No. 23-14

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Government does not—and cannot—contest that the expert testimony deemed admissible by the Ninth Circuit in this case would have been inadmissible in the Fifth Circuit.

Nor can the Government dispute that the question presented is important. For at least a decade now, drug-trafficking organizations based in Mexico have, unbeknownst to drivers, hidden illegal drugs in the gas tanks, door panels, and spare tires of cars crossing the border.[1] These organizations bet that unwitting couriers are less likely to arouse suspicion and less able to turn on members of the organizations should they be caught. The critical question in many drug-trafficking trials each year is thus whether the defendant knew that drugs were hidden in her car. The type of expert testimony at issue in this case—that is, expert testimony that most people caught with drugs know they are transporting drugs and that drug-trafficking organizations rarely entrust large quantities of drugs to blind mules—can make the difference between a verdict of acquittal and a hefty mandatory minimum sentence.

This Court should grant certiorari. The Federal Rules of Evidence should be uniformly applied across the country—not differently depending on whether an accused drug trafficker crossed the border in Nogales,

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[1] *See* Marty Graham, *Mexican Cartels Trick Border Crossers into Being Drug Mules*, Reuters (Apr. 15, 2012); Sofía Mejías-Pascoe, *'Blind Mule' Crossed Border with 100 Pounds of Meth and Had No Idea*, Times of San Diego (June 3, 2023); Emily Smith, *'Blind Mules' Unknowingly Ferry Drugs Across the U.S.-Mexico Border*, CNN (Jan. 24, 2012).

Arizona, or El Paso, Texas. And the Ninth Circuit's interpretation of Rule 704(b) contravenes both the plain text of the rule and this Court's precedent regarding mens rea.

I. As the Government concedes, the split is real.

1. The Government acknowledges that the Fifth and Ninth Circuits treat the same testimony differently under Rule 704(b). *See* BIO 13 (conceding "disagreement" between the circuits). As the court below explained, the test that the Fifth Circuit has adopted "is contrary to" the Ninth Circuit's view. Pet. App. 6a. And the cases collected in the petition make clear that the split is entrenched and frequently leads to different outcomes in similar cases. Pet. 8-13.

This fact alone—that the same testimony is permitted by one court of appeals and barred by another—is sufficient to warrant certiorari. This Court routinely grants certiorari to resolve 1-1 circuit splits. *See, e.g.*, Pet. at 13-14, *Bittner v. United States*, 143 S. Ct. 713 (2023) (No. 21-1195); Pet. at 20-23, *Babb v. Wilkie*, 140 S. Ct. 1168 (2020) (No. 18-882); Pet. at 12-17, *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768 (2020) (No. 18-1116).

Moreover, this is no ordinary 1-1 split. Because the blind-mule tactic is most associated with Mexican drug-trafficking organizations, the blind-mule defense typically arises in cases where defendants have crossed the United States' border with Mexico.[2] The Fifth and Ninth Circuits cover more than 90% of that border and see most cases involving drugs trafficked

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[2] *See* Graham, *supra* note 1.

into the United States from Mexico. In 2022, for instance, these two circuits accounted for more than 97% of all fentanyl seized by U.S. Customs and Border Patrol.[3] That same year, these two circuits included the four federal districts with the most convicted methamphetamine traffickers.[4]

In short, the split between the Fifth and Ninth circuits affects the vast majority of cases that involve the blind-mule defense. And the Government does not dispute that resolving the conflict could also provide clarity to other circuits regarding the scope of Rule 704(b). Pet. 11-13, 15-16.

2. Trying to downplay the consequences of this split, the Government notes that "most of the testimony offered in this case by Agent Flood" would have been admissible in the Fifth Circuit. BIO 14. But it doesn't matter if "most" of his testimony would have been admitted. What matters is that the two key statements petitioner challenges—that most people caught with drugs know they are transporting drugs and that drug-trafficking organizations generally do not use blind mules—are plainly inadmissible in the Fifth Circuit.

The Government also suggests that the answer to the question presented "depends heavily on the facts" of each case. BIO 13. Not so. In the Fifth Circuit, the

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[3] *Drug Seizure Statistics FY2023*, U.S. Customs & Border Prot., https://perma.cc/EX8Y-MLV9 (last updated Sept. 22, 2023).

[4] *Quick Facts: Methamphetamine Trafficking Offenses, Fiscal Year 2022*, U.S. Sent'g Comm'n, https://perma.cc/H9N6-7Q35.

two kinds of testimony petitioner challenges are regularly deemed inadmissable, regardless of the underlying facts of the case.[5] In the Ninth, that same testimony is regularly admitted, again regardless of the underlying facts.[6]

3. Finally, the Government suggests that the Fifth Circuit permits "expert testimony that would otherwise be inadmissible" when it is used to "rebut the defendant's innocent explanation for his behavior." BIO 13. Whatever the validity of that interpretation with respect to Federal Rules of Evidence *other than* Rule 704(b), *see* Pet. 7 n.4, it has no bearing on the circuit split at issue here. Every Fifth Circuit case

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[5] *See, e.g.*, *United States v. Gutierrez-Farias*, 294 F.3d 657, 661-63 (5th Cir. 2002) (finding the district court abused its discretion in allowing a government expert to testify that "most drivers know there are drugs in their vehicles"); *United States v. Mendoza-Medina*, 346 F.3d 121, 129 (5th Cir. 2003) (finding that "generalized statements regarding distributors having to trust their couriers" constitute prohibited state-of-mind testimony); *see also United States v. Lara*, 23 F.4th 459, 476-77 (5th Cir. 2022); *United States v. Gonzalez-Rodriguez*, 621 F.3d 354, 366-67 (5th Cir. 2010); *United States v. Cuellar*, 478 F.3d 282, 294-95 (5th Cir. 2007), *rev'd on other grounds*, 553 U.S. 550 (2008); *United States v. Ramirez-Velasquez*, 322 F.3d 868, 879 (5th Cir. 2003).

[6] *See, e.g.*, *United States v. Gomez*, 725 F.3d 1121, 1128 (9th Cir. 2013) (allowing expert testimony that drug-trafficking organizations do not use unknowing couriers); *United States v. Esparza*, 999 F.2d 545, 1993 WL 263429, at *2 (9th Cir. 1993) (unpublished table decision) (permitting an expert's testimony that he had "never, ever found one person who did not know that there was either drugs in the vehicle, or something illegal in the vehicle . . . all of them knew"); *see also United States v. Quintero*, 567 Fed. Appx. 522, 523 (9th Cir. 2014); *United States v. Murillo*, 255 F.3d 1169, 1178 (9th Cir. 2001).

cited in the petition involved expert testimony that was being used to "rebut the defendant's innocent explanation"—that is, the blind-mule defense—yet the Fifth Circuit held that the testimony was inadmissible under Rule 704(b). Pet. 8-10 (collecting cases).

The Government insinuates that *United States v. Montes-Salas*, 669 F.3d 240 (5th Cir. 2012), is to the contrary. BIO 13. But the defendant's mens rea was "not at issue" in that case, so the testimony did not implicate Rule 704(b). *Montes-Salas*, 669 F.3d at 251. *Montes-Salas* nowhere suggested that the testimony was admissible under Rule 704(b) because it "rebutted the defendant's innocent explanation."

II. This case is the rare vehicle that will allow this Court to answer the question presented.

1. The Government does not contest that petitioner preserved objections to the two kinds of expert testimony commonly introduced in blind-mule cases: that most people caught with drugs know they are transporting drugs and that drug-trafficking organizations generally do not use blind mules.

This case thus presents the rare opportunity to resolve the entrenched split on both kinds of testimony. The Government has apparently resolved not to seek review in any case arising from the Fifth Circuit. For their part, defendants in the Ninth Circuit who take their case to trial may see little point in preserving objections to that circuit's long-established rule. And of course, the mere threat that the government might introduce this kind of testimony within the Ninth Circuit undoubtedly pressures the vast majority of defendants in that jurisdiction to forgo trial altogether, often waiving their right to appeal in

plea bargains as well. Indeed, the Government cites only one previous petition to this Court raising the question presented, and in that case, the relevant objection had not been preserved (and the petition had been untimely filed to boot). BIO 8 (citing *Caraballo-Rodriguez v. United States*, 137 S. Ct. 1065 (2017)).

2. The Government's only vehicle argument is that any error was harmless. But the court below did not reach that issue, and this Court regularly grants certiorari where the Government asserts harmless error, leaving the issue for remand. *See, e.g.*, U.S. BIO at 17, *Samia v. United States*, 143 S. Ct. 2004 (2023) (No. 22-196); U.S. BIO at 29, *Ciminelli v. United States*, 143 S. Ct. 1121 (2023) (No. 21-1170); U.S. BIO at 22-24, *Ruan v. United States*, 142 S. Ct. 2370 (2022) (No. 20-1410); Resp. BIO at 26-27, *Hemphill v. New York*, 142 S. Ct. 681 (2022) (No. 20-637).

In any event, the error here was not harmless. The Ninth Circuit has explained that the sort of expert testimony at issue in this case goes "to the heart of [a person's] defense that he was simply an unknowing courier." *United States v. Murillo*, 255 F.3d 1169, 1177 (9th Cir. 2001). And sure enough, the Government reminded the jurors of Agent Flood's testimony four times during closing arguments, C.A. E.R. 70, 74-75, 104, 105, forcing the defense to acknowledge that Agent Flood was the Government's "star witness," *id.* 97-98. Furthermore, though the trial lasted only two days, the jury deliberated for a day and a half, signaling that the jurors thought it was a close case even considering the testimony at issue. *See id.* 381; *Parker v. Gladden*, 385 U.S. 363, 365 (1966) (per curiam) (rejecting harmless-error arguments by noting, in part, that the length of juror deliberations

"indicat[ed] a difference among them as to the guilt of petitioner").

What's more, the Fifth Circuit has rejected harmless-error arguments in similar cases. In *United States v. Ibarra*, 493 F.3d 526 (5th Cir. 2007), for example, the Fifth Circuit found that erroneously admitting analogous testimony was not harmless even though the defendant had lied to the police about material facts. *Id.* at 529. Central to the Fifth Circuit's determination was the fact that the prosecution referenced the expert testimony in closing statements, as occurred here. *Id.* at 532; *cf. United States v. Lara*, 23 F.4th 459, 478 (5th Cir. 2022).[7]

III. The Ninth Circuit's interpretation of Rule 704(b) is wrong.

1. As with a statute, the plain text of a federal rule is dispositive. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 587 (1993). And the Ninth Circuit's position cannot be squared with the plain language of Rule 704(b). The rule precludes expert witnesses 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). In ordinary usage, "about" means "[c]oncerning, regarding, with regard to, in reference to; in the matter of." Pet. 18 (quoting *About*, Oxford English

[7] In the procedural history section of its brief, the Government mentions that petitioner made a post-trial proffer in order to help secure a more-than-fifteen-year reduction of her sentence. BIO 6-7. But this post-trial proffer is irrelevant to the harmless-error analysis. *See* Pet. 6 n.3. The Government does not argue otherwise.

Dictionary (3d ed. 2009)). Generalizations regarding what most couriers know plainly "concern," or are made "in reference to," the defendant's mental state and therefore violate Rule 704(b). *See* Pet. 18-19.

The Government never accounts for the crucial preposition "about." The Government contends there was no Rule 704(b) violation here because "Agent Flood did not state an opinion *that* petitioner herself had the requisite mens rea." BIO 9 (emphasis added) (citation omitted). But Rule 704(b) does not just prohibit experts from stating an opinion *that* a defendant had the requisite mens rea. It also prohibits opinions *about*—that is, concerning—a defendant's mental state.

The Government not only ignores the word "about," but also attempts to insert new words into Rule 704(b). The Government insists that Rule 704(b) forbids expert testimony only when the expert "draw[s] the ultimate inference or conclusion for the jury," presents "particularized evidence," or expresses an "'explicit opinion' on the defendant's state of mind." BIO 8, 10-11; Pet. App. 6a. But none of those words—not "ultimate," not "particularized," and not "explicit"—appears in Rule 704(b)'s text. And courts should "resist reading words or elements into a statute that do not appear on its face." *See Bates v. United States*, 522 U.S. 23, 29 (1997).

2. The Government does not dispute that the Ninth Circuit's interpretation of Rule 704(b) permits the prosecution to substitute one-size-fits-all generalizations for particularized evidence regarding the "mental state of the defendant himself or herself." *Ruan v. United States*, 142 S. Ct. 2370, 2381 (2022); *see* Pet. 22-24. Indeed, the Government does not

contest that it could procure a conviction in a case like this with *no* particularized evidence of the defendant's mens rea. Pet. 23. For instance, the Government says it does not "*ordinarily* seek to prove a drug courier defendant's knowledge *solely* by expert testimony." BIO 12 (emphasis added). But the Government does not deny that it *sometimes* does so; the Government's modifier "ordinarily" implicitly admits as much.

Seeking to further minimize the problems with its reading of Rule 704(b), the Government suggests that the Ninth Circuit's test would not allow an expert to testify that "defendants who carry drugs *always* know that they are transporting drugs." BIO 11. But the Ninth Circuit's test contains no such prohibition. *See, e.g.*, *United States v. Valencia-Lopez*, 971 F.3d 891, 895, 903 n.13 (9th Cir. 2020) (permitting expert testimony that there was "[a]lmost nil, almost no[]" likelihood that "drug trafficking organizations would entrust a large quantity of illegal drugs" to an unwilling driver) (first alteration in original).

3. The Government's position is fundamentally in tension with the two values underlying Rule 704(b). First, this testimony encroaches on questions entrusted to the jury. Rule 704(b) specifically leaves questions of mental state "for the trier of fact alone." Fed. R. Evid. 704(b). "Expert evidence can be both powerful and quite misleading," *Daubert*, 509 U.S. at 595—especially when it carries the imprimatur of a government agent. Juries should not be put in a position of weighing testimony that essentially says the defendant must be guilty. Second, allowing this sort of testimony impermissibly lightens the

Government's burden to prove mens rea. The mens rea element in a criminal statute is "necessary to separate wrongful conduct from otherwise innocent conduct." *Ruan*, 142 S. Ct. at 2377 (citation omitted). Generalizations about the mental states of many should not be used to prove the wrongdoing of one.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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