No. 23-14

In the Supreme Court of the United States

DELILAH GUADALUPE DIAZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
NICOLE M. ARGENTIERI
Acting Assistant Attorney General
ERIC J. FEIGIN
Deputy Solicitor General
MATTHEW GUARNIERI
Assistant to the Solicitor General
JAVIER A. SINHA
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court acted within the scope of its discretion when it determined that Federal Rule of Evidence 704 permitted expert testimony that in most circumstances drug-trafficking organizations do not use unwitting couriers to import large shipments of drugs into the United States.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter but is available at 2023 WL 314309.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2023. A petition for rehearing was denied on March 3, 2023 (Pet. App. 7a). On May 2, 2023, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including July 1, 2023, and the petition was filed on June 30, 2023. The petition was granted on November 13, 2023. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

FEDERAL RULES INVOLVED

Rule 704 of the Federal Rules of Evidence 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.

Other pertinent rules are reproduced in the appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of importing 500 grams or more of methamphetamine, in violation of 21 U.S.C. 952 and 960. Judgment 1; see Verdict Form 1. Petitioner was sentenced to 84 months of imprisonment, to be followed by five years of supervised release. Judgment 2-4. The court of appeals affirmed. Pet. App. 1a-6a.

A. Legal Background

1. The testimony of expert witnesses in a federal trial is governed by Rules 702 to 706 of the Federal Rules of Evidence. "The basic approach to opinions, lay and expert, in [those] rules is to admit them when helpful to the trier of fact." Fed. R. Evid. 704 advisory committee's notes (Proposed Rules) (Original Rule Notes). "In order to render this approach fully effective and to allay any doubt on the subject," Rule 704 "specifically

abolished" the "so-called 'ultimate issue' rule"—a judge-made rule "against allowing witnesses to express opinions upon ultimate issues." *Ibid.*

The influential Wigmore evidence treatise called the ultimate-issue rule "impracticable," "misconceived," and "lack[ing] any justification in principle." 7 John Henry Wigmore, *Evidence in Trials at Common Law* § 1921, at 19 (3d ed. 1940) (Wigmore); see Original Rule Notes (citing Wigmore §§ 1920-1921). The "stated justification" for the ultimate-issue rule was generally that a witness who gives an opinion on an ultimate fact in issue "'invades the province' of the jury." 1 Kenneth S. Broun et al., *McCormick on Evidence* § 12, at 80 (7th ed. 2013) (McCormick) (citation and footnote omitted). But the drafters of the Federal Rules agreed with Wigmore that the justification was "aptly characterized as 'empty rhetoric.'" Original Rule Notes (quoting Wigmore § 1920, at 17).

The drafters of the Federal Rules, like the commentators, found that the ultimate-issue rule was "unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information." Original Rule Notes. And they identified "[m]any" contemporaneous decisions that "illustrate[d] the trend to abandon the rule completely." *Ibid.* Many States had already discarded the ultimate-issue rule, see McCormick 81, and the initial version of Rule 704, enacted in 1975, likewise did so, by instructing that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Act of Jan. 2, 1975 (1975 Act), Pub. L. No. 93-595, Rule 704, 88 Stat. 1937.

2. In 1984, Congress amended the Rule in response to the acquittal of would-be presidential assassin John Hinckley, Jr. See H.R. Rep. No. 577, 98th Cong., 1st Sess. 4 (1983) (House Report). Hinckley's attempt to shoot and kill President Reagan had wounded the President, injured a police officer and a Secret Service agent, and critically injured Press Secretary James Brady. Lincoln Caplan, *The Insanity Defense and the Trial of John W. Hinckley, Jr.* 8-9 (1984). But a federal jury deemed Hinckley not guilty by reason of insanity after hearing conflicting expert opinions from medical professionals directly opining on whether or not he satisfied the legal standard for insanity. *Id.* at 97-100; see Richard J. Bonnie et al., *A Case Study in the Insanity Defense: The Trial of John W. Hinckley, Jr.* 49-86 (3d ed. 2008) (Bonnie) (excerpts of trial testimony).

A House committee report observed that "for many," the Hinckley verdict "constituted a miscarriage of justice." House Report 2. And Congress responded to the principal evidentiary issue in the case by amending Rule 704. See *id.* at 15-17. The amendment retained the existing language that had abolished the ultimate-issue doctrine as Rule 704(a), while adding a new Rule 704(b), which provided that "[n]o expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference 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. Such ultimate issues are matters for the trier of fact alone." Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 406, 98 Stat. 2068.

3. In 2011, the language of Rule 704 was updated "as part of the general restyling of the Evidence Rules" to

create the present version. Fed. R. Evid. 704 advisory committee's notes (2011 Amendment). "These changes [were] intended to be stylistic only. There [was] no intent to change any result in any ruling on evidence admissibility." *Ibid.*

As currently codified, the Rule, 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.

B. Offense Conduct

At around 2 a.m. on a Monday morning in August 2020, petitioner—an American citizen living in Moreno Valley, California—entered the United States from Mexico at the San Ysidro Port of Entry as the driver and sole occupant of a Ford Focus. J.A. 23-25; see C.A. S.E.R. 29-30.[1] In a primary inspection at the border, petitioner told a border patrol officer that the car belonged to her boyfriend. J.A. 26.

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[1] The cited pages of the government's supplemental excerpts of record are a transcript of a videorecorded interview that petitioner gave to law enforcement after her arrest. Portions of the videorecording were played for the jury at her trial but were not transcribed by the court reporter. Gov't C.A. Br. 3 n.2; see J.A. 37.

When the officer asked petitioner to roll down the rear driver-side window, petitioner replied that the window was manual. J.A. 26. The officer left his inspection booth, opened the rear door, and tried to roll down the window himself. J.A. 25. The window rolled halfway down before the officer felt "some resistance" and heard a "crunch-like sound." *Ibid.*

During a secondary inspection, federal officers found a total of 56 packages hidden inside the car's doors and in a concealed space beneath the carpeting in the trunk. J.A. 29-34. The packages contained 24.82 kilograms (about 55 pounds) of pure methamphetamine. J.A. 20. Petitioner also had two cell phones in her possession. J.A. 35. She was arrested, and law-enforcement officers seized the car and both phones. *Ibid.*

Petitioner waived her *Miranda* rights and agreed to speak to Homeland Security Investigations Special Agent Jeffrey Porter, who videorecorded the interview. J.A. 36-37; see C.A. E.R. 302. During the interview, petitioner again claimed that the car belonged to her boyfriend and that she "didn't even know [the methamphetamine] was in the car." C.A. S.E.R. 33.

Petitioner claimed that the boyfriend who had allowed her to use the car was named "Jesse," although she also referred to him at one point as "Jesus." J.A. 38. She said that she had first met him several months before, C.A. S.E.R. 35; had seen him "two, three times tops," *ibid.*; and did not know his phone number or where he lived, *id.* at 34, 51.

Petitioner claimed that her boyfriend had invited her to come to Rosarito, Mexico, that weekend to visit him. C.A. S.E.R. 36-37. She told Agent Porter that her daughter had driven her down in the daughter's truck on the preceding Friday. *Ibid.* Petitioner stated that

she had initially planned to return to the United States with her daughter but chose to stay when her boyfriend said that he would lend her his car to drive back. *Id.* at 40. According to petitioner, she spent Friday night with her boyfriend and his friends at a bar and slept at the home of one of the friends. *Id.* at 41-43. She could not, however, name anyone at the bar or the owner of the home. *Id.* at 42-44.

