No. 23-14

IN THE

Supreme Court of the United States

DELILAH DIAZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Ninth Circuit holds that, so long as government agents testifying as experts do not offer an "explicit opinion" about the particular defendant's state of mind, Rule 704(b) permits them to tell juries that people in the defendant's position have the *mens rea* required to convict. *See* Petr. Br. 12, 23 (citing cases); Pet. App. 5a-6a (applying the rule here). The Government purports to defend that rule, arguing that Rule 704(b) prohibits only "explicit testimony" that a "particular defendant[]" possessed the requisite mental state. U.S. Br. 28. Yet the Government cannot bring itself to defend the full import of that rule, *see id.* 36, which allows experts to testify that people like the defendant not just generally—but *always*—have the requisite *mens rea*. *See* Petr. Br. 22-23.

Instead, the Government spends most of its time constructing a caricature of petitioner's rule and then tearing down that straw man. According to the Government, petitioner's rule "would preclude even inferentially relevant testimony"—that is, any testimony "that may help a jury to itself draw an inference about the defendant's mental state." U.S. Br. 21, 34. But that is not true at all. Petitioner acknowledges that expert testimony "from which the jury might *infer* the defendant's mental state"—such as testimony describing the organizational practices of drug-trafficking organizations or the value of drugs—is perfectly legitimate. Petr. Br. 20 (emphasis added). An expert crosses the line only where he "directly addresses the subject of *mens rea*," ascribing the mental state necessary to convict to the defendant herself or those in her position. *Id.*

The Government also levels the odd charge that not "a single court" has ever adopted petitioner's approach. U.S. Br. 34. The Fifth Circuit, however, has followed this course for over two decades. The Fifth Circuit allows expert testimony regarding "the *modus operandi* of drug smuggling," even when the jury might draw from it an "inference" regarding whether the defendant knew she was transporting drugs. *United States v. Sanchez-Hernandez*, 507 F.3d 826, 831-33 (5th Cir. 2007). But the Fifth Circuit bars classwide *mens rea* testimony, prohibiting "generalizations" that "most drivers know there are drugs in their vehicles." *United States v. Gutierrez-Farias*, 294 F.3d 657, 663 & n.5 (5th Cir. 2002); *see also* Pet. 8-10 (discussing other Fifth Circuit caselaw); Petr. Br. 13, 24 (same).

That dividing line has proven to be eminently administrable. It also honors the text, history, structure, and legal principles that animate Rule 704(b). Indeed, it is the only way to save the Rule from empty formalism and to safeguard the jury's rightful role in determining moral culpability in criminal cases.

This Court should reverse.

I. Rule 704(b) forbids classwide *mens rea* testimony.

A. The text of Rule 704(b) is not restricted to "explicit testimony" that a "particular defendant" had the requisite *mens rea*.

Rule 704(b) bars expert testimony in a criminal case that "state[s] an opinion *about* whether the defendant" possessed the mental state required to

convict. Fed. R. Evid. 704(b) (emphasis added). According to the Government, this language covers only "explicit testimony" that "a particular defendant[]" had the requisite *mens rea*. U.S. Br. 28. Yet none of the arguments the Government advances in support of this wafer-thin proscription can be reconciled with the plain meaning of Rule 704(b).

1. For starters, the Government fails to come to grips with the implications of the word "about." Instead, the Government (a) mischaracterizes petitioner's argument based on that term; (b) ignores Fifth Circuit caselaw demonstrating the boundaries of petitioner's rule; and (c) attempts to distract this Court with expert testimony petitioner introduced that is not at issue here. None of these maneuvers works.

a. The Government mischaracterizes petitioner's proposed rule in two ways.

First, petitioner's rule does not bar expert testimony that is merely "inferentially relevant" to whether the defendant had a particular state of mind. *See* U.S. Br. 34. Testimony is not covered by Rule 704(b) unless it is about mental state. A statement about something else is not covered merely because it allows a jury to infer the presence of a mental state.

Thus, for instance, petitioner agrees with the Government's assertion that in a prosecution against a lawyer for willful tax evasion, Rule 704(b) permits an expert to opine that "tax lawyers are typically taught the requirement to pay a certain tax." U.S. Br. 21-22. Such testimony is about the education of tax lawyers. It is not about mental state because it does not assign any state of mind to the defendant or her

class. *See* Petr. Br. 20. An expert would go too far only if he stated that tax lawyers "generally *know* that they are required to pay the tax at issue."

