NO. _____

In the
Supreme Court of the United States

DALIBOR KABOV AND BERRY KABOV,

Petitioners,

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

After the Petitioners were convicted of drug trafficking under 21 U.S.C. § 841, this Court held that Section 841 requires a defendant to "knowingly or intentionally" act in a manner unauthorized by law. The jury instructions for their convictions conflict with *Ruan*'s holding, reflecting an earlier and now-overturned view of Section 841's state of mind requirement. The Ninth Circuit, recognizing this, vacated the Petitioners' convictions on the drug importation counts. But it left intact the Petitioners' drug distribution conviction—despite *Ruan*—because it held that the Petitioners had "invited error" on this point, even though the disputed instruction was (1) based on the state of the law *before Ruan*, (2) proposed by the government, and (3) objected to by Petitioners.

That was not the Ninth Circuit's only error. It also concluded, despite material falsehoods in the testimony of the government's star witness and other evidentiary errors violating *Brady* and *Napue*, that the outcome of the Kabovs' trial would not have been different.

The questions presented are:

1. Whether this Court should grant, vacate, and remand as to Petitioners' drug distribution convictions in light of *Ruan*, or in the alternative, grant review to resolve a conflict over the invited error doctrine.

2. Whether this Court should hold this case pending *Glossip v. Oklahoma*, or in the alternative, determine whether the Ninth Circuit's treatment of the *Brady* and *Napue* violations was error.

RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit, listed here in reverse chronological order:

- *United States v. Kabov*, Nos. 19-50083, 19-50089 (9th Cir. 2023). Petition for rehearing denied November 14, 2023.
- *United States v. Kabov*, Nos. 19-50083, 19-50089 (9th Cir. 2023). Judgment entered July 18, 2023.
- *United States v. Kabov*, No. 15-cr-00511. Judgment entered March 15, 2019.

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

In *Ruan v. United States*, 597 U.S. 450 (2022),[1] this Court held that 21 U.S.C. § 841 requires a defendant to "knowingly or intentionally" act in a manner unauthorized by law. In so doing, it rejected the application of an objective standard for mens rea under that statute. *Ruan*, 597 U.S. at 452. Before *Ruan* was decided, Defendant-Petitioners Berry and Dalibor Kabov were convicted under this statute and the statute governing the importation of drugs, using jury instructions that incorporated an objective standard. The Ninth Circuit, recognizing that this intervening precedent affected the sufficiency of the jury instructions in the Kabovs' trial, vacated the Kabovs' convictions for drug importation, and remanded for the district court to apply *Ruan* and *Rehaif v. United States*, 139 S. Ct. 2191 (2019), in the first instance, decide whether the jury was properly instructed in light of those decisions, and for any further proceedings. It refused, however, to do the same the Kabovs' convictions for drug distribution, which suffered from the same *Ruan* error, mistakenly finding that they had "invited" the error.

That split-the-baby approach makes no sense and conflicts with other Circuits' case law. In refusing to treat the distributions count the same way as the importation ones, the Ninth Circuit stretched the meaning of "invited error" beyond all recognition. It did not explain *how* the Kabovs could have knowingly

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[1] *Ruan*'s holding also depended on this Court's earlier holding in *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019), about the scienter requirement in another statute.

relinquished a right under *Ruan*, which was only decided *after* their convictions and in fact after briefing was concluded in their appeal. That puts the Ninth Circuit in direct conflict with the Eleventh Circuit which, under the same facts, decided that the invited error doctrine did *not* apply to challenges to jury instructions under *Ruan*. Indeed, as consensus among circuit courts and precedent from this Court makes clear, the invited error doctrine does not apply where the law changes on appeal. This Court should either grant, vacate, and remand this case in light of *Ruan*, or grant review to resolve this split over the application of invited error.

That is not the only basis for review. At trial, the government relied on false evidence to support its case. That included testimony from the government's star witness, Courtland Gettel, who repeatedly lied on the stand, and whose testimony was contradicted by evidence in the government's possession—but not disclosed to Defendants until after trial. It also included false evidence that the government claimed connected to mailboxes used in the criminal conspiracy, and recordings that apparently connected the Kabovs to another member of the conspiracy. Still, the district court denied that request for a new trial, and the Ninth Circuit affirmed because "the government presented overwhelming evidence of defendants' guilt, and none of these purported constitutional violations or additional evidence could or would have changed the outcome of defendants' trial." App.5. The appellate court concluded that Gettel's testimony in particular was "unnecessary to secure defendants' convictions," *id.*, even though that is not the proper test under *United States v. Bagley*,

473 U.S. 667, 684 (1985), which asks instead whether there is a reasonable probability of a different result.

That conclusion also violates this Court's command that courts must consider such evidence "collectively, not item by item." *Kyles v. Whitley*, 514 U.S. 419, 436 (1995). While the Ninth Circuit later alluded to the non-Gettel claims failing individually and collectively, it did not engage in any analysis of the collective impact of those errors, and what analysis it did conduct applied the wrong test. Had it properly assessed the impact of those errors, it could not have concluded that the suppressed evidence would not have changed the outcome of the trial. Because that issue is before this Court in *Glossip v. Oklahoma*, No. 22-7466, this Court should, in the alternative, hold this petition, or grant review to consider this question as well.