Petitioner claimed that when she woke up on Saturday morning, her boyfriend was gone and did not return until around 5 p.m. C.A. S.E.R. 44. Petitioner claimed that when her boyfriend came back, she was upset and wanted to go home, but she did not leave on Saturday evening because she "can't really see" well enough to drive "when it's dark." *Id.* at 46. Petitioner said that she then spent Sunday with her boyfriend and left to drive home at 7 p.m. in his car, which he planned to retrieve from her in a couple of days. *Id.* at 47-49.

As for the two cell phones, petitioner admitted that one of them was hers, but she told Agent Porter that the other was "given to [her]" by a friend and was "locked," and she could not access it. C.A. S.E.R. 51. Petitioner also told Agent Porter that she would "rather not say" to whom the second phone belonged, but she maintained that it was not her boyfriend. *Id.* at 53; see *id.* at 51.

Agent Porter found petitioner's story implausible. See C.A. S.E.R. 54 ("PORTER: You know this is a terrible story, right?"). Among other things, Rosarito (where petitioner claimed to have been staying) is only about an hour-and-a-half drive from the border, and petitioner was caught at the inspection point at 2 a.m. (seven hours after she claimed to have started driving) while driving in the dark (which she claimed she could not do). See *id.* at 50; J.A. 24.

C. Procedural Background

Four days after her arrest, a grand jury in the Southern District of California charged petitioner with "knowingly and intentionally" importing 500 grams or more of methamphetamine, in violation of 21 U.S.C. 952 and 960. J.A. 1.

1. Before trial, both parties gave notice under Federal Rule of Criminal Procedure 16 of their intent to call expert witnesses. See D. Ct. Doc. 28, at 7 (Nov. 25, 2020); D. Ct. Doc. 30, at 1, 4 (Nov. 30, 2020).

The government's notice included its intent to call Homeland Security Investigations Special Agent Andrew Flood to testify as an expert on the value of methamphetamine and the structure and operation of drug-trafficking organizations. D. Ct. Doc. 30, at 4-8. The government stated that Agent Flood would "testify that drug traffickers generally do not entrust large quantities of drugs to people who are unaware they are transporting them," and that such testimony would be relevant and admissible to disprove petitioner's anticipated "unknowing courier" defense. *Id.* at 7.

For her part, petitioner gave notice that she intended to call an automobile expert, Kenneth Davis, to testify about where and how the drugs were hidden in the Ford. D. Ct. Doc. 28, at 7-9. Petitioner stated 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," and that Davis's testimony would "assist the trier of fact to understand the evidence and to determine a fact in issue." *Id.* at 9-10.

2. Petitioner subsequently moved to exclude any expert testimony about whether drug-trafficking organizations use "unknowing couriers or 'blind mules.'" J.A. 2. She maintained that such testimony would be inad-

missible under Federal Rules of Evidence 401, 403, and 704(b). J.A. 2-13. With respect to Rule 704, petitioner argued that expert testimony that "drug traffickers do not use unknowing couriers would be * * * the 'functional equivalent' of telling the jury that [petitioner] knew of the drugs" and would therefore constitute "an improper comment on the ultimate issue." J.A. 10. The government filed a countervailing motion to admit Agent Flood's proposed testimony, explaining that circuit precedent established that "expert testimony on drug trafficking organizations and the behavior of unknowing couriers is admissible when relevant, probative of a defendant's knowledge, and not unfairly prejudicial." J.A. 17 (citation omitted); see J.A. 14-19.

At a pretrial hearing, the district court granted in part and denied in part petitioner's motion to exclude the disputed expert testimony. Pet. App. 29a-33a. The court observed that "modus operandi-type evidence" from law enforcement experts is not "unusual, in these courier cases," particularly if the defense suggests "lack of knowledge." *Id.* at 30a. The court further observed that such experts can typically testify from their experience to "the fact that there is a high value of drugs" that "wouldn't be given to an untrusted, unknowing person." *Id.* at 31a. After petitioner expressed concern that Agent Flood might testify that "blind mules" are "mythical" or "do not exist," *ibid.*, the court ruled that he would not be allowed to testify in such "absolute[s]," *id.* at 32a. But the court found the proposed testimony otherwise "fair game" and emphasized that it would all be "subject to cross-examination." *Id.* at 31a.

3. The case proceeded to trial. The government called eight witnesses, including the two officers who conducted the primary and secondary inspections of the

Ford Focus, see J.A. 22-35 (excerpts); Agent Porter, who had interviewed petitioner after her arrest, see J.A. 36-39 (excerpts); and the law-enforcement expert, Agent Flood, see Pet. App. 9a-28a.[2]

Agent Flood testified that the United States provides a market for drugs manufactured in Mexico; that "people are willing to pay a good price for the drugs"; and that drug traffickers often smuggle drugs in hidden compartments in cars and other conveyances from Mexico to the United States. Pet. App. 14a; see *id.* at 14a-15a. Agent Flood further testified that transporting the drugs across the border was "a job" for which the transporter is compensated, "[p]rimarily [with] money" but also sometimes in the form of "drugs" or "use of the vehicle." *Id.* at 15a. Agent Flood also testified that the methamphetamine in petitioner's car had a conservatively estimated retail value of $368,550 at the time. *Id.* at 21a; see *id.* at 18a-21a.

Agent Flood's testimony additionally included the following exchange:

> Q. Agent Flood, based on your training and experience, are large quantities of drugs entrusted to drivers that are unaware of those drugs?
>
> [DEFENSE COUNSEL]: Objection. 401, 403.
>
> THE COURT: Overruled.
>
> THE WITNESS: No. In extreme circumstances —actually, in most circumstances, the driver knows

[2] Petitioner did not object to Agent Flood's qualifications as an expert. Pet. App. 13a. Agent Flood has been a special agent for more than 20 years and has been involved in "over 500 investigations dealing with distribution of drugs." *Id.* at 10a-11a.

> they are hired. It's a business. They are hired to take the drugs from point A to point B.
>
> BY [GOVERNMENT COUNSEL]:
>
> Q. And why aren't—why don't they use unknowing couriers, generally?
>
> [DEFENSE COUNSEL]: Objection. 401, 403.
>
> THE COURT: Overruled. You may answer.
>
> THE WITNESS: 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.

Pet. App. 15a-16a.

On cross-examination, Agent Flood confirmed that he was not involved in the investigation of petitioner's particular case. Pet. App. 21a. When defense counsel asked him whether he was "aware that [the Department of Homeland Security] has identified many schemes where drug trafficking organizations use unknowing couriers," Agent Flood testified that he was aware of several "possible" such schemes, such as where a person is hired for what the person believes is legitimate employment driving a company vehicle across the border. *Id.* at 23a. But he explained that in his experience, the use of unknowing couriers is "very rare." *Id.* at 22a. On further cross-examination, Agent Flood testified that a viable scheme using an unknowing courier would involve a person with "a known destination" or regular "pattern," such as someone who regularly commutes across the border for work, so that the drug-trafficking organization would not be "taking the risk of we hope

we can find the drugs at the end." *Id.* at 24a-25a. He also testified that other "factors" in the use of an unwitting courier included having access to the car in Mexico "to place the drugs in the vehicle," knowing the "specific location" of the courier's destination in the United States, and knowing whether the drugs could be removed there without "arous[ing] suspicion." *Id.* at 25a.

During the defense case, petitioner presented her own previously identified expert, Davis, as an expert in "automobile mechanics and repair," based on his experience working with and teaching students about cars. C.A. S.E.R. 144; see *id.* at 139-144. Davis testified that he had physically examined the Ford Focus at a Homeland Security lot and that he had reviewed the government's report of the investigation, including relevant photos, regarding the seizure of the drugs from that car. *Id.* at 144-158. Based on his expertise, his review of the government's report, and his personal inspection of the vehicle, Davis opined that the car would have operated normally with the drugs hidden in it and, as a result, he saw "no way for someone to suspect or know that there [were] drugs hidden within that car" based simply on driving it. *Id.* at 159.