For the same reason, Rule 704(b) does not prohibit testimony stating that a murder victim "died of a poison administered daily in small doses." U.S. Br. 24. Even though that testimony might be one step in an inferential chain from which a factfinder might conclude that the defendant acted with "extreme premeditation," *id.*, it does not assign that mental state to anyone, and thus is not "about" whether the defendant did or did not possess any particular state of mind.

Second, even when it comes to mental state, expert testimony does not violate Rule 704(b) unless it offers an opinion about whether the defendant had the state of mind "that constitutes *an element of the crime charged* or of a defense." Fed. R. Evid. 704(b) (emphasis added). Petitioner therefore agrees that experts may "present[] and explain [medical] diagnoses, such as whether the defendant had a severe mental disease." U.S. Br. 32-35 (describing testimony allowed under the Insanity Defense Reform Act). Indeed, Rule 704(b) permits experts to offer opinions about any number of aspects of the defendant's mental condition, so long as they do not state whether the defendant had the *mens rea* required to convict. For example, an expert may testify that a defendant invoking the insanity defense has been diagnosed with severe schizophrenia and describe the characteristics of that disorder. The expert would cross the line, however, by stating that individuals suffering from schizophrenia do not appreciate the wrongfulness of their conduct, where such a state of mind would negate

the *mens rea* element of the charged offense. *See* Petr. Br. 21-22.

Once petitioner's rule is properly understood, the Government's recharacterizations of the hypotheticals in petitioner's brief speak volumes. In particular, the Government revises each hypothetical to omit the problematic classwide *mens rea* testimony. Thus, petitioner agrees with the Government that Rule 704(b) would allow testimony "about how persons with schizophrenia behave, how corporate executives prepare for interviews with law enforcement, or how drug-trafficking organizations operate." U.S. Br. 35-36 (citations omitted); *see also* Petr. Br. 20, 43. But if any of these experts were to assign a classwide *mens rea* to people in the defendant's group, that testimony would run afoul of Rule 704(b). *See* Petr. Br. 21-23 (original hypotheticals).[1]

b. The Government also presents a distorted view of the legal landscape in the lower courts. Most importantly, the Government claims that not a "single court" follows petitioner's approach to Rule 704(b). U.S. Br. 34. This assertion ignores decades of Fifth Circuit caselaw following petitioner's basic approach.

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[1] Amici law professors likewise misunderstand the scope of petitioner's and the Fifth Circuit's rule. One more time: Rule 704(b) permits "framework evidence" to show how groups "behave." *See* Br. of John Monahan *et al.* 6. And the Rule allows testimony speaking to mental state so long as it does not deal with the *mens rea* required to convict. Thus, experts may testify as to "how bookkeepers tend to keep ledgers," *id.* 24, or regarding the phenomenon of battered women syndrome, *id.* 25. The only thing experts cannot do per Rule 704(b) is opine about whether the defendant or people like her possess the *mens rea* required to commit the charged offense.

See, e.g., *United States v. Morin*, 627 F.3d 985, 995-96 (5th Cir. 2010); *United States v. Gutierrez-Farias*, 294 F.3d 657, 663 (5th Cir. 2002). In fact, the Government itself admitted in its brief in opposition that the Fifth Circuit would have excluded the expert testimony at issue here. BIO 12-13.

The Government also errs in suggesting that certain courts of appeals besides the Ninth Circuit have rejected the Fifth Circuit's position. The Government, for example, invokes *United States v. DiDomenico*, 985 F.2d 1159 (2d Cir. 1993), for the notion that Rule 704(b) permits "testimony that gives rise to an inference concerning a defendant's mental state." U.S. Br. 22-23 (quoting *id.* at 1165). Neither the Fifth Circuit nor petitioner disagrees. But classwide *mens rea* testimony, which directly assigns the requisite *mens rea* to people like the defendant, is different. Indeed, the Second Circuit in *DiDomenico* seemed to recognize as much, condemning evasions of Rule 704(b) through "semantic camouflage"—that is, testimony that directly implies, but does not explicitly state, the bottom-line *mens rea* inference. *DiDomenico*, 985 F.2d at 1165.[2]