OPINIONS BELOW

The relevant opinion below of the Ninth Circuit is unpublished, but available at 2023 WL 4585957. It is also reproduced here at App.1-22. The relevant judgments of the U.S. District Court for the Central District of California are reproduced here at App.23-50.

JURISDICTION

The judgment of the Ninth Circuit was entered on July 18, 2023. App.1-22. On November 14, 2023, the Ninth Circuit denied Petitioners' request for en banc and panel rehearing. App.51-52. This petition is timely because it was filed before March 13, 2024, the date set by this Court's order extending the deadline

to file a petition for certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant part of the Fourteenth Amendment of the Constitution is reproduced at App.65. 21 U.S.C. § 841 is reproduced at App.67.

STATEMENT OF THE CASE

1. The Kabovs were charged with a series of controlled substance offenses arising out of their ownership and operation of a compounding pharmacy, Global Compounding Pharmacy, LLC. Neither was a pharmacist or a medical professional. 3-ER-621-22.[2] Neither was familiar with the regulations governing pharmacies. 3-ER-621-22. And neither knew much about the procedures they were required to follow. 3-ER-620-22. They obtained a pharmaceutical license in February 2012, and hired a licensed pharmacist with compounding experience, who, like the doctor who wrote most of the prescriptions at issue, was never criminally charged. 1-ER-108, 17-ER-3939-40. Defendants, however, were. Those charges included conspiracy to distribute and distributing oxycodone in January and May 2012, in violation of the Controlled Substances Act, 21 U.S.C. § 841(a)(l), (b)(l)(C), and the illegal importation of controlled substances, 21 U.S.C. §§ 952(b), 960(a)(1).

2. The government's case was deeply flawed from the get-go: it depended on false testimony from its star

[2] References to the excerpts of the district court record filed with the Ninth Circuit are "ER," "SER," and "FER."

witness, Courtland Gettel, a cooperator who falsely testified that his addiction to opiates—which he claimed were supplied by the Kabovs—was triggered by Kabovs and his four-year old son's illness.[3] 3-ER-518-19, 710. Between 2013 and 2015, he estimated that the Kabovs sold him between $10,000 to $30,000 in drugs without valid prescriptions. 13-ER-3025-26. That testimony was false. The government had evidence of bank transactions refuting his claims but that was not disclosed to the defense, and evidence showing that he also lied about withdrawing large amounts of cash to buy opiates from the Kabovs, about his purported multiple overdoses, and about his supposed repeated hospitalizations for addiction was also not disclosed until after trial. Opening Br. 47-56 (9th Cir. Dkt. 70).

3. As disclosed at trial, Gettel was a serial fraudster who had been indicted along with his partner, Peter Cash Doye, in a $50 million complex conspiracy, had recently pled guilty to fraud counts in Arizona and the Southern District of California and

[3] The trial transcript reflects that Gettel testified that his addiction was spurred by his son's death, although his son was still alive. On appeal, after full briefing and oral argument, the government went back to the court reporter to determine whether Gettel had in fact falsely testified that his son had died—a factual dispute it had not previously raised either in the trial court or in briefing before the Ninth Circuit. (In post-trial motions, the government tried to explain this discrepancy by claiming that Gettel had innocently conflated his wife's miscarriages and his four-sear-old son's condition, an explanation about which the trial court was appropriately skeptical. 1-ER-31; 4-ER-749.) The Court did not resolve this issue in ruling against the Kabovs.

had agreed to pay millions to his victims. 13-ER-3073-74, 3058-59, 14-ER-3106-10. But as *not* disclosed at the Kabov's trial, Gettel was also engaged in a whole new real estate fraud before, during, and after that trial: it was only after trial that the defense learned about this new fraud, and the jury never learned about it. 5-ER-960-64, 1039-57, 1164-69, 1185-1215. That conflicted with his claims that he only engaged in criminal activity because of the Kabovs. Specifically, Gettel—the only person to testify that the Kabovs provided him with illegal drugs—asserted that his "addiction to prescription drugs provided by the Kabovs" contributed to him committing the crimes to which he had pled guilty. 13-ER-3057. Indeed, on cross-examination, he doubled down, asserting: "if I wouldn't have been on those drugs, none of that would have happened." 14-ER-3120.

4. There were other issues with the government's case. Another government witness, Investigator Buntrock, testified that the Kabovs used several mailboxes to which packages containing cash were addressed. 16-ER-3682. The Kabovs did not rent, control, or possess those mailboxes; others did. 2-ER-356-58, 3-ER-459-61, 569-71; FER-6-65. Finally, the government introduced testimony by Postal Inspector Johnson identifying Berry as a participant in a recorded phone call. 8-ER-1920-21. But the subpoenaed account information for that number revealed it belonged to someone else (who said that he never knew or let the Kabovs/others use his phone), the original recordings were deleted, the confidential informant did not testify, and the government's witness made factual errors about the voice recordings, including crucial errors about the call

dates. 2-ER-358-59; 3-ER-571; Dist. Ct. Dkt. 368-2 at 9 (time-stamp) (embedded metadata of the recorder calls).

5. During the charging conference, the Kabovs objected to the government's distribution instruction, which read:

> In order for a defendant to be found guilty of Counts Two and Three, the government must prove each of the following elements beyond a reasonable doubt: … the defendant acted with the intent to distribute the identified controlled substance outside the usual course of professional practice and without legitimate medical purpose.

6-ER-1255. They explained that "the usual course of professional practice" would lead the jury "to confuse civil liability with criminal culpability." 20-ER-4556-58 (cleaned up). In response, the government justified the instructions as reflecting "verbatim" the Ninth Circuit's decision in *United States v. Feingold*, 454 F.3d 1001, 1010, 1011 n.3 (9th Cir. 2006) (quotation marks omitted):

> For a given approach to a distribution of a controlled substances to be within the "usual course of professional practice," there must at least be a reputable group of people in the pharmacy profession within the country who agree that it is consistent with legitimate pharmacy practice. In determining whether the defendant acted outside the usual course of professional practice, you may consider the standards to which pharmacy professionals

> generally hold themselves, including accepted standards of care among pharmacy professionals.

20-ER-4554, 4556. The district court subsequently instructed the jury that it could convict on the distribution counts if "defendant acted with the intent to distribute the identified controlled substance *outside the usual course of professional practice and without legitimate medical purpose*." 6-ER-1255 (emphasis added). And in closing, the government told the jury that "this term, 'usual course of practice,' as the Judge just instructed you, *it's an objective term*. What does that mean? It means, let's say I'm in the pharmacy business, or I'm a doctor, I don't get to say I'm following the [prosecutor's name] rule of medicine. Right? *There are objective standards of medicine that apply*." 19-ER-4326-27 (emphasis added).

6. The Kabovs were convicted on all counts. 1-ER-39-56, 57-79, 80-100. Five years later, *Ruan* was decided. The Kabovs, who had challenged the jury instructions in their briefing (and flagged *Ruan*'s pendency before the Ninth Circuit), filed supplemental briefing explaining why *Ruan* compelled vacatur. Appellants' Supp. Br. 3-4 (9th Cir. Dkt. 126).

7. The Ninth Circuit vacated the Kabovs' convictions for drug importation, and remanded for the district court to apply *Ruan* and *Rehaif* in the first instance, decide whether the jury was properly instructed in light of those decisions, and for any further proceedings. But it refused to reach the same result on the distribution counts, despite the same error. It did so by concluding incorrectly that they had

"invited instructional error" and "relinquished a known right." App.13.

8. The Ninth Circuit further dismissed the Kabovs' challenges under *Brady* and *Napue* to Gettel, the mailbox, and the evidence and testimony of recordings. The Ninth Circuit discussed each piece of testimony individually, but did not meaningfully address its cumulative impact. App.5-10. And while it rejected the challenges to testimony about the mailboxes and recordings on the merits as well as on impact, the only basis for the Court's rejection of the challenges to Gettel's testimony was its conclusion that "none of these purported constitutional violations or additional evidence could or would have changed the outcome of defendants' trial." App.5. Specifically, it concluded that Gettel's testimony was "unnecessary to secure defendants' convictions. *Id.* The Kabovs sought rehearing, but the Ninth Circuit denied that request. App.52.

REASONS FOR GRANTING THE PETITION

I. This Court should grant, vacate, and remand in light of *Ruan*.

The Court should grant the petition, vacate in part the Ninth Circuit's judgment, and remand with instructions to reconsider the drug distribution counts in light of *Ruan*. In the alternative, it should grant review to resolve a circuit split over the proper application of the invited error doctrine. *First*, the Ninth Circuit's decision puts it in direct conflict with the Eleventh Circuit—which found that the invited error doctrine was inapplicable in a challenge to a pre-*Ruan* jury instruction. *United States v. Duldulao*, 87

F.4th 1239, 1257 (11th Cir. 2023). *Second*, this Court and federal appellate courts across the country do not apply the invited error doctrine where this Court's precedent changes the relevant law, because the defendant could not have "invited" any error. *Third*, because *Ruan* applied to the drug distribution instruction given at trial, the court's failure to include the appropriate mens rea requirement in that instruction was reversible error.