In its final charge, the district court instructed the jury that the opinion testimony that it had heard from Davis and Agent Flood "should be judged like any other testimony." J.A. 77. The court further instructed: "You may accept it or reject it, and give it as much weight as you think it deserves, considering the witnesses['] education and experience, the reasons given for their opinions, and all the other evidence in the case." J.A. 77-78.

The jury found petitioner guilty. J.A. 79. The jury also specifically found that "the amount of methamphet-

amine" involved in the importation offense "equaled or exceeded 500 grams." Verdict Form 1.

4. Based on the jury's drug-quantity finding, the statutory term of imprisonment for petitioner's offense was ten years to life. 21 U.S.C. 960(b)(1)(H); see Presentence Investigation Report (PSR) Pt. D, ¶ 6. Under the safety-valve provision of 18 U.S.C. 3553(f), however, a sentencing court may impose a sentence below the statutory minimum for certain drug offenders who satisfy the criteria set forth in that provision. A defendant is not eligible for such safety-valve relief unless, "not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense." 18 U.S.C. 3553(f)(5).

Petitioner sought the benefit of the safety-valve provision here. In a presentence interview with the Probation Office, petitioner offered a revised account of her actions, in which she had "become involved with a new romantic partner, Jesse," who had offered her $3000 to smuggle drugs into the United States and had provided her with the car in which to do so. PSR Pt. A, ¶¶ 16-18. In a later proffer with the government, however, petitioner admitted that "[t]here is no Jesse," C.A. S.E.R. 172; that she had "made him up," *ibid.*; that she had been paid to smuggle drugs from Mexico into the United States at least one time before, *id.* at 173-174; and that she knew that the drugs were in her car when she was caught here, *id.* at 173.

The district court determined that petitioner's advisory Guidelines range was 235 to 293 months of imprisonment. C.A. S.ER. 177. The court also determined that she qualified for the safety-valve provision, *ibid.*, and imposed a sentence of 84 months of imprisonment,

to be followed by five years of supervised release, *id.* at 187-188; see J.A. 81-83.

5. The court of appeals affirmed in an unpublished memorandum decision. Pet. App. 1a-6a. The court found no abuse of discretion in the admission of Agent Flood's "modus operandi testimony on drug trafficking organizations' use of unknowing couriers." *Id.* at 5a. The court rejected petitioner's argument that the expert testimony was irrelevant and unduly prejudicial, explaining that such evidence is relevant when a defendant puts on an unknowing courier defense "because it goes 'right to the heart' of that defense." *Ibid.* (citation omitted). The court also observed that petitioner had "'opened the door' to expert testimony by calling her own expert to testify to facts that supported her blind mule defense." *Id.* at 6a (citation omitted).

The court of appeals rejected petitioner's argument that testimony about how drug-trafficking organizations rarely use unknowing couriers is the functional equivalent of expert opinion on mental state constituting an element of the offense, which is prohibited by Federal Rule of Evidence 704(b). Pet. App. 6a. While noting one Fifth Circuit decision supporting that view, the court of appeals adhered to circuit precedent under which such testimony is permitted "so long as the expert does not provide an 'explicit opinion' on the defendant's state of mind." *Ibid.* (citation omitted). And the court found that Agent Flood "did not do so here." *Ibid.*

SUMMARY OF ARGUMENT

The lower courts correctly recognized that Agent Flood did not "state an opinion about whether [petitioner] did or did not have a mental state," Fed. R. Evid. 704(b), when he provided expert testimony about general drug-trafficking practices without once mentioning

petitioner. Petitioner's conviction should accordingly be affirmed.

I. The text, history, and design of Federal Rule of Evidence 704 all make clear that the Rule allows expert opinion that is inferentially relevant to a mental-state issue, so long as it does not include a conclusion on a specific defendant's own mental state. Petitioner's request for a broader prohibition on expert testimony relevant to mental state lacks merit.

A. Rule 704(a) instructs that an opinion is "not objectionable just because it embraces an ultimate issue." Fed. R. Evid. 704(a). Rule 704(b) then carves out one type of opinion that embraces an ultimate issue: "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). But testimony that embraces a mental-state issue in other ways, and simply provides a basis from which the jury could infer that the defendant had the requisite mental state, remains expressly permissible. The Rule requires only that the expert's testimony stop short of a direct opinion on the specific defendant's own mental state.

The limited scope of Rule 704(b) is particularly clear in the Rule's original language, which has since been adjusted only in a nonsubstantive restyling. That original language expressly contemplated that an expert in a criminal trial could testify "with respect to the mental state or condition of a defendant," so long as he did not go so far as to "state an opinion" on the ultimate issue of a mental-state element or defense. Fed. R. Evid. 704(b) (1985). Both before and after the restyling, numerous lower courts have correctly understood Rule 704(b) to prohibit only statements of opinion on the de-

fendant's own mental state, while allowing opinion testimony relevant to mental state that leaves the final step in the inferential process to the jury.

Petitioner's contrary reading of Rule 704(b)'s text rests on its use of the word "about." But Rule 704(b) does not preclude all expert opinions broadly characterizable as "about . . . mental state," Pet. Br. 20 (citation omitted); it precludes only opinions "about whether the defendant did or did not have a mental state." Fed. R. Evid. 704(b). An expert who testifies in general terms about the practices of drug-trafficking organizations is not expressing an opinion about what was or was not in a particular defendant's mind. In any event, the term "about" appears in the Rule only as a result of its nonsubstantive restyling in 2011. Petitioner's position therefore depends on the proposition that the restyling dramatically changed the Rule's scope, which cannot be reconciled with the Rules Committee's specific disclaimer of any substantive change. And petitioner's reading would also require courts to draw distinctions between different forms of inferentially relevant expert testimony that have no grounding in the text of Rule 704(b).

B. The history and design of Rule 704 confirm that petitioner's interpretation is unsound. Rule 704 is the product of two successive legislative reforms. In the first, Congress eliminated the judge-made rule against expert opinion on an ultimate issue. In the second, Congress responded to problems laid bare in the trial of John Hinckley by adding an exception that addressed the confusion, spectacle, and incentive to overstatement that arise when an expert directly opines on the ultimate issue of whether the defendant's mindset satisfied an element of the offense or a defense, such as the in-

sanity defense. Petitioner's approach, however, would create an exclusionary principle even more robust than the deprecated ultimate-issue rule apparently ever was.

C. Petitioner's remaining arguments lack merit. Recognizing the limitations of Rule 704(b) does not render it a mere formalism, but instead respects the bright line that Congress drew to address the concerns on which it focused. Giving effect to the rule as written also does not vitiate any requirement to prove mens rea or otherwise short-circuit the role of juries, which are not required to credit any expert's testimony—as they are commonly instructed. If a jury chooses to credit an expert's testimony and finds based of inferences drawn from that testimony and the other evidence before it that the defendant had the requisite mental state at the time of the offense, then the jury has necessarily made an individualized assessment of the defendant's guilt.

II. The judgment below should be affirmed. The court of appeals correctly determined that the district court acted within the scope of its discretion when it granted in part and denied in part petitioner's motion to exclude Agent Flood's testimony. The court forbade Agent Flood from expressing any opinion about unwitting couriers in "absolute" terms, and Agent Flood's testimony complied with that ruling—and with Rule 704(b). That testimony was appropriately limited to an opinion that "in most circumstances" couriers who transport large quantities of drugs know that they have been hired to do so. Agent Flood did not state any opinion about petitioner's own mental state. Indeed, he never mentioned petitioner at all.

ARGUMENT

I. RULE 704 PERMITS EXPERT TESTIMONY ABOUT UNWITTING COURIERS THAT DOES NOT OPINE ON THE DEFENDANT'S OWN MENTAL STATE

Rule 704 of the Federal Rules of Evidence allows an expert witness's testimony to "embrace[] an ultimate issue," Fed. R. Evid. 704(a), subject to a limited exception in Rule 704(b) that an expert in a criminal case "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," Fed. R. Evid. 704(b). Agent Flood's testimony here—that "in most circumstances" drug-trafficking organizations do not entrust large quantities of drugs to drivers who are unaware of those drugs and that the drivers "know[] they are hired" to transport the drugs, Pet. App. 15a—was consistent with that Rule for the straightforward reason that it did not "state an opinion about whether *the defendant*" was aware of the drugs hidden in her car, Fed. R. Evid. 704(b) (emphasis added). Petitioner's effort to extend Rule 704(b) to prohibit all testimony that embraces the ultimate issue of mental state—even indirectly or inferentially—cannot be squared with the text, history, or purpose of the Rule.

A. By Its Plain Terms, Rule 704 Allows Testimony Relevant To Mental State As Long As It Does Not Include A Conclusion About The Defendant's Own Mental State

The Federal Rules of Evidence are a legislative enactment, and this Court applies "the 'traditional tools of statutory construction' in order to construe their provisions." *Beech Aircraft Corp.* v. *Rainey*, 488 U.S. 153, 163 (1988) (citation omitted). The proper starting point is therefore "the language of the Rule itself." *Ibid.* Here,

the text of Rule 704 expressly permits expert testimony that "embraces an ultimate issue" like mental state, so long as it does not go so far as to "state an opinion about whether" a particular person—"the defendant"—did or did not have the requisite mental state. Fed. R. Evid. 704(a) and (b). Rule 704 therefore allows expert testimony from which the jury could draw an inference about the defendant's mental state so long as the testimony stops short of "the last step in the inferential process—a conclusion as to the defendant's actual mental state." *United States* v. *Dunn*, 846 F.2d 761, 762 (D.C. Cir. 1988). Petitioner's contrary argument, which focuses on a word ("about") that appeared only when the Rule was nonsubstantively restyled, cannot withstand scrutiny.

1. Rule 704's text allows expert testimony from which the jury could infer a defendant's mental state

a. In a federal trial, a witness qualified as an expert by "knowledge skill, experience, training, or education may testify in the form of an opinion." Fed. R. Evid. 702. Any such testimony must be "based on sufficient facts or data" and must be the product of "reliable principles and methods," reliably applied by a qualified expert to the facts of the case. Fed. R. Evid. 702(a)-(d); see *Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589-595 (1993). But within those bounds, an expert, "[u]nlike an ordinary witness," is afforded "wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." *Daubert*, 509 U.S. at 592.

That latitude extends to the very issues that the jury will ultimately need to decide in rendering its verdict. In adopting the Federal Rules, Congress explicitly specified in Rule 704 that "[t]estimony in the form of an

opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." 1975 Act, Rule 704, 88 Stat. 1937. Congress later carved out a limited exception under which "[n]o expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference 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." Fed. R. Evid. 704(b) (1985). But in both its original amended form, and as nonsubstantively "restyl[ed]" in 2011, Fed. R. Evid. 704 advisory committee's notes (2011 Amendment), Rule 704 expressly has permitted many forms of testimony that may aid the jury's consideration of a defendant's mental state without going so far as to state a direct opinion on it.

The plain language of Rule 704(a) presumptively permits an expert's testimony to "embrace[]" any "ultimate issue," which in a criminal case would include the elements of the statute under which the defendant has been charged. Fed. R. Evid. 704(a); see, *e.g.*, *The American Heritage Dictionary of the English Language* 426 (1975) (defining "embrace" to mean, as relevant here, "[t]o include within its bounds; encompass") (emphasis omitted). Rule 704(b), in turn, forecloses one way that an expert's testimony might embrace the mental-state element in particular: "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). The provision does not, however, foreclose testimony that embraces the mental-state issue in other ways, short of a direct opinion about what was in the particu-

lar defendant's own mind. Instead, by its explicit terms, Rule 704(b)'s carveout applies only when an expert in a criminal case actually "state[s] an opinion about * * * the defendant." *Ibid.*

In its paradigmatic application, Rule 704(b) prohibits an expert at a criminal trial from stating an opinion about whether a defendant asserting an insanity defense had the requisite mental state for that defense—*i.e.*, whether the defendant, "as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts," 18 U.S.C. 17(a). But it does not prohibit the expert from testifying about "the characteristics of [a] mental disease and defect," and whether the defendant was suffering from that disease or defect. McCormick 87. What the expert may not do under Rule 704(b) is testify to the "ultimate legal issue" of whether the defendant satisfies the insanity standard. *Ibid.*

Similarly, the Rule would prohibit an expert at a criminal trial from stating an opinion about whether a defendant had the mental state necessary for commission of the crime. But because the expert can still provide other forms of testimony that "embrace[] [the] ultimate issue" of the defendant's mental state, Fed. R. Evid. 704(a), the expert would not be foreclosed from providing testimony that may help a jury to itself draw an inference about the defendant's mental state in other ways. In particular, nothing in the text of the Rule forbids an expert from testifying about the mental state or condition of a certain group of people without opining on the particular mental state or condition of the defendant (or the defendant's membership in that group).

An expert could, for example, provide otherwise-admissible testimony that tax lawyers are typically taught

the requirement to pay a certain tax—inferentially relevant to the "willful[]" mental state of a particular tax lawyer who failed to do so, see *Cheek* v. *United States*, 498 U.S. 192, 201-202 (1991)—that does not contain an opinion on whether the defendant tax lawyer himself acted willfully in failing to pay it. And an expert might similarly testify about what it would be like to drive a car with smuggling compartments—inferentially relevant to the mental state of the driver—as petitioner's expert did here. See p. 12, *supra*.

Agent Flood's testimony is of a piece with those examples. He did not express any opinion about petitioner's mental state when she crossed the border in a drug-laden car. Indeed, Agent Flood—who confirmed on cross-examination that he was not involved in the investigation of petitioner's case, Pet. App. 25a—did not express any opinion about petitioner at all. See *id.* at 10a-28a. His testimony instead consisted of helpful and reliable statements, drawn from his years of experience, about drug-trafficking organizations and the use of unwitting couriers in general. See *id.* at 15a (testifying about why couriers "in most circumstances" know that they are transporting drugs). The jury was then free to decide whether petitioner herself was a knowing drug courier, or whether Agent Flood's testimony about general practices of drug organizations and couriers, combined with the other evidence, left reasonable doubt on that point. And in compliance with Rule 704, the jury was free to do so without having heard an expert's conclusion as to how the specific issue of petitioner's mental state should be resolved.

b. Numerous courts, both before and after Rule 704(b)'s restyling, have relied on the Rule's "plain language" to recognize that it "does not prohibit all expert

testimony that gives rise to an inference concerning a defendant's mental state," but instead means only that "the expert cannot expressly 'state the inference.'" *United States* v. *DiDomenico*, 985 F.2d 1159, 1165 (2d Cir. 1993) (Friendly, J.) (citation omitted); see, *e.g.*, *United States* v. *Archuleta*, 737 F.3d 1287, 1297 (10th Cir. 2013) (explaining that Rule 704(b) prevents "experts from expressly stating the final conclusion or inference as to a defendant's mental state" but not from "testifying to facts or opinions from which the jury could conclude or infer the defendant had the requisite mental state" (citation omitted)), cert. denied, 573 U.S. 938 (2014); *United States* v. *Morales*, 108 F.3d 1031, 1038 (9th Cir. 1997) (en banc) (observing that Rule 704(b) generally "allows testimony supporting an inference or conclusion that the defendant did or did not have the requisite *mens rea*, so long as the expert does not draw the ultimate inference or conclusion for the jury"); see also 3 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 7:21, at 899-901 & nn.25-26 (4th ed. 2013) (stating that Rule 704(b) does not prohibit "[e]xpert testimony at one remove from such ultimate issues as intent" and collecting cases).

The D.C. Circuit's decision in *United States* v. *Dunn* is illustrative. In that drug-trafficking prosecution, a police expert testified "that the quantities of drugs, drug-packaging material, drug paraphernalia and weapons located in the townhouse where defendants were arrested indicated the presence of a retail drug operation." 846 F.2d at 762. The expert did not, however, "express[] an opinion on whether the particular defendants * * * had the requisite intent to distribute cocaine." *Ibid.* The D.C. Circuit accordingly rejected the defendants' contention that the expert's testimony

violated Rule 704(b), which was premised on the theory that the testimony "might lead a jury to infer" the defendants' intent to distribute. *Ibid.* The D.C. Circuit observed that "[a]ll expert evidence assists jurors in analyzing and drawing inferences from other evidence," including sometimes inferences about a defendant's "ultimate intent." *Ibid.*

As the D.C. Circuit recognized, extending Rule 704(b) to forbid any expert testimony that could support an indirect inference of intent (or any other mental-state element) would "swallow the permissive aspects of Rule 704." *Dunn*, 846 F.2d at 762. "Suppose, for example, that an expert testifies at a homicide trial that the victim died of a poison administered daily in small doses over a long period. The evidence goes not only to what happened, but suggests extreme premeditation on the part of whoever doled out the poison." *Ibid.* Nothing in Rule 704(b)'s text supports prohibiting the admission of helpful and reliable opinion testimony about the facts of the poisoning; the Rule instead "commands the expert to be silent" only at the "last step in the inferential process," by forbidding the expert from offering an opinion "as to the defendant's actual mental state." *Ibid.*

2. Petitioner's "about"-focused reading is insupportable

Petitioner contends that Rule 704(b) compels a more sweeping prohibition on expert testimony through its use of the word "about," which petitioner takes to mean "'[c]oncerning, regarding, with regard to, in reference to; in the matter of.'" Pet. Br. 18 (citation omitted; brackets in original); see *id.* at 17-20. But petitioner's reliance on the word "about" is misplaced.

a. As a threshold matter, petitioner's suggestion that the distinctive problem with Agent Flood's testimony was that it was "about . . . mental state," Pet. Br.

20 (quoting Fed. R. Evid. 704(b)), omits a critical portion of the Rule. Rule 704(b) does not forbid all opinion "about mental state"; it forbids only an opinion "about whether *the defendant* did or did not have a mental state." Fed. R. Evid. 704(b) (emphasis added). Even applying petitioner's preferred definition of the word "about," Rule 704(b) does not preclude the generalized testimony of the sort provided by Agent Flood, as petitioner's own examples (Br. 18) prove.

If a therapist says at a conference that "[p]eople do not usually have trouble getting out of bed in the morning unless they are depressed," Pet. Br. 18, no reasonable listener would understand that statement to be an expert opinion "about" the mental state of an identifiable patient. That remains true even though an audience member may subsequently find the therapist's general point useful in evaluating a particular case. So too, if the therapist were asked a question premised on a particular case, a response in the form of "I haven't seen your patient, but here are some general observations about depression from my clinical experience" is not an "opinion about whether the [patient] did or did not have" depression, Fed. R. Evid. 704(b).

b. In any event, petitioner's emphasis on the word "about" incorrectly focuses on a word that appeared only when the Rule was nonsubstantively restyled in 2011. As petitioner appears to recognize (see Br. 20 n.11), the original—substantively equivalent—language of Rule 704(b) entirely refutes her argument, making clear that the Rule prohibits only the expert's ultimate conclusion on a defendant's mental state, not other testimony that relates to the mental state. As previously noted, the original version of Rule 704(b), enacted by Congress in 1984, prohibited an "expert witness testify-

ing with respect to the mental state or condition of a defendant in a criminal case" from "stat[ing] an opinion or inference as to whether the defendant did or did not have [a] mental state or condition constituting an element of the crime charged." Fed. R. Evid. 704(b) (1985).

The very existence of experts "testifying with respect to the mental state or condition of a defendant in a criminal case"—the only experts to whom Rule 704(b) applies—necessarily presupposes the admissibility of testimony by those experts from which a jury could infer the defendant's intent or other requisite mental state. Fed. R. Evid. 704(b) (1985). The Rule prohibits only one form of testimony from such testifying experts: "stat[ing] an opinion or inference as to whether the defendant did or did not have" the mental state at issue. *Ibid.* As petitioner would have it, the 2011 restyling dramatically amended the Rule so as to eliminate the entire category of testifying experts to whom it had exclusively applied. That reading is untenable.

The language of Rule 704(b) was restyled by the Rules Committee in 2011 as part of "the general restyling of the Evidence Rules." Fed. R. Evid. 704 advisory committee's notes (2011 Amendment). Those revisions were "intended to be stylistic only" and were not intended to "change any result in any ruling on evidence admissibility." *Ibid.* Petitioner's "about"-focused reading of the Rule, however, cannot plausibly be described as a "stylistic" change from the prior version. And it would have the effect of overruling the many pre-2011 judicial rulings allowing experts to testify about a defendant's mental state. See pp. 22-24, *supra* (discussing those decisions); cf. *City of San Antonio* v. *Hotels.com, L.P.*, 593 U.S. 330, 339 (2021) (looking to predecessor version of a federal rule to "reinforce[]" an interpreta-

tion of the current rule, where the changes in the rule's language were "'intended to be stylistic only'") (citation omitted).[3]

c. Petitioner's interpretation has the additional flaw of replacing the distinction drawn in the Rule's text—between bottom-line expert opinions and inferentially relevant expert testimony—with one of her own invention. Petitioner fails to explain, for example, why Agent Flood's testimony was impermissible, but other modus-operandi testimony, such as testimony about whether the packaging or value of drugs is suggestive of distribution (*i.e.,* intent to distribute) rather than personal consumption, see Pet. Br. 20, would be allowed.

Indeed, it is unclear how petitioner reconciles her current interpretation of Rule 704(b), which contains no exception for expert testimony offered by the defense rather than the prosecution, with the testimony of her own expert. Petitioner's expert plainly testified "about . . . mental state," Pet. Br. 20 (citation omitted), when he opined to the jury that a person would not have been aware of the drugs hidden in the Ford Focus merely from driving it (and, presumably, leaving the windows up). See C.A. S.E.R. 159. That testimony was no less "about . . . mental state," Pet. Br. 20 (citation omitted), than Agent Flood's.

Petitioner suggests (*e.g.*, Br. 3) that her reading of Rule 704(b) would prohibit only one particular type of

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[3] Petitioner's additional examples (Br. 25-27) of the use of "about" in the Federal Rules of Evidence do not support her reading of Rule 704(b). Petitioner does not identify any instance in which a rule refers to testimony "about" a person—the defendant, another party, a witness—to encompass any and all testimony from which the trier of fact could infer something about that person, even if the testimony does not refer to the person specifically.

implicit or indirect expert testimony about mental state—what she refers to as "classwide *mens rea*" opinion testimony. That suggestion is unsound. In petitioner's view (Br. 42), Agent Flood's testimony, which did not mention petitioner a single time, nonetheless violated Rule 704(b) because (1) he stated an opinion that "driver[s] transporting drugs" in large quantities know about the drugs in most circumstances; (2) other evidence demonstrated that "petitioner was a member of that class"; and (3) "the jury would have understood Agent Flood's testimony as imputing a guilty mental state to her." But the same could be said about the testimony of petitioner's expert.

The testimony of petitioner's expert was even more particularized to a "class" of one: the driver of the particular Ford Focus at issue. Her expert opined that the driver of that car would not have known, from driving it alone, about a hidden compartment. C.A. S.E.R. 159. It was undisputed that petitioner was the driver and sole occupant of the Ford Focus, J.A. 57; thus, the jury would have taken the testimony as relevant to its determination of petitioner's mental state—the precise reason for which petitioner offered it, see D. Ct. Doc. 28, at 9-10. Nothing in the text of the Rule differentiates between the two experts' testimony, or otherwise supports petitioner's "classwide *mens rea*" reading.

d. The more analytically sound reading—and the one that the text of the Rule compels—is instead to limit Rule 704(b)'s prohibition to explicit testimony about a particular defendant's mental state or condition. In applying that prohibition, courts can look to the entirety of the expert's testimony to determine what opinion it conveys. For example, the Rule could prevent an expert from testifying that *all* persons in a defined "class" sat-

isfy the legal definition of insanity (for example, that all persons with a specified mental condition are incapable of appreciating the nature or wrongfulness of their conduct), and then further testifying that the defendant is a member of that "class."

But nothing like that occurred here. Not only did Agent Flood omit any opinion about petitioner's own mental state, but he adhered to the pretrial prohibition against expressing an "absolute" opinion, Pet. App. 32a, and confined his testimony to his own experience with drug traffickers "in most circumstances," *id.* at 15a. It was up to the jury to evaluate the evidence as a whole, including the testimony of both experts, to determine whether petitioner herself had the requisite mental state for the crime of knowingly importing illegal drugs. Cf. *Samia* v. *United States*, 599 U.S. 635, 654 (2023) (distinguishing between direct evidence and "juror inferences" from other evidence, which may be "impractical to fully police").

District courts are fully capable of exercising their discretion, and firsthand view of the trial, to identify and exclude testimony that in so many words "state[s] an opinion about whether the defendant did or did not have a mental state," Fed. R. Evid. 704(b). Experience demonstrates that the inherently fact-specific determination about whether particular testimony has crossed the line drawn by Rule 704(b) can be made "on a case-by-case basis." *United States* v. *Sepulveda-Barraza*, 645 F.3d 1066, 1072 (9th Cir. 2011); see *General Elec. Co.* v. *Joiner*, 522 U.S. 136, 141 (1997) ("We have held that abuse of discretion is the proper standard of review of a district court's evidentiary rulings.").

In applying Rule 704(b) to expert testimony about the modus operandi of drug-trafficking organizations,

for example, trial courts can and do take into account "the language used by the questioner," the specific wording of the expert's answers, and "whether the context of the testimony makes clear to the jury that the opinion is based on knowledge of general criminal practices, rather than 'some special knowledge of the defendant's mental processes.'" *United States* v. *Smart*, 98 F.3d 1379, 1388 (D.C. Cir. 1996), cert. denied, 520 U.S. 1128 (1997); cf. *United States* v. *Watson*, 260 F.3d 301, 305-306, 309 (3d Cir. 2001) (cited at Pet. Br. 24-25) (concluding that references to the defendant's "intent" in a prosecutor's questions led to a violation of Rule 704(b), even though the witness did not directly address the defendant's state of mind). That textually grounded determination is much easier for trial courts than the more amorphous, atextual, and logically unsound one that petitioner proposes.

Furthermore, in many cases that petitioner might otherwise portray as problematic, Rule 704 will never even come into play because other Rules will independently exclude the disputed testimony. To be admissible, expert testimony must be relevant, see Fed. R. Evid. 401; reliable and helpful, see Fed. R. Evid. 702; and not have its probative value substantially outweighed by the risk of undue prejudice, see Fed. R. Evid. 403.[4] Especially given the "'liberal thrust' of the Federal Rules" toward admissibility, *Daubert*, 509 U.S. at 588 (citation omitted), petitioner identifies no sound basis for adjusting Rule 704(b) to prohibit helpful, reli-

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[4] Here, the district court overruled petitioner's Rule 401 and 403 objections to the disputed portions of Agent Flood's testimony, Pet. App. 15a-16a; the court of appeals found no abuse of discretion, *id.* at 5a-6a; and petitioner has abandoned any further challenge to those evidentiary rulings in this Court.

able opinion testimony that does not fall within the Rule's plain terms.

B. The History And Design Of Rule 704(b) Confirm Its Limited Scope

Even if the text of Rule 704 were not itself dispositive, its history confirms that Rule 704(b) serves only to restore a limited version of the ultimate-issue rule in criminal trials. Rule 704(b) was not designed to forbid expert testimony that leaves the ultimate inference of a defendant's mental state for the jury.

1. As detailed above (at pp. 2-4), the current version of Rule 704 is the product of two successive reforms. First, a version of it was included in Congress's enactment of the Federal Rules in 1975 to "specifically abolish[]" the judge-made ultimate-issue rule, which forbade any witness from expressing an opinion on any ultimate issue to be resolved at trial. Original Rule Notes; see McCormick 80-81; see also, *e.g.*, *United States* v. *Spaulding*, 293 U.S. 498, 506 (1935) (applying a version of the ultimate-issue rule). Second, Congress amended Rule 704 in 1984 to maintain the admissibility of ultimate-issue opinion testimony in Rule 704(a), while adding a limited exception in Rule 704(b). See Insanity Defense Reform Act § 406, 98 Stat. 2067-2068.

The historical record is clear about the impetus for that second reform: the acquittal of President Reagan's would-be assassin, John Hinckley, Jr. See House Report 4 (explaining that "26 bills were introduced to modify the [insanity] defense" after the verdict in Hinckley's case). Both the prosecution and the defense had called psychiatrists and psychologists to testify at Hinckley's trial, and "[e]ach of the testifying experts was asked to express an opinion on the 'ultimate' issue[]" of whether Hinckley satisfied the then-prevailing

legal standard for insanity—with some telling the jury that he did, and others telling the jury that he did not. Bonnie 49; see *id.* at 51, 63, 66-67, 82-83. The result, as the Senate committee report addressing the Rule 704 amendment later described it, was a "confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact." S. Rep. No. 225, 98th Cong., 1st Sess. 230 (1983) (Senate Report).

Even beyond the confusion and difficulty of such diametrically opposed explicit opinions, supporters of evidentiary reform—including both the American Psychiatric Association and the American Psychological Association—expressed concern that allowing expert testimony on the ultimate legal issue of a mental-state element caused medical experts to testify to matters beyond their expertise. See House Report 16 n.29 (observing that psychiatrists and psychologists "have no specialized knowledge" regarding the "legal and moral" judgments inherent in the insanity defense); see also *Reform of the Federal Insanity Defense: Hearings before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 85, 114, 249-250, 345, 393 (1983) (testimony in support of reform). Congress accordingly sought to "eliminate" the undesirable practice. Senate Report 230.

Rule 704(b) was not, however, designed to prohibit all expert testimony "regarding a particular medical diagnosis." House Report 16 n.33. As the Senate report illustrated, the new Rule 704(b) would continue to allow expert opinion from which a jury might infer a defendant's mental state or condition—namely, experts' testimony "presenting and explaining their diagnoses, such as whether the defendant had a severe mental disease

or defect and what the characteristics of such a disease or defect, if any, may have been." Senate Report 230. Indeed, that report specifically endorsed a statement by the American Psychiatric Association that experts "must be permitted to testify fully about the defendant's diagnosis, mental state[,] and motivation (in clinical and commonsense terms) at the time of the alleged act so as to permit the jury or judge to reach the ultimate conclusion." *Id.* at 231. Accordingly, the final text of Congress's amendment presupposed that experts would still "testify[] with respect to the mental state or condition of [the] defendant in a criminal case." Fed. R. Evid. 704(b) (1985); see pp. 25-26, *supra*.

2. Petitioner's broad reading of Rule 704(b) is irreconcilable with its history in two respects.

First, whereas the history underscores that Rule 704(b) was designed as a targeted exception to the overall abolition of the ultimate-issue rule, petitioner's reading would require a practice even broader than that deprecated doctrine. For example, under the ultimate-issue rule, "in cases of medical causation," witnesses "sometimes" simply "couch[ed] their opinions in cautious phrases of 'might or could,' rather than 'did.'" Original Rule Notes. "In other instances the rule was simply disregarded, and, as concessions to need, opinions were allowed upon such matters as intoxication, speed, handwriting, and value, although more precise coincidence with an ultimate issue would scarcely be possible." *Ibid.*; cf. *Grismore* v. *Consolidated Prods. Co.*, 5 N.W.2d 646, 657-660, 663-664 (Iowa 1942) (reviewing forms of opinion testimony already permitted under the ultimate-issue rule in deciding to eliminate the rule altogether) (cited at McCormick 80 n.8 as "the leading case" precipitating a trend towards reform).

Petitioner's interpretation of Rule 704(b), however, would create a supercharged version of the ultimate-issue rule that would preclude even inferentially relevant testimony. Cf. Pet. Br. 18-19, 22, 24, 27-28. Petitioner does not attempt to ground that interpretation in any traditional understanding of the ultimate-issue rule. Indeed, she does not identify a single court or commentator that has ever adopted or advocated the approach she now proposes.

Second, the history of Rule 704(b) makes clear that Congress anticipated that medical professionals would still be permitted to testify in a criminal trial about the defendant's mental state or condition, particularly when the defendant raises an insanity defense. That is the plain import of the original language of Rule 704(b) and is repeatedly confirmed in the legislative record. And Congress enacted Rule 704(b) as part of a broader package of reforms to the federal insanity defense, which reinforce Congress's expectation that expert testimony would still be admissible to prove or disprove insanity, just without opinions about the ultimate issue.

In particular, Congress created a pretrial process for the government to move for an expert psychiatric or psychological examination when a defendant gives notice of intent to rely on the insanity defense. See Insanity Defense Reform Act § 403(a), 98 Stat. 2059 (18 U.S.C. 4242); see also § 404, 98 Stat. 2067 (amendments to pretrial notice requirements for experts). That procedure would have no purpose if the expert who examined the defendant were foreclosed from providing testimony that, while avoiding a direct opinion, inferentially bears on the defendant's insanity. See, *e.g.*, 29 Charles Alan Wright & Victor Gold, *Federal Practice and Procedure* § 6285, at 482 (2d ed. 2016) (observing

that expert testimony on insanity is "offered to prove whether [the] defendant acted with the mental state required to commit the crime").

C. Petitioner's Remaining Arguments Lack Merit

Petitioner's remaining arguments for reversal lack merit. Giving effect to the plain language of Rule 704(b) as prohibiting only statements of opinion about the defendant's own mental state does not render the Rule "toothless," Pet. Br. 21, or vitiate any requirement to prove mens rea, see *id.* at 30-34. And petitioner's constitutional arguments (Br. 35-41) are insubstantial.

1. Petitioner contends (Br. 21) that interpreting Rule 704(b) to prohibit only opinions about whether the defendant's own mental state satisfied the elements of an offense (or the prerequisite for an affirmative defense) would render the rule an empty "formalism," because experts could testify to all but the last step in the chain of inferences. As the history discussed above confirms, however, Congress viewed the admission of explicit expert opinions on an ultimate mental-state issue to invite specific problems—the confusion of two conflicting expert determinations, the public spectacle of directly opposing "expert" testimony on the bottom-line question, and the risk of inviting ultimate conclusions that experts were not qualified to make—that are not present (at least to the same degree) in more general, inferentially relevant, testimony. See House Report 16; Senate Report 230-231.

In enacting Rule 704(b), Congress "made a careful judgment as to what [testimony] may come into evidence and what may not. To respect its determination, [the courts] must enforce the words that it enacted." *United States* v. *Salerno*, 505 U.S. 317, 322 (1992) (discussing hearsay). Expert testimony about how persons

with schizophrenia behave (Pet. Br. 21), how corporate executives prepare for interviews with law enforcement (*id.* at 22), or how drug-trafficking organizations operate (*id.* at 22-23) is not objectionable under Rule 704(b) where it does not entail expressing an opinion about a particular defendant's own mental state.

An expert's testimony might be viewed as expressing such a forbidden opinion if it "leaves no room for inference" or "compels the conclusion" that the defendant had the requisite mental state, *United States* v. *Campos*, 217 F.3d 707, 711 (9th Cir.), cert. denied, 531 U.S. 952 (2000)—as testimony that drug traffickers *never* use unwitting couriers (cf. Pet. Br. 4-6, 23) might do. Thus, even assuming that the testimony were otherwise admissible, see Fed. R. Evid. 702 advisory committee's notes (2011 Amendment) (emphasizing that Rule 702 forbids overstating the expert's conclusion), it could be excluded on that basis. But petitioner's more expansive rule of exclusion lacks grounding in the text, history, or purpose of Rule 704(b).

2. Petitioner is also wrong to suggest (Br. 30-34) that adopting her expansive reading of Rule 704(b) is necessary to safeguard the role of mens rea in criminal law. Petitioner observes (Br. 33) that no third party can have direct knowledge of what was in the defendant's head at the time of an offense. But that is precisely why mens rea "must almost always be proved[] by circumstantial evidence." *United States* v. *Santos*, 553 U.S. 507, 521 (2008) (plurality opinion); see, *e.g.*, *Ruan* v. *United States*, 597 U.S. 450, 467 (2022). Circumstantial evidence in the form of relevant and reliable expert opinion testimony, like the modus operandi testimony at issue here, does not uniquely undermine mental-state requirements.

"The jury [is] not bound to accept the opinion of any expert in weighing the evidence," *Hamling* v. *United States*, 418 U.S. 87, 100 (1974), and the government always has the burden of proving any mental-state element of an offense beyond a reasonable doubt. Thus, if the jury chooses to credit expert testimony offered by the government, and chooses to draw an inference of knowledge or intent on the basis of that testimony and the other evidence before it, the jury has necessarily rendered an "individualized assessment" (Pet. Br. 32) of the defendant's mental state.

Jurors are commonly instructed, as they were in this case, that expert testimony should be "judged like any other testimony"; that jurors may "accept it or reject it"; and that they are free to give "as much weight as [they] think it deserves." J.A. 77; see 9th Cir. Manual of Model Criminal Jury Instructions 3.14 (Aug. 2023). Jurors are "presumed to follow their instructions," *Richardson* v. *Marsh*, 481 U.S. 200, 211 (1987), and properly instructed jurors "could not possibly [be] misled into the notion that they must accept the [testimony] of [a] government expert," *United States* v. *Johnson*, 319 U.S. 503, 519 (1943)—including testimony from which the defendant's mental state might be inferred.