Nor does caselaw from the D.C. Circuit contradict Fifth Circuit precedent. In *United States v. Dunn*, 846 F.2d 761 (D.C. Cir. 1988)—which the Government discusses at some length, U.S. Br. 23-24—an expert witness gave permissible *modus operandi* testimony when he opined that the items found in the defendant's house were "common among drug

[2] The Government attributes this opinion to Judge Friendly. U.S. Br. 23. But Judge Friendly was not on the panel in the case, or even on the court when the case was decided.

distributors" and "indicated the presence of a retail drug operation." 846 F.2d at 762. Nowhere did the expert opine regarding anyone's mental state, much less say that individuals found with such items *intend* to distribute drugs.

Then-Judge Kavanaugh's opinion in *United States v. Martinez*, 476 F.3d 961 (D.C. Cir. 2007), likewise concerned evidence that was merely inferentially relevant to *mens rea*. In that case, the expert discussed the "methods" of drug-trafficking organizations and "where Colombian cocaine transported north was 'generally' headed." *Id.* at 968. The expert never assigned a mental state to any person or group—much less ascribed the state of mind required for conviction to the defendant or people in his position. *See id.*

If anything, the D.C. Circuit has signaled that it, like the Fifth Circuit, would distinguish between inferentially relevant testimony and classwide *mens rea* testimony. The D.C. Circuit has stressed that it "has never held that the Government may simply recite a list of 'hypothetical' facts that exactly mirror the case at hand and then ask an expert to give an opinion as to whether such facts prove an intention to distribute narcotics. Indeed, we would have been remiss even to suggest such an approach, because it flies in the face of Rule 704(b)." *United States v. Boyd*, 55 F.3d 667, 672 (D.C. Cir. 1995). Just like classwide *mens rea* testimony, such "hypothetical facts" testimony would avoid any explicit mention of the defendant. But it would violate Rule 704(b) because the jury would readily understand it as being about whether the defendant had the requisite mental state.

c. The Government is also wrong to suggest, U.S. Br. 22, 27-28, that the testimony petitioner introduced from an expert in automobile mechanics somehow sheds light on the meaning or scope of Rule 704(b). As soon as the Government moved to admit Agent Flood's testimony, petitioner moved *in limine* to exclude any classwide *mens rea* testimony. CA9 ER 348-49, 353-56; Pet. App. 30a-33a.[3] The district court denied that motion. Pet. App. 33a. Once it did so and Agent Flood testified, petitioner was entitled to defend herself according to the rules the court established and to try to counter the agent's problematic testimony. *See, e.g.*, *United States v. Weitzenhoff*, 35 F.3d 1275, 1287 n.8 (9th Cir. 1993). Even if one or two sentences of the mechanic's testimony—which focused largely on attributes of the car petitioner drove—approached or even crossed the line petitioner advocates, that has no bearing on how this Court should construe Rule 704(b).

At any rate, the Government never objected to any portion of the mechanic's testimony—much less argued below that introducing it somehow waived any ability to argue that Agent Flood's classwide *mens rea* testimony violated Rule 704(b).

2. Nor does petitioner's textual argument disregard "a critical portion of the Rule," U.S. Br. 24-25. Of course, the Government is correct that testimony falls within the ambit of Rule 704(b) only if it concerns whether "the defendant" had the *mens rea*

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[3] "Dist. Ct. Dkt." refers to the docket in *United States v. Diaz* (S.D. Cal. No. 3:20-cr-02546-AJB-1). "CA9 ER" and "CA9 SER" refer to the excerpts and supplemental excerpts of the record on appeal in the Ninth Circuit.

necessary to convict. *See* Petr. Br. 19-20. But what the Government misses is that classwide *mens rea* testimony introduced at trial is necessarily about a group that *includes the defendant*. Such testimony is therefore as much about the defendant as testimony describing the defendant herself.

The Government's spin on petitioner's therapist hypothetical proves this point. The Government argues that "[i]f 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,'" a reasonable listener would not understand that statement as being directed towards an identifiable patient. U.S. Br. 25 (emphasis added). But note what the Government does: In order to counter petitioner's original hypothetical, *see* Petr. Br. 18, the Government takes the therapist out of a session with a particular patient and relocates the therapist in a professional or academic conference where no individual is being diagnosed. U.S. Br. 25. The situation is completely different at a trial, where the jury's job is to determine the state of mind of a particular defendant. *See* Petr. Br. 39-41.