A. The Ninth Circuit's decision conflicts with the Eleventh's Circuit's application of the invited error doctrine and *Ruan*.

Facing the same issue as Ninth Circuit did here, the Eleventh Circuit came to the opposite conclusion.[4] Where the Ninth Circuit got it wrong, the Eleventh Circuit got it right. The invited error doctrine does not apply to pre-*Ruan* jury instructions that improperly instructed on the mens rea element. *Duldulao*, 87 F.4th at 1257. Put another way, the invited error doctrine does not apply here, to "a criminal appeal involving an instructional error in defining a substantive offense flowing directly from … longstanding and clear precedent." *Id.*

Three points drove the Eleventh Circuit's reasoning. First, applying the invited error doctrine here would impose a rule that no criminal defendant

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[4] In a similar case, the Sixth Circuit rejected the government's argument that the "invited error doctrine … foreclose[d] [a defendant's] challenge to the jury instructions" because "the Government jointly invited the error" and the defendant "claim[ed] a constitutional violation." *United States v. Bauer*, 82 F.4th 522, 530 n.2 (6th Cir. 2023).

can overcome—if you adhere to settled law to propose a jury instruction or fail to perfectly guess the contours of a Supreme Court decision that comes years later while on appeal, you are out of luck. *Cf. Joseph v. United States*, 574 U.S. 1038, 1039 (2014) (Kagan, J., dissenting on denial of certiorari) ("When a new claim is based on an intervening Supreme Court decision … the failure to raise the claim in an opening brief reflects not a lack of diligence, but merely a want of clairvoyance."). As the court explained, "[r]equiring litigants to propose jury instructions inconsistent with established circuit precedent on the off-chance of Supreme Court intervention would not promote the invited-error doctrine's purpose." *Duldulao*, 87 F.4th at 1255.

Indeed, "the invited error doctrine is designed to prevent a defendant from engaging in tactical gamesmanship—e.g., proposing erroneous jury instructions in an attempt to create reversible error on appeal." *United States v. Tandon*, 111 F.3d 482, 492-93 (6th Cir. 1997) (McCalla, J., concurring in part and dissenting in part). But when "the error is only apparent as a result of an intervening change in the law, however, the same policy rationale does not apply." *Id.* at 493. In those cases, "the defendant did not propose the jury instruction in an attempt to create a reversible error on appeal." *Id.* "To the contrary, the defendant included the proposed jury instruction because it complied with the clear and uncontroverted law at the time of the trial." *Id.*

Second, failing to apply *Ruan* would "would be inconsistent with [the] approach [of courts] in other contexts," "recogniz[ing] the failure to anticipate an

abrupt change in precedent is blameless and should not preclude appellate review." *Duldulao*, 87 F.4th at 1255-56. "For instance (subject to plain error review), [courts] allow an appellant to raise new arguments based on intervening precedent." *Id.* at 1256. And even in the habeas context, courts excuse procedural default "when there has been in an intervening change in the law, despite the strong finality interests at play." *Id.*

Third, it "would undermine the principle that '[d]ecisions of the Supreme Court construing substantive federal criminal statutes must be given retroactive effect.'" *Id.* at 1255 (quoting *United States v. Peter*, 310 F.3d 709, 711 (11th Cir. 2002) (per curiam)). That is especially important here, in a "case involv[ing] the substantive elements of a criminal offense." *Id.* at 1256.

The Ninth Circuit's decision did not engage with any of these serious concerns despite acknowledging that "[t]he district court did not have the benefit of the Supreme Court's decisions in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), and *Ruan v. United States*, 142 S. Ct. 2370 (2022)." App.15. That was error, and it leaves two circuits in direct conflict over the proper approach for applying *Ruan* to convictions before the decision.

B. The invited error doctrine does not apply where this Court's intervening precedent changes the law for a previously given jury instruction.

The Ninth Circuit's decision also stands in conflict with the decisions of this Court and others with

respect to invited error more generally. This Court has repeatedly declined to apply the invited error doctrine where intervening precedent impacts jury instructions based on then-controlling case law. In *United States v. Wells*, the government proposed a jury instruction, which the court then gave, stating that materiality was an element of a particular offense under federal law, but that the judge, not the jury, should decide it. 519 U.S. 482, 486 (1997). After the trial concluded and while the appeal was pending, this Court decided another case making clear that materiality was an element to be decided by the jury. *Id.* In response, the government argued for the first time that materiality was *not* an element of the relevant offense. *Id.* The defendants argued that the invited error doctrine barred this argument.