To the extent that petitioner nonetheless has concern that the jury will too readily believe an expert, see Pet. Br. 34, she overlooks additional important tools that a criminal trial provides for addressing that concern. The defendant may always cross-examine the government's expert witness—as petitioner did here, see Pet. App. 21a-25a, 27a. Cross-examination can demonstrate to the jury that an opinion is worthy of little weight because, for example, the opinion is overbroad, or based on questionable assumptions or incom-

plete data. Cf. *United States* v. *Hubbard*, 61 F.3d 1261, 1275 (7th Cir. 1995) ("[N]othing in [the expert's] testimony foreclosed or hampered the defense in offering innocent explanations for evidence that [the expert] had identified as consistent with narcotics trafficking."), cert. denied, 516 U.S. 1175 (1996). Defendants may also seek to call their own expert witnesses to counter expert testimony offered by the government—as petitioner did here. See C.A. S.E.R. 139-144.

Furthermore, as a practical matter, the government does not ordinarily seek to prove a drug-courier defendant's knowledge solely by expert testimony. In this case, for example, the government presented ample other evidence—including recordings of petitioner's transparently flimsy story to Agent Porter about her boyfriend "Jesse," the large quantity of methamphetamine placed throughout the car, and the audible "crunch" that resulted when rolling the window down—from which the jury could have independently found that petitioner knew she was transporting drugs (as she later admitted). See pp. 9-11, *supra*. Indeed, the prosecutor in fact downplayed Agent Flood's testimony: while petitioner asserted in her closing argument that Agent Flood was the government's "star witness," J.A. 68, the prosecutor rejected that characterization in his rebuttal, instead emphasizing petitioner's recorded interview with Agent Porter, see J.A. 72 ("You heard that Agent Flood was the star witness. No, Agent Porter was. Agent Porter is the star witness. He's the one who met with [petitioner] the hours after her entry. He's the one who investigated it.").

3. Finally, petitioner's constitutional arguments (Br. 35-41) lack merit. Petitioner does not contend that any provision of the Constitution was violated by the admis-

sion of Agent Flood's testimony, or even that the admission raised constitutional questions that might support application of the constitutional-avoidance canon to Rule 704(b). And she identifies no constitutional basis for her countertextual and counterhistorical reading of Rule 704.

Petitioner asserts that the admission of "[c]lasswide *mens rea* testimony undermines the jury's role" under the Sixth Amendment on the theory that, if the jury credits the expert's testimony, the expert "'has taken the jury's place.'" Pet. Br. 37 (citation omitted). But Wigmore "aptly characterized" that theory as "'empty rhetoric.'" Original Rule Notes (quoting Wigmore § 1920, at 17). Absent an admission or stipulation, a jury is always relying on *some* evidence of a defendant's mental state; making factual findings based on evidence is what juries do. Petitioner would presumably acknowledge that the Sixth Amendment allows expert testimony bearing on elements of the criminal offense other than mental state. And she provides no reason why expert testimony bearing on a defendant's mental state—which is, under Rule 704(b), more circumscribed than expert testimony bearing on other elements—uniquely raises Sixth Amendment problems.

Petitioner's due-process argument (Br. 39-41) is similarly misplaced. That argument rests on inapposite case law concerning legal presumptions that resulted in improperly shifting the burden of proof. See *Francis* v. *Franklin*, 471 U.S. 307, 311-312, 317-318 (1985) (jury instructions invited rebuttable presumption of intent to kill); *Sandstrom* v. *Montana*, 442 U.S. 510, 521 (1979) (similar). The district court's reasoned decision to admit Agent Flood's testimony over petitioner's Rule 704(b) objection was not akin to such a presumption.

The jury here was properly instructed on the government's burden of proving "beyond a reasonable doubt * * * every fact necessary to constitute the crime," including the mental-state element of the offense. Pet. Br. 39 (quoting *In re Winship*, 397 U.S. 358, 364 (1970)); see J.A. 77 (instruction on reasonable doubt). Unlike the operation of a legal presumption, admitting Agent Flood's testimony into evidence did not require the jury to accept some fact as true by default, or to presume that other facts followed from it. The admission of Agent Flood's testimony may have helped the government to carry its burden of proof, but it did not reallocate the burden or otherwise diminish it.

II. THE JUDGMENT BELOW SHOULD BE AFFIRMED

For the reasons stated above, the court of appeals correctly determined that the district court acted within the scope of its discretion when it granted in part and denied in part petitioner's motion to exclude Agent Flood's testimony. Pet. App. 5a-6a. The district court forbade Agent Flood from testifying in "absolute" terms that drug-trafficking organizations never use unwitting couriers or that unwitting couriers are "mythical," but the court permissibly viewed his opinion testimony as otherwise "fair game." *Id.* at 31a-32a.

Agent Flood adhered to the specified parameters—and to Rule 704—when he testified based on his knowledge and experience that "in most circumstances" involving large quantities of drugs, "the driver knows they are hired" to transport the drugs because drug-trafficking organizations do not want to run the "risk[s]" associated with unwitting couriers. Pet. App. 15a-16a. And petitioner's cross-examination of Agent Flood included Agent Flood's express acknowledgment that he was not involved in the investigation of this case.

Id. at 21a; cf. *United States* v. *Martinez*, 476 F.3d 961, 968 (D.C. Cir.) (Kavanaugh, J.) (finding no violation of Rule 704(b) when, *inter alia*, the expert "stated during cross-examination that he had no personal knowledge" of the defendant's drug-trafficking organization, "thereby mitigating any risk that his statement would be misinterpreted"), cert. denied, 552 U.S. 968 (2007).

Agent Flood even went so far as to acknowledge that he was aware of possible schemes involving unwitting couriers. See Pet. App. 23a-25a, 27a. Petitioner asserts (Br. 42) that Agent Flood's testimony about those possible schemes made things worse rather than better from her perspective, but petitioner herself elicited that testimony on cross-examination. She cannot object to it now. See, *e.g.*, *United States* v. *Cruz-Feliciano*, 786 F.3d 78, 89 (1st Cir.) ("[A] defendant cannot complain about the admission of testimony directly responsive to a question posed by defense counsel."), cert. denied, 577 U.S. 909 (2015). And nowhere in Agent Flood's testimony did he state an opinion about petitioner's own knowledge or intent that might have strayed outside what Rule 704 permits.[5]

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[5] Even if the Court were to perceive an error under Rule 704(b) in the admission of Agent Flood's testimony, the case should be remanded to the court of appeals to assess harmlessness. Fed. R. Crim. P. 52(a). The government made a harmless-error argument below, see Gov't C.A. Br. 58-59, which the court of appeals had no occasion to reach. The lower court would also be better positioned to evaluate in the first instance whether and to what extent petitioner "opened the door" to otherwise objectionable Rule 704(b) testimony by calling her own expert to offer comparable testimony. Pet. App. 6a (citation omitted); cf. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (observing that this Court generally sits as "a court of review, not of first view").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
NICOLE M. ARGENTIERI
Acting Assistant Attorney General
ERIC J. FEIGIN
Deputy Solicitor General
MATTHEW GUARNIERI
Assistant to the Solicitor General
JAVIER A. SINHA
Attorney

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APPENDIX

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APPENDIX

1. Fed. R. Evid. 702 provides:

Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

2. Fed. R. Evid. 703 provides:

Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

3. Fed. R. Evid. 704 provides:

Opinion on an Ultimate Issue

(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.

4. Fed. R. Evid. 704 (1985) provided:

Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference 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. Such ultimate issues are matters for the trier of fact alone.

5. Fed. R. Evid. 704 (1976) provided:

Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

6. Fed. R. Evid. 705 provides:

Disclosing the Facts or Data Underlying an Expert's Opinion

Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.