No. ____

In The

Supreme Court of the United States

DELILAH DIAZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Evidence 704(b) provides: "In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone." Fed. R. Evid. 704(b).

The question is: In a prosecution for drug trafficking—where an element of the offense is that the defendant *knew* she was carrying illegal drugs—does Rule 704(b) permit a governmental expert witness to testify that most couriers know they are carrying drugs and that drug-trafficking organizations do not entrust large quantities of drugs to unknowing transporters?

RELATED PROCEEDINGS

United States v. Diaz, No. 21-50238, 2023 WL 314309 (9th Cir. Jan. 19, 2023)

United States v. Diaz, No. 3:20-cr-02546-AJB-1 (S.D. Cal. 2020)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Delilah Guadalupe Diaz respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The panel decision of the court of appeals is available in the Westlaw database at 2023 WL 314309, and reprinted in the Appendix to the Petition ("Pet. App.") at 1a-6a. The Ninth Circuit's order denying en banc review is reprinted at Pet. App. 7a. The relevant proceedings in the district court are unpublished.

JURISDICTIONAL STATEMENT

The panel decision of the court of appeals was issued on January 19, 2023. Pet. App. 1a. On March 3, 2023, the Ninth Circuit denied en banc review. *Id.* 7a. On May 2, 2023, the Court extended the time to file a petition for a writ of certiorari to July 1, 2023. *See* No. 22-A-954. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Federal Rule of Evidence 704, entitled "Opinion on an Ultimate Issue," provides:

(a) In General — Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.

(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of

a defense. Those matters are for the trier of fact alone. Fed. R. Evid. 704.

INTRODUCTION

An essential element of proving importation of illegal drugs in violation of the Controlled Substances Act is that the defendant *knew* she was transporting drugs. This element is "necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Ruan v. United States*, 142 S. Ct. 2370, 2377 (2022) (quoting *Elonis v. United States*, 575 U.S. 723, 736 (2015)).

This petition concerns how this element may be proven. Petitioner was apprehended at the Southern border, where investigators found methamphetamine hidden in the door panels of the car she was driving. For many years, the federal government has recognized that drug-trafficking organizations in Mexico sometimes use "blind mules"—people who do not know drugs are in the cars they are driving—to transport drugs across the border.[1] Petitioner maintained at trial that that must have happened here.

To rebut petitioner's defense, the Government called a Homeland Security agent to testify in an expert capacity that "in most circumstances, the driver knows they are hired" to transport drugs and that drug-trafficking organizations do not entrust large quantities of drugs to unknowing drivers. Pet. App. 15a. Petitioner argued that this testimony violated

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[1] Kristina Davis, *More 'blind mules' escaping drug charges*, The San Diego Union-Tribune (May 2, 2015, 11 AM), https://www.sandiegouniontribune.com/news/courts/sdut-drug-smuggling-blind-mules-innocent-drugs-2015may02-story.html.

Federal Rule of Evidence 704(b), which prohibits an expert witness in a criminal case from "stat[ing] an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged." Fed. R. Evid. 704(b). The district court and Ninth Circuit disagreed, holding that testimony implicates that rule only when it provides "an 'explicit opinion' on the defendant's state of mind." Pet. App. 6a (quoting *United States v. Gomez*, 725 F.3d 1121, 1128 (9th Cir. 2013), *cert. denied*, 572 U.S. 1073 (2014)).

As the Ninth Circuit acknowledged, however, the testimony in this case would have been barred in the other court of appeals that encompasses most of the rest of our Southern border. In the Fifth Circuit, Rule 704(b) prohibits not just "explicit opinions" on mental state but also "the 'functional equivalent' of a prohibited opinion on mental state." Pet. App. 6a (quoting *United States v. Gutierrez-Farias*, 294 F.3d 657, 663 (5th Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003)). And the Fifth Circuit has repeatedly applied this rule to preclude testimony identical to the agent's testimony here.

This Court should grant certiorari to resolve this conflict. The circuit split is clear and entrenched, and it extends even beyond the Ninth and Fifth Circuits. The issue is significant. And the Ninth Circuit's position is wrong. It contravenes the text of Rule 704(b), which prohibits all "opinion[s] about" the defendant's mental state—not just *explicit* opinions. It also impermissibly lightens the Government's burden to prove knowledge beyond a reasonable doubt, permitting it to substitute a generalization about a particular class

of defendants for evidence specific to the actual defendant.

STATEMENT OF THE CASE

A. Factual Background

On August 17, 2020, petitioner Delilah Guadalupe Diaz was returning to her home in California from a trip to Mexico. Dist. Ct. Dkt. 112 at 150-51, 160-62.[2] When the border agent asked her to roll down the window of the car she was driving, he heard a "crunch-like sound." *Id.* at 158. He called for backup and used a "buster" to measure the density inside the door panels. *Id.* at 159. Inspectors found 27.98 kilos of methamphetamine hidden in the door panels of the car. *Id.* at 194-95.

Petitioner told investigators that she did not know the drugs were in the car. ROA 307. She explained that she had driven down for the weekend with her daughter, but that her daughter drove back earlier while petitioner stayed to visit her boyfriend, a man named Jessie. *Id.* 311-14. Jessie let petitioner drive his car home, telling her he would pick it up in a few days. *Id.* 319.

B. Procedural History

1. The Government charged petitioner with importation of methamphetamine in violation of the Controlled Substances Act. ROA 371; *see* 21 U.S.C. §§ 952, 960. One of the elements of that offense is that the

[2] "Dist. Ct. Dkt." refers to the docket in *United States v. Diaz* (S.D. Cal. No. 3:20-cr-02546-AJB-1). "Dkt." refers to the docket in *United States v. Diaz* (9th Cir. No. 21-50238). "ROA" refers to the record on appeal in the Ninth Circuit.

defendant knew she was transporting drugs. 21 U.S.C. § 960(a)(1). Petitioner continued to insist that element was not satisfied here.

Before trial, petitioner moved to exclude any expert testimony concerning the knowledge of typical drug couriers, arguing that permitting a Government expert to testify that "narcotic traffickers do not entrust large and valuable quantities of narcotics to unknowing couriers" would violate Federal Rule of Evidence 704(b) by providing "a direct comment on the ultimate issue—Ms. Diaz's knowledge." ROA 348-49, 353-56. The district court rejected petitioner's argument. Pet. App. 31a.

At trial, the Government called Andrew Flood, a Homeland Security agent, as an expert on drug-trafficking organizations. Based on his experience investigating other cases, Agent Flood testified that drugs are packaged in Mexico and hidden in cars and other vehicles to be "transported from point A to point B across the border." Pet. App. 14a-15a. In response to the prosecution's question whether, in his "training and experience, are the transporters compensated for their efforts," he testified, "Yes. It's a job. It's to take it from point A to point B." *Id.* 15a. Agent Flood stated that couriers are primarily paid with money but could also receive drugs, "use of the vehicle," or repayment of debts. *Id.*

The prosecution then asked, "Agent Flood, based on your training and experience, are large quantities of drugs entrusted to drivers that are unaware of those drugs?" Pet. App. 15a. He responded: "No. In extreme circumstances—actually, in most circum-

stances, the driver knows they are hired. It's a business. They are hired to take the drugs from point A to point B." *Id.* The prosecution then asked, "[W]hy don't they use unknowing couriers, generally?" *Id.* Agent Flood responded: "Generally, it's a risk of your—your cargo not making it to the new market; not knowing where it's going; not being able to retrieve it at the ending point, at your point B. So there's a risk of not delivering your product and, therefore, you're not going to make any money." *Id.* 16a.

Agent Flood also distinguished the purportedly rare "schemes" involving unknowing couriers from the facts of petitioner's case. Pet. App. 23a. He testified that drug-trafficking organizations had been known to hide drugs in "easily accessible" locations in an unknowing individual's car, or in a company vehicle that an unknowing employee drives to a job across the border. *Id.* He also said that organizations sometimes target individuals with "a known destination," such as those who commute to a job across the border at the same time every day. *Id.* 24a. Since the drugs in petitioner's case were hidden inside her boyfriend's car, which she was driving home from a one-off personal trip, none of these "schemes" mapped onto her case.

The jury found petitioner guilty, and the district court sentenced her to seven years in prison. ROA 2-3.[3]

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[3] That sentence was reduced from the mandatory minimum of ten years, partly as a result of a proffer petitioner made in which she disclaimed her "blind mule" defense. Dist. Ct. Dkt. 107 at 6, 9; *see* 18 U.S.C. § 3553(f) (permitting downward deviation).

2. Petitioner appealed her conviction on multiple grounds. As relevant here, she renewed her argument that Agent Flood's testimony that drug-trafficking organizations do not entrust large quantities of drugs to unknowing couriers and that "in most circumstances, the driver knows they are hired" violated Rule 704(b). Dkt. No. 3 at 47, 50-53.

The Ninth Circuit rejected this argument, reasoning that this testimony was admissible because it did "not provide an 'explicit opinion' on the defendant's state of mind." Pet. App. 6a (quoting *United States v. Gomez*, 725 F.3d 1121, 1128 (9th Cir. 2013)). The court of appeals acknowledged that the Fifth Circuit would have found a violation of Rule 704(b) here because that court has held "that testimony that drug trafficking organizations rarely use unknowing couriers is the 'functional equivalent' of a prohibited opinion on mental state." *Id.* (quoting *United States v. Gutierrez-Farias*, 294 F.3d 657, 663 (5th Cir. 2002)). But Ninth Circuit precedent precluded the panel from adopting that view. *Id.* [4]

That proffer, however, plays no role in this appeal. The Government bears the burden of proving guilt beyond a reasonable doubt *at trial*. Alleged errors regarding the admission of evidence during the guilt/innocence phase, therefore, cannot be deemed harmless based on "new admissions made at sentencing." *Butler v. Curry*, 528 F.3d 624, 648 (9th Cir. 2008).

[4] Petitioner also argued that Agent Flood's testimony was inadmissible in its entirety because it was irrelevant under Rule 401. Dkt. No. 3 at 48-49. The Ninth Circuit rejected this argument, holding that (1) "modus operandi evidence" about drug-trafficking organizations is "relevant when a defendant puts on an unknowing courier defense," and (2) petitioner had put on

REASONS FOR GRANTING THE WRIT

A. There is an entrenched split on the question presented.

In the Ninth Circuit, an expert witness in a prosecution for importing illegal drugs does not run afoul of Rule 704(b) unless he states an "explicit opinion" regarding the defendant's "state of mind or knowledge of his transportation of drugs." *United States v. Gomez*, 725 F.3d 1121, 1128 (9th Cir. 2013) (quoting *United States v. Murillo*, 255 F.3d 1169, 1178 (9th Cir. 2001), *cert. denied*, 535 U.S. 948 (2002)). But in the Fifth Circuit, that same expert cannot say anything that "amount[s] to the functional equivalent" of a statement that the defendant knew she was transporting drugs. *United States v. Gutierrez-Farias*, 294 F.3d 657, 663 (5th Cir. 2002). These rules generate opposite outcomes, permitting testimony in one jurisdiction that is squarely barred in the other. And at least two additional circuits have sided with the Ninth in permitting expert testimony that drug-trafficking organizations rarely, if ever, use unknowing couriers, deepening the conflict among the courts of appeals.

1. The Fifth Circuit adopted its rule barring the sort of testimony at issue here in *Gutierrez-Farias*.

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such a defense. In other words, the Ninth Circuit held that petitioner "opened the door" to modus operandi evidence. Pet. App. 5a-6a; *see Hemphill v. New York*, 142 S. Ct. 681, 692 (2022) (defendants "open the door" to evidence "relevant to contradict their defense"). Petitioner does not renew this relevance contention here. Instead, she argues only that portions of Agent Flood's testimony, though relevant, violated Rule 704(b).

294 F.3d at 663. There, the Government called a Drug Enforcement Agency agent who testified that "[t]he way it usually works" with drug-trafficking organizations is that they do not recruit couriers who "ha[ve] no knowledge" of the operation, due to the amount of money involved and the fact that "just as in any other business, the people need a certain amount of credentials." *Id.* at 662. The Fifth Circuit held that this opinion "presented the jury with a simple generalization: In most drug cases, the person hired to transport the drugs knows the drugs are in the vehicle." *Id.* at 663. Because the "clear suggestion" of this opinion was that, "because most drivers know there are drugs in their vehicles, [the defendant] must have known too," the testimony violated Rule 704(b)'s prohibition against giving an opinion about the defendant's mental state. *Id.*

The Fifth Circuit continues to enforce its holding in *Gutierrez-Farias*. Just last year, for example, the court held that it was "clear and obvious error" under *Gutierrez-Farias* for an agent to testify "that drug couriers 'usually' know that they are transporting drugs." *United States v. Lara*, 23 F.4th 459, 476-77 (5th Cir. 2022). Other examples abound. *See, e.g.*, *United States v. Gonzalez-Rodriguez*, 621 F.3d 354, 366-67 (5th Cir. 2010) ("testimony that the majority of people arrested at immigration checkpoints are couriers" impermissibly "implied that [defendant] was a drug courier, and therefore knew he was carrying drugs, *because* he was arrested at a checkpoint"); *United States v. Cuellar*, 478 F.3d 282, 294-95 (5th Cir. 2007) (en banc) (district court erred in admitting expert statement that "[t]he people who are driving money or who

are driving dope know that they are transporting either dope or money, something of value"); *United States v. Mendoza-Medina*, 346 F.3d 121, 129 (5th Cir. 2003) ("generalized statements regarding distributors having to trust their couriers" are functional equivalent of state-of-mind testimony).

2. The Ninth Circuit, by contrast, holds that Rule 704(b) permits expert testimony that most couriers know they are carrying drugs or that drug-trafficking organizations rarely, if ever, use unknowing drug couriers. So long as the expert refrains from expressing "any 'explicit opinion' of [the defendant's] state of mind or knowledge of his transportation of drugs," such expert testimony is admissible. *Gomez*, 725 F.3d at 1128.

In *Murillo*, for example, the court found no Rule 704(b) violation where an expert agent described "how drug traffickers do not entrust large quantities of drugs to people who are unaware that they are transporting them." 255 F.3d at 1176, 1178. Likewise in *Gomez*, where the court of appeals held Rule 704(b) permitted an "expert opinion that drug-trafficking organizations do not use unknowing drug couriers." 725 F.3d at 1128; *see also United States v. Valencia-Lopez*, 971 F.3d 891, 895, 903 n.13 (9th Cir. 2020) (no Rule 704(b) violation where expert responded to prosecution's question about "the likelihood drug trafficking organizations would entrust a large quantity of illegal drugs to the driver of a commercial vehicle who was forced or threatened to comply" with "[a]lmost nil, almost none"); *United States v. Venegas-Reynoso*, 524 F. App'x 373, 376 (9th Cir. 2013) (upholding the admis-

sion of "blind mule" expert testimony like the testimony approved in *Murillo*), *cert. denied*, 571 U.S. 1002 (2013).[5]

The Ninth Circuit applied that rule in this case, holding that Rule 704(b) permitted Agent Flood's testimony that drug-trafficking organizations do not entrust large quantities of drugs to unknowing transporters and that "in most circumstances, the driver knows they are hired" to carry drugs. Pet. App. 6a, 15a. The Ninth Circuit also perceived no issue with Agent Flood's further testimony differentiating the rare scenarios in which organizations have used unknowing couriers from the situation here, thus making the inference that petitioner knew she was transporting drugs all the more inescapable. *Id.* 23a-24a.

3. The Eighth and Eleventh Circuits have sided with the Ninth in permitting expert testimony that most couriers know they are carrying drugs.

The Eleventh Circuit holds that Rule 704(b) prohibits nothing more than an expert "*expressly*

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[5] The petitions for certiorari in *Murillo* and *Gomez* did not raise the question presented here. Instead, the *Murillo* petition argued that the Ninth Circuit's admission of various expert testimony violated Federal Rule of Evidence 403. *See* Pet. for Cert. at i, 9, *Murillo v. United States*, No. 01-8316 (Jan. 31, 2002). The *Gomez* petition asked this Court to review whether officer-expert testimony violated the Confrontation Clause. *See* Pet. for Cert. i, 10, *Gomez v. United States*, No. 13-9168 (Mar. 4, 2014). And while the *Venegas-Reynoso* petition did raise the Rule 704(b) question, resolving that question would not have been outcome-determinative because the court of appeals had made a clear finding of harmless error. *See* Pet. for Cert. i, 5, *Venegas-Reynoso v. United States*, No. 13-6694 (Sept. 30, 2013).

stat[ing] a conclusion that the defendant did or did not have the requisite intent." *United States v. Alvarez*, 837 F.2d 1024, 1031 (11th Cir. 1988) (emphasis added). It has applied this rule to uphold the admission of an agent's expert testimony "that it would be unlikely crew members aboard a vessel carrying a large quantity of contraband would be unaware of its presence" despite the "obvious inference" that "the defendants in this case were aware of contraband aboard the vessel." *Id.* The Eleventh Circuit has also allowed an expert to testify that "'unwitting drug smugglers' who do not know they are transporting drugs are 'extremely rare,'" and that the expert "had not personally seen a case in which a smuggler gave $300,000 of cocaine to someone without first alerting them that they had that amount of contraband in their possession." *United States v. Russell*, 799 F. App'x 747, 750-51 (11th Cir. 2020).

The Eighth Circuit similarly permits "[e]xpert testimony 'to the effect that drug traffickers do not typically use couriers who are unaware they are transporting drugs.'" *United States v. Urbina*, 431 F.3d 305, 311-12 (8th Cir. 2005) (quoting *United States v. Martinez*, 358 F.3d 1005, 1010 (8th Cir. 2004)). In *Urbina*, the court held that a law-enforcement expert "did not offer a view on" the defendant's knowledge where he testified that "in his experience he had never seen a drug dealer entrust as large a quantity of drugs as were found in [defendant's] auxiliary gas tank to a courier who was not aware of what he was transporting." *Id.*

4. This split is entrenched. Some Ninth Circuit judges have expressed concerns that this type of testimony "venture[s] close to drawing, in effect, the ultimate conclusion for the jury," in violation of Rule 704(b). *Venegas-Reynoso*, 524 F. App'x at 376. Nevertheless, the Ninth Circuit has continued to enforce the "explicit opinion" standard and refused to reconsider that standard en banc here. Pet. App. 7a. And there is no reason to believe the Fifth, Eleventh, and Eighth Circuits will all reconsider their views. Indeed, the Fifth Circuit has reaffirmed its view many times over the years, including as recently as 2022. *See Lara*, 23 F.4th at 476-77. Only this Court can resolve this enduring conflict.

B. There is a pressing need to resolve the conflict.

Rule 704(b) is an important evidentiary rule whose scope has a significant impact on how drug-trafficking cases are prosecuted. The conflict here also has implications in numerous other contexts.

1. Rule 704(b) embodies important values. In particular, it is rooted in our historical tradition of protecting the role of the jury as the finder of fact. *See*, *e.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968) (recounting common-law roots and constitutional protections of right to jury trial). Until the mid-twentieth century, courts generally prohibited expert witnesses from expressing opinions on "ultimate issues," believing that such testimony threatened to "usurp[] the province of the jury." Fed. R. Evid. 704 Advisory Committee's Notes to 1972 Proposed Rules; *see also, e.g.*, *United States v. Spaulding*, 293 U.S. 498, 506-07 (1935) (applying this rule and citing other decisions

from this Court and others doing same). The Federal Rules later relaxed this prohibition in general, but Rule 704(b) sticks to our historical tradition in the especially sensitive area of mens rea in criminal cases.

2. The Government prosecutes thousands of drug-trafficking cases each year.[6] These cases most commonly arise in the Fifth and Ninth Circuits.[7] At the same time, drug-trafficking organizations have been known to plant drugs on unknowing couriers, or "blind mules," who then unwittingly transport those drugs across the border. Walter I. Gonçalves, Jr., *Busted at the Border: Duress and Blind Mule Defenses in Border-Crossing Cases*, The Champion 46, 50-51 (Feb. 2018) (listing news stories involving drugs planted on cross-border commuters, job applicants, and other unknowing couriers). Indeed, the Government's standard practice in importation cases is to produce a memorandum during discovery listing known "schemes" involving blind mules (including those that Agent Flood testified about here, *see* Pet. App. 23a-24a). It thus comes as no surprise that cases regularly arise in which defendants charged with importing drugs maintain that they did not know about the drugs. *Gonçalves, supra,* at 49.

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[6] U.S. Sentencing Comm'n, Quarterly Data Report, Fiscal Year 2022 at 2, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2022_Quarterly_Report_Final.pdf.

[7] U.S. Sentencing Comm'n, Quick Facts: Drug Trafficking Offenses, Fiscal Year 2018 at 1, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Drug_Trafficking_FY18.pdf.

As the Ninth Circuit has acknowledged, expert testimony in such cases about the likelihood of unknowing couriers goes "right to the heart of" that defense. *United States v. Murillo*, 255 F.3d 1169, 1177-78 (9th Cir. 2001). Convincing a jury you did not know that drugs were hidden inside your truck is exceedingly difficult when the Government can rely on an agent's testimony "that the likelihood drug trafficking organizations would entrust a large quantity of illegal drugs" to someone who did not know about the drugs is "[a]lmost nil, almost none." *United States v. Valencia-Lopez*, 971 F.3d 891, 895, 903 n.13 (9th Cir. 2020) (involving duress defense). This is especially true when that testimony "carries with it the imprimatur of the Government" and an expert-reliability finding by the court. *United States v. Sosa*, 897 F.3d 615, 619, 621 (5th Cir. 2018) (quoting *United States v. Young*, 470 U.S. 1, 18-19 (1985)). The Ninth Circuit's permissive interpretation of Rule 704(b) thus puts a huge amount of pressure on defendants who say they were "blind mules" nevertheless to plead guilty (perhaps to lesser charges).

3. The scope of Rule 704(b) governs the admissibility of expert testimony in other contexts as well. Take two examples of other types of testimony that regularly arises in drug-trafficking cases.

First, the Government frequently seeks to elicit expert testimony about "the typical roles within a drug trafficking organization" in order to prove that a defendant participated in a drug-trafficking conspiracy. *Sosa*, 897 F.3d at 619. This "modus operandi" testimony usually does not implicate Rule 704(b). But it can cross the line—at least in the Fifth Circuit—when

the expert begins "matching those roles to individuals in the case, including the defendant." *Id.* Similar testimony, however, is regularly admitted in other jurisdictions that take a more permissive approach to the Rule. *See United States v. Richard*, 969 F.2d 849, 854-55 (10th Cir. 1992) (affirming admission of expert testimony that "[n]o drug dealer of a drug deal this size is going to have four persons that don't know anything about it" to prove participation in drug conspiracy because the expert "did not expressly draw that conclusion or inference for the jury").

Second, the Government regularly elicits expert testimony that certain quantities of drugs correlate with intent to distribute them. Courts take different approaches to this testimony based on their interpretations of Rule 704(b). In *United States v. Soler-Montalvo*, 44 F.4th 1 (1st Cir. 2022), for example, the First Circuit "held that 'a qualified expert does not violate Rule 704(b) by expressing an opinion as to whether predicate facts are consistent with drug distribution rather than mere possession.'" *Id.* at 14 (citation omitted). By contrast, in *United States v. Watson*, 260 F.3d 301 (3d Cir. 2001), the Third Circuit held that Rule 704(b) was violated when the district court admitted expert testimony that a certain quantity of cocaine was "consistent with someone selling cocaine rather than using it for personal consumption." *Id.* at 305, 309-10.

C. This case is an excellent vehicle to evaluate the reach of Rule 704(b).

This case presents a clean vehicle to resolve the question presented.

Unlike many defendants in the Ninth Circuit who may see no point in challenging the Ninth Circuit's longstanding view, petitioner preserved the Rule 704(b) issue by moving to exclude Agent Flood's testimony on 704(b) grounds. ROA 348-49, 353-56. At the hearing on that motion, her counsel engaged in an extended colloquy about the scope of Rule 704(b) with the trial judge and the prosecution. Pet. App. 30a-33a. Petitioner also renewed that argument on appeal. Dkt. No. 3 at 50-53. This differentiates petitioner's case from many Rule 704(b) disputes that end in plea bargains, otherwise die in district courts, or are reviewed on appeal only for plain error. *See United States v. Sosa*, 897 F.3d 615, 620 (5th Cir. 2018) (stringent requirements of "plain-error review ha[ve] prevented defendants from obtaining relief in most of the other cases involving improper drug profiling testimony").

This case also involves both flavors of the sort of testimony that has given rise to the circuit split here. First, Agent Flood testified that most people found driving drugs across a border know they have drugs in their cars. *See* Pet. App. 15a ("[I]n most circumstances, the driver knows they are hired."); *compare, e.g.*, *United States v. Lara*, 23 F.4th 459, 476 (5th Cir. 2022) (forbidding testimony that "drug couriers 'usually' know that they are transporting drugs"). Second, Agent Flood testified that drug-trafficking organizations rarely use unknowing couriers. *See* Pet. App. 15a ("Q. Agent Flood, based on your training and experience, are large quantities of drugs entrusted to drivers that are unaware of those drugs? . . . [A.]

No."); *compare, e.g.*, *United States v. Mendoza-Medina*, 346 F.3d 121, 129 (5th Cir. 2003) (forbidding "generalized statements regarding distributors having to trust their couriers"). This case thus affords the Court the opportunity to consider the entire scope of the disagreement among the courts of appeals and to resolve it fully.

D. The Ninth Circuit's "explicit opinion" rule is wrong.

The Ninth Circuit's interpretation of Rule 704(b) runs counter to the text of the rule, is unduly formalistic, and impermissibly lightens the Government's burden to prove the crucial element of mens rea.

1. The plain text of Rule 704(b) forecloses limiting its reach to an "explicit opinion" regarding the defendant's knowledge. Rule 704(b) prohibits an expert witness in a criminal case from "stat[ing] an opinion *about* whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." Fed. R. Evid. 704(b) (emphasis added). "About" means "[c]oncerning, regarding, with regard to, in reference to; in the matter of." *About*, Oxford English Dictionary (3d ed. 2009). The opinions captured by this rule thus need not explicitly state that the defendant had a particular state of mind; the Rule does not prohibit stating only *whether* the defendant had a certain mental state. It is enough if the expert's testimony "concern[s]" or is "in reference to" whether the defendant possessed that mental state. *Id.*

A generalization that most drug couriers know they are carrying drugs amounts to an opinion "concerning" or "in reference to" an alleged drug courier's mental state. This is true of many generalizations about a class of individuals. Say a patient asks his therapist whether he is depressed and she responds, "People do not usually have trouble getting out of bed in the morning unless they are depressed." She has clearly expressed an "opinion about" her patient's mental state. Likewise for a high-school teacher who, when asked whether one of her students knew that he was not supposed to get outside help on a take-home exam, responds, "High-school seniors generally know the honor code."

The same is true with respect to statements that drug-trafficking organizations rarely entrust their drugs to people who do not know they are carrying such cargo. Again, a couple of examples from ordinary speech prove the point. If parents are talking to a friend about their son's new romantic relationship and they say their son rarely takes a partner away for a weekend unless the person really likes him, the parents surely have expressed an opinion concerning the mental state of the partner. Likewise for a journalist who reports that the President of the United States virtually never invites a corporate executive to the White House unless that executive is sympathetic to the Administration's goals; the journalist is expressing an opinion about the executive's state of mind.

The Ninth Circuit rejects this common-sense understanding of Rule 704(b)'s text, requiring not just an opinion "about" the defendant's state of mind, but an "explicit" opinion, *United States v. Gomez*, 725 F.3d

1121, 1128 (9th Cir. 2013) (quoting *United States v. Murillo*, 255 F.3d 1169, 1178 (9th Cir. 2001)). This gloss on the rule violates the well-established principle that courts "ordinarily resist reading words or elements into a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997). So, too, for the Eleventh Circuit's approach, which reads Rule 704(b) as meaning "that the expert cannot *expressly* state a conclusion that the defendant did or did not have the requisite intent." *United States v. Alvarez*, 837 F.2d 1024, 1031 (11th Cir. 1988) (emphasis added).

2. The Ninth Circuit's atextual, hyper-formalistic approach permits prosecutors and expert witnesses to evade the reach of Rule 704(b) simply by speaking artfully. In reading the rule to bar only "explicit opinion[s]," *Gomez*, 725 F.3d at 1128 (quoting *Murillo*, 255 F.3d at 1178), the Ninth Circuit has effectively reduced it to a prohibition against uttering certain "magic words," *United States v. Lipscomb*, 14 F.3d 1236, 1240 (7th Cir. 1994). As long as the witness does not "comment[] directly" on the defendant's "mental state," the rule is not triggered. *United States v. Hayat*, 710 F.3d 875, 902 (9th Cir. 2013).

Indeed, some Ninth Circuit judges have recognized that the court's "precedents limit[] Rule 704(b) essentially to a semantic preclusion," yet consider themselves bound to enforce this flawed reading. *Hayat*, 710 F.3d at 902; *but see id.* at 911 (Tashima, J., dissenting) (observing that expert testimony that the "kind of person" who would carry a certain Islamic text in his wallet is "[a] person who perceives him or herself as being engaged in war for God against an

enemy" clearly "usurped the jury's role as ultimate finder of fact").

3. The Ninth Circuit's crabbed interpretation of Rule 704(b) also drains the vitality of the mens rea element of the Controlled Substances Act and other federal criminal statutes. This Court has repeatedly emphasized that "consciousness of wrongdoing is a principle 'as universal and persistent in mature systems of [criminal] law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.'" *Ruan v. United States*, 142 S. Ct. 2370, 2376-77 (2022) (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952)).

Consciousness of wrongdoing is so important to the just administration of criminal law that courts must construe federal criminal statutes "start[ing] from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state." *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019). Even statutes that "contain no *mens rea* provision whatsoever" must be read to require the Government to prove scienter as part of its case-in-chief—"often that of knowledge or intent" to commit wrongdoing. *Ruan*, 142 S. Ct. at 2377; *see also Elonis v. United States*, 575 U.S. 723, 736 (2015); *Wooden v. United States*, 142 S. Ct. 1063, 1076 (2022) (Kavanaugh, J., concurring) (urging Court to "continue to vigorously apply (and where appropriate, extend) *mens rea* requirements"); *United States v. Burwell*, 690 F.3d 500, 527 (D.C. Cir. 2012) (en banc) (Kavanaugh, J., dissenting)

(explaining how "[t[he presumption of mens rea embodies deeply rooted principles of law and justice that the Supreme Court has emphasized time and again").

The mens rea element here and in numerous other federal statutes is particularly important because it separates criminal from otherwise "entirely innocent" conduct, *Rehaif*, 139 S. Ct. at 2197; *see also Liparota v. United States*, 471 U.S. 419, 426 (1985). To state the obvious: There is nothing inherently blameworthy about driving a boyfriend's car across the Mexico-United States border. Nor, for example, is it necessarily improper to possess a gun, *see Rehaif*, 139 S. Ct. at 2197, or for a doctor to prescribe medication containing a controlled substance, *see Ruan*, 142 S. Ct. at 2378. It is vital, therefore, that the Government establish that the particular defendant in any of these scenarios possesses the requisite "vicious will," *id.* at 2376 (citations omitted).

To do so, the Government must present evidence of the "mental state of the defendant himself or herself." *Ruan*, 142 S. Ct. at 2381; *see also Elonis*, 575 U.S. at 738. It is not enough to show that a "hypothetical" or typical defendant who takes certain actions usually has the requisite state of mind. *Ruan*, 142 S. Ct. at 2381.

The Ninth Circuit's "explicit opinion" rule undercuts this foundational requirement in at least two ways.

First, the Ninth Circuit's rule permits the Government to substitute generalizations about a group of people (most couriers) for evidence specific to the defendant (this courier). The rule would equally allow a

governmental expert to testify that doctors who prescribe certain medication under particular circumstances almost always know it will be abused, *see Ruan*, 142 S. Ct. at 2382, or that almost all undocumented persons who arrived in the United States as children know they do not have legal status, *see Rehaif*, 139 S. Ct. at 2197-98. Such testimony accomplishes just what Rule 704(b) prohibits: it unmistakably signals that the testifying expert believes the defendant must have had the requisite mens rea. In permitting the Government to rely on this testimony, the Ninth Circuit lightens the Government's burden to prove this essential element.

Indeed, this permissive approach leaves room for testimony that defendants who carry drugs across the border *always* know they are transporting drugs or that drug-trafficking organizations would *never* entrust drugs to unknowing couriers—despite the fact that such testimony creates an inescapable inference that the particular defendant knew about the drugs. *See*, *e.g.*, *United States v. Urbina*, 431 F.3d 305, 311 (8th Cir. 2005) (expert testimony that "in his experience he had never seen a drug dealer entrust" certain quantity of drugs "to a courier who was not aware of what he was transporting"); *United States v. Russell*, 799 F. App'x 747, 751 (11th Cir. 2020) (expert testimony that he "had personally never seen a case in which a smuggler gave someone $300,000 worth of cocaine without informing them in advance what it was"). In fact, the expert testimony in this case was essentially to this effect. After testifying that "in most circumstances, the driver knows they are hired," Pet. App. 15a, Agent Flood went on to limit the possibility

that a driver might not know about the drugs to "three schemes," *id.* 23a, none of which resembled the facts of petitioner's case. This elaboration narrowed his testimony from "most" drivers to "all" drivers like petitioner.

Second, the Ninth Circuit's rule allows the Government to establish a rebuttable presumption of mens rea, which raises serious constitutional concerns. The Due Process Clause forbids creating "rebuttable presumptions" regarding mens rea or another element of a criminal offense. *See Francis v. Franklin*, 471 U.S. 307, 317-18 (1985). The reason is simple: such a presumption—which posits that if certain predicate facts are present, the jury should presume a certain element is satisfied—"relieves the State of the affirmative burden of persuasion on the presumed element." *Id.* at 317; *see also Sandstrom v. Montana*, 442 U.S. 510, 521 (1979); *In re Winship*, 397 U.S. 358, 364 (1970) (prosecution must prove every element beyond a reasonable doubt).

Franklin and *Sandstrom* involved jury instructions from a judge, whereas the presumption in this case is created by expert testimony. But at least where, as here, the expert is a government agent speaking with the imprimatur of someone who enforces the law, there is not much difference between the two. When members of law enforcement—testifying based on their "specialized knowledge," Fed. R. Evid. 702—tell the jury that a particular class of defendants generally has a particular state of mind when certain predicate facts are present, they, in all practical terms, "shift[] to the defendant the burden

of persuasion on the crucial element of intent." *Francis*, 471 U.S. at 316; *see also* Brian R. Gallini, *To Serve and Protect? Officers as Expert Witnesses in Federal Drug Prosecutions*, 19 Geo. Mason L. Rev. 363, 365 (2012) ("An officer, testifying as an expert, relieves the prosecution of its burden to prove that defendant possessed the charged crime's requisite mens rea beyond a reasonable doubt.").

This is grossly unfair, and Rule 704(b) should not be construed to tolerate such a potential incursion on elementary notions of due process. The Government must prove that every *individual* it wishes to imprison committed an evil act. Burden-shifting generalizations will not do. Especially when mens rea is involved.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

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