In its second attempt to rebut petitioner's hypothetical, the Government at least imagines that the therapist answers "a question premised on a particular [individual]." U.S. Br. 25. But the intuition that her classwide answer is about that particular individual becomes so strong (even in the abstract environment of a conference) that the Government caveats the therapist's response with an express disclaimer of any familiarity with the particular person. *Id.* Agent Flood of course never disclaimed insight into petitioner's *mens rea*. And even if he had,

it's hard to see why a disclaimer would change the equation. Where classwide *mens rea* testimony is provided as a response to a "question premised on a particular case," *id.*, that answer is naturally construed as pertaining to that particular case. *See* Petr. Br. 24.

The Government itself acknowledges that expert testimony stating that persons like the defendant "always" have the requisite *mens rea* "might" or "could" be problematic under Rule 704(b), even though such testimony does not speak to any particular individual. U.S. Br. 28-29, 36. This is a wise concession. Yet the concession not only departs from the Ninth Circuit's "explicit opinion" test, *see* Petr. Br. 22-23, but the Government's explanation for it finds no footing in the language of Rule 704(b). According to the Government, testimony that individuals like the defendant always possess the requisite *mens rea* "*compels* the conclusion that the defendant had the requisite mental state." U.S. Br. 36 (emphasis added). Rule 704(b), however, says nothing about compelled conclusions. It forbids testimony "about" whether the defendant had the requisite *mens rea*. And testimony that people like the defendant *generally* have the requisite *mens rea* satisfies that test as readily as testimony that such people *always* do so. To hold otherwise would be to reduce compliance with Rule 704(b) to a mere semantic game.

B. The Government's statutory history arguments are unconvincing.

Shifting gears from the text, the Government argues that Rule 704(b)'s statutory history supports its crabbed conception of the Rule. The Government is incorrect.

1. The Government first argues that the word "about" in Rule 704(b) cannot bear the weight petitioner places on it because the word was added to the Rule through a stylistic amendment. The Government is wrong for two reasons.

First, contrary to the Government's suggestion, U.S. Br. 25-27, there is no real difference in meaning between the two versions of the Rule. The Government stresses that the original rule contained the prefatory phrase "[n]o expert witness testifying with respect to the mental state or condition of a defendant." Pub. L. No. 98-473, § 406, 98 Stat. 2057, 2067-68 (1984). But this phrase is entirely consistent with petitioner's argument. As explained above, Rule 704(b)—now, as then—allows expert testimony about a defendant's mental state or condition so long as it does not state an opinion about whether the defendant had the *mens rea* that is required to convict. *See supra* at 3-5.

Second, even if—despite the Rules Committee's explanation that the changes to Rule 704(b) were stylistic only—there were a difference in meaning between the new and old text of the Rule, the new text would control. "The new text is the law." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 257 (2012). Consequently, "even when the legislative history" indicates that Congress did not intend in a

recodification or restyling to "change" a provision's meaning, the new text of a statute still controls as to any substantive difference between the two versions of the law. *Id.*; *see also Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (citation omitted) ("the existing statutory text, and not the predecessor statutes," controls); *United States v. Wells*, 519 U.S. 482, 496-97 (1997) (same).[4]

To be sure, the meaning of a superseded statutory provision sometimes carries over to a new version where there was a "[p]rior judicial construction" of that statute that was "uniformly adopt[ed]" by the courts. 2B Norman Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction* § 49:8 & n.1 (7th ed. 2023). But that proviso "has no application" where the statute's scope was not settled at the time of the reenactment. *Liu v. SEC*, 140 S. Ct. 1936, 1947 (2020) (citation omitted). Such was the case here. In 2011, when Rule 704(b) was restyled, the Fifth and Ninth Circuits had been split for nearly a decade over whether Rule 704(b) permitted classwide *mens rea* testimony. *See supra* at 2; Pet. 8-11 (citing cases in those circuits dating back to 2002 and 2001, respectively).