This Court disagreed. It noted that the invited error doctrine "may be" "valuable … in controlling the party who wishes to change its position on the way from the district court to the court of appeals," but that it could not "dispositively oust this Court's traditional rule that we may address a question properly presented in a petition for certiorari if it was pressed [in] or passed on by the Court of Appeals." *Id.* at 488 (quotation marks omitted). Because this Court's intervening case law "rendered it reversible error to assign a required materiality ruling to the court, the Government suddenly had reason to contest the requirement to show materiality at all." *Id.* at 489. "*Nothing the Government has done disqualifies it from the chance to make its position good in this Court.*" *Id.* (emphasis added).

Indeed, a critical element of this Court's "invited error" jurisprudence is that a party may not complain of errors *it created*. *Id.* at 488 ("a party may not complain on appeal of errors that he himself invited or provoked the district court to commit" (cleaned up)); *cf. Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 461-62 (2016) (where petitioner argued against bifurcation at trial, it could not then "profit from the difficulty it caused"); *F.W. Woolworth Co. v. Contemp. Arts, Inc.*, 344 U.S. 228, 230-31 (1952) (explaining that "petitioner cannot complain of this [evidentiary] exclusion, which was in response to its objections"). That cannot be true where this Court later decides an issue making the earlier instruction reversible error.

Following this Court's logic in *Wells*, federal appellate courts consistently hold that defendants cannot intentionally relinquish a known right where the Supreme Court later changes the law. *See, e.g.*, *Cassotto v. Donahoe*, 600 F. App'x 4, 6 (2d Cir. 2015), *as corrected* (Jan. 14, 2015) (holding that the invited error "doctrine does not apply in this case" because "did not seek a tactical advantage by failing to request a more favorable causation standard, but merely acquiesced in this Circuit's established interpretation of Title VII, which the district court was bound to apply regardless of what charge the defendant proposed"); *United States v. Andrews*, 681 F.3d 509, 517 n.4 (3d Cir. 2012) (when "the law is found to be constitutionally problematic, we will not apply the 'invited error' doctrine" (quoting *United States v. W. Indies Transp., Inc.*, 127 F.3d 299, 305 (3d Cir. 1997)); *United States v. Miller*, 406 F.2d 1100, 1105 (4th Cir. 1969) ("mere failure to assert the [Fifth Amendment] privilege in the original proceedings, before *Haynes*

was decided, could not constitute 'an intentional relinquishment of a known right or privilege'");*United States v. McBride*, 826 F.3d 293, 295 (6th Cir. 2016) ("McBride could not have intentionally relinquished a claim based on *Johnson*, which was decided after his sentencing"); *United States v. Chesney*, 86 F.3d 564, 568 (6th Cir. 1996) (declining to find waiver because "the *Lopez* case was decided after the district court entered judgment in this case. Thus, [defendant's] *Lopez* challenge … was not available below"); *Lauchli v. United States*, 402 F.2d 455, 456 (8th Cir. 1968) (per curiam) (holding that because "[t]his case was tried prior to the United State Supreme Court's decisions" in a trio of cases, defendant did not waive argument even though he "did not raise the privilege of self-incrimination at the trial"); *United States v. Myers*, 804 F.3d 1246, 1254 (9th Cir. 2015) (en banc), *as amended* (Oct. 28, 2015) (holding that a defendant did not "intentionally relinquish[] … a *known* right" where the defendant did have the guidance of a later-decided Supreme Court case (quoting *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997))); *United States v. Titties*, 852 F.3d 1257, 1264 n.5 (10th Cir. 2017) (agreeing that "the invited-error doctrine does not apply when a party relied on settled law that changed while the case was on appeal").

Here, the Ninth Circuit acknowledged that the "district court did not have the benefit of the Supreme Court's decisions" in *Ruan* (and *Rehaif*), and that they "bear on the questions presented here." App.15. It nevertheless insisted that Defendants "invited instructional error by proposing the distribution jury instructions" and "relinquished a known right because the arguments they raise on appeal concerning the

distribution instructions are functionally the same arguments they made to the district court to support their proposed instruction." App.13-14. Neither the Ninth Circuit nor the government ever identified these "same arguments," let alone anything suggesting that the arguments below were made knowingly.

As explained above, this Court's precedent in *Wells* forecloses the application of the invited error doctrine here. The Kabovs did not "change [their] position on the way from the district court to the court of appeals"—the law changed, so the Kabovs "suddenly had reason to contest" the required state of mind element under Section 841. *Wells*, 519 U.S. at 488-89.

But even if all of this were not true, the Kabovs did not propose or argue *for* the disputed instruction—they objected to it. In the district court, the Kabovs did not argue that they could be convicted by evaluating mens rea against a hypothetical, reasonable-doctor's mental state. To the contrary, they argued the opposite, both before the district court and the Ninth Circuit. 20-ER-4544 ("the government's jury instruction would serve to import a civil 'reasonable person' or 'reputable group' standard into a criminal trial"); Opening Br. 105-06 (contesting "reasonable person" standard); Reply Br. 38 n.8 (9th Cir. Dkt. 105) (same and raising pendency of *Ruan*); Appellants' Supp. Br. 6-10 (9th Cir. Dkt. 146) (raising *Ruan* argument).

True, in the trial court Defendants only objected to the proposed instruction's final paragraph and "request[ed] that the remainder of the instruction be

provided to the jury." 20-ER-4555. But their argument was largely foreclosed by existing Ninth Circuit precedent, *United States v. Magdaleno* later rejected a related argument, 43 F.4th 1215, 1220 (9th Cir. 2022), and Defendants *did* object to the definition of "usual course of professional practice" because it would "lower[] the benchmark for a criminal conviction" and "is too vague and confusing." 20-ER-4558. That identifies the same error they pursued on appeal—that what mattered was their subjective mens rea, not the objective mens rea of some hypothetical medical professional. And that error impacted the proceedings and outcome here.

C. The drug distribution instruction did not comply with *Ruan*.

There is no reason to distinguish, as the Ninth Circuit did, between the distribution and importation counts. *Ruan* applies just as much to the distribution instruction as the importation one.

In *Ruan*, the defendants were medical doctors convicted for dispensing controlled substances other than "as authorized" under Section 841. 597 U.S. at 454. On appeal, this Court held that Section 841's "'knowingly or intentionally' *mens rea* applies to the 'except as authorized' clause" of the statute. *Id.* at 468. In interpreting how the requisite scienter applied to that clause, it explained that after "a defendant produces evidence that he or she was authorized to dispense controlled substances, the [g]overnment must prove beyond a reasonable doubt that the defendant knew that he or she was acting in an unauthorized manner"—in other words, that the defendant was not acting "for a legitimate medical

purpose … acting in the usual course of his professional practice"—"or intended to do so." *Id.* at 454 (cleaned up).

The Court rejected the government's substitute scienter—"objectively reasonable good-faith effort"—then the prevailing approach in this Circuit. *Id.* at 465 (cleaned up). In rejecting that approach, the Court explained that it would make a defendant's criminal liability turn on an objective standard—namely, the mental state of a hypothetical "reasonable" doctor, not the actual defendant's subjective mens rea. *Id.*

Both the reasoning and result in *Ruan* compel vacatur here. *Duldulao*, 87 F.4th at 1257; *United States v. Henson*, 2023 WL 2319289, at *1-2 (10th Cir. Mar. 2, 2023) (vacating conviction based on *Ruan*). As *Ruan* makes clear, the instructions allowed the jury to convict Defendants based on insufficient scienter by evaluating it against a hypothetical, reasonable-doctor's mental state. 597 U.S. at 465. The district court instructed the jury to convict Defendants for two drug distribution charges (Counts 1 and 4) if it found that they (who were *not* actual medical professionals) failed in practice to meet the same standard as hypothetical medical professionals would. Thus, just as in *Ruan*, the instructions allowed the jury to convict Defendants based on a hypothetical, reasonable-doctor would think, not what they, as laypeople, actually knew. *Id.* Here, the government contended the jury should convict if it found that Defendants had not met the same bar as some Platonic form of medical professionals might, "act[ing] in the usual course of pharmacy practice." Gov't Br. 93 (9th Cir. Dkt. 85); 19-ER-4327 (Government closing: "There are objective

standards of medicine that apply. And in the criminal context there needs to at least be some reputable group. Right? Somebody in the profession, some objective standard that says what you're doing is okay."). Accordingly, this Court should either grant, vacate, and remand for the lower courts to consider the impact of *Ruan* on both the drug importation convictions and the drug distribution ones, or, in the alternative, grant certiorari to review and resolve the circuit split over the applicability of invited error.

II. This Court should hold this case pending *Glossip v. Oklahoma* in light of the Ninth Circuit's failure to properly consider the cumulative impact of the *Brady* and *Napue* errors.

The failure to properly apply the invited error doctrine and *Ruan* was not the only error that the Ninth Circuit made. The Ninth Circuit also failed to apply the correct test assessing the impact of the errors (the only basis for its dismissal of challenges to Gettel's testimony) under *Bagley*, or properly address the aggregate effect of the government's false evidence under *Kyles*. Because the issues raised here are similar to the one made in Richard Glossip's petition for certiorari in *Glossip v. Oklahoma*, No. 22-7466 (U.S.), which this court recently granted, this Court should hold the petition and at a minimum, consider granting, vacating, and reversing after that case is decided.

Here, the government introduced a wealth of deeply flawed and untrustworthy evidence. As noted above, the government's star witness, Courtland Gettel, testified that the Kabovs led him back to

addiction and crime, supplying him with endless opiates to fuel that addiction, causing his overdoses and hospitalizations. 13-ER-3055-57. In a case primarily about quantities and dosages, compliance with civil regulations and computer records, Gettel was the witness who brought home the consequences of the alleged crimes. He was the only one to testify to receiving drugs from the Kabovs. And he was the one who made the jury *want* to convict the Kabovs.

But Gettel lied throughout his testimony. His son was alive and his illness not the cause of Gettel's drug abuse. 3-ER-518. He had not been sober for a year before meeting the Kabovs. 4-ER-899-900, 5-ER-1123; 3-ER-596-97; *see also* 5-ER-1159. He had not been through multiple hospitalizations. 5-ER-1125; 3-ER-518. And bank records produced to the defense after trial proved that he had procured drugs from many other suppliers, but did *not* show that he had bought any opioids from the Kabovs. 5-ER-979, 983, 985, 990, 992, 1001 (showing purchases of cocaine, marijuana, and other unspecified drugs, but no purchases from the Kabovs or for opiates).

After trial, the government provided material demonstrating that the government had previously interviewed a witness in Gettel's Arizona fraud case, who told them that Gettel's drug use started more than a year before meeting the defendants. 4-ER-898-99; 5-ER-1123. However, that didn't stop Gettel from falsely testifying in this case that his drug addiction was the Kabovs' fault. In addition, post-trial investigation discovered that Gettel testified in another federal case in Arizona against defendant Peter Cash Doye, using the same set of facts that he

used against the Kabovs. 4-ER-899-900. Moreover, after trial the government provided material demonstrating that Gettel's choice of drug was cocaine and ecstasy and not the prescription drugs that were the subject of the indictment here. 4-ER-903-04; 5-ER-1123.

And that was not all. The government also introduced false testimony connecting the Kabovs to mailboxes where the cash parcels were allegedly shipped. *See* 8-ER-1785-86, 9-ER-1972; 9-ER-1978, *see also* 7-ER-1725, 1750; 7-ER-1726-27, 9-ER-2027. After trial there was evidence provided by the government showing that the mailboxes were not under the Kabovs' names during the relevant times. 2-ER-357-58. One box, #369, had originally been assigned to Dalibor Kabov, but he was reassigned a different mailbox before the packages were sent, and #369 given to someone else. 2-ER-357. Neither brother possessed another mailbox at a different location (#409) during the relevant time period. 2-ER-356-57, 3-ER-569-70; *see also* FER-48. In fact, at least six other people possessed the mailbox during the government's investigation, some of whom were associated with criminal misconduct. 2-ER-357. But at trial, despite that evidence, the government contended that the Kabovs controlled those mailboxes.

There was more false evidence, too, through recordings that apparently connected the Kabovs to a member of the criminal conspiracy. As Defendants argued before the Ninth Circuit, the district court erred in letting in testimony about recordings of telephone calls allegedly between a nontestifying informant and Berry Kabov. The government's

witness was only present for one of those calls—the others were made by the unsupervised informant, who, as noted above, did not testify at trial, who later turned over the original recordings to the government witness, who subsequently deleted them, thus denying Defendants of "potentially useful evidence" in violation of their "due process right to present a complete defense." *United States v. Zaragoza-Moreira*, 780 F.3d 971, 977 (9th Cir. 2015); Opening Br. 72-76, 88-90.

Despite the absence of the original recordings, the court also let that witness testify that the one key call that purportedly linked Berry to the alleged conspiracy took place on May 29. 8-ER-1796-97; Dist. Ct. Dkt. 368-2 at 10. But his computer metadata of those recordings—provided after trial—indicated that the copy of the telephonic recording was downloaded days before that, making that date impossible. 2-ER-327-28, 359; Dist. Ct. Dkt. 368-2 at 9; 7-ER-1631-32; SER-45-46. Moreover, that account/phone number was not linked to Berry Kabov. 3-ER-529-30, 549. Nevertheless, with the district court's blessing, that witness also testified that the voice was Berry Kabov's, despite the fact that he never met or had spoken to Berry Kabov. After trial, *Brady* material demonstrated that that witness had other targets in his investigation who could have been the person on the other end of the call. Moreover, after trial the defense retained a voice expert who analyzed all of the calls introduced at trial that were attributed to Berry Kabov using biometric speak comparison, and opined that the voice on the recordings was dissimilar to Berry Kabov's. 2-ER-365-66, 401-19.

In summary, the Government withheld exculpatory evidence that permitted their informant to testify to inaccurate and misleading information, suppressed exculpatory evidence that proved the mailboxes were not associated with the Kabovs, and withheld pertinent information undercutting their claims that the phone calls were not from the defendants.

On appeal, the Kabovs explained that these errors violated their rights under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Napue v. Illinois*, 360 U.S. 264 (1959), because this false testimony was withheld by the government despite its potential exculpatory effect, and it was material, meaning it had a reasonable likelihood of affecting the jury's verdict. *E.g.*, Opening Br. 42-77. The Ninth Circuit rejected the *Napue* and *Brady* challenges to Gettel's testimony, concluding that "none of these purported constitutional violations or additional evidence could or would have changed the outcome of defendants' trial. In short, Gettel's testimony was unnecessary to secure defendants' convictions." App.5. That reasoning is inconsistent with *Bagley*, 473 U.S. at 684, which requires courts to consider whether there is a reasonable probability of a different result,[5] and *Kyles,* 514 U.S. at 436, which requires courts to consider such evidence "collectively, not item by item." Addressing the Kabovs' argument, the Ninth Circuit made "a series of independent materiality evaluations, rather than the cumulative evaluation" required by this

[5] By contrast, the Ninth Circuit did at least cite the correct language when rejecting the other *Napue* challenges brought by defendants, although it did not meaningfully apply that test.

Court's precedent. *Kyles*, 514 U.S. at 441. But viewing the suppressed evidence in isolation, the Ninth Circuit could not get the full picture of its weight. Here, Gettel claimed that he bought thousands of dollars in opiates from Defendants per month—something easily refuted by the bank records the government produced after trial. He was the only witness to testify to receiving drugs from the Kabovs. This Court should either hold this case pending resolution of *Glossip,* or grant review to correct this conflict with this Court's authority, apply the correct standard, and reverse.

As for the other claims, while the Ninth Circuit purported to reject them "individually and collectively because defendants failed to establish that much of the evidence they challenge was 'actually false' or misleading, and there is not a reasonable probability that absent the remaining evidence, the result at trial could have been different," that conclusion was riddled with error, and the Court did not properly engage with, let alone analyze, the cumulative effect of those errors. App.2-10. (Indeed, it did not even identify which evidence fell into which bucket—actually false or not.)

For example, the Ninth Circuit refused to consider the deletion of the recordings, finding it was "forfeited because defendants did not raise it in a motion to suppress before trial, and the district court never addressed it." App.13. Both statements are wrong. Before trial, the government filed a motion in limine requesting that the recordings be introduced without the informant's testifying, and Defendants opposed that motion, identifying serious concerns about the recordings' reliability, and pointing out that

the government had not indicated whether any recordings were "[d]estroyed or missing." Dist. Ct. Dkt. 123 at 1-2. Their fourteen-page filing also emphasized the government's failure to show "[t]hat the recording[s had] been preserved in a [reliable] manner," that "deletions ha[d] not been made in the recording[s]," and that the recordings had "not … been modified." *Id.* at 8-9. Defendants also stated that they had not been informed "[w]hether the recording device or the originals of the recordings still exist," or whether the recordings were "in substantially the same condition as when they were" turned over by the informant. *Id.* at 9-10. The district court denied Defendants' request to exclude the recordings, finding them admissible "subject to the government providing proper foundational testimony." App.61-62.

Before the witness's testimony, the court allowed voir dire outside the jury's presence. During this questioning, defense counsel first learned that the witness had destroyed the original recordings, even though it should have been divulged before trial. 7-ER-1629-30. Counsel also learned (also for the first time) about many other problems with the reliability of the recordings and the witness/s logs. 7-ER-1630-50, 1653-54. Without that (and other) information produced after trial, defendants could not cross-examine him effectively.

Following his testimony, defendants argued vehemently that the court should exclude the evidence, emphasizing that the witness had "destroyed the originals.... How do we know that what he has is the original calls, especially since there are multiple missing calls, and none of these calls have

time and date on them?" but the court denied the motion, stating that the destruction of, and problems with, the evidence was nothing more than "fodder for cross[]." 7-ER-1654-55. There is no denying that the issue was preserved, and ruled on, in the district court. So too with the many other errors that the court excused by asserting incorrectly any objections had been waived or that the Kabovs had failed to substantiate their claims.

Had the suppressed evidence been admitted and the false evidence excluded, it would have shown that the government's evidence connecting the Kabovs' to the mailboxes and recordings with an alleged co-conspirator was tenuous at best. "Since all of these possible findings were precluded by the prosecution's failure to disclose the evidence that would have supported them, 'fairness' cannot be stretched to the point of calling this a fair trial." *Kyles*, 514 U.S. at 454. This "is a significantly weaker case than the one heard by the … jury." *Id.* It is also one which merits this Court's attention.

CONCLUSION

For the foregoing reasons, this Court should grant, vacate, and remand in light of *Ruan*, or grant the petition for certiorari to resolve the conflict over invited error. Alternatively, this Court should hold pending *Glossip*.

Respectfully submitted,

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