S. 198, 203-204 (1999). The purpose of that final-judgment rule is not to preclude review of interlocutory rulings altogether. Rather, "[t]he purpose is to combine in one review all stages of the proceeding." *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). The rule simply requires parties to "raise all claims of error in a single appeal." *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981).

For that reason, a corollary of the final-judgment rule is that parties normally *can* seek review of prejudicial interlocutory rulings following final judgment. "The prohibition against immediate appeal * * * is offset by the rule that once appeal is taken from a truly final judgment that ends the litigation, earlier rulings generally can be reviewed." 15A C. Wright *et al.*, *Federal Practice and Procedure* § 3905.1, at 249 (2d ed. 1991) (footnote omitted). The "appeal from final judgment opens the record and permits review of all rulings that led up to the judgment." *Id.* at 250-252 & n.3 (collecting cases).[5] Consis-

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[5] See also, *e.g.*, *City of New York* v. *Smokes-Spirits.Com, Inc.*, 541 F.3d 425, 453 (2d Cir. 2008) (appeal from final judgment "'incorporates all previous interlocutory judgments in th[e] case and permits their review'"); *Bastian* v. *Petren Resources Corp.*, 892 F.2d 680, 682 (7th Cir. 1990) (appeal from final judgment "brings up all previous rulings of the district judge adverse to the appellant"); 19 *Moore's Federal Practice* § 205.08[2] (3d ed. 2009) ("An appeal from a final judgment brings up all prior interlocutory orders and rulings * * * .").

tent with that rule, this Court has repeatedly noted the availability of post-judgment review before disallowing immediate review of non-final orders. See, *e.g.*, *Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. 370, 375-376 (1987); *Flanagan* v. *United States*, 465 U.S. 259, 266-269 (1984); *United States* v. *MacDonald*, 435 U.S. 850, 860-861 (1978).[6]

As the Ninth Circuit explained in *Recio*, that rule applies squarely to prior-trial sufficiency rulings. Although an order denying a motion for acquittal is an "interlocutory order [that] c[an]not [be] immediately appealed," defendants "should be allowed to appeal the evidentiary sufficiency ruling made after the first trial" once that order has "merged into a final judgment." 371 F.3d at 1104. "'A necessary corollary to the final judgment rule is that a party may appeal interlocutory orders after entry of final judgment * * * .'" *Ibid.*

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[6] The "general rule" that an appeal from final judgment brings up all prior interlocutory rulings is subject to certain well-defined exceptions. See 15A Wright *et al.*, *supra*, § 3905.1, at 257. For example, a party to a civil case that has gone to trial generally cannot appeal an earlier denial of summary judgment. See *id.* at 257-260. That exception is justified on the ground that a summary-judgment ruling is merely a prediction of whether the evidence at trial will suffice, and "summary judgment procedure is not designed to confer a prize on the party who is correct as a matter of the pretrial record" when the prediction proves wrong. *Id.* at 258. Similarly, a criminal defendant cannot seek review of the mid-trial denial of his motion for acquittal made at the close of the government's case if he thereafter presents evidence in his defense. See *United States* v. *Calderon*, 348 U.S. 160, 164 n.1 (1954). That so-called "waiver rule" is founded on the principle that a defendant should not be allowed to present evidence on his behalf while "insulat[ing] himself from the risk that the evidence will be favorable to the government." *United States* v. *Rhodes*, 631 F.2d 43, 44 (5th Cir. 1980). Those deviations from the general principle are the proverbial exceptions that prove the rule. They rest on their own distinct logic and have no application here.

B. Nothing in *Richardson* Disturbs the Settled Rule That Parties Can Obtain Post-Judgment Review of Interlocutory Rulings

The four courts of appeals that have prohibited post-judgment review of prior-trial sufficiency rulings all concluded that *Richardson* foreclosed such claims. See pp. 18-20, *supra*. But *Richardson* did no such thing. *Richardson* addressed only whether a retrial following the erroneous denial of a motion to acquit would *violate double jeopardy*. The Court's ruling could not be clearer: Retrial would not violate double jeopardy because the mistrial did not terminate jeopardy. 468 U.S. at 325-326. The defendant in that case asserted *only* a double-jeopardy claim, because that was the only sort of claim that could be reviewed on an interlocutory basis under *Abney*. See *Richardson*, 468 U.S. at 320. The Court simply did not address—and had no reason to address—whether the erroneous denial of the motion to acquit could be reviewed in its own right following final judgment, just like any other interlocutory order.

The decision below, like most of the circuit cases on which it relies, simply conflates a challenge to a sufficiency ruling with a double-jeopardy claim. The court below began by declaring that "ultimately this issue [of reviewability] turns on the simple proposition that there must be a termination of the first jeopardy before there can be a second." App., *infra*, 9a. But that is not true. Whether a retrial *violates double jeopardy* turns on that proposition, but that does not resolve the reviewability of the sufficiency ruling. Petitioner did not claim below that his retrial violated double jeopardy; he specifically disavowed that argument. See C.A. Reply Br. 4 ("Mr. Achobe does not contend that his retrial violated double jeopardy. He contends only that the district court erred by denying his motion to acquit at the first trial."). The Fifth Circuit simply ignored the distinction between

those two types of claims. The Third and Tenth Circuits' analyses are flawed for the same reason. See *Willis*, 102 F.3d at 1080-1081; *Coleman*, 862 F.2d at 460.

The First Circuit at least recognized that *Richardson*'s double-jeopardy holding does not foreclose review under general final-judgment principles. See *Julien*, 318 F.3d at 321. But the court's reasons for denying review are inscrutable. The court asserted that "there is language in both Justice Rehnquist's majority opinion and Justice Stevens' dissent which tends to demonstrate that the Supreme Court's majority would be inhospitable to such a claim." *Ibid.* (citing 468 U.S. at 326; *id.* at 334-335 (Stevens, J., dissenting)). But nothing on the cited pages remotely addresses this issue.

The Ninth Circuit, by contrast, explained why *Richardson* has no bearing here. "*Richardson* held that a second trial following a hung-jury mistrial does not violate the Double Jeopardy Clause * * * ." *Recio*, 371 F.3d at 1104. But a court reviewing a first-trial sufficiency ruling after final judgment is not doing so "in order to decide whether the second trial violated the Double Jeopardy Clause." *Ibid.* Rather, the "first-trial insufficiency argument is * * * properly raised on appeal from a final judgment," just like any other prejudicial interlocutory ruling. *Id.* at 1104-1105. The court is simply determining the correctness of that ruling in its own right—just as it would with any other interlocutory order.[7]

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[7] That a retrial following the erroneous denial of a motion to acquit does not violate double jeopardy does not mean double-jeopardy principles are entirely irrelevant. For example, but for double-jeopardy principles, the government could argue that any error in denying the motion was harmless because, even if the court had granted it, the government could have retried the defendant and obtained the same result. See *United States* v. *Wilkinson*, 601 F.2d 791, 794 (5th Cir. 1979). Double-jeopardy principles foreclose that argument because, even after *Richardson*, it is clear that a district court's *grant*

III. THE ISSUE IS RECURRING AND IMPORTANT

A. The Issue Routinely Arises

1. Time and again, the federal courts have grappled with this issue. Since *Richardson*, six different courts of appeals have addressed whether a defendant can seek review of the denial of his prior-trial sufficiency motion following final judgment on retrial. See pp. 14-20, *supra*. Federal courts repeatedly addressed this issue before *Richardson* as well—and almost uniformly *allowed* post-judgment review.[8]

The issue has also repeatedly arisen in state courts. Some state courts allow post-judgment review of prior-trial sufficiency rulings.[9] Others reject such claims, often

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of a motion to acquit bars retrial. See 468 U.S. at 325 n.5; *Smith* v. *Massachusetts*, 543 U.S. 462, 466-467 (2005).

[8] See, *e.g.*, *Wilkinson*, 601 F.2d at 794 ("[T]he claimed insufficiency of the evidence in the first trial is before us on review of a judgment of conviction after a second trial."); *United States* v. *Bodey*, 607 F.2d 265, 267-268 (9th Cir. 1979) (defendant entitled to reversal "if the evidence at his first trial was insufficient"); *United States* v. *Balano*, 618 F.2d 624, 632 & n.13 (10th Cir. 1979) (first-trial sufficiency ruling "is now clearly appealable" post-judgment), overruled by *Willis*, 102 F.3d at 1081; *United States* v. *Rey*, 641 F.2d 222, 225-226 & n.8 (5th Cir. 1981) ("[T]he claimed insufficiency of the evidence at Rey's first trial is properly decided only on appeal after any conviction in his second trial."); *United States* v. *Becton*, 632 F.2d 1294, 1296 (5th Cir. 1980) ("[P]recisely this issue is subject to review on appeal from a second conviction, should one occur."); see also *United States* v. *Ellis*, 646 F.2d 132, 135-136 (4th Cir. 1981) (Murnaghan, J., concurring); *Richardson*, 702 F.2d at 1081 & n.17. Although the reasoning of some of these cases does not survive *Richardson*, the cases nonetheless show that the issue is recurring.

[9] See *State* v. *McGill*, No. 99CA25, 2000 WL 1803650, at *6-9 (Ohio Ct. App. Dec. 8, 2000); *State* v. *Seravalli*, 455 A.2d 852, 855-856 (Conn. 1983); *People* v. *Tingue*, 91 A.D.2d 166, 167-168 (N.Y. App. Div. 1983); *Rafferty* v. *Owens*, 82 A.D.2d 582, 586 (N.Y. App. Div. 1981). Again, while the reasoning in at least one of the earlier cases does not survive *Richardson*, the cases show the issue is recurring.

expressly relying on *Richardson*.[10] To the extent those courts have misinterpreted *Richardson*, they would benefit from this Court's guidance as well.

2. The issue will continue to recur. Whenever the government retries a defendant, the evidence on retrial is bound to differ somewhat from the evidence at the first trial. And because the prosecution will naturally seek to strengthen its case in the hope of obtaining a better outcome, those differences are likely to involve stronger evidence the second time around. See, *e.g.*, pp. 8-9, *supra*; *Recio*, 371 F.3d at 1097; *Coleman*, 862 F.2d at 460 n.9; *Alvey* v. *Commonwealth*, No. 2004-CA-000199-MR, 2005 WL 1490360, at *6 (Ky. Ct. App. June 24, 2005); *People* v. *Thompson*, 379 N.W.2d 49, 58 n.2 (Mich. 1985) (Brickley, J., dissenting in part). The issue can thus arise in *any* case where the government retries a defendant.

That is a substantial number of cases. Of the approximately 3,000 federal criminal trials each year, more than 130 are retrials following mistrials. See Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts* 257 tbl.D-7, 279 tbl.D-13 (2008). That number has increased sharply over the past five years. See *id.* at 279 tbl.D-13. And mistrial rates in state courts—which hear more than 50,000 criminal trials each year—are even higher. See P. Hannaford-Agor *et al.*, *Are Hung Juries a Problem?* 19-27 (Nat'l Ctr. for State Courts 2002).

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[10] See, *e.g.*, *People* v. *Doyle*, 765 N.E.2d 85, 91 (Ill. App. Ct. 2002); *State* v. *Hogan*, No. M1999-00013-CCA-R3-CD, 2000 WL 641149, at *3 (Tenn. Crim. App. May 19, 2000); *Romero* v. *State*, No. 09-95-143, 1996 WL 239832, at *2 (Tex. App. May 8, 1996); *Gallagher* v. *City of Van Buren*, 786 S.W.2d 837, 838 (Ark. Ct. App. 1990); *State* v. *Schelsky*, 481 N.E.2d 807, 809 (Ill. App. Ct. 1985); *Brandley* v. *State*, 691 S.W.2d 699, 701 (Tex. Crim. App. 1985); *People* v. *Thompson*, 379 N.W.2d 49, 56 (Mich. 1985).

The issue arises outside the mistrial context as well. It arises where a district court grants a defendant's motion for a new trial following a guilty verdict. See *Recio*, 371 F.3d at 1096-1097; *United States* v. *Rey*, 641 F.2d 222, 225-226 (5th Cir. 1981). It arises where a court of appeals reverses a conviction and remands for a new trial, but either the court neglects to address a sufficiency challenge or the grounds for the challenge do not yet exist (for example, because the insufficiency became apparent only after an intervening decision of this Court). Cf. *United States* v. *Miller*, 952 F.2d 866, 871 (5th Cir. 1992); *United States* v. *Porter*, 807 F.2d 21 (1st Cir. 1986); *United States* v. *Sneed*, 705 F.2d 745, 746-747 (5th Cir. 1983). And analogous issues arise in civil cases. See *Basciano* v. *Reinecke*, 313 F.2d 542 (2d Cir. 1963); *McFall* v. *Tooke*, 308 F.2d 617 (6th Cir. 1962). The vast number of cases in which this issue can and does arise weighs strongly in favor of granting the petition.

B. The Question Is Important to Criminal Defendants and the Administration of Justice

The reviewability of prior-trial sufficiency rulings is a matter of great importance to criminal defendants. *Richardson* involved the relatively modest question of *when* defendants could seek review, prohibiting only efforts to obtain immediate review by cloaking a sufficiency challenge in double-jeopardy garb. This case presents the much broader question of whether such rulings are reviewable *at all*. The consequences of the rule applied below and in three other circuits are harsh. Defendants are forever barred from obtaining review—however patently erroneous the district court's ruling may have been. Those circuits foreclose review even though, but for the district court's error, the prosecution would have ended altogether. See *Richardson*, 468 U.S. at 325 n.5. And they do so despite the normal rule that appeals from final judgments bring up all prior orders, see pp. 21-22, *su-*

pra—effectively singling out for disfavored treatment one category of interlocutory orders that are often particularly important to defendants.

Ironically, the decision below leaves defendants who are *not* convicted at their first trial worse off than those who are. If a jury convicts a defendant and the district court erroneously denies his motion to acquit, the court of appeals can correct the error on appeal. But if the jury is merely unable to reach a verdict and there is a retrial, the error is unreviewable. Moreover, even though the holding below does not result in actual double-jeopardy violations, it implicates similar fairness concerns because it gives the government multiple bites at the prosecutorial apple, affording it repeated opportunities to construct a legally sufficient case.

The question presented is also important to the criminal justice system. First-trial sufficiency challenges vindicate important interests of defendants, but they impose burdens—on defense counsel who may have to review an additional trial record to ascertain whether a basis for such a challenge exists, and on the government counsel and courts that must respond to and resolve such challenges. If *Richardson* does indeed bar such claims, courts and counsel in the Ninth and Eleventh Circuits would certainly benefit from knowing that. And in the half-dozen circuits that have not yet weighed in, courts and counsel can only speculate whether they have an obligation to undertake such review. This case thus implicates important interests whichever way the Court rules on the merits.

IV. THIS CASE IS AN EXCELLENT VEHICLE

Finally, this case is an excellent vehicle for resolving the question presented. The court below addressed the issue at length in a published opinion, expressly acknowledging that courts had reached conflicting results in

comparable circumstances. App., *infra*, 9a-14a. And petitioner assiduously preserved his claim at all stages below. See pp. 7-8, 10, *supra*.[11]

Moreover, the dramatic differences between the government's evidence at the two trials make this an ideal case in which to address the question. See pp. 8-9, *supra*. Although the court of appeals found the evidence at the second trial sufficient, see App., *infra*, 5a-9a, the differences in the evidence preclude any suggestion that that ruling dooms petitioner's first-trial challenge as well. The court of appeals did not address the sufficiency of the evidence at the first trial, and the government did not defend the district court's first-trial ruling on appeal, see Gov't C.A. Br. 37-38 n.25, foreclosing any argument on that point here, see *14 Penn Plaza LLC* v. *Pyett*, 129 S. Ct. 1456, 1474 (2009). The case thus could not present the issue more squarely.[12]

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[11] Although the court of appeals reversed two of petitioners' six money-laundering convictions and remanded for adjustment of his sentence, see n.3, *supra*, this case is not interlocutory in any meaningful sense. Any proceedings on remand will not affect Mr. Achobe's *convictions*; the remand relates only to his *sentence*, which is not relevant to the question presented. See App., *infra*, 27a.

[12] If this Court were to grant the petition and reverse, whether the government preserved any response on the merits to the first-trial sufficiency challenge and the proper resolution of that challenge would be issues for the court of appeals to address on remand. Nonetheless, the government's grounds for opposing the motion for acquittal at the first trial are noteworthy for their insubstantiality. See pp. 7-8, *supra*. Mr. Achobe's initial advice to Dr. Herpin about not writing "large quantities" and the like, while not "incompatible with criminal intentions," App., *infra*, 7a, is equally consistent with the defense's position that Mr. Achobe was simply telling Dr. Herpin not to break the law. Evidence that gives "equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence" cannot support a conviction. *United States* v. *Pennington*, 20 F.3d 593, 597 (5th Cir. 1994). The two undercover officers' missing bottles

The substantial differences in the evidence also highlight the unfairness of the rule applied below. Having presented an utterly anemic case that caused the jury to hang 8 to 4 in favor of acquittal, the government got a second chance, allowing it to "spend more time" with its star witness so she could "elaborate" on her testimony, to recruit two drug dealers as witnesses, and to hire a new and more experienced expert. See pp. 8-9, *supra*. The government had that opportunity only because of the fortuity that the district court erroneously denied petitioner's motion to acquit at the first trial. The facts of this case thus make poignantly clear that denying review of such rulings—in the teeth of the settled rule that parties can generally appeal *all* interlocutory rulings after final judgment—would be the height of unfairness.

CONCLUSION

The petition for a writ of certiorari should be granted.

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of cough syrup, whether or not they would support a conviction for unlawfully distributing *those bottles* (a misdemeanor, see 21 U.S.C. § 841(b)(3); 21 C.F.R. § 1308.15(c)), hardly prove Mr. Achobe knew of Dr. Herpin's year-long scheme to sell prescriptions to people with no medical need. Finally, the government's claim that Mr. Achobe must be guilty because he dispensed 15% more hydrocodone than the state average (see p. 8, *supra*) barely warrants response. On that theory, nearly half the pharmacists in Texas would be guilty.

Respectfully submitted.

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