2. The Government next notes that the "impetus" for Rule 704(b)'s enactment was the John Hinckley, Jr.

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[4] The Government offers a "cf." citation to *City of San Antonio v. Hotels.com, L.P.*, 141 S. Ct. 1628 (2021), U.S. Br. 26-27, but that case is in line with the other authority just cited. The Court merely noted there that a rule's predecessor version "reinforce[d]" the Court's interpretation of the plain text of the current rule. *Hotels.com*, 141 S. Ct. at 1635. There, as here, the text of the current statute was "decisive[]." *Id.* at 1634.

trial, which featured dueling expert testimony regarding his insanity defense. U.S. Br. 31. But the specific episode that motivated Congress to enact Rule 704(b) cannot impose an atextual limitation on the Rule. Petr. Br. 28-30.

At any rate, Rule 704(b)'s legislative history is consistent with petitioner's reading of the Rule. The 1983 Senate report explains that "the rationale for precluding ultimate opinion psychiatric testimony extends *beyond* the insanity defense to any ultimate mental state of the defendant that is relevant to the legal conclusion sought to be proven." S. Rep. No. 98-225, at 230-31 (1983) (emphasis added). And competing expert testimony as to whether persons like the defendant have the requisite *mens rea* would be as much of a "confusing spectacle" as competing testimony regarding whether the defendant herself did. *See* U.S. Br. 32 (citation omitted).

3. The Government lastly suggests that Rule 704(b) should be read in a "limited" manner because the ultimate-issue doctrine was "deprecated" in Professor Wigmore's treatise on evidence, and the drafters of the original Rule 704 "agreed" with these criticisms. U.S. Br. 3, 31, 33. But this argument is backwards. "Courts narrowly, or strictly, construe statutes in derogation of the common law." 3 Shambie Singer, *Sutherland Statutes and Statutory Construction* § 61:1 (8th ed. 2023); *see also, e.g.*, *Minerva Surgical, Inc. v. Hologic, Inc.*, 141 S. Ct. 2298, 2307 (2021). And the ultimate-issue doctrine has a robust common-law history. *See* Petr. Br. 37-38. If anything, therefore, it is Rule 704*(a)*, not Rule 704*(b)*, that should be read narrowly.

Falling back, the Government suggests that the ultimate-issue doctrine itself did not necessarily bar classwide *mens rea* testimony. U.S. Br. 33. But, as the Government admits, its argument relies principally on "the leading case" that criticized the doctrine and "precipitat[ed] a trend towards reform." *Id.* (citation omitted). Suffice it to say neither caselaw nor academic commentary criticizing and moving away from a common-law doctrine gives this Court license to deviate from that doctrine in a context in which Congress has expressly decided that the doctrine should govern. *See Tome v. United States*, 513 U.S. 150, 164 (1995) (refusing to credit the Government's "reliance on academic commentaries critical of" a common-law rule codified in the Rules of Evidence).

C. Defendants lack meaningful tools besides Rule 704(b) to combat classwide *mens rea* testimony.

The Government is also mistaken that evidence rules or procedural tools other than Rule 704(b) offer defendants meaningful protection from classwide *mens rea* testimony.

1. The Government first suggests that Rules 401 and 403 might sometimes restrict the admissibility of classwide *mens rea* testimony. U.S. Br. 30. Quite the opposite: Classwide *mens rea* testimony is clearly "relevant" to (Fed. R. Evid. 401) and highly "probative" of (Fed. R. Evid. 403) whether the defendant had the *mens rea* required to convict. In fact, in the precise context of the blind-mule defense, the Ninth Circuit has declared that such testimony goes "right to the heart" of the jury's guilt/innocence determination. *United States v. Murillo*, 255 F.3d 1169, 1177 (9th Cir.

2001). The Ninth Circuit said as much in this case as well. *See* Pet. App. 5a-6a. The problem with classwide *mens rea* testimony, in short, is not that it is immaterial. It is that such testimony infringes on the jury's special dominion over *mens rea*.

2. Nor is cross-examination an effective tool for challenging classwide *mens rea* testimony. *Contra* U.S. Br. 37-38. This is especially so where experts' opinions are based on self-validating, personal experiences rather than scientific criteria. NACDL Br. 21. While defendants can question the methods underpinning research-based science, cross-examination is "futile" where, as here, agents can respond to challenges with the simple retort, "not in my experience." *Id.* at 21-22; *see also* NAFD Br. 11-12 (explaining that an agent's experience is likely to be a "skewed sample" because once blind-mule schemes are uncovered, drug-trafficking organizations abandon them in favor of new schemes). So long as the prosecutