NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID LAGUE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Rule 404(b) prohibits evidence of a defendant's uncharged acts that "might adversely reflect on the actor's character," unless the evidence helps prove intent, motive, or one of the other purposes enumerated in the rule. *Huddleston v. United States*, 485 U.S. 681, 686 (1988). The circuit courts have split over whether aggregate data and statistics about a person's prior conduct are admissible under Rule 404(b) to show unlawful intent, without evidence about the unlawfulness of the underlying incidents contained in the data set.

In this case and similar ones, the particular question was whether a medical professional's practice-wide prescription data are admissible to show an unlawful intent to prescribe without a medical purpose, based simply on a comparison to other doctors' prescription rates, without evidence of the impropriety of the prescriptions. In a different context, the question was whether data from a tax preparer's entire practice are admissible to show an intent to make false statements, based only on the percentage of clients that made the same tax claims as the charged acts, without evidence that the claims were false as to those other clients. And in other cases, the question has been whether data about the number of excessive force complaints against an officer, as compared to other officers, are admissible to show intent to use excessive force, without evidence of whether the complaints were proven true.

The question presented is: Whether data about a defendant's other acts are admissible under Rule 404(b) to show unlawful intent based only on comparisons or statistics, without evidence that those other acts involved an unlawful intent?

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INTRODUCTION

The circuit courts are split on whether data and statistics can be used to prove unlawful intent under Rule 404(b) without evidence about the unlawfulness of the individual acts underlying the data. The Eighth and Tenth Circuits, and two district courts, have taken the view that the government must produce independent evidence that the acts captured in the data were unlawful. The Ninth and Eleventh Circuits have held instead that other-act data are admissible based on a suggestion of illegality from large prescription amounts or top prescription rates compared to other practitioners. In the published decision below, the Ninth Circuit called this split "irreconcilable."

While the instant case arises in the unlawful prescription context, the same data admissibility issue has arisen in other types of cases, from tax fraud to excessive force suits. And the issue will continue to arise, with even greater frequency, because of the explosive growth of electronic data in every facet of life and the resulting ease with which data can be captured and analyzed. A person's prior actions can be reduced to statistical trends and patterns in just about any context. Given the split over when other-act data are admissible for Rule 404(b) purposes, and the breadth of situations to which this issue applies, the Court should grant review and bring clarity and uniformity to the lower courts.

The Court should also take review because the Ninth Circuit's view that data trends and comparisons are admissible to show unlawful intent, without evidence that the acts included in the data were actually unlawful, is incompatible with this

Court's decision in *Huddleston*. As the Court explained in that case, "'Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case.'" *Huddleston*, 485 U.S. at 689 (quoting Advisory Committee's Notes on Fed. R. Evid. 401). In the context of showing unlawful intent, prior acts are only relevant if the defendant actually harbored an unlawful intent with regard to those acts. Thus, without evidence that the prior acts were unlawful, data and statistics about those acts are really just "unsubstantiated innuendo" of unlawful intent. *Ibid*.

This case presents an ideal vehicle to resolve the issue of when data and statistics can be used for Rule 404(b) purposes. First, the issue was squarely and fully addressed below. And, second, the issue was material to Lague's case. The data were not admissible on any other grounds and, given how pervasively used at trial, the data "reasonably could have affected whether the jury thought Mr. Lague's prescriptions were unlawful." App. 24a

OPINION BELOW

The Ninth Circuit's published opinion (App. 1a–19a) is reported at 971 F.3d 1032 (9th Cir. 2020). The district court's oral ruling on the admissibility of the data (App. 27a–30a) is not published in the Federal Supplement.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit entered judgment on August 20, 2020. App. 1a. This petition was filed within 150 days of judgment and thus is timely under Sup. Ct. R. 13.3 and the Court's order of

March 19, 2020, regarding deadline extensions in light of COVID-19.

STATUTORY PROVISION INVOLVED

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

(b) Crimes, Wrongs, or Other Acts.

(1) *Prohibited Uses*. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses; Notice in a Criminal Case*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

STATEMENT OF FACTS

1. The government tried petitioner David Lague, a physician's assistant, on 39 counts of prescribing controlled substances without a legitimate medical purpose in violation of 21 U.S.C. § 841, based on his prescriptions to five patients. App. 3a. Lague had gone back to school in his mid-40s to become a physician's assistant and worked in that profession for 15 years before the government brought these charges. C.A. E.R. 1113–1114. The case centered on his care of 5 patients at a chronic pain management practice in San Leandro, California, that was run by Dr. Mannie Joel. App. 4a; C.A. E.R. 1115–1116. According to the Stanford-trained medical expert at trial, the pain clinic took "very complicated, difficult chronic pain patients that other pain specialists didn't know what to do with." C.A. E.R. 1469, 1675.

Joel's practice became the target of an undercover operation in April 2016, when the DEA started working with a confidential source who had been selling his prescriptions. App. 4a; C.A. E.R. 212, 454–455. The source, SL, had seen Lague for about a year before he started cooperating with the DEA. C.A. E.R. 464. Under the direction of the DEA, SL secretly record his office visits with Lague from May to October 2016. App. 4a; C.A. E.R. 454–455, 552–553. After several months of ordinary visits, the DEA devised a plan by which SL would offer Lague cash to double his prescription. App. 4a; C.A. E.R. 475. But at the appointment SL didn't offer Lague cash; he told Lague that he needed money to pay his mortgage and save his home and asked Lague to double his prescription for just one month so he could sell half and use the money for his home. C.A. E.R. 528–529. SL had never done this with Lague before. C.A. E.R. 546. Lague agreed and wrote a double prescription and discussed with SL how to avoid scrutiny from the pharmacy. App. 4a.

In March 2017, the DEA executed a search warrant of the office. App. 5a. Soon after, the government filed an information charging Lague with two counts of violating 21 U.S.C. § 841(a)(1) for distributing oxycodone to SL outside the scope of professional practice. C.A. E.R. 128. On the same day, the government provided a proffer agreement that anticipated Lague's cooperation against Joel. C.A. E.R. 128. Lague met with the prosecution and investigators and testified in a grand jury proceeding regarding Joel's practice and its relationship with a drug company Insys Therapeutics that makes the drug Subsys (fentanyl). C.A. E.R. 129.

The parties failed to reach a plea agreement, and on November 17, 2017, the government filed the First Superseding Indictment, which added 37 counts of unlawful prescriptions related to four additional patients: DL, KO, JF, and MCM. App. 5a; C.A. E.R. 130. A month later, the government filed the Second Superseding Indictment, which added seven health care fraud allegations based on Lague's prescriptions of Subsys to patient MCM. App. 5a; C.A. E.R. 1892–1904.

2. Before trial, the government moved under Rule 404(b) to introduce data and statistics from Lague's entire practice of 458 patients, involving tens of thousands of uncharged prescriptions. App. 6a–7a. The government asserted that the data would show Lague's unlawful intent to issue prescriptions without a medical purpose because he issued large amounts of pills throughout his practice and ranked at the very top of California prescribers. App. 7a. The district court granted the motion orally at a pre-trial hearing. App. 29a–30a.

At trial, the government used the data extensively. It referenced the data in its opening; introduced the data through two different witnesses dedicated to the issue at trial; used the data to discredit Lague's medical expert; and reminded the jury of the data in closing. C.A. E.R. 98–123, 383–436, 1082–1108, 1337–1352, 1712–1720. The two data witnesses dissected Lague's prescription records into myriad classifications at trial—by prescription type, by prescription strength, by average daily dose per patient, by average dose by patient age—and presented multiple comparisons to multiple subsets of medical professionals in California. App. 7a; C.A. E.R. 98–123, 383–436, 1082–1108.

For the data comparisons, the prosecution called Robert Gibbons, who spent half a day analyzing how Lague stacked against three comparison pools: all practitioners in California with over 50 Medicare patients who receive opioids; pain management and anesthesiology practitioners; and cancer specialists. C.A. E.R. 109–120, 383–436. Later at trial, the government called Paul Short, who presented numerous statistics about Lague's prescriptions standing by themselves. C.A. E.R. 98–108, 121, 1082–1108.

Separately, during the defense's case, the government used the data to discredit Lague's medical expert, Dr. Gary Martinovsky, by asking him about his own prescription rates versus Lague's rates, and then recalled Paul Short as a rebuttal witness to give a more detailed comparison of Lague's and Martinovsky's data. C.A. E.R. 1520–1522, 1712–1718.

As the government's own experts admitted at trial, though, Lague's pattern of prescribing large amounts of pain medication, and the combination of medications, did not reveal anything in terms of the legality of those prescriptions. C.A. E.R. 418–419, 1096–1108. The experts had not analyzed any of the underlying prescriptions in the data set and did not have any knowledge or opinion as to whether the prescriptions were medically appropriate. *Ibid.*

The medical experts at trial admitted that it was not unusual to have dosing levels much higher than the CDC guidelines, especially for long-term pain patients. C.A. E.R. 831, 1469, 1505–1506. Patients can become tolerant to medications need higher doses for the same pain-relief effect. C.A. E.R. 285, 635.

The jury learned that in the field of pain management there are no laws defining the standard of care; it comes down to expert opinion. C.A. E.R. 781–782. Doctors "can disagree on what is appropriate care in any given circumstance." *Ibid.* This became clear from the dueling medical experts at trial. Each was highly qualified and accepted as an expert in pain management. C.A. E.R. 622, 1453. Dr. Charles Szabo, the expert for the government, began his career as an anesthesiologist after a residency at UCSF and later transitioned to pain management in private and hospital settings. C.A. E.R. 616–617. Dr. Martinovsky, the defense expert, had equally impressive credentials: he began as an anesthesiologist after a residency at Stanford (having gone to medical school there) and went into private practice for pain management in 2005. C.A. E.R. 1450–1451.

The experts reviewed the 37 prescriptions for patients DL, KO, JF, and MCM. C.A. E.R. 672–673, 686, 704, 729, 1468, 1488–1489, 1505–1506, 1514–1515. They did not review the two prescriptions for SL that involved unique circumstances and gave rise to an entrapment defense. C.A. E.R. 1859–1860. The experts testified about the medical history of each patient, their diagnoses and symptoms, and their course of treatment. C.A. E.R. 617–749, 775–863, 883–910, 1448–1530. They disagreed about which prescription guidelines were most relevant, how to handle "dirty urine" results with a patient, the best way to handle family members who want to intervene in patient care, the realities of record keeping in private practice, and the appropriate uses of certain drugs alone and in combination with other drugs. C.A. E.R. 617–749, 775–863, 883–910, 1448–1530.

Most importantly, the experts disagreed as to whether the charged prescriptions had a legitimate medical purpose and were within the usual course of medical practice. Szabo concluded that each prescription lacked a medical purpose and was outside the usual course of practice. C.A. E.R. 672–673, 686, 704, 729. But Martinovsky found the opposite: that all were medically justified and within the usual course of practice. C.A. E.R. 1468, 1488–1489, 1505–1506, 1514–1515.

Despite the government's proffered purpose for the data to show unlawful intent, the closing argument did not rely on the data in that regard. C.A. E.R. 1738–1746, 1833–1848. Instead, the government argued to the jury that four different categories of evidence showed Lague's unlawful intent to prescribe without a medical purpose to the five patients: Lague's own statements to investigators about his prescribing approach, testimony from the confidential informant about the ease with which he was able to increase his prescription, the red flags that Lague supposedly overlooked while treating the 5 named patients, and Lague's alleged falsification of records in treating the 5 named patients. *Ibid.* The government's invocation of the data was simply to show that Lague "was the #1 [prescriber] in the state of CA by a long shot." ER 1738–1739.

3. The jury deliberated for several hours over two days and posed multiple questions to the court. C.A. E.R. 187–190, 195, 1870–1877. Ultimately, the jury found Lague guilty of the unlawful prescription charges, and not guilty of the health care conspiracy and fraud charges related to MCM's Medicare coverage. C.A. E.R. 10–17; App. 8a.

At the sentencing hearing, the district court noted that this case is unusual in that Lague had no apparent motive; he did not divert drugs or financially gain from the charged overprescribing. C.A. E.R. 24–25. Lague spoke on his own behalf and expressed that his sole motivation was to relieve his patients' pain, but he also acknowledged lapses in judgment. C.A. E.R. 27–28. After considering the factors under 18 U.S.C. § 3553(a), the court ultimately agreed with probation's recommendation of 120 months for the Schedule II offenses, with 60 months for the Schedule IV offenses to be served concurrently, and imposed judgment accordingly. C.A. E.R. 2–3, 29; App. 8a.

In a post-trial motion, the district court acknowledged that the government relied on Lague's prescription data "extensively throughout trial." App. 24a. It also acknowledged that the data "reasonably could have affected whether the jury thought Mr. Lague's prescriptions were unlawful." App. 24a.

4. On appeal, the Ninth Circuit upheld the district court's decision to admit the data. App. 8a–15a. The Ninth Circuit recognized the split of authority among the courts of appeal as to "whether a medical professional's practice-wide prescription data [are] probative of unlawful intent in a section 841 charge" for unlawful prescriptions. App. 11a–14a. The court discussed the Eighth Circuit's decision in *United States v. Jones*, 570 F.2d 765, 768 (8th Cir. 1978), which held that data are inadmissible absent evidence about the alleged impropriety of the prescriptions included in the data set. App. 12a. But the court sided with the Eleventh Circuit's decision in *United States v. Merrill*, 513 F.3d 1293, 1302–1303 (11th Cir. 2008), which

held to the contrary that data are admissible without an analysis of the underlying prescriptions because the "sheer volume of abusable drugs" in the data could create an inference of impropriety. App. 11a–15a.

The Ninth Circuit concluded that data trends and comparisons can speak for themselves with regard to intent. App. 14a–15a. The court noted that, under *Huddleston*, the government must lay a sufficient factual foundation for the jury to conclude that the defendant committed the earlier acts with the requisite intent. App. 14a (citing *Huddleston*, 485 U.S. at 685). However, the court failed to reconcile this requirement with the government experts' trial testimony that they did not, and could not, form an opinion on the legality or medical propriety of the prescriptions included in the data set based on the amounts and combination of medication reflected in the data, nor the data comparisons to other prescribers. C.A. E.R. 418–419, 1096–1108. Instead, the Ninth Circuit independently determined that Lague's data showing a trend of "enormous quantities" of prescribed medication in "dangerous combinations" supported an inference of unlawful intent to prescribe without a medical purpose. App. 15a.

The Ninth Circuit's decision on the Rule 404(b) issue was material to the case. The data could not have come in under any other rule or theory. On appeal, the government argued for the first time that the data was admissible as "intrinsic" to the charged conduct. App. 9a–10a, n.5. The court rejected this theory because the thousands of uncharged prescriptions to unnamed patients were not intertwined with the 39 charged prescriptions to the 5 named patients. *Ibid.* Further, the data was

not "necessary for the government to offer a coherent narrative of Lague's crimes." *Ibid.* Had the Ninth Circuit agreed with the Eighth Circuit's view in *Jones*, the admission of the data would have been in error.

The Ninth Circuit issued the mandate on August 20, 2020. App. 1a. This petition follows.

REASONS FOR GRANTING THE WRIT

I. Circuit and District Courts Have Split Over the Use of Data to Show Unlawful Intent Under Rule 404(b)

The Ninth Circuit acknowledged the split of authority on the admissibility of data under Rule 404(b) in unlawful prescription cases. The same Rule 404(b) issue arises in other cases, too, from tax fraud to excessive force claims, without agreement as to when the admission of other-act data is proper. This data issue will continue to arise, with even greater frequency, given the explosive growth of electronic data in every facet of life and the ease with which a person's prior actions can be reduced to statistical trends and patterns.

A. The split is acknowledged in unlawful prescription cases

In the decision below, the Ninth Circuit acknowledged a split as to "whether a medical professional's practice-wide prescription data [are] probative of unlawful intent in a section 841 charge." App. 11a. In prosecutions under § 841, the government must prove that the defendant lacked a medical purpose for issuing the charged prescription and intended to issue the prescription without a medical purpose. *United States v. Feingold*, 454 F.3d 1001, 1008 (9th Cir. 2006). The Eighth Circuit has ruled that practice-wide data are inadmissible under Rule 404(b) to show

unlawful intent absent other evidence that the prescriptions within the data set were made without a medical purpose. *Jones*, 570 F.2d at 766–768. The Tenth Circuit and two district courts have agreed with that view. *United States v. Mackay*, 715 F.3d 807, 840–842 (10th Cir. 2013); *United States v. Robinson*, 255 F.Supp.3d 199, 204 (D.D.C. 2017); *United States v. Hofstetter*, No. 3:15-CR-27-TAV-DCP, 2019 WL 6884981, *1–4 (E.D. Tenn. Dec. 17, 2019).

In contrast, the Eleventh Circuit has admitted practice-wide data under Rule 404(b) without evidence about the individual underlying prescriptions. *Merrill*, 513 F.3d at 1300–1302. The Ninth Circuit followed the Eleventh Circuit here and allowed practice-wide data, based on the view that the enormous prescription amounts and potentially dangerous combinations, and a comparison with other prescribers, intuitively reveals unlawful prescriptions and an attendant unlawful intent. App. 9a–15a.

The Eighth Circuit's decision came first, in *Jones*, which held that the district court erred in admitting data from 478 uncharged prescriptions to show the doctor's unlawful intent with regard to 2 charged prescriptions. 570 F.2d at 766–767. A witness testified that the 478 prescriptions accounted for 47% of the filling drug store's total volume in Schedule II drug prescriptions within a three-month period. *Ibid.* Another witness testified that a dozen of the patients included in the data set had track marks indicative of drug use. *Ibid.* The government "clearly" introduced this evidence to "imply that some, if not all, of these 478 prescriptions had been issued by [the defendant] outside the legitimate and proper scope of medical practice." *Id.*

at 768. It "sought to imply wrongdoing on the physician's part from the quantity of the prescriptions and the 'quality' of some patients." *Ibid.*

The government, however, did nothing to substantiate the illegality of the prescriptions contained in the data set. *Jones*, 570 F.2d at 768. The government "did not introduce any evidence concerning the doctor-patient relationship existing with respect to these prescriptions, nor did it present other proof that the prescriptions had not been issued for a proper medical purpose." *Ibid.*

As the Eighth Circuit explained, without evidence of illegality, the prescriptions in the data set were not similar to the charged crimes nor probative of unlawful intent. *Jones*, 570 F.2d at 768. "Absent any evidence bearing upon Dr. Jones' treatment of the patients in question, issuance of the prescriptions without more does not show that Dr. Jones acted unprofessionally in issuing [the] prescriptions." *Ibid.*

As a result, the Eighth Circuit concluded that the district court erred in admitting the evidence under Rule 404(b). *Ibid.* In addition, the court discussed the separate reasons that the data should have been excluded under Rule 403: it "could have led the jury to speculate that the quantity of prescriptions alone established wrongful conduct"; the government spent more time on the uncharged conduct than the charged conduct; and the data "placed [the defendant] in a posture of having to explain not only a proper medical purpose for [the charged prescriptions], but also * * * to attempt to rebut the suggestion of wrongful conduct in prescribing Schedule II narcotics for the scores of persons" included in the data set. *Id.* at 767–768.

The next case to address the issue, the Eleventh Circuit's decision in *Merrill*, upheld the admission of data from 33,000 prescriptions over a three-year period to show a "plan, design, or scheme" under Rule 404(b). *Merrill*, 513 F.3d at 1300–1302. The charges against the defendant included devising a scheme to defraud Medicaid and other insurance providers by prescribing excessive and inappropriate quantities of controlled substances. *Id.* at 1301. Unlike the case in *Jones*, the government's experts testified that the "sheer volume of abusable drugs contained in the summary raised an inference of excessiveness and impropriety," as did the frequency of the prescriptions to patients who were filling them less than two weeks apart. *Id.* at 1302.

Further, because a practice-wide scheme was alleged, the Eleventh Circuit reasoned that "the only way the Government could prove . . . the scheme" was through the data and a comparison to other prescribers. *Merrill*, 513 F.3d at 1302. The court determined that the data were thus "directly related" to the fraud charge and "was outside the scope of Rule 404(b)." *Id.* at 1303. But the court went on to conclude that, to the extent Rule 404(b) applied, the district court did not abuse its discretion by admitting the data. *Ibid.*

The Eleventh Circuit did not discuss the Eighth Circuit's decision in *Jones*, but cited to a Fifth Circuit decision for the proposition that "[a] jury may consider prescription data sets outside those specifically charged in the indictment to determine whether a physician has exceeded 'the legitimate bounds of medical practice' and as 'evidence of plan, design or scheme.'" *Merrill*, 513 F.3d at 1303

(quoting *United States v. Harrison*, 651 F.2d 353, 355 (5th Cir. 1981)). However, the Fifth Circuit decision contains no analysis. *Harrison*, 651 F.2d at 355. The decision is an order granting rehearing and denying rehearing en banc and simply states that the jury was not "limited to considering only prescriptions charged in counts 11 through 27." *Ibid.* It gives no indication of what other prescription information was considered, nor does it engage in a Rule 404(b) analysis. *Ibid.*

The Tenth Circuit later tried to reconcile the Eight Circuit and Eleventh Circuit decisions, based on the charges involved in each case. *Mackay*, 715 F.3d at 840–842. In *Mackay*, the defendant was charged with numerous counts of unlawfully prescribing controlled substances. *Id.* at 813. During trial, the district court admitted data charts showing the annual rankings of Utah's top prescribers for a five-year period, which placed the defendant among the top prescribers for hydrocodone and oxycodone for each year. *Id.* at 838. These charts came in under the theory that defendant opened the door to them, not under Rule 404(b). *Id.* at 838–840.

Focusing on the relevancy of the data to the charges under Rule 403, the Tenth Circuit distinguished *Merrill* and *Jones*. *Mackay*, 715 F.3d at 840–842. The practice-wide data had probative value in *Merrill* because it helped demonstrate a practice-wide scheme of overprescribing, where the issue for the jury was whether a scheme existed. *Ibid.* But the data had little to no probative value in *Jones*, where the issue for the jury was the propriety of individual prescriptions to a few patients. *Ibid.*

The Tenth Circuit agreed with the Eight Circuit that any potential probative value of practice-wide data on individual prescription charges was substantially

outweighed by the risk of prejudice from the jury speculating that the prescription amounts "alone established wrongful conduct." *Mackay*, 715 F.3d at 840, 841–842. However, the court determined that defense counsel's particular statements at trial in *Mackay* made the data "more probative" than in *Jones*, and, thus, the district court did not abuse its discretion in admitting the data. *Id.* at 842.

The district court for the District of Columbia also agreed with the Eighth Circuit's reasoning in *Jones* and permitted uncharged prescription data "only to the extent the government in fact establishes that those prescriptions were issued illegally." *Robinson*, 255 F.Supp.3d at 204. "[T]he government may not simply present evidence that other prescriptions were made without any evidence that they were unlawful," the court warned. *Ibid.* With that caveat, the court conditionally allowed the government to present uncharged prescriptions, contingent on the government "establish[ing] that the other prescriptions were issued outside the bounds of professional practice." *Ibid.* The court went on to limit the amount of uncharged prescription evidence under Rule 403 to "a reasonable number of other patients," rather than the entire practice. *Id.* at 205.

Taking a similar approach, a Tennessee district court excluded practice-wide statistics where there was no showing that the other prescriptions were unlawful. *Hofstetter*, 2019 WL 6884981, at *1–4. In that case, the government sought to introduce evidence that the three defendants received letters identifying them as among the top 50 opioid prescribers in the state. *Hofstetter*, 2019 WL 6884981, at *1. The government argued that the jury could use its common sense to determine

that these rankings and the amount of drugs prescribed reflected that the providers were unlawfully prescribing and had the intent to do so. *Id.* at *2. The court disagreed. *Id.* at *3. "[T]he letters are not probative of intent," the court explained, because "they only report data on volume of overall prescriptions and quantity of drugs prescribed, not quality of care or prescription practices specific to the clinics in this case." *Ibid.*

Here, the Ninth Circuit upheld the admission of the practice-wide data as proper intent evidence under Rule 404(b). App. 15a. The court reasoned that the government "need only lay a factual foundation from which a 'jury could reasonably conclude that [the defendant] committed the allegedly-similar bad acts,' and that he possessed the requisite intent in committing those bad acts." App. 14a (citing *Huddleston*, 485 U.S. at 685). Further, the district court judge may rely on her or his "'own experience, general knowledge, and understanding of human conduct and motivation'" to decide whether the other-act evidence is relevant to prove intent. App. 14a (citations omitted).

Under "this relaxed standard" for admissibility, the Ninth Circuit held that the uncharged practice-wide prescription data, showing "enormous quantities, and in dangerous combinations, support[ed] a reasonable inference that the underlying prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose." App. 15a. The Ninth Circuit did not square this view with the government's own expert testimony at trial that the quantity and combination of the prescriptions did not indicate that the prescriptions were

medically improper, and that the experts had formed no opinion on the propriety of the uncharged prescriptions included in the data. C.A. E.R. 418–419, 1096–1108.

Further, the Ninth Circuit concluded that, despite the distinctions between *Jones* and *Merill*, the cases were plainly "irreconcilable." App. 14a. The court sided with *Merrill*. App. 14a.

In sum, the Eighth and Tenth Circuits, and two district courts, have taken the view that the government must produce independent evidence that the other acts captured in the data were unlawful for purposes of admission under Rule 404(b) to show unlawful intent. The Ninth Circuit, siding with the Eleventh Circuit, has held instead that practice-wide data are admissible to show unlawful intent based only on the large prescription amounts or outlier prescription rates compared to other practitioners.

B. The issue arises in other contexts and will continue to arise with the exponential growth of electronic information

While the split is most pronounced in the context of unlawful prescription cases, other types of criminal and civil cases have given rise to the same data admissibility issue without any more clarity.

For example, the Sixth Circuit considered the use of practice-wide data in a case against a tax preparer, where the charged conduct involved only 10 clients. *United States v. Charles*, 702 Fed. Appx. 288, 291–292 (6th Cir. 2017). Under Rule 404(b), the government introduced data from nearly a thousand tax returns prepared over six years to show that a large percentage of the returns indicated that the tax payers were "self-employed individuals and small-business owners" with occupations

such as "dancer . . . hair braider or babysitter, that would produce little in the way of income-verifying documentation" because they were "cash businesses." *Charles*, 702 Fed. Appx. at 289. The defendant argued that the data were improperly admitted because the government did not introduce any evidence to show that the tax returns included in the data were, in fact, false. *Id.* at 290.

The admissibility issue divided the panel. The majority decision circumvented the issue by concluding that, regardless, the data were harmless given the strength of the evidence that the charged tax returns were false. *Charles*, 702 Fed. Appx. at 291–292. The concurrence held the view that the data were properly admitted on other grounds, aside from the stated Rule 404(b) purpose. *Id.* at 292. In the dissent's view, "it was most certainly error for the district court to admit [the data] without proper foundation" that the tax returns in the data were unlawful, and the error was not harmless. *Id.* at 293. "The government offered *no evidence whatsoever* that any of the hundreds of other tax returns [in the data] were fraudulent, and thus failed to lay the proper foundation to admit the [data] as Rule 404(b) evidence." *Id.* at 294.

The dissent rejected the government's argument that the jury could have inferred the other returns were unlawful simply because they had the same type of deductions as the charged returns. *Charles*, 702 Fed. Appx. at 294–295. The only way for the jury to know that the returns in the data were unlawful, the dissent explained, was for the government "to offer evidence that [the returns did] not actually reflect the financial circumstances of the taxpayer, as the government did for each of the twenty-five fraudulent returns charged in the indictment." *Ibid.*

"Because the government offered no evidence that would allow the jury to properly infer that all (or even most) of the 967 returns [in the data] were invalid, [the data] should not have been admitted as evidence," according to the dissent. *Charles*, 702 Fed. Appx. at 295.

In a much different context, the use of other-act data has arisen for civil excessive force claims. *Sherrod v. Williams*, No. 3:14-cv-454, 2019 WL 398129, at *2–4 (S.D. Ohio Jan. 31, 2019); *Crawford by & Through Crawford v. City of Kan. City,* No. 95-2336-DES, 1997 WL 381758, at *2 (D. Kan. June 11, 1997). An Ohio district court assumed arguendo that statistics showing the defendant used force more often than other officers is admissible under Rule 404(b) to show an intent to inflict physical or emotional injury. *Sherrod*, 2019 WL 398129, at *4. The court focused on Rule 403 instead, and concluded that, without proof that the other uses of force were similar and were found to be excessive, the evidence was "not especially probative of [the officer's] intent" and would "distract the jury from the relevant issues stemming from this particular incident." *Ibid*.

A Kansas district court similarly opined that a police department's data compilations concerning the number of complaints against the defendant officers might be admissible under Rule 404(b) to show intent to injure the plaintiff. *Crawford,* 1997 WL 381758, at *2. But the court deferred ruling on the issue until the parties further developed their arguments and evidence. *Ibid.*

The issue of data to show intent under Rule 404(b) will continue to arise, with even greater frequency, given the explosive growth of electronic data in every facet of

life and the resulting ease with which data can be captured and analyzed. See *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 160 n.1 (3d Cir. 2012). "'The shift of information storage to a digital realm has * * * caused an explosion in the amount of information that resides in any enterprise[,] profoundly affecting litigation.'" *Ibid.* (quoting The Sedona Conference, The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery, 8 Sedona Conf. J. 189, 193 (2007)). A person's prior actions can be reduced to statistical trends and patterns in just about any context, in both a professional and a personal setting. Data from a person's office, smart phone, smart doorbell, or smart watch can easily provide other-act evidence for litigation.

Further, Rule 404(b) issues are the most frequently litigated of all evidentiary disputes and yet are often given short shrift. *United States v. Davis*, 726 F.3d 434, 442 (3d Cir. 2013). The Third Circuit has acknowledged that the procedural requirements for proffering and admitting evidence under Rule 404(b) "are 'so often honored in the breach' that they resonate 'about as loudly as the proverbial tree that no one heard fall in the forest.'" *Ibid.* When it comes to appellate review of Rule 404(b) issues, circuit courts often dodge the admissibility issue as long as the admission of the evidence can be deemed harmless. Thus, guidance from the Court on this important Rule 404(b) is essential.

Given the irreconcilable split on the use of data and statistics under Rule 404(b), and the breadth of contexts in which the issue will continue to arise, this Court should grant the petition and bring clarity and uniformity to the lower courts.

II. The View Taken Here That Data Are Admissible to Show Unlawful Intent, Without Evidence That the Acts Were Unlawful, Conflicts With this Court's Reasoning in *Huddleston v. United States*

The Ninth Circuit's view that data trends and comparisons are admissible to show unlawful intent, without evidence that the acts included in the data set were actually unlawful, is incompatible with this Court's decision in *Huddleston*. As the Court explained in that case, "'Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case.'" *Huddleston*, 485 U.S. at 689 (quoting Advisory Committee's Notes on Fed. R. Evid. 401). In the context of Rule 404(b), the defendant's other acts are not relevant unless the jury can reasonably infer from them the fact at issue: i.e., that the defendant had the relevant intent, knowledge, motive, or opportunity based on the prior acts.

Huddleston illustrates this point with the use of other acts to show the defendant's knowledge that he was selling stolen merchandise. 485 U.S. at 686–688. The defendant was charged with possessing and selling stolen Memorex video cassette tapes, which he was offering in large quantities at deep discounts. *Id.* at 682–683. He denied knowing that the tapes were stolen and stated that the third party he bought them through had represented that the merchandise was obtained legally. *Huddleston*, 485 U.S. at 684. The district court allowed in evidence under Rule 404(b) that the defendant also offered to sell several brand-new televisions for only $28 a piece and a large quantity of brand-new appliances for a low price, all from the same source as the Memorex tapes. *Id.* at 683–684. The Court agreed with the

defense that the other-act evidence was only relevant to the extent the government put on evidence that the merchandise was in fact stolen. *Huddleston*, 485 U.S. at 686.

As a procedural matter, the Court ruled that no preliminary finding on this fact was necessary; the district court could conditionally admit the evidence, subject to later introduction of evidence that the items were stolen. *Id.* at 690. But, if the Court does so, it must later "assess whether sufficient evidence has been offered to permit the jury to make the requisite finding." *Id.* at 690. If the government fails to do so, the evidence must be stricken and the jury instructed to disregard it. *Ibid.* Further, the strength of the government's evidence on the conditional fact must be considered as part of the district court's Rule 403 analysis before admitting the other acts. *Id.* at 689 n.6.

Under this reasoning, when data are used to show an unlawful intent, the government must introduce sufficient evidence to permit the finding that the acts reflected in the data were committed with an unlawful intent. The relevancy of other-act evidence to prove intent "'derives from the defendant's indulging himself in the same state of mind in the perpetration of both the [other acts] and charged offenses.'" *United States v. Guerrero*, 650 F.2d 728, 734 (5th Cir. 1981) (citation omitted).

But in this case, the data were used to suggest unlawful intent based on Lague's status as a top prescriber, without independent evidence that the other prescriptions were unlawful. The government described its data theory here as "[t]he doctrine of chances," meaning the "logical process which eliminates the element of

innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all." Gov't C.A. Br. 28–29. Under this theory, the government suggested that the data showing "enormous" medication amounts over thousands of prescriptions cannot be reconciled with innocent explanations. *Ibid.* But the "doctrine of chances" theory can only operate if there is external evidence that the data trends wouldn't occur *without* illegal conduct. In the unlawful prescription context, for example, there must be medical expert testimony that the amount and combination of prescriptions reflected in the data could not be medically justified for any patient. Notably, there was some testimony along these lines in *Merrill*, 513 F.3d at 1302–1303—but none in this case.

To the contrary, here, the government's experts admitted that Lague's prescription data did not reveal anything in terms of the medical propriety of the underlying prescriptions. C.A. E.R. 418–419, 1096–1108. Further, there is no ceiling amount of medication above which experts have agreed that prescriptions lack a medical purpose, nor is there a combination of medication that is necessarily outside the bounds of legitimate medical practice. C.A. E.R. 781–782. Based on this testimony, the jury could not reasonably infer from Lague's high prescription rates that he had an unlawful intent when he made the prescriptions included in the data.

The government's argument in this case is akin to suggesting that outlier sentencing data from a district court judge could raise a permissible inference that the judge intended to impose substantively unreasonable sentences. That's not an inference this Court would be willing to draw. The Court would need to know the

circumstances of the underlying cases or have other indicia that the higher sentences resulted from a bad intention rather than permissible, professional decision-making.

The use of data disparities and trends to suggest illegality violates the fundamental notion that defendants must be convicted based on solid evidence of the charged conduct, not the jury's impression of their character. While "[s]ports fans often use 'statistical odds' to predict the outcome of a sporting event," they "are not a substitute for admissible evidence to decide the guilt or innocence of the defendant." *People v. Julian*, 246 Cal.Rptr.3d 517, 519 (Cal. App. 2019). In order for data and statistics to be relevant under Rule 404(b) to show unlawful intent, the proponent of the evidence must demonstrate that the other acts underlying the data were in fact unlawful.

Without evidence of unlawfulness, data and statistics are really just "unsubstantiated innuendo" of unlawful actions and intent. *Huddleston*, 485 U.S. at 689. At the same time, statistics have an air of infallibility—"numbers don't lie." *NLRB v. Hartman & Tyner, Inc.*, 714 F.3d 1244, 1250 (11th Cir. 2013). Thus, data can be particularly influential to jurors, even if the data create nothing more than mere innuendo. This Court should grant review to clarify that data cannot be admitted to show unlawful intent without evidence that the acts contained within the data were, in fact, unlawful.

III. This Case Is an Ideal Vehicle to Address the Issue Because It Was Squarely and Fully Addressed and Was Material to the Case

This case presents an ideal vehicle to resolve the issue of when data and statistics can be used for Rule 404(b) purposes. First, the issue was squarely and

fully addressed below. The parties briefed the Rule 404(b) issue extensively, and the Ninth Circuit issued a published decision acknowledging the split and taking a side. App. 9a–15a; Lague C.A. Br. 27–37; Gov. C.A. Br. 22–32; Lague C.A. Reply Br. 3–12.

Second, the Rule 404(b) issue was material to Lague's case. The data came in under Rule 404(b) and could not have come in under any other theory. The Ninth Circuit rejected the government's argument on appeal that the data were alternatively admissible as intrinsic to the charged conduct. App. 9a–10a, n.5. Thus, had the Ninth Circuit agreed with the Eighth Circuit and other courts that the data could not come in without evidence of unlawfulness, the admission would have been in error. The error was prejudicial because it "reasonably could have affected whether the jury thought Mr. Lague's prescriptions were unlawful." App. 24a.

CONCLUSION

The petition for a writ of certiorari should be granted for the Court to resolve the irreconcilable split on this important Rule 404(b) issue.

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