No. 23-14

IN THE

Supreme Court of the United States

DELILAH DIAZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR PETITIONER

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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 presented 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 people at the border with drugs know they are carrying those drugs and that drug-trafficking organizations do not entrust large quantities of drugs to unknowing couriers?

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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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BRIEF FOR PETITIONER

Petitioner Delilah Guadalupe Diaz respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the Ninth Circuit is unpublished but is available in the Westlaw database at 2023 WL 314309, and is reprinted in the Appendix to the Petition ("Pet.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 The relevant proceedings in the district court are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2023. Pet. App. 1a. On March 3, 2023, the Ninth Circuit denied en banc review. *Id.* 7a. On May 2, 2023, this Court extended the time to file a petition for a writ of certiorari to July 1, 2023. *See* No. 22A954. The petition was filed on June 30, 2023, and the Court granted it on November 13, 2023. The 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

The requirement of *mens rea* in criminal law—that is, of a "vicious will," or consciousness of wrongdoing—is "as universal and persistent in mature systems of law as belief in freedom of the human will." *Morissette v. United States*, 342 U.S. 246, 250 (1952). It "took deep and early root in American soil." *Id.* at 252. And this Court has steadfastly protected the requirement, emphasizing that it "is no mere technicality, but rather implicates 'fundamental and far-reaching issues.'" *United States v. Burwell*, 690 F.3d 500, 527 (D.C. Cir. 2012) (en banc) (Kavanaugh, J., dissenting) (quoting *Morissette*, 342 U.S. at 247) (describing this Court's precedent).

One such issue is how the prosecution may prove the defendant's *mens rea*. It has long been established that all facts necessary to convict must be proven to juries, which represent the conscience and common sense of the community. *See Apprendi v. New Jersey*, 530 U.S. 466, 500-18 (2000) (Thomas, J., concurring); Valerie P. Hans & Neil Vidmar, *Judging the Jury* 28-37 (1986). And at the Founding, no expert testimony on *mens rea*, or most any other issue, was allowed. Even as the categorical bar on expert testimony was gradually lifted, courts generally prohibited expert witnesses in criminal and civil cases alike from expressing opinions on "ultimate issues" of fact, believing that such testimony threatened to "usurp[]

the province of the jury." Fed. R. Evid. 704 advisory committee's notes to 1972 proposed rules.

The prohibition against "ultimate issue" expert testimony softened in the twentieth century, and, in 1975, Federal Rule of Evidence 704(a) abolished it. But that rule's carve-out, Rule 704(b), continues to safeguard the jury's historic role in the especially sensitive area of *mens rea* in criminal cases. Rule 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."

The question in this case is whether a prosecutorial practice that has arisen in the Ninth Circuit violates this Rule. In certain drug-trafficking cases, the Ninth Circuit allows law-enforcement agents, testifying as expert witnesses, to tell the jury that individuals in the defendant's position almost always possess the requisite *mens rea* for the crime charged. *See, e.g.*, Pet. App. 15a-16a; *United States v. Gomez*, 725 F.3d 1121, 1128 (9th Cir. 2013); *United States v. Murillo*, 255 F.3d 1169, 1178 (9th Cir. 2001). Petitioner refers to these statements as "classwide *mens rea*" testimony because such testimony states that individuals like the defendant always or generally have a guilty mind. Petitioner respectfully submits that classwide *mens rea* testimony runs afoul of the plain text of Rule 704(b) and impermissibly treads on the jury's prerogative to assess the moral culpability of the particular defendant before it.

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STATEMENT OF THE CASE

A. Factual Background

1. For decades, Mexican drug-trafficking organizations (DTOs) have run drug-smuggling operations across the southern border of the United States. DTOs often use drug couriers who know that they are transporting drugs into this country. Such persons are paid to undertake this task and perform it with full awareness that they are carrying contraband.

DTOs also sometimes use unknowing couriers—also known as "blind mules"—to transport drugs into the United States. Kristina Davis, *More 'Blind Mules' Escaping Drug Charges*, San Diego Union-Trib. (May 2, 2015).[1] Using blind mules has several benefits. For one thing, because unknowing couriers are unaware of the drugs in their vehicles, they do not need to be compensated for the risks attendant to drug smuggling. *Id.* Nor is there any danger that they will steal the drugs for themselves. *Id.* When unknowing couriers approach the border and speak to customs agents, they do not act nervous or believe they have anything to hide. *Id.* And if apprehended, blind mules are unable to give law enforcement any information about the DTO. *Id.* They have no idea who the drugs belong to.

As the Government has acknowledged in filings and other documents, DTOs use blind mules in a variety of settings. For instance, about a decade ago, federal investigators uncovered "a scheme to take advantage of unsuspecting drivers to smuggle an estimated 3,000 kilograms of marijuana from Juarez,

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[1] https://perma.cc/G82Q-3PNY.

Mexico into El Paso." FBI, *El Paso Man Sentenced to 20 Years in Federal Prison in Marijuana Smuggling Scheme* (Sept. 11, 2012).[2] The DTO used lookouts to target college students and professionals who routinely crossed the border with rapid inspection passes. *See* Emily Smith, *"Blind Mules" Unknowingly Ferry Drugs Across the U.S.-Mexico Border*, CNN (Jan. 24, 2012).[3] Once a target was identified, the lookout would obtain the vehicle identification number from the traveler's car, use that number to make keys for the trunk, and plant the drugs inside. *Id.* After the traveler crossed the border and went to class or work, the DTO would retrieve the drugs. *Id.*

In another example of this phenomenon, a teacher at a bilingual charter school in El Paso was arrested by Mexican soldiers after they discovered more than 45 kilograms of marijuana in the trunk of her car at the border. *See* Jason Beaubien, *At Border, Teacher Becomes Unwitting Drug Smuggler*, NPR (July 21, 2011).[4] Hundreds protested, incredulous that "Miss Ana" had been accused of drug smuggling. *Id.* After spending a month in a Mexican jail—during which she passed the time by offering English classes to other inmates—it was discovered that she, too, had been victimized by the sprawling El Paso blind-mule scheme. *Id.*

The use of unknowing couriers occurs beyond El Paso as well. For example,

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[2] https://perma.cc/RPG4-4QBW.

[3] https://perma.cc/5C7E-P2WR.

[4] https://perma.cc/J8EL-BW5A.

Given DTOs' natural incentive to stay one step ahead of law enforcement, they are constantly altering how they deploy unknowing-courier schemes—devising new schemes as soon as old ones are discovered. For instance, starting in 2011, the State Department warned that DTOs were "increasingly target[ing] unsuspecting individuals who cross the border on a regular and predictable basis" to "affix drugs to the undercarriage of the[ir] car[s]."[6] But a few

[5] During discovery, the Government disclosed under a protective order. *See* Dist. Ct. Dkt. 42. Petitioner cites these materials by Bates stamp. In order to comply with the protective order, she has moved to file this brief under seal, with a redacted copy available to the public.

[6] Bureau of Consular Affs., U.S. Dep't of State, *Mexico: Country-Specific Information*, https://perma.cc/C9SJ-5QDJ (archived Nov. 18, 2011) (to view live archived version, click "View the live page").

years later, the Department ceased giving that specific warning in favor of a more general advisory, presumably because DTOs were no longer using that particular scheme.[7] More recently,

2. On August 17, 2020, petitioner Delilah Guadalupe Diaz was in Mexico, driving northbound towards the United States. Dist. Ct. Dkt. 112 at 150-51, 160-62.[8] When she arrived at the San Ysidro Port of Entry, she submitted a customs declaration stating she had nothing to declare. CA9 SER 82. She explained to a border agent that she was driving her boyfriend's car back to her home in California. *Id.*

The border agent then asked petitioner to roll down the rear window of the car. She replied that the windows were manual, not electric. So the agent opened the back door himself and tried to roll down the

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[7] The current advisory reads as follows: "Drug Smuggling: Mexican criminal organizations are engaged in a violent struggle to control trafficking routes. Criminal organizations smuggling drugs into the United States have targeted unsuspecting individuals who regularly cross the border. Frequent border crossers are advised to vary their routes and travel times and to closely monitor their vehicles to avoid being targeted." Bureau of Consular Affs., U.S. Dep't of State, *Mexico: Safety and Security*, https://perma.cc/H3GX-BN3C (archived Dec. 22, 2023).

[8] "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). "CA9 ER" and "CA9 SER" refer to the excerpts and supplemental excerpts of the record on appeal in the Ninth Circuit.

window. Upon attempting this, he heard a "crunch-like sound" and felt "some resistance." CA9 SER 80.

The border agent called for backup, and the car underwent a secondary inspection. Inspectors found almost 28 kilograms of methamphetamine hidden in the door panels of the car. J.A. 20, 34-35. Also concealed in the car was a GPS device. CA9 SER 154.

Petitioner waived her *Miranda* rights and agreed to an interview with a Homeland Security agent. She told him that she had no idea drugs were in the car. CA9 ER 305-07. She explained that she had traveled with her daughter to Mexico for the weekend. *Id.* 311. Her daughter had then met up with friends while petitioner stayed to spend time with her boyfriend. *Id.* 311-14. When petitioner decided to go home, her boyfriend offered to let petitioner drive his car, telling her he would pick it up in a few days. *Id.* 319.

B. Procedural History

1. Disbelieving petitioner's explanation, the Government charged her with importation of methamphetamine in violation of the Controlled Substances Act. CA9 ER 371; *see* 21 U.S.C. §§ 952, 960. One of the elements of that offense is that the defendant knew she was transporting drugs. 21 U.S.C. § 960(a)(1). Petitioner maintained that element was not satisfied here. In fact, she made clear as litigation proceeded that "[t]he *only* issue in this case is knowledge, specifically whether [she] knew that there were drugs hidden in the vehicle she was driving." CA9 SER 13 (emphasis added).

Before trial, the Government shared 975 pages of sealed discovery detailing ways in which DTOs sometimes use unknowing couriers to transport drugs

across the Mexico-United States border. Dist. Ct. Dkt. 42. The Government also filed a notice under Federal Rule of Criminal Procedure 16 of its intent to call an expert witness on this issue. Specifically, the Government stated that it would call Homeland Security Investigations Special Agent Andrew Flood as an expert witness on the structure and practices of DTOs, including whether they use unknowing couriers. CA9 SER 18-22.

Petitioner moved to exclude any expert testimony concerning the purported general knowledge of drug couriers. As directly relevant here, she argued that permitting a Government expert to testify that people who cross the border with large amounts of drugs typically know they are transporting those drugs would violate Federal Rule of Evidence 704(b) by providing an opinion about the "ultimate issue [of] Ms. Diaz's knowledge." J.A. 3, 9-12.[9]

In light of the discovery the Government had provided, the district court ruled on factual grounds that Agent Flood could not testify in "absolute" terms

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[9] Petitioner also argued that Agent Flood's testimony was inadmissible in its entirety because it was irrelevant under Rule 401. Dkt. 3 at 38-39. The district court and Ninth Circuit rejected this argument, holding that (1) "modus operandi evidence" about DTOs is "relevant when a defendant puts on an unknowing courier defense"; and (2) petitioner had put on such a defense. Pet. App. 5a-6a. In other words, the lower courts held that petitioner "opened the door" to *modus operandi* evidence. *Id.*; *see also 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, even if relevant, violated Rule 704(b).

that blind mules are "mythical creatures" who do not exist. Pet. App. 31a-32a. But the district court otherwise denied petitioner's motion *in limine*, holding that Agent Flood could testify that the "majority" of people who transport drugs across the border know they are transporting drugs. *Id.* 31a-33a.

At trial, the Government called Agent Flood to the stand. Referencing his "training and 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 drivers are "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 whether "large quantities of drugs [are] entrusted to drivers that are unaware of those drugs?" Pet. App. 15a. Agent Flood responded: "No. In extreme circumstances—actually, in most circumstances, 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 described the "three schemes" involving unknowing couriers of which he was aware, highlighting details that differed markedly from the facts of petitioner's case. Pet. App. 23a. Specifically, he acknowledged that DTOs had been known to hide drugs in "easily accessible" locations in an unknowing individual's car, such as a "spare tire" in the back of a "pickup bed." *Id.* Another known scheme, he said, is where DTOs surreptitiously place "a magnet of drugs" "underneath a vehicle." *Id.* Agent Flood also conceded that DTOs sometimes target individuals based on their "employment," such as those with a daily commute across the border to an office with a "parking lot [where] the car can be easily accessed so the drugs can be taken out." *Id.* 23a-24a. Because the drugs in petitioner's case were hidden inside her boyfriend's car, which she was driving home from a personal trip, none of these "schemes" mapped onto her case.

Consistent with petitioner's statement to the arresting officers, defense counsel maintained in closing argument that petitioner did not know about the drugs in the car. Counsel suggested that the boyfriend must have loaded his car with the methamphetamine and planned to retrieve it a few days after petitioner unsuspectingly took it across the border. J.A. 57, 64. Testimony from a defense witness who was an expert in automobile mechanics supported this suggestion; he explained that the car petitioner was driving would not have handled any differently with drugs inside the door panels. CA9 SER 159.

The Government responded in its rebuttal: "Does that [story] make sense? Or does it make more sense that, as Agent Flood testified to, generally couriers are

compensated. Generally, you don't use unknowing couriers." J.A. 73.

The jury deliberated for nearly two days—almost as long as the trial itself. *See* CA9 ER 381. Eventually, the jury found petitioner guilty. The district court sentenced her to seven years in prison. J.A. 80.[10]

2. Petitioner appealed her conviction on multiple grounds. As pertinent here, she renewed her argument that Rule 704(b) prohibited Agent Flood's classwide *mens rea* testimony. *See* CA9 Br. 13-14, 40-43.

The Ninth Circuit rejected this argument. The panel explained that binding circuit authority had interpreted Rule 704(b) to allow expert testimony regarding DTOs' "use of unknowing couriers," "so long as the expert does not provide an 'explicit opinion' on the defendant's state of mind." Pet. App. 5a-6a (quoting *United States v. Gomez*, 725 F.3d 1121, 1128 (9th Cir. 2013) (quoting in turn *United States v. Murillo*, 255 F.3d 1169, 1178 (9th Cir. 2001))). Applying that construction of Rule 704(b) to this case, the Ninth Circuit held that Agent Flood's testimony

[10] 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). 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) (quoting *United States v. Salazar-Lopez,* 506 F.3d 748, 755 (9th Cir. 2007)).

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was admissible because he did not offer any such "explicit opinion." Pet. App. 6a.

The Ninth Circuit acknowledged that the Fifth Circuit would have found a violation of Rule 704(b) here on the ground "that testimony that drug trafficking organizations rarely use unknowing couriers is 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)). But Ninth Circuit precedent precluded the panel from adopting that view. *Id.*

3. Petitioner sought rehearing en banc, stressing not only that the Ninth Circuit's narrow conception of Rule 704(b) conflicts with Fifth Circuit precedent, but also that several judges on the Ninth Circuit itself had questioned the validity of that court's "explicit opinion" rule. *See* Pet. for Reh'g En Banc 10-13; *United States v. Hayat,* 710 F.3d 875, 901 (9th Cir. 2013) (recognizing that the Ninth Circuit interprets Rule 704(b) in this context "much more narrowly than its text might indicate"); *id.* at 911-12 (Tashima, J., dissenting) (further criticizing Ninth Circuit's construction of Rule 704(b)); *United States v. Campos*, 217 F.3d 707, 718 (9th Cir. 2000) (Pregerson, J., concurring in part and dissenting in part) (discerning "no principled distinction" between classwide *mens rea* testimony and testimony explicitly stating the defendant had the requisite *mens rea*). The Ninth Circuit denied rehearing en banc. Pet. App. 7a.

4. This Court granted certiorari. 144 S. Ct. ___ (2023).

SUMMARY OF THE ARGUMENT

The district court violated Rule 704(b) by admitting Agent Flood's testimony that "in most circumstances," a driver transporting drugs across the border "knows" they are carrying those drugs, and that large quantities of drugs are not entrusted to drivers who are "unaware of those drugs." Pet. App. 15a.

I. Rule 704(b) bars an expert witness from "stat[ing] an opinion about whether the defendant did or did not have [the] mental state" required to convict. Fed. R. Evid. 704(b). Classwide *mens rea* statements fall within the purview of that Rule.

A. Contrary to the Ninth Circuit's view, the text of Rule 704(b) covers more than just an expert's "'explicit opinion' on the defendant's state of mind." Pet. App. 6a (citation omitted). The plain meaning of the phrase "about whether" encompasses statements *concerning,* or *in reference to*, whether the defendant had a certain *mens rea*. And various examples from ordinary speech demonstrate that classwide *mens rea* statements fall within this test. Even though such statements do not single out the particular defendant on trial, juries naturally understand them as expressing an opinion about the defendant's state of mind.

B. Precluding classwide *mens rea* expert testimony also furthers a core purpose of Rule 704(b): preserving the vitality of statutory *mens rea* requirements. *Mens rea* requirements embody the Anglo-American tradition of ensuring that people are not deprived of their liberty unless they are morally blameworthy. Given the importance and sensitivity of such statutory elements, Rule 704(b) does not stop at prohibiting an expert witness from offering an

"explicit opinion" regarding the defendant's state of mind. The Rule also ensures the finder of fact has space—unencumbered by classwide *mens rea* testimony—to make an individualized assessment of every particular defendant's culpability.

C. Construing Rule 704(b) in this manner also accords with two vital constitutional values. First, the Sixth Amendment demands that juries—representing the conscience of the community—make the qualitative determination whether the defendant is sufficiently blameworthy to deserve punishment. Even if a jury technically has the power to reject a governmental expert's assertion that people like the defendant generally have a guilty mind, there is an intolerable risk that the jury will defer to a governmental expert's generalization that people in the defendant's position know they are transporting drugs. Second, due process requires the prosecution to prove *mens rea* with individualized evidence. Presumptions or generalizations about classes of defendants are at odds with that principle.

II. Agent Flood's testimony featured impermissible classwide *mens rea* statements.

Agent Flood asserted that, "in most circumstances," a driver transporting drugs "knows they are hired" to carry those drugs. Pet. App. 15a. This is an unambiguous statement that people in the defendant's position generally possess the *mens rea* necessary to convict. And this testimony became all the more problematic when Agent Flood added that he was aware of only three types of unknowing courier schemes, none of which map onto the facts here.

Agent Flood's assertion that "large quantities of drugs are not entrusted to drivers that are unaware of those drugs," Pet. App. 15a, also violated Rule 704(b). This assertion was couched in terms of how drug-trafficking organizations conduct themselves. But, like the other testimony just discussed, this testimony spoke directly to the mental state of drivers like petitioner transporting drugs across the border. It thus equally concerned whether petitioner knew that she was carrying contraband.

ARGUMENT

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." The Ninth Circuit holds that this Rule bars expert witnesses only from expressing 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)). As long as the expert does not "comment[] directly" on the particular defendant's "mental state," the Rule is not triggered. *United States v. Hayat*, 710 F.3d 875, 902 (9th Cir. 2013). Accordingly, the Ninth Circuit upheld the admission of expert testimony here that "in most circumstances," a driver found with drugs at the border "knows" they are transporting such contraband and that narcotics traffickers do not entrust their drugs to drivers who "are unaware of those drugs." Pet. App. 15a.

That holding is erroneous. Rule 704(b) excludes expert testimony that a certain class of defendants

generally possesses the requisite *mens rea* for a crime charged. And that line was crossed here.

I. Rule 704(b) bars expert testimony that a certain class of defendants generally possesses the *mens rea* for the charged offense.

The Federal Rules of Evidence should be construed according to their ordinary meaning and other canons of statutory interpretation. In other words, this Court "interpret[s] the legislatively enacted Federal Rules of Evidence as [it] would any statute." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 587 (1993). These standard tools of interpretation demonstrate that the Ninth Circuit's reading of Rule 704(b) contradicts the Rule's plain text, undermines the vitality of *mens rea* requirements, and contravenes constitutional values of due process and trial by jury.

A. The text of Rule 704(b) prohibits more than just "explicit opinions on the defendant's state of mind."

The Ninth Circuit's crabbed interpretation of Rule 704(b)—limiting its prohibition to statements expressing an "explicit opinion on the defendant's state of mind," Pet. App. 6a (internal quotation marks omitted) (citation omitted)—cannot be squared with the plain text of the Rule.

1. To begin, the Ninth Circuit's gloss on Rule 704(b) violates the well-established principle that courts should "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). Rule 704(b) forbids an expert witness 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." The word "explicit" appears nowhere in this text. Nor does the preposition "on." Instead of prohibiting only an "explicit opinion on" the defendant's state of mind, the Rule bars expert testimony "about whether" the defendant had the mental state required to convict. Fed. R. Evid. 704(b).

"About" means "[c]oncerning, regarding, with regard to, in reference to; in the matter of." *About*, Oxford English Dictionary (3d ed. 2009). A few examples from everyday speech illuminate how this definition works here. Say a patient who has been struggling to complete everyday tasks visits his therapist. During their session, the therapist tells him, "People do not usually have trouble getting out of bed in the morning unless they are depressed." The therapist has thereby expressed an opinion "about" whether her patient is suffering from depression. Or imagine a high-school student facing a disciplinary hearing for allegedly copying answers from the Internet during a take-home exam. After the student says he did not know he was forbidden from accessing outside sources during the test, his teacher asserts that "high-school seniors generally know the honor code." The teacher surely has expressed an opinion about whether the student knowingly cheated.

One more variation: Suppose parents are trying to figure out what their son, Bobby, would like for his birthday. They ask Bobby's hockey coach if he has any ideas. The coach responds: "I've talked to several kids on the team, and all the boys generally want the same thing: a model train set." Although the coach did not explicitly single out Bobby, his answer is still *about* what Bobby wants for his birthday. Describing a toy

every boy on Bobby's team wants obviously *concerns* or is *in reference to* what Bobby wants for his birthday, too.

In short, the opinions captured by Rule 704(b) need not state *explicitly* that the defendant had a particular state of mind. The text of the Rule encompasses more: An opinion "about whether" a defendant has a mental state. And this language includes expert testimony on the subject of *mens rea* that "concerns" or is "in reference to" whether the defendant possessed a particular state of mind. Indeed, even the Ninth Circuit has been forced to admit that its "caselaw has interpreted [Rule 704(b)] much more narrowly than its text might indicate." *United States v. Hayat*, 710 F.3d 875, 901 (9th Cir. 2013).

Perhaps for this reason, the Government's argument in its Brief in Opposition eschewed any mention of an "explicit opinion" requirement. Instead, the Government contended that the expert testimony here comported with Rule 704(b) because it "did not 'state an opinion' *that* petitioner herself had the requisite mens rea to be found guilty." BIO 9 (emphasis added) (citation omitted). But this formulation fares no better than the Ninth Circuit's "explicit opinion" rule. The Government's use of the word "that" simply ignores the word "about." And this is no more permissible than adding the word "explicit." "[I]t is no more the court's function to revise by subtraction than by addition." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012). Rule 704(b) does not prohibit an expert witness only from stating an opinion *that* a defendant had the requisite *mens rea* to be found

guilty. The Rule also prohibits opinions *about* whether the defendant had the requisite *mens rea* for the crime. To omit the word "about" is to alter the meaning of the Rule.

This is not to say that every assertion by an expert from which the jury might infer the defendant's mental state is covered by Rule 704(b). For example, expert testimony about the monetary value of drugs found in a car, or about how DTOs typically package drugs for smuggling or distribution, might cause jurors to draw certain inferences about a courier's mental state. But such statements are not "about . . . mental state," Fed. R. Evid. 704(b); rather, they concern the value of drugs, or the organizational practices of DTOs. By contrast, classwide *mens rea* testimony directly addresses the subject of *mens rea*. Such testimony thus falls squarely within Rule 704(b)'s prohibition against offering an opinion "about" the defendant's "mental state."[11]

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[11] The original text of Rule 704(b), enacted by Congress in 1984, barred expert testimony "*as to* whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." Pub. L. No. 98–473, § 406, 98 Stat. 1837, 2067-68 (1984) (emphasis added). In 2011, the Federal Rules of Evidence underwent a "restyling" to make them "more easily understood." Fed. R. Evid. 101 advisory committee's notes to 2011 amendment; *see also* Fed. R. Evid. 704 advisory committee's notes to 2011 amendment. Part of this restyling included changing the phrase "as to" in Rule 704(b) to "about." This drafting history has no bearing on the textual analysis necessary to resolve this case: The focus of statutory interpretation "is the existing statutory text, and not the predecessor statutes." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534

2. Statutory interpretation also requires giving a provision its "fair reading": A court must determine a text's meaning "on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued." Scalia & Garner, *supra*, at 33. This canon forbids reading a statute too broadly or too narrowly. Indeed, reading a provision "hyperliterally" by artificially constraining its meaning can result in a "'viperine' construction that kills the text." *Id.* at 40.

Yet the Ninth Circuit's reading of Rule 704(b) does exactly that. Construing the phrase "about whether the defendant did or did not have a mental state or condition" to cover only "explicit opinions" about the particular defendant herself effectively reduces the Rule to a toothless semantic nicety. So long as an expert witness does not "comment[] directly" on the defendant's own "mental state," the witness is free to speak directly about *mens rea* and to generalize about the state of mind of people in the defendant's position. *Hayat*, 710 F.3d at 902. This is formalism in the extreme and drains Rule 704(b) of any real substance.

Indeed, it is hard to believe the Ninth Circuit's construction of Rule 704(b) would be seriously entertained in other contexts. For one thing, it would allow psychiatrists who testify as experts to easily circumvent the Rule. Such a witness could tell the jury that when people with schizophrenia as severe as the defendant's commit acts of violence, it is generally because they do not appreciate the wrongfulness of

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(2004) (citation omitted). And where, as here, linguistic alterations were made to clarify a provision's intended meaning, the current text best expresses that meaning.

their conduct. Such testimony would seem plainly to express an "opinion about whether the defendant" had the mental state required to convict. Fed. R. Evid. 704(b). But the Ninth Circuit's test, if applied in the context of expert psychiatric testimony, would seemingly allow its admission.

Or imagine an executive at an investment bank who is charged under 18 U.S.C. § 1001 with making false statements to an FBI investigator about his bank's financial dealings. The only issue at trial is whether the executive knew his statement was false when he made it. The Government calls an expert witness (say, an SEC official with decades of investigative experience), who testifies that whenever high-level banking executives submit to an FBI interview, they extensively review all of the bank's financial records and are thoroughly briefed on its relevant activities. "Thus," the expert testifies, "the chances that a banking executive in this setting would unknowingly make a false statement are exceedingly small." Under the Ninth Circuit's construction of Rule 704(b), even this quoted testimony would seemingly be admissible because it does not offer an "explicit opinion" on the executive's mental state. But one searches the Federal Reporter in vain for testimony like this in any white-collar prosecution.

The Ninth Circuit's hyper-formalistic approach to Rule 704(b) in drug-trafficking cases even permits expert testimony that defendants who carry drugs across the border *always* know they are transporting drugs—or that DTOs would *never* entrust drugs to unknowing couriers. After all, such testimony does not offer an "explicit opinion" on whether the defendant herself knew she was carrying drugs. Such testimony

clearly suggests that the particular defendant knew about the drugs; indeed, it leaves no other possible inference. But the testimony does not say so directly.

In fact, until recently, governmental expert witnesses frequently gave—and the Ninth Circuit approved—just such absolute testimony. *See, e.g.*, Br. of Appellant at 15, *United States v. Venegas-Reynoso*, 524 Fed. Appx. 373 (9th Cir. 2012), 2012 WL 1423741 (ICE agent testimony that "in his experience, drug couriers being unaware of the drugs in their vehicles 'has not happened'"); Trial Tr. at 92, *United States v. Diaz-Espinoza*, No. 11-cr-03566 (D. Ariz. May 22, 2012) (ECF No. 147) (DEA agent testimony that using blind mules "is not something I would call even fathomable"); *United States v. Campos*, 217 F.3d 707, 712 (9th Cir. 2000) (similar); *United States v. Castro*, 972 F.2d 1107, 1111 (9th Cir. 1992) ("Government experts testified that that amount of cocaine . . . would have never been entrusted to an unknowing dupe."); *cf. People v. Covarrubias*, 134 Cal. Rptr. 3d 455, 462 (Cal. Ct. App. 2011) (testimony from Agent Flood, the same expert as in this case, that "[t]he blind mule is pretty much—it is fictional").

For the past decade, however, the Government's own successful prosecutions of DTO members running blind-mule operations have required it to concede, as a factual matter, that the phenomenon sometimes occurs. *United States v. Flores*, 510 Fed. Appx. 594, 595 (9th Cir. 2013); *see also Venegas-Reynoso*, 524 Fed. Appx. at 377. Governmental expert witnesses thus "no longer [testify] to the effect that blind mules do not exist." *Flores*, 510 Fed. Appx. at 595. Instead, investigators like Agent Flood now typically testify (within the Ninth Circuit) that, "generally" or "in most

instances," drivers are knowingly hired to transport drugs. Pet. App. 15a; *see also* Trial Tr. at 27-28, *United States v. Valdez-Puerta*, No. 17-CR-00636 (D. Ariz. Mar. 16, 2018) (ECF No. 117) (DEA agent testifying that blind mules are "almost nonexistent"). They also hasten to suggest that past instances of the use of unknowing couriers do not match the circumstances of the defendant's case. *See* Pet. App. 23a.

As the Fifth Circuit has rightly observed, such testimony—no less than expert testimony stating that couriers at the southern border always know they are carrying drugs—is the "functional equivalent" of saying the defendant on trial possessed the requisite *mens rea*. *See United States v. Lara*, 23 F.4th 459, 475 (5th Cir. 2022). Such classwide *mens rea* testimony posits that persons in the defendant's position generally possess the requisite state of mind and that the rare circumstances in which they do not are different from that defendant's case. This is not meaningfully different from simply stating the defendant must have known she was transporting drugs.

Even expert witnesses themselves recognize there is no real distinction between these two forms of testimony. For example, in *United States v. Watson*, 260 F.3d 301 (3d Cir. 2001), the Government asked its expert, a police officer, whether he thought the defendant had an intent to distribute drugs found in his possession. *Id.* at 305-06. The officer answered "Yes" and substantiated that answer solely with generalizations about defendants "that have amounts of crack cocaine like this." *Id.* at 306. That the expert used classwide *mens rea* testimony to answer a question asking for an "explicit opinion" confirms that

there is no principled way to distinguish between the two.

The Ninth Circuit itself seems to perceive this reality—albeit in a different legal setting. Defendants sometimes challenge classwide *mens rea* testimony on relevance grounds. Such testimony, they argue, does not help the jury because it does not speak directly to the particular defendant's own state of mind. The Ninth Circuit has forcefully rejected this argument, reasoning that classwide *mens rea* testimony goes "right to the heart of [a blind mule's] defense that he was simply an unknowing courier." *United States v. Murillo*, 255 F.3d 1169, 1177 (9th Cir. 2001); *see also* Pet. App. 5a-6a (applying that reasoning here to reject petitioner's relevance objection).

Testimony that "goes right to the heart" of proving a defendant's mental state must be "about whether the defendant did or did not have" the mental state required to convict, Fed. R. Evid. 704(b). To suggest the contrary defies not just the English language but common sense.

Lest there be any doubt that the Ninth Circuit's construction of Rule 704(b) is overly rigid, the Federal Rules of Evidence employ the word "about" as a preposition in 21 other instances.[12] In none of those instances is the Rules' usage of "about" restricted to evidence explicitly addressing a particular subject.

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[12] For the other occurrences of "about" as a preposition in the text of the Federal Rules of Evidence, see Fed. R. Evid. 103(c); *id.* 104(a); *id.* 405(a); *id.* 408(a)(2); *id.* 606(b)(1); *id.* 606(b)(2); *id.* 608(a); *id.* 608(b)(2); *id.* 612(b); *id.* 613(a); *id.* 613(b); *id.* 801(d)(1); *id.* 803(13); *id.* 804(a)(1); *id.* 804(a)(2); *id.* 804(b)(2); *id.* 804(b)(4); *id.* 804(b)(4)(A); *id.* 901(b)(8); *id.* 1003; and *id.* 1008.

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And in multiple instances, the word "about" plainly expands coverage beyond what an evidentiary provision would otherwise reach.

For example, Rule 606(b) prohibits attacking a verdict with testimony from a member of the jury "about" any juror's "mental processes concerning the verdict" or "the effect of anything on that juror's or another juror's vote." Fed. R. Evid. 606(b). This Rule prohibits not just explicit descriptions of deliberations, but broader characterizations "regarding what occurred in a jury room." *Warger v. Shauers*, 574 U.S. 40, 42 (2014). The Rule also covers testimony about how the jury *would have voted* had the evidence at trial been different. *United States v. Burns*, 495 F.3d 873, 875-76 (8th Cir. 2007). Such testimony does not explicitly concern the votes the jurors actually cast. But it surely relates to, or is about, those votes.

Or take Rule 804(b)(2). That rule excepts from the hearsay ban statements "that the declarant, while believing the declarant's death to be imminent, made *about its cause or circumstances*." Fed. R. Evid. 804(b)(2) (emphasis added). Courts interpret this subject-matter reference to include transactions "leading up to and shortly before" the attack at issue, including statements "describing prior threats by, or fights and argument with," an attacker. 2 McCormick On Evidence § 311 (8th ed. 2022). The exception thus "reaches further than . . . immediate descriptions" of the cause of death, and includes statements "describing a prior threat on the speaker's life, a prior quarrel or altercation, or past physical pain or sensations, or substances previously inhaled, injected, or ingested." 5 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 8:124 (4th ed. 2013).

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So too here. An opinion "about" whether a defendant has a mental state includes expert testimony on the subject of *mens rea* that relates to whether the defendant possessed the state of mind necessary for conviction. The testimony does not have to opine explicitly that the particular defendant did or did not have that state of mind.

3. A straightforward rule thus governs this case: Rule 704(b) excludes expert testimony that a certain class of defendants generally possesses the requisite *mens rea* of a crime charged. A generalization that *most* drug couriers know they are carrying drugs amounts to an "opinion about whether" *this* alleged drug courier has the mental state required to convict. Such classwide *mens rea* testimony is barred by Rule 704(b) because it is naturally understood as "concerning" or "in reference to" the defendant's mental state.

It makes no difference if classwide *mens rea* testimony is presented as the expert's description of what a third party thinks about the state of mind of people like the defendant. That is, an expert's assertion that DTOs do not generally use drivers who are unaware they are transporting drugs is still testimony about whether a particular defendant charged with transporting drugs had the mental state required to convict.

An example of ordinary usage proves the point. Imagine a recording artist appears on a popular late-night television program. Someone knowledgeable about the music industry then tells a reporter for *Rolling Stone* that late-night programs usually do not invite musicians to perform unless the musicians intend to go on tour soon. That comment concerns the

recording artist's state of mind—even though it is couched in terms of the *modus operandi* of late-night programs.

One last linguistic component of Rule 704(b) reinforces this analysis. Recall that the Rule does not simply bar testimony "about whether the defendant did or did not have" the requisite *mens rea.* It also emphasizes that this is an issue "for the trier of fact alone." Fed. R. Evid. 704(b). At first glance, this additional sentence might appear to add nothing to the substantive prohibition in the Rule. But it must be there for a reason. And that reason can only be to underscore the vital importance of the Rule's prohibition and to warn courts against allowing testimony that cuts too close to the bone.

Suppose a company has a guideline warning employees against speaking to the press about the hiring or firing of the company's CEO, and that rule is punctuated with the admonition: "Such matters are for the Board of Directors alone to decide." Would a worker for the company then feel free to say to a reporter, in the midst of a controversy over the CEO's alleged mismanagement, that "companies almost always fire their CEOs when they lack support among the rank and file"? Obviously not.

In sum, Rule 704(b) bars classwide *mens rea* testimony in drug-trafficking prosecutions because such testimony is necessarily about the individual defendant's mental state. This is so regardless of how exactly such testimony is phrased.

4. To be sure, the initial impetus for Congress's enactment of Rule 704(b) was a different form of *mens rea* testimony: expert psychiatric testimony relevant

to an insanity defense. *See generally* S. Rep. No. 98-225 (1983). But although psychiatric testimony regarding insanity may have been the catalyst for enacting Rule 704(b), even the Ninth Circuit has acknowledged that the text of the Rule that Congress adopted is not limited to this category of testimony. *United States v. Campos*, 217 F.3d 707, 710-11 (9th Cir. 2000). Had Congress wanted to limit the excluded testimony to the insanity defense—or to psychiatrists and psychologists—it could have done so. It did not.

And the text Congress enacted controls. As this Court has frequently noted, "statutory prohibitions often go beyond the principal evil" envisioned by Congress. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (Scalia, J.). Consider, for example, RICO and Title VII. Although RICO was designed to target organized crime, its unqualified language sweeps in other types of "corrupt organizations" as well. 18 U.S.C. § 1961. Narrowing RICO's reach to organized crime would therefore impose "an extratextual requirement." *Boyle v. United States*, 556 U.S. 938, 944-45 (2009). Similarly, while the drafters of Title VII almost certainly were not thinking of prohibiting workplace discrimination on the basis of sexual orientation, this Court has held that "the limits of the drafters' imagination supply no reason to ignore the law's demands." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020); *see also Oncale*, 523 U.S. at 79.

This same principle controls here. "[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale*, 523 U.S. at 79. And Rule 704(b)'s

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plain text covers both expert witnesses other than psychiatrists and states of mind other than insanity.

B. Classwide *mens rea* testimony undermines the vitality of *mens rea* requirements.

Rule 704(b) singles out *mens rea* in criminal cases for a good reason: For centuries, it has been an essential component of the Anglo-American legal tradition. And under that tradition, the question is whether the individual defendant is sufficiently blameworthy to be deserving of punishment. Generalizations will not suffice.

1. Requiring a "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)). As far back as Hammurabi's Code, law has made a point to distinguish between intentional and unintentional acts. The Code of Hammurabi § 206 (L. W. King trans., 2008). Cicero, the Roman jurist and statesman, reasoned that requirements of criminal intent were consistent with a "law of humanity, that punishment for intentions, but not for fortune, may be exacted of a man." Marcus Tullius Cicero, For M. Tullius, *in* 2 *The Orations of Marcus Tullius Cicero, Literally Translated* 1, 14 (C. D. Yonge trans., 1856). For this reason, Roman criminal statutes as early as 81 B.C. contained a requirement of *dolo malo*, or evil intention. The *lex Cornelia de Sicariis et Veneficis*, for example, distinguished those who set a fire accidentally from those who did so intentionally.

Incendium, A Dictionary of Greek and Roman Antiquities (William Smith ed., 1875).

Early English jurists likewise embraced the requirement of "moral blameworthiness," declaring that "a crime is not committed unless the intent to injure (*voluntas nocendi*) intervene; and the desire and purpose distinguish evil-doing." Francis Bowes Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 985, 988 (1932) (quoting Henry de Bracton, *De Legibus Et Consuetudinibus Angliæ* 136b (1256)). As Sir Edward Coke put it: "An Act does not make the doer of it guilty, unless their mind be also guilty." 3 Edward Coke, *Institutes of the Laws of England* 107 (London, E. & R. Brooke 1797) (1644) (translation of Coke's statement in Latin). Blackstone reiterated this fundamental principle, observing that "[a]n unwarrantable act without a vicious will is no crime at all." 4 William Blackstone, *Commentaries on the Laws of England* 21 (1769).

Mens rea has always been a vital component of American criminal law as well. Justice Holmes famously remarked in his treatise on the common law that punishment "can hardly go very far beyond the case of a harm intentionally inflicted: even a dog distinguishes between being stumbled over and being kicked." Oliver Wendell Holmes Jr., *The Common Law* 3 (1881). Indeed, our tradition of *mens rea* is so strong that criminal statutes are presumed to include *mens rea* elements even in the face of legislative silence. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994). Such elements are designed to ensure that juries assess the "blameworthiness or culpability" of the individual defendant. *Schad v. Arizona*, 501 U.S. 624, 643-44 (1991).

The *mens rea* elements in this case (the person's *knowledge* that she was transporting drugs) and in numerous other federal statutes are particularly important because they separate criminal from otherwise "entirely innocent" conduct. *Rehaif v. United States*, 139 S. Ct. 2191, 2197 (2019); *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 therefore vital that the Government establish that the particular defendant in any of these scenarios possesses the requisite "vicious will." *Id.* at 2376 (citations omitted).

2. Given the importance and sensitivity of *mens rea*, it makes sense that Rule 704(b) does not stop at prohibiting an expert witness from offering an explicit opinion regarding the defendant's state of mind. The Rule also ensures that the finder of fact has space—unencumbered by classwide *mens rea* testimony—to make an individualized assessment of each defendant's blameworthiness. This is crucial for two related reasons.

First, blameworthiness is unique to the individual. Indeed, our "philosophy of criminal law" is grounded in "an intense individualism"—that is, our insistence that a person should not be branded a wrongdoer based on generalized assumptions or characteristics. *Morissette*, 342 U.S. at 250-52; *see also Ruan*, 142 S. Ct. at 2381. Our legal tradition thus requires the Government to prove *mens rea* with

evidence of "the mental state of the defendant *himself or herself*." *Ruan*, 142 S. Ct. at 2381 (emphasis added). Stated differently, it is not enough for the Government to show that a "hypothetical" or typical defendant who takes certain actions is blameworthy. *Id.* Even the "reasonable person" standard that permeates other areas of the law will not suffice to establish a guilty mind for charges that require a *mens rea* higher than criminal negligence. *Elonis v. United States*, 575 U.S. 723, 737-38 (2015).

Second, *mens rea* is most reliably inferred from the words and actions of the defendant herself, not from an expert's generalizations about the state of mind of others in the defendant's position. As an early twentieth-century treatise on criminal law put it: "A man's acts are the best index to his intention. Such acts need not be criminal in themselves; they may be only the external 'overt acts,' which make manifest what is passing in the mind." William Blake Odgers & Walter Blake Odgers, 1 *The Common Law of England* 115 (2d ed. 1920); *see also* Wayne R. LaFave, *Substantive Criminal Law* § 5.2(f) at 355-58 (3d ed. 2017) ("[W]hat [a defendant] does and what foreseeably results from his deeds have a bearing on what he may have had in his mind.").

To put it bluntly: No one can see into the mind of another person—much less into their mind at some time in the past. The inquiry is necessarily conjectural. The factfinder must make a qualitative inference, by translating external behavior into an insight about a defendant's internal mental state.

3. One might argue that presenting classwide *mens rea* expert testimony can only help the jury in its undertaking. But the fact that defendants under

certain circumstances commonly know they are transporting drugs—even if true—is more likely to frustrate than facilitate a careful determination as to whether the particular defendant before the jury had such knowledge.

The problem is that classwide *mens rea* testimony offers an all-too-tempting shortcut. It invites jurors to rest on an expert witness's generalization instead of wrestling on their own with whether the individual defendant in front of them is truly blameworthy. In other words, there is a serious risk that classwide *mens rea* testimony will appear overly definitive and drown out specific evidence regarding the individual defendant's own actions—"induc[ing] the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18-19 (1985) (describing problem with prosecutorial vouching). And if that were not problematic enough, classwide *mens rea* testimony also gives rise to a ratchet-like effect in the criminal justice system: When a jury credits the expert's testimony in a case like this one, it convicts the defendant. The next time that expert testifies in a similar case, he can rely on the conviction in the past case—which relied on his testimony—to bolster his claim that most defendants in the situation at hand have a guilty mind. *See* Pet. App. 32a-33a. And this cycle can repeat over and over.

Rule 704(b) guards against these risks. It ensures that the Government has to prove each individual defendant is blameworthy, unaided by an ever-growing wind at its back from past prosecutions.

C. Allowing classwide *mens rea* testimony would thwart important constitutional values.

In interpreting statutory provisions, this Court has frequently reiterated that Congress writes laws with the Constitution as a "backdrop." *Bond v. United States*, 572 U.S. 844, 857 (2014) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). Even before questions regarding constitutional avoidance might arise, the Court endeavors to read statutes in harmony with the principles "inherent in our constitutional structure." *Id.* at 856 (interpreting criminal statute in light of constitutional principles of federalism); *see also, e.g.*, *Dubin v. United States*, 143 S. Ct. 1557, 1572-73 (2023) (interpreting criminal statute consistent with due-process concept of "fair warning"); *Custis v. United States*, 511 U.S. 485, 493-96 (1994) (construing recidivism statute in light of Sixth Amendment right to counsel).

The Ninth Circuit's reading of Rule 704(b) undermines two fundamental constitutional values: (1) the right to jury trial; and (2) the requirement that the Government carry the burden to prove each element of a crime, including *mens rea*, beyond a reasonable doubt.

1. As noted above, Rule 704(b) emphatically seeks to protect the role of the jury as the finder of fact. The Ninth Circuit's tolerance for classwide *mens rea* testimony is at loggerheads with that constitutional value.

"[T]rial by jury in criminal cases is fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *see also Apprendi*

v. New Jersey, 530 U.S. 466, 476-77 (2000) (reaffirming the "surpassing importance" of the Sixth Amendment right to trial by jury). In fact, the right to trial by jury is the only individual right guaranteed by both the original text of the Constitution (Article III, Section 2, Clause 3) and the Bill of Rights (the Sixth Amendment). This reflects the Framers' understanding of the jury as an essential intermediary between executive officials enforcing the law and judicial officers applying it. *See, e.g.*, *Baldwin v. New York*, 399 U.S. 66, 72 (1970).

In particular, the jury is best positioned to make assessments of "the defendant's moral culpability and blameworthiness." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). This is because jurors represent the "conscience of the community." *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968); *see also* 4 William Blackstone, *Commentaries on the Laws of England* 343 (1769) (stressing that juries are comprised of "the defendant's equals and neighbours"); Valerie P. Hans & Neil Vidmar, *Judging the Jury* 28-37 (1986). Although juries are "not always minutely skilled in the laws," they are well-schooled in the "condition of the people." Letter from the Federal Farmer to the Republican, No. 15 (Jan. 18, 1788), *in* 2 *The Complete Anti-Federalist* 315, 320 (Herbert J. Storing ed., 1981); *see* John Adams, *Diary Entry* (Feb. 12, 1771), *in* 2 *The Works of John Adams* 255 (Charles Francis Adams ed., 1850) (A juror's duty is "to find the verdict according to his own best understanding, judgment, and conscience."). Accordingly, the Sixth Amendment guarantees that "[i]f the defendant prefer[s] the common-sense judgment of a jury to the more tutored

but perhaps less sympathetic reaction of the single judge, he [is] to have it." *Duncan*, 391 U.S. at 156.

As trier of fact, the jury holds an "unreviewable power . . . to return a verdict of not guilty." *Smith v. United States*, 143 S. Ct. 1594, 1608 (2023) (quoting *United States v. Powell*, 469 U.S. 57, 63 (1984)). Indeed, a jury's acquittal must be respected even if such a verdict seems at odds with general assumptions regarding human behavior. *See Jackson v. Virginia*, 443 U.S. 307, 317 n.10 (1979) (noting that a jury's acquittal must stand "even if the evidence of guilt is overwhelming"). In this way, the jury is empowered to serve as a "circuitbreaker," precluding conviction or punishment where it would conflict with the jury's individualized assessment of the defendant's blameworthiness. *Blakely v. Washington*, 542 U.S. 296, 306-07 (2004).

Classwide *mens rea* testimony undermines the jury's role as the arbiter of *mens rea*. For the reasons just explained, "ultimately the decision [in a criminal case] on the issue of intent must be left to the trier of fact alone." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 446 (1978). But when the jury credits an expert witness's opinion regarding an element of a crime or cause of action, "the expert has taken the jury's place." Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. L. Rev. 40, 52 (1901). There is no real work left for the jury to do.

To be sure, Judge Hand's critique of experts taking "the jury's place" is grounded in the ultimate-issue doctrine—the common-law rule that precluded witnesses from expressing opinions about *any* "ultimate issue to be decided by the jury." *United*

States v. Spaulding, 293 U.S. 498, 506 (1935). That doctrine prevailed well into the twentieth century. *See id.* at 506-07 (applying this doctrine and citing other cases doing same). But the doctrine, based on the concern that experts might otherwise "usurp the role of the jury," then met criticism for being "empty rhetoric." 7 Wigmore on Evidence § 1920 (3d ed. 1940). The jury, some argued, "may still reject" an expert's opinion on an ultimate issue and take "some other view." *Id.* For this reason, the enactment of Rule 704(a) in 1975 mostly abolished the ultimate-issue doctrine. *See* Fed. R. Evid. 704 advisory committee's notes to 1972 proposed rules.

But Congress had powerful reason in Rule 704(b) to adhere to the doctrine in the special context of a criminal defendant's mental state. In criminal cases, of course, the defendant's individual liberty—and sometimes his life—is on the line. And *mens rea* elements in criminal prosecutions lie at the core of the jury's function. Even if a jury technically has the power to reject an expert's assertion that the defendant had a guilty mind—or, as here, that all or most individuals like the defendant do—there is an intolerable risk that the jury will defer to the expert witness, effectively ceding its mandate to determine blameworthiness. *See* Brian R. Gallini, *To Serve and Protect? Officers as Expert Witnesses in Federal Drug Prosecutions*, 19 Geo. Mason L. Rev. 363, 365-66 (2012). All the more so where, as here, knowledge of wrongdoing is the only disputed issue at trial. Any erosion of the jury's dominion in this regard would "change the weights and balances in the scales of justice," "ease the prosecution's path to conviction,"

and "circumscribe the freedom heretofore allowed juries." *Morissette*, 342 U.S. at 263.

2. Classwide *mens rea* testimony also undermines constitutional values of due process. Based on centuries of tradition, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). One such fact—often, as here, the most important one—is "the mental element or *mens rea*." *Clark v. Arizona*, 548 U.S. 745, 766 (2006); *see also Morissette*, 342 U.S. at 274.

This constitutional requirement demands that the prosecution establish that the *individual defendant* had the requisite *mens rea*, not simply that others in her situation generally do. In *Francis v. Franklin*, 471 U.S. 307 (1985), for instance, this Court held that juries cannot be instructed to presume, based on extrinsic findings that generally signal a guilty mind, that the defendant had the *mens rea* required to convict. *Id.* at 313-15, 325. Such instructions "relieve[] the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding." *Id.* at 317. In *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979), the Court likewise forbade deeming the requisite *mens rea* to be present whenever certain predicate facts were proven. *Id.* at 521. As the Court put it years before, a legal presumption regarding *mens rea*, "permit[ting] the jury to make an assumption which all the evidence considered together does not logically establish," impermissibly

"prejudge[s] a conclusion which the jury should reach of its own volition." *Morissette*, 342 U.S. at 275.

Classwide *mens rea* testimony treads upon this principle. When such testimony is given at trial, an expert witness—testifying with the imprimatur of a government agent who enforces the law—asserts that people found at the border with drugs in their cars are generally aware they are transporting that contraband. Such testimony encourages the jury to substitute generalized *mens rea* evidence for the individualized evidence that is required to convict. It creates an undue risk—regardless of any limiting instructions—that jurors will simply defer to what the court brands as the agent's "specialized knowledge," Fed. R. Evid. 702.

By a similar token, other provisions throughout the Federal Rules of Evidence and Criminal Procedure respect the constitutional demand for individualized proof of guilt.

Consider "profile evidence"—evidence about a class of individuals who share characteristics with the defendant. Such evidence is a permissible basis for investigative detention. *See United States v. Sokolow*, 490 U.S. 1, 10-11 (1989). But courts have invoked Federal Rules of Evidence 401 and 403 to repeatedly "denounce the use of this type of evidence as substantive evidence of a defendant's innocence or guilt." *United States v. Hernandez-Cuartas*, 717 F.2d 552, 555 (11th Cir. 1983); *see also, e.g.*, *United States v. Jones*, 913 F.2d 174, 177 (4th Cir. 1990); *United States v. Quigley*, 890 F.2d 1019, 1022 (8th Cir. 1989). Using profile evidence to establish a particular defendant's guilt impermissibly substitutes the guilt of a class of defendants for the individual

determination the jury must make regarding the particular defendant.

Even in conspiracy cases, where the jury must think about each defendant as a member of a group, the jury is not permitted to rely on evidence about one defendant to make assumptions about another defendant. Guilt can be predicated only on "the knowing involvement of each defendant, considered individually." *U.S. Gypsum Co.*, 438 U.S. at 463. And under Federal Rule of Criminal Procedure 14, courts may sever conspiracy trials when the jury might not be able to judge "each defendant solely upon that defendant's own acts, statements and conduct." *Peterson v. United States*, 344 F.2d 419, 422 (5th Cir. 1965) (citation omitted). In such cases, allowing evidence about the acts and mental state of other members of the conspiracy makes it "difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together." *Krulewitch v. United States*, 336 U.S. 440, 454 (1949) (Jackson, J., concurring); *see also United States v. Pedrick*, 181 F.3d 1264, 1273 (11th Cir. 1999) (severance required when evidence pertaining to the group may preclude the jury from making an "individualized determination as to each defendant").

In like fashion, Rule 704(b) protects against classwide *mens rea* testimony because it invites the jury to presume, based on generalizations, that the defendant acted with a guilty mind. Such testimony lessens the Government's constitutional burden to show that the individual defendant is blameworthy.

II. Agent Flood offered impermissible classwide *mens rea* testimony.

Two strands of Agent Flood's testimony here violated Rule 704(b)'s prohibition against classwide *mens rea* testimony.

1. Agent Flood testified on direct examination that "in most circumstances," a driver transporting drugs "knows they are hired" to carry those drugs. Pet. App. 15a.

This testimony squarely violates Rule 704(b)'s prohibition against classwide *mens rea* testimony. Agent Flood generalized about the mental state of all people crossing the border with drugs hidden in the cars they are driving. Because petitioner was a member of that class, the jury would have understood Agent Flood's testimony as imputing a guilty mental state to her.

Agent Flood's testimony about the typical *mens rea* of drivers became still more illegitimate when he was pressed to elaborate on his opinion. Agent Flood explained that he knew of "three schemes that were primarily identified as being possible for an unknowing courier." Pet. App. 23a. He then described the schemes in a way that clearly differentiated them from petitioner's circumstances. *Id.* And the Government successfully objected to any suggestion by the defense that other types of unknowing courier scenarios were possible. J.A. 68-69. Agent Flood's testimony thus suggested to the jury not merely that *most* drivers know that they are carrying drugs, but that *all* drivers like petitioner—that is, all drivers who do not fit into one of the three schemes—know. The general presumption became an inescapable

syllogism: If Agent Flood's testimony was to be credited, petitioner had to be found guilty.

2. Agent Flood also testified that large quantities of drugs are not "entrusted to drivers that are unaware of those drugs." Pet. App. 15a. The prosecutor then asked: "And why aren't—why 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.

This testimony also constitutes impermissible classwide *mens rea* testimony. Rule 704(b) does not stand in the way of an expert giving ordinary *modus operandi* testimony—that is, testimony describing "methods of operation" unique to DTOs or other specialized organizations. *See, e.g.*, *United States v. Sanchez-Hernandez*, 507 F.3d 826, 831-33 (5th Cir. 2007). Nor does it stand in the way of other expert testimony, such as how much drugs seized from the defendant were worth, if that testimony might cause jurors to draw inferences about the defendant's mental state. But when an expert witness directly assigns a mental state to individuals in the defendant's position, his testimony crosses the line. And here, Agent Flood stated that DTOs do not entrust large quantities of drugs to drivers who "are unaware of those drugs" and then purported to explain why that is so. Pet. App. 15a. Couching this opinion as an observation about the behavior of drug traffickers did nothing to make this testimony any less "about" whether petitioner had the mental state necessary to convict.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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