No. 23-14

In The
Supreme Court of the United States

DELILAH GUADALUPE DIAZ,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR JOHN MONAHAN, DAVID FAIGMAN, CHRISTOPHER SLOBOGIN, EDWARD IMWINKLEREID, JENNIFER MNOOKIN, ROGER PARK, PAUL ROTHSTEIN, AND 15 OTHER EVIDENCE PROFESSORS AS *AMICI CURIAE* SUPPORTING RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

INTERESTS OF *AMICI CURIAE*[1]

Amici are twenty-two current and emeritus law professors who teach and research Evidence law. Some of us authored the most frequently cited textbooks and treatises. Among us are former prosecutors and defense attorneys. Three of us are recipients of the John Henry Wigmore Lifetime Achievement Award for Evidence scholarship. A complete list of *amici* can be found in the Appendix. *Amici* have no personal interest in this case and write solely to inform the Court on how we think Rule 704(b) ought to be interpreted, considering evidence doctrine and practice.

SUMMARY OF ARGUMENT

When experts provide opinions about how most drug traffickers behave and what most drug traffickers know, they are not drawing and cannot draw conclusive inferences about whether an individual possessed the requisite *mens rea*. Instead, they are providing "framework" evidence—evidence that bears on the likelihood of a fact being true, based on the defendant's membership in a particular group.[2] The jury still

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* made such a monetary contribution.

[2] Petitioner's brief refers to such evidence as "classwide *mens rea* testimony." Pet. Br. 3, *passim*. *Amici* use "group" or

decides whether to believe the expert's framework testimony, how much weight to give it, and separately, whether the group data apply to the facts of this case. For these reasons, experts who testify under Rule 704(b) as to how members of a group tend to think do not replace the jury's ultimate fact-finding regarding *mens rea*.

Experts who provide reliable framework evidence merely provide an opinion about general facts in the world. So long as they do not opine on an individual defendant's mental state, this does not run afoul of Federal Rule of Evidence 704(b). The Court should not adopt the Petitioner's interpretation of Rule 704(b), because an expert's framework testimony is not the "functional equivalent" of telling the jury how to decide the case. *United States v. Gutierrez-Farias*, 294 F.3d 657, 663 (5th Cir. 2002). Petitioner's view conflates several separate inferences, and thus violates norms of evidence doctrine that treat each inference independently.[3] Additionally, Petitioner's interpretation:

"category" because of the specific legal connotations of "class" in aggregate litigation, but it seems as though we mean the same thing.

[3] Adopting the "functional equivalence" standard under Rule 704(b) could upend the way many other rules, like Rule 801 and Rule 404(b), are applied. Whether statements are impermissible hearsay or character evidence depends on the precise reason they are introduced, and not on other likely juror inferences. If the Court is concerned that the jury will give a witness's testimony too much weight, this should be treated under a case-by-case application of Federal Rule of Evidence 403. *See* FED. R. EVID. 403; *United States v. Blade*, 811 F.2d 461, 465 (8th Cir. 1987). This concern can also be addressed through admonitions to the jury and through jury instructions, discussed below.

1) relies on an inaccurate view of mental states and how they are inferred, 2) assumes that jurors are incapable of drawing individual inferences and assessing the credibility and weight of mental state expert testimony, and that attorneys are incapable of exposing any weaknesses on cross-examination, 3) denies jurors access to a critical source of expert framework evidence, and 4) triggers interpretive inconsistencies and thus more appellate litigation.

The Court *can* answer the Question Presented and improve the functionality of Rule 704(b) by drawing a clearer line between an expert's permitted group testimony and the jury's application of that group testimony to a particular defendant. Fears that 704(b) testimony might become the "functional equivalent" of telling the jury how to decide the case can be laid to rest by having judges explain to the jury in plain terms the group nature of the expert's testimony and its independence from the jury's factual determination. There is nothing unique about Rule 704(b) testimony that warrants blocking the jury from assessing its credibility. The rule specifically reminds us that determinations of a defendant's mental state or condition are "matters [] for the trier of fact alone." FED. R. EVID. 704(b). If the foundation and purpose of the expert's framework testimony is made clear, such testimony can be relevant and useful, and thus ought to be admissible. Denying jurors access to probative framework evidence would be ill-advised in the many cases where lay jurors' intuitions are at odds with experts'

specialized knowledge, which may unduly prejudice criminal defendants.

ARGUMENT

I. This Case Presents a Narrow Issue That has Broad Implications

Petitioner focuses exclusively on the application of Rule 704(b) to testimony pertaining to the mental states of defendants accused of drug trafficking. Indeed, the Question Presented addresses government experts in such cases. But the Federal Rules of Evidence apply to every case in a federal district court, and the rules governing expert testimony—including Rule 704(b)—apply equally to any party. Moreover, this Court's interpretation of the Federal Rules has persuasive influence on analogous rules in state courts. Thus, the Court's ruling in this case will have broad implications far outside the limited context of *mens rea* in prosecutions for drug trafficking and related crimes.

Further, the conflict between the circuit courts as to when expert testimony runs afoul of Rule 704(b) extends beyond the context of drug trafficking. Given the number of appeals that have resulted from ambiguity in Rule 704(b)'s interpretation,[4] a means of reconciling these diverse views that will apply in all

[4] In just the four-year period from 1/1/2018 to 12/31/2022, there were at least 78 total circuit court decisions addressing appeals based on Rule 704(b) available on Westlaw (results on file with authors).

704(b) cases would best serve litigants and the courts. The Court should explain that jurors are permitted to draw individual mental state inferences from expert-provided group data; at the same time, the Court should provide guidance for fact-finders on how they can and should do this. Doing this would respect the legislative history and text of Rule 704(b) and the jury's role as ultimate fact-finder. It would also permit expert mental state testimony in the many cases where it might assist the jury.

The guidance litigants and lower courts need is found in decades of Evidence scholarship. In the 1980s, John Monahan and Laurens Walker developed a sound way of thinking about this kind of expert, group-based data.[5] Noting that this sort of testimony is neither adjudicative (it does not answer the question of who did what, with what mental state) nor legislative (abstract empirical data that might guide policy-making), they instead referred to this as "framework" evidence because it straddles the two. That is, framework evidence provides abstract, empirical data that can be relevant to the current dispute.

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[5] John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 488 (1986); Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 570 (1987); Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CAL. L. REV. 877, 879 (1988).

Framework evidence is extremely common.[6] Its relevance must be understood on two levels that are analytically distinct.[7] At the first level, the expert gathers and processes information in a way that must meet the standard of reliability under Rule 702.[8] The descriptions of the group, or the "framework" evidence that follows from this specialized knowledge, provide the basis for an expert's probabilistic opinions about how members of a group tend to think or behave.

But to be relevant to a particular case, there must be a second step that connects the framework information to the particular defendant. Moving from the group framework analysis to deciding that it applies to a particular individual has been labeled by some

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[6] Framework evidence is addressed generally and in multiple specific contexts in the major treatise on scientific evidence precisely because its appearance in court—whether termed as such or not—is extremely common. *See generally* 1 David L. Faigman et al., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY §§ 1:19, 3:19, 12:13, 41:9 (2023–2024 ed.).

[7] David L. Faigman, John Monahan & Christopher Slobogin, *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 U. CHI. L. REV. 417, 423–24 (2014).

[8] *Amici* recognize that the reliability of the proffered expert testimony is an important issue but one not before the Court. *Amici* assume, *arguendo*, that in order to be admitted under Rule 704(b) a testifying expert must meet the requirements for qualification and reliability under Rule 702. FED. R. EVID. 702. There are likely many cases where the law enforcement agent's "expertise" relating to the practices of drug cartels is properly questioned at the trial stage under Rule 702. *See United States v. Valencia-Lopez*, 971 F.3d 891, 898 (9th Cir. 2020). Some of the undersigned *amici* have serious concerns about whether law enforcement testifying as experts would meet a rigorous 702 analysis. However, the issue was not preserved in this case.

amici as the "group to individual" or "G2i" inference.[9] While group data helps inform inferences about the individual (the "diagnosis"), the inferences are analytically separate and are drawn by the jury in a second step of analysis. As applied to the facts of *Diaz*, the jury could decide that they believe Agent Flood's testimony on how drug traffickers tend to behave, but they might think that there are facts present in Ms. Diaz's case rendering this group data inapplicable to her. The jury is also free to discredit the expert witness's testimony entirely and afford it no weight, which they might do after vigorous cross examination.[10] Maintaining the distinctions between the required inferences is critical for the introduction of many types of expert mental state testimony, as we will explain in the next section.

A. Mental State Experts Are Fundamentally Similar to Other Types of Expert "Framework" Testimony

Federal courts once held that Rule 704(b) may apply "only to psychiatrists and other mental health experts." *United States v. Morales*, 108 F.3d 1031, 1036 (9th Cir. 1997). However, the Rule is now interpreted

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[9] Faigman et al., *supra* n.7 at 423–24.

[10] Indeed, cross-examiners can make it crystal clear to the jury that while the expert might have some specialized knowledge about the group, the expert knows absolutely nothing about the specific defendant. *See United States v. Finley*, 301 F.3d 1000, 1014 (9th Cir. 2002) (expert's subjective 704(b) testimony can be "properly addressed by the government on cross-examination").

to prohibit experts of all types from drawing "explicit opinions" as to whether a defendant had a particular mental state. *United States v. Gomez*, 725 F.3d 1121, 1128 (9th Cir. 2013).

The rule was and is sensible, for it is simply not factually possible for an expert to diagnose an individual as having had a particular mental state at a particular time.[11] While the Rule permits experts to provide opinion testimony as to the "characteristics" of a particular group to which the defendant may belong,[12] there is currently no crystal ball or neuroimaging device that allows psychiatrists, law enforcement agents, or other experts to diagnose an individual's *mens rea*.[13] Psychological constructs like

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[11] Christopher Slobogin, PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE, AND SPECULATION IN ADJUDICATING CULPABILITY AND DANGEROUSNESS 39–57 (Ronald Roesch ed., 2006).

[12] But unless the expert also personally evaluated the defendant near the time of the crime, the expert cannot say that it was likely, given his mental illness, that he did or did not possess the intent to kill. In this way, *amici* also disagree with aspects of the view of Rule 704(b) endorsed by the Ninth Circuit. *See United States v. Merriam*, 68 F. App'x 840, 842 (9th Cir. 2003) (expert allowed under 704(b) to testify that it was "more likely" that an issuer would be involved in a "pump and dump" scheme, based on group data; *see also Finley*, 301 F.3d at 1015 (stating that Rule 704(b) allows expert testimony on a defendant's mental state so long as the "expert does not draw the ultimate inference" or "necessarily compel" a conclusion about *mens rea*).

[13] Emily Murphy & Jesse Rissman, *Evidence of Memory from Brain Data*, J.L. & BIOSCIENCES (2020); Teneille Brown & Emily Murphy, *Through a Scanner Darkly: Functional Neuroimaging as Evidence of a Criminal Defendant's Past Mental States*, 62 STAN. L. REV. 1119, 1122 (2010).

intentionality and knowledge are subjective and exist on a continuum, but the criminal law requires jurors to make the ultimate yes/no decision of whether they were present or absent. This *legal* conclusion is for the jury alone.

Perhaps Petitioners and some courts treat expert mental state testimony as necessarily invading the jury's fact-finding role because they assume that juries will uncritically defer to experts in this domain. Indeed, the Fifth Circuit's "functional equivalent" interpretation suggests that jurors will be so dazzled by this expert testimony, that they will lose their ability to assess its credibility and weight. But, to our knowledge, Petitioner provides no evidence of this jury incompetence.

Indeed, while jurors might not know how people with schizophrenia or in drug trafficking organizations tend to think and behave, they likely *do* know, through common sense, that there is individual variation within these groups. Jurors understand that experts cannot testify to how *everyone* with schizophrenia tends to think, *all the time*. And unlike the potential "aura of infallibility" that the Court in *United States v. Scheffer* worried would attach to polygraph evidence, attorneys can effectively cross-examine experts like Agent Flood, demonstrating to the jury that they know nothing about this defendant in particular. 523 U.S. 303, 313 (1998).[14]

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[14] Polygraph evidence, excluded from admissibility on reliability grounds by the Military Rules of Evidence at issue in *United*

Further, unless there is evidence that jurors uncritically overvalue a class of expert evidence, courts should err on the side of its inclusion.[15] Excluding evidence because of the worry that the jury will uncritically accept it goes against the "liberal thrust" of the evidence rules related to expert testimony.[16] It also

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States v. Scheffer, is distinct from other types of expert evidence in that "[u]nlike other expert witnesses who testify about factual matters outside the jurors' knowledge, such as the analysis of fingerprints, ballistics, or DNA found at a crime scene, a polygraph expert can supply the jury only with another opinion, in addition to its own, about whether the witness was telling the truth." *Id.* at 313. The Court observed that such evidence risks the jury giving "excessive weight to the opinions of a polygrapher, clothed as they are in scientific expertise and at times offering . . . a conclusion about the ultimate issue in the trial." *Id.* at 313–14. *Scheffer* reminds us that juries are "presumed to be fitted for [this task] by their natural intelligence and their practical knowledge of men and the ways of men." *Id.* at 313 (quoting *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88 (1891)). And in contrast to lie detection tests purporting to determine an individual's sincerity, expert psychiatric testimony and other expert framework testimony adds helpful *context* to aid the jury's ultimate credibility determinations.

[15] "[T]he jury, not the judge traditionally determines the reliability of evidence." *Perry v. New Hampshire*, 565 U.S. 228, 245 (2012).

[16] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 588 (1993) (noting the "liberal thrust" of the Federal Rules, especially as applied to expert opinion testimony) (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)). This does not mean judges-as-gatekeepers of expert testimony have no role. Indeed, the 2023 update to Rule 702 (concerning expert qualifications and the reliability and relevance) clarifies the standard the trial court should apply: the proponent must "demonstrate[ ] to the court that it is more likely than not that" the evidence meets the requirements of Rule 702.

risks proving too much. If jurors are incapable of evaluating expert mental state testimony, why let them evaluate expert evidence *at all*? Why is expert mental state testimony unique in this regard?

The answer is that it is not. Inferring mental states does not require expertise or special skills. We spontaneously infer mental states whenever we hear how someone has behaved.[17] This "mentalizing" happens every day, all around us, and is at the root of most moral and legal judgments.[18] Imagine that someone appears to have kicked you, but they claim it was an accident. To decide whether you believe them, you must look beyond what they say. By examining this person's facial expression, demeanor, behavior,

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[17] *See* Sarah-Jayne Blakemore & Jean Decety, *From the Perception of Action to the Understanding of Intention*, 2 NATURE REVIEWS NEUROSCIENCE 561, 561 (2001) ("Humans have an inherent tendency to infer other people's intentions from their actions."); Mark Ho et al., *Communication in action: Planning and Interpreting Communicative Demonstrations*, 150 J. EXPERIMENTAL PSYCH. 2246, 2246 (2021) ("[Mindreading] enables an observer to interpret others' behavior in terms of unobservable beliefs, desires, intentions, feelings, and expectations about the world."); *see also* Francesco Margoni & Teneille Brown, *Jurors Use Mental State Information to Assess Breach in Negligence Cases*, 236 COGNITION 105442, 3 (2023) ("[P]eople spontaneously process mental state information before attributing blame.").

[18] Liane Young, Jonathan Scholz & Rebecca Saxe, *Neural Evidence for "Intuitive Prosecution": The Use of Mental State Information for Negative Moral Verdicts*, 6 SOC. NEUROSCIENCE 302, 302 (2011); *see also* Fiery Cushman, *Deconstructing Intent to Reconstruct Morality*, 6 CURRENT OPINION PSYCH. 97, 101 (2015) ("[P]eople spontaneously incorporate mental state inferences into their moral judgments.").

character, and group membership, you will quickly decide whether you think they are telling the truth. We use juries to do the same thing at trial. Jurors are quite familiar with how this imperfect mindreading works in everyday life, even if they rarely stop to think about it.

Lay people infer mental states by observing or learning about externally visible behavior. This is often so reflexive as to go unnoticed. If someone broke a bedroom window, took jewelry, and then sold it to a pawn shop, their *actus reus* (planning, damaging property, profiting) is strong evidence of their *mens rea* (intent). Jurors typically do not need an expert to help them infer *mens rea*. Indeed, if specialized knowledge were always required to infer mental states, jurors would not be able to perform their core function—to assess witness credibility.[19] But sometimes jurors do need expert help understanding the *context* in which they must perform their ultimate mindreading judgment. This is where experts regularly provide framework evidence.

Because our argument appeals to a generalizable distinction between group data and individual inferences, it will be helpful to explain how mental state evidence is different from expert testimony on other ultimate issues. As some *amici* have argued, 704(b) experts differ from psychiatrists diagnosing a patient,[20]

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[19] Teneille R. Brown, *Minding Accidents*, 94 U. COLO. L. REV. 89, 95 (2023).

[20] Carl E. Fisher et al., *Toward A Jurisprudence of Psychiatric Evidence: Examining the Challenges of Reasoning from Group*

or causation experts in toxic tort cases.[21] For example, causation experts *can* apply epidemiological data to the facts of a particular plaintiff's toxic tort case to opine on both legal and factual cause.[22] Due to the multiple potential causes of plaintiff's injury, experts generally cannot conclude that the defendant's toxins served as a but-for cause of the plaintiff's injury. But because the effects of toxins are observable and have been scientifically measured, experts can make an individual inference, albeit a weak one, based on their ability to rule out other known toxins and causes. This same inferential process is not possible with mental state experts because subjective mental states cannot yet be externally measured and validated in the same objective way. In real-world settings like trials, "there are no known 'error' rates for how we read minds," and "we can never be *certain* that we got it right."[23] This means experts cannot rule out mental states the same way they can exclude potential toxins as causes.

Data in Psychiatry to Individual Decisions in the Law, 69 U. MIAMI L. REV. 685, 752 (2015) (explaining why experts may diagnose a criminal defendant as having schizophrenia based upon a review of their records, and then may opine on how people with schizophrenia tend to think or behave, but unless the expert also personally evaluated the defendant near the time of the crime, the expert cannot say that it was likely, given his mental illness, that he did or did not possess the intent to kill).

[21] Joseph Sanders et al., *Differential Etiology: Inferring Specific Causation in the Law from Group Data in Science*, 63 ARIZ. L. REV. 851, 921–22 (2021).

[22] *Id.*

[23] Teneille R. Brown, *Demystifying Mindreading for the Law*, WIS. L. REV. FORWARD 1, 5 (2022).

Thus, 704(b) mental state testimony is more like expert testimony related to eyewitness identification. Courts often allow expert testimony regarding factors that, on average, interfere with accurate eyewitness identifications.[24] However, courts do not allow experts to draw an individual inference, and to testify that a particular witness was likely inaccurate.[25] This is because the social science research—despite being itself replicated and reliable—cannot support reliable statements about individual cases.[26] The same is true with mental states. Because of the similarities between 704(b) testimony and expert testimony on eyewitness identification, we argue for a similar judicial response to the Question Presented here: permit the expert to testify as to the group data, but admonish and instruct

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[24] *See*, *e.g.*, *People v. Boone*, 30 N.Y.3d 521, 530 (2017) ("Despite the fact that jurors may be familiar from their own experience with factors relevant to the reliability of eyewitness observation and identification, it cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror.") (internal citations omitted).

[25] 1 MCCORMICK ON EVIDENCE § 13, at 123–26 (8th ed. 2020); *see also* Hon. D. Duff McKee, *Challenge to Eyewitness Identification Through Expert Testimony*, 35 AM. JUR. PROOF OF FACTS 3d § 9 (1996) ("Courts have permitted experts to explain the memory process of perception, retention and recall, and to elaborate on recognized psychological phenomena in general terms. No court has allowed the expert to express a specific opinion, either directly or upon hypothetical question, regarding the specific identification made by a particular witness.").

[26] Fisher et al., *supra* n.20 at 715 (comparing expert testimony on eyewitness accuracy and psychiatric diagnoses).

the jury that the distinct, individual inference is theirs to make.[27]

B. Experts Can Provide Helpful Framework Evidence to Give Context for a Jury's Mental State Inferences

While lay people reflexively make inferences about mental states based on their commonsense intuitions, these intuitions can be wrong. For example, lay people often assume that flight is strong evidence of guilt,[28] or that women who delay reporting sexual assault are fabricating. Social science data now confirm that neither of these common inferences are valid. Indeed, innocent people flee to avoid harassment and police brutality,[29] and women do not report sexual assault due to fears of being retraumatized by police.[30]

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[27] Thomas D. Albright & Brandon L. Garrett, *The Law and Science of Eyewitness Evidence*, 102 B.U. L. REV. 511, 556 (2022).

[28] *See Miller v. United States*, 320 F.2d 767, 769–70 (D.C. Cir. 1963) (Judge Bazelon describing the required inferences from observation of flight to guilt, suggesting that trial courts do what we suggest: outline the separate inferences that a jury needs to perform to avoid elision, and noting that "had such an instruction been requested, failure to give it would have been reversible error.").

[29] "White experience assumes that running from the police indicates consciousness of guilt of a crime, but people of color often flee from law enforcement due to fear of racially targeted profiling or violence." Jasmine Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2253 (2017).

[30] Courtney Ahrens, *Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape*, 3 AM. J. COMMUNITY PSYCH. 263, 263–74 (2006).

There are many situations where jurors lack personal experience or knowledge about specific groups or contexts. In these cases, expert testimony explains how members of a group might have mental states that differ from lay expectations.[31] Experts use essentially the same imperfect mindreading process as jurors; the key difference is that permissible framework testimony relies on specialized knowledge about how particular *groups* of people in particular contexts tend to think and behave. That is, when an expert suggests that most drug trafficking organizations use knowing couriers, they are still looking to the circumstantial evidence. It just so happens that their circumstantial evidence comes from professional experience (*e.g.*, investigating the culture of drug cartels, based on techniques such as wiretap investigations and cooperating witnesses).

But the expert cannot testify about whether the mental state is likely legally present or absent in the particular case, and thus cannot replace the jury. This key insight is critical to dispelling the Fifth Circuit's incorrect view that expert mental state testimony is the "functional equivalent" of telling the jury how to decide *mens rea*. *Gutierrez-Farias*, 294 F.3d at 663. But as Petitioners also conflate these inferential steps, their independence must be made clearer to counsel, courts, and jurors.

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[31] "Our case law recognizes the importance of expert testimony when an issue appears to be within the parameters of a layperson's common sense, but in actuality, is beyond their knowledge." *Finley*, 301 F.3d at 1013.

Permitting (otherwise qualified) experts to provide reliable, informed opinions about groups and contexts, and *then* explaining to juries the series of inferences that they must make based upon these opinions, would resolve many conflicts among lower courts about 704(b) testimony. This would be in addition to the standard jury instruction that a jury can take or leave all expert opinion testimony.[32] Separating out the questions the jury should answer provides clarity to their task. First, is the expert's opinion about the group or context valid? If valid, is the defendant a member of that group, and then, to what extent do the group data tell us something about the defendant's particular mental state? This is in keeping with the case law from federal courts that recognize the jury is "left to decide whether to make the logical connection from the expert's [mental state framework] testimony to the case at hand."[33] Below, we explain how the type of evidence at issue in *Diaz* has become routine in

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[32] The standard jury instruction was given in this case: "Such opinion testimony should be judged like any other testimony. 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.

[33] *United States v. Morris*, 576 F.3d 661, 674 (7th Cir. 2009); *see also United States v. Goodman*, 633 F.3d 963, 967 (10th Cir. 2011); *United States v. Valle*, 72 F.3d 210, 216 (1st Cir. 1995) ("Though Rule 704(b) bars experts from opining on the ultimate issue of a defendant's felonious intent, the rule does not prohibit experts from testifying to predicate facts from which a jury might infer such intent.").

diverse criminal trials, and how it helps, rather than replaces, the jury's fact-finding.

C. Agent Flood's Expert Testimony Did Not Violate Rule 704(b) and Did Not Abrogate the Jury's Role

Amici write in support of the Respondent because as applied to the present case, Agent Flood's testimony was properly admitted under Rule 704(b): it spoke to group framework data and did not decide anything at the individual level.[34] The expert used purportedly specialized knowledge about similar cases of drug trafficking, based on his experience investigating these cases.[35] This allowed Agent Flood to provide what was, in essence, probabilistic data on the *modus operandi* of drug trafficking organizations. But even when he opined that "[i]n most circumstances, the driver knows they are hired. It's a business," Pet. App.

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[34] While not applicable to Agent Flood's testimony (Pet. App. 10a–28a), the Court could resolve the Circuit split by clarifying that the 704(b) experts who have no personal knowledge of the individual defendant's mental states are prohibited from drawing even probabilistic inferences about what defendant "likely" knew.

[35] Whether prior cases on which the expert bases his opinion about generalities are valid for inclusion in the group framework is an issue of methodological reliability, and should be analyzed under Rule 702. Moreover, under *Kumho Tire*, even with a qualified expert and a framework that reliably states relevant factors on the issue, where the ultimate opinion is inconsistent with the expert's own framework, it may be too unreliable for admission. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150–51 (1999).

15a, it remained up to the jury to decide whether to believe Agent Flood, and whether to find that this group data applies to Ms. Diaz's situation and mental state.

Because Agent Flood's testimony did not "diagnose" Ms. Diaz as possessing the mental state of knowledge, and merely provided the group data from which the jury could draw or not draw such an inference, Agent Flood's testimony did not violate Rule 704(b). Rather, it provided helpful off-the-shelf context about the state of the world, including the fact that he was aware of "three schemes" where an unknowing drug courier was possible. Pet. App. 23a.[36] Framework information helps answer common jury questions about a topic they know nothing about or have no informed prior opinions on: for example, do drug traffickers generally use knowing couriers?

Future juries will be aided in their task by being instructed on the separate nature of the required

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[36] *Amici* do not read the cross examination of Agent Flood, or the government's closing arguments, as Petitioner does. Petitioner argues that Agent Flood's testimony—which arose on cross examination—about the "three schemes" involving unknowing couriers "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." Pet. Br. 42. But no such argument was made by the government either on redirect or in closing. Gov't Br. in Opp. 41. While it is certainly possible that defense counsel's cross examination—which never asked if Agent Flood knew anything about Ms. Diaz, personally, in order to undermine the inference that the "classwide" *mens rea* testimony he offered applied to her—would bolster the government's case, that is not something the government put into evidence.

inferences. This can happen as part of cross-examination, but admonitions and jury instructions would help as well. Samples are provided below. Either way, judges should explain the general two-step process of group to individual inference to juries. In the first step, jurors hear the expert's framework data and evaluate its weight and credibility. Then, in the second step, jurors must apply this framework to the facts of this case. Again, as applied to this case, the jury could decide that they believe Agent Flood's unchallenged testimony on how drug traffickers tend to behave, but given that Agent Flood never spoke to Ms. Diaz, they might also conclude that what he described simply did not apply to her.

II. How the Court Resolves the Interpretation of Rule 704(b) Will Have Reverberating Effects That May Unduly Prejudice Criminal Defendants and Jeopardize Framework Evidence More Generally

The Question Presented is narrow and could be resolved with an interpretation of a broadly-applicable rule of evidence for a special subset of drug trafficking cases. But litigants in cases beyond drug trafficking will no doubt argue over the contours of whether *Diaz v. United States* should apply to their cases, and if not, why not.[37] *Amici* struggle to identify any justification,

[37] While the Fifth Circuit's "functional equivalence" rule from *Gutierrez-Farias* also concerned a drug trafficking charge and a blind mule defense, the "functional equivalent" interpretation of Rule 704(b) is not, even within the Fifth Circuit, limited to

rooted in the plain text of Rule 704(b) or ordinary evidence principles, for treating drug trafficking cases as exceptional. In this case, the Court has an opportunity to harmonize competing circuit precedent and provide broader guidance for how courts should handle the extremely common phenomenon of expert framework evidence: evidence that bears on the likelihood of the fact being true, but is not direct evidence of the fact itself.

We need not look beyond *Diaz* for other uses of framework evidence. *Amici* in support of Petitioner cite numerous examples of drug traffickers lacking the requisite scienter. *See* Nat'l Ass'n of Fed. Defenders *Amicus* Br. 5–16. This, too, is framework evidence. The fact that in some contexts, a portion of accused defendants truly did not know they were trafficking drugs makes it somewhat more likely that Ms. Diaz, similarly, did not know. But their argument that probabilistic evidence from a government expert forecloses jury fact-finding is misdirected. Moreover, if the argument is meant to undermine the reliability of Agent Flood's testimony, that is a preliminary question for the trial judge under Rule 702 and ultimately a jury

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cases of narcotics or human trafficking and similar offenses. For example, courts in the Fifth Circuit have applied the "functional equivalent" interpretation of 704(b)'s contours to expert testimony in cases about money laundering and wire fraud (*United States v. Vicknair*, No. CRIM.A.03-16, 2005 WL 1400443, at *7 (E.D. La. June 2, 2005)) as well as tax fraud, bank fraud, and false statements (*United States v. Fisher*, 236 F. App'x 54, 57 (5th Cir. 2007)).

determination, and not an issue raised to this Court.[38] *Amici* in support of Petitioner seek to engage in an appellate "battle of the experts" that apparently did not happen at trial.[39]

There are two key problems with this argument. First, the Federal Defenders' argument about Rule 704(b) laments the *credibility* accorded to a government expert: "a juror is unlikely to take the word of a civilian paid by the defense over that of a sworn officer who takes the stand as part of his duties." *Id.* at 22. This is an argument about the *weight* accorded to the evidence. However, the Rules of Evidence deal with matters of admissibility, not weight, which is almost always a question for the jury.[40] Evidence that is unduly prejudicial relative to its probative value—such as being given too much weight by the jury—ought to be excluded pursuant to Federal Rule of Evidence 403,

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[38] *Amici*'s review of the trial court record further indicates that no Rule 702 challenge to the expert's qualifications or methodology was raised in a *motion in limine* by the defense, or objected to or even questioned at trial despite Judge Battaglia's query to defense counsel about same.

[39] As noted by Respondent and the Ninth Circuit, Ms. Diaz did introduce expert testimony from an automobile mechanic (Davis) that arguably bore on her mental state of knowledge by describing how someone could operate a vehicle like hers without knowledge of drugs hidden in the car. Gov't Br. in Opp. 12; Pet. App. 6a ("Diaz 'opened the door' to expert testimony by calling her own expert to testify to facts that supported her blind mule defense."). While an auto mechanic's testimony is perhaps not obviously mental state evidence, its relevance does depend on an inference about Ms. Diaz's mental state within a given context.

[40] Charles L. Barzun, *Rules of Weight*, 83 NOTRE DAME L. REV. 1957, 1958 (2008).

and not under 704(b).[41] In cases where a type of testimony may be helpful, but also presents documented risks of being over-valued by the jury, detailed and specific jury instructions and perhaps admonitions before the presentation of evidence may be justified. Given the concerns of the *amici* for Petitioners about the potential for juries to over-value expert mental state testimony by government agents, these safeguards could be employed here as well.[42]

The second problem with the Federal Defenders' argument is that interpreting Rule 704(b) to sharply foreclose expert mental state framework testimony will inadvertently prejudice defendants in future cases. Criminal defendants regularly offer expert

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[41] *See*, *e.g.*, *United States v. Dupre*, 339 F. Supp. 2d 534, 542–45 (S.D.N.Y. 2004), *aff'd*, 462 F.3d 131 (2d Cir. 2006) (excluding under Rule 403 expert's mental state testimony that criminal defendant participated in fraud scheme because of delusions the scheme was directed by God).

[42] While beyond the scope of this brief, such an instruction might advise the jury on relevant factors when assessing testimony that is based on one's specialized knowledge or experience. For example, the jury could be instructed to consider how many cases the expert has analyzed, what inclusionary criteria the expert used for their dataset, whether the expert's sample might be biased, or what features make two cases similar or different. An admonition or instruction could advise the jury to pay attention to such commonsense factors as how large the purported group or sample is, how geographically dispersed it is, and what are the common features of the group. Trial counsel could also cross examine any expert on these commonsense questions, and further elicit to the jury that the expert's opinion is not directly related to or based on the defendant because the expert does not know and has not examined the defendant.

testimony about the typical mental states of people like them, to create an inference about their *mens rea*. For example, expert testimony "is routinely admitted" to opine on whether possession of a certain quantity of drugs typically indicates personal use or an intent to distribute.[43] Under a "functional equivalent" test like the Fifth Circuit's, the government could move to exclude such expert testimony, preventing the jury from hearing this potentially helpful evidence.

Outside of the drug context, it is also common for defendants to introduce framework evidence to negate *mens rea*. It is so common that the University of Michigan Law School hosts a database of briefing on such issues specifically for defense counsel.[44] Petitioner's interpretation risks excluding, for example, expert framework evidence such as how bookkeepers tend to keep ledgers when introduced by the defendant to argue that she lacked the requisite *mens rea.*[45] Notably,

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[43] *Commonwealth v. Walton*, No. 15-P-179, 2017 WL 1829781, at *2 (Mass. App. Ct. May 5, 2017); *see also People v. Lyons*, No. C069222, 2013 WL 6070493, at *1 (Cal. Ct. App. Nov. 19, 2013).

[44] *See Data for Defenders*, https://datafordefenders.org (last visited January 26, 2024). The "About" section of the website says the project "promotes creative and evidence-based advocacy through strategic and effective use of social science research. Social science draws on a wide range of disciplines . . . to explain how and why people, groups, and societies do the things that they do."

[45] *United States v. Morales*, 108 F.3d 1031, 1037 (9th Cir. 1997). Expert framework testimony about psychiatric conditions or life experiences can also be used to argue that a defendant did not fit the profile of a pedophile, and he thus lacked the requisite intent. *See United States v. Wooden*, 887 F.3d 591, 603 (4th Cir. 2018) (not clear error to admit expert psychiatric testimony that

all such common and probative psychiatric and non-psychiatric group testimony is being used to infer a defendant's mental state and is vulnerable to challenge if the Court adopts Petitioner's interpretation of Rule 704(b).

Moreover, adopting Petitioner's view of 704(b) could also make it more difficult for defendants to prove self-defense; the text of 704(b) also applies there. Imagine a defendant charged with assault who claims she stabbed the victim because, as a battered woman, she honestly believed that he was about to kill her. While lay jurors might assume that this fear was unreasonable based on their personal experience, expert framework evidence can help contextualize the mental states of criminal defendants who have been victims of domestic abuse or trauma.[46]

In these cases, as in the case at hand, the jury is not asked to simply adopt the expert's opinion. Just as with other types of expert testimony related to mental states, the jury can and must make two decisions: whether to believe the expert and then whether to infer that the expert's group data applies to the individual defendant in this case. There is simply no reason

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defendant suffered from intellectual disability disorder and that it was this diagnosis, and not pedophilic disorder, that drove his criminal behavior); *see also State v. Richard A.P.*, 223 Wis. 2d 777, 792 (Ct. App. 1998) (error to exclude expert psychiatric testimony that defendant likely did not have a sexual disorder).

[46] Erica Beecher-Monas, *Domestic Violence: Competing Conceptions of Equality in the Law of Evidence*, 47 LOY. L. REV. 81, 83–85 (2001).

to assume, as the Fifth Circuit did, that jurors cannot do this. And if jurors cannot perform it under 704(b), how can requiring them to do the very same thing in other contexts, such as when hearing competing expert testimony related to the *actus reus* or causation, possibly be justified?

How this Court resolves the interpretation of Rule 704(b) in this case will undoubtedly have reverberating interpretive effects on how "framework" evidence is generally handled in court, even if the Court attempts to rule narrowly. But framework evidence and the reasoning it imposes is both exceedingly common and extremely helpful for accurate factual determinations. This is especially true in cases where jurors may be unfamiliar with a group and have inaccurate beliefs about the typical behavior of its members.

Inevitable questions will be raised about the limits of a narrow ruling. The indirect effects of a rare Supreme Court opinion on evidence may lead to unwelcome and inconsistent doctrinal developments. Line-drawing questions that ask whether Petitioner's interpretation would apply symmetrically to criminal defendants' experts, and if so, whether this would violate their due process rights, would be sure to follow. This confusion will create unnecessary lower court appeals. Indeed, in a recent Eleventh Circuit case, a concurring judge acknowledged that the routine admissibility of a criminal defendant's expert psychiatric testimony "runs headlong into Rule 704(b)" and that "one day, in an appropriate case, we'll need to provide better

guidance." *United States v. Litzky*, 18 F.4th 1296, 1308–10 (11th Cir. 2021) (Jordan, J., concurring).

III. The Core Conflict Between the Goals of Science and the Demands of Adjudication Cannot Be Solved, But Can Be Managed

The issue in this case is part of a larger discussion about how to bring expert data into court. The challenges of bringing science and expertise into a courtroom are well understood, but remain difficult to solve.[47] It is the opinion of *amici*, who have collectively studied and written about these issues for decades, that the conflicts between science, data, and the adversarial legal system cannot be completely solved, but can be better managed. The Court has the opportunity to provide guidance to litigants and lower courts in managing common problems in expert testimony, improving consistency and accuracy in lower courts.

Courts and litigants very much need the Court to provide concrete guidance about framework evidence. This does not require a separate interpretation of Rule 704(b) as applied to evidence offered by the government in a particular type of case. The best way to manage the difficult task of making analytically independent inferences about complex phenomena is not by excluding helpful group and contextual data. Rather, the best way to manage the required inferences

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[47] David L. Faigman, LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE IN THE LAW 69 (1999) ("While science attempts to discover the universals hiding among the particulars, trial courts attempt to discover the particulars hiding among the universals.").

is by instructing jurors on their existence and providing guidance for them to appropriately evaluate otherwise admissible, relevant framework evidence. Indeed, without the group data and/or context, in some cases jurors will be making unfair inferences about what they think the defendant likely knew, based on their own life experiences.[48]

Such guidance could come in the form of an admonition to the jury at the time the framework evidence is presented: "You are about to hear testimony from experts that may help you decide whether the defendant [*had/did not have the requisite mental state*]. They offer us their opinions based on their [*experience/knowledge/study*]. But it is up to you as the jury to decide how much weight if any to give the expert, and it is up to you to decide whether the information they offer applies to this particular defendant." The need to make separate inferences could be reinforced as a jury instruction, such as:

As members of the jury, you must determine whether the criminal defendant had the guilty mind (or *mens rea*) required to be found guilty of [*this crime*]. The prosecution must prove beyond a reasonable doubt that the defendant [*intended, knew, was reckless*] with regard to their acts. You have heard from expert witnesses, who have provided their opinion as to how certain groups of people in certain contexts tend to think,

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[48] Pascal Molenberghs & Winnifred R. Louis, *Insights From fMRI Studies Into Ingroup Bias*, 9 FRONTIERS IN PSYCH. 1, 5–6 (2019) (reviewing studies finding poorer performance on mentalizing when participants inferred the mental states of people who are culturally different from them).

and the mental states they tend to possess. Keep in mind that these experts cannot say whether the defendant did or did not possess [*intent/knowledge/recklessness*]. They can only offer their opinion about groups or categories of persons, based on their specialized knowledge about the state of the world in general. It remains up to you, as the jury, to listen to all of the evidence and decide whether the expert is credible, and if so, how much weight to give to the expert testimony. If you find the expert credible, keep in mind that you still must make your own determination of whether the defendant is a member of the [*group to which the expert testified*], and whether this particular defendant [*intended, knew, was reckless*].

The challenges associated with framework evidence and the question of whether expert testimony can reach opinions about individual cases is endemic in the law. Even so, the distinction between the group data and individual inference is a critical one to maintain. In some cases, the two must be better disambiguated so that experts do not invade the province of the jury. However, rather than prohibiting all expert group data as it relates to mental states under Rule 704(b), courts should provide guidance on how to evaluate this common and helpful type of expert testimony. A jury instruction and/or admonition at the time the expert testifies can help remind jurors that they are the only ones to make the credibility assessment and the ultimate individual inference.

This understanding of Rule 704(b) permits parties in all types of federal cases to prepare for trial knowing

that expert opinion about group mental states in purportedly similar situations may be admissible. However, it must still be otherwise reliable, and the expert must be appropriately qualified. If these threshold Rule 702 conditions for expert testimony are met, it can and should be explained to the jury that such evidence only provides information about how people in certain contexts tend to think. The jury must still evaluate the expert testimony's credibility and weight, and may ultimately find that the defendant's situation does not warrant applying the group framework to her.

CONCLUSION

For all these reasons, the Court should affirm.

Respectfully submitted,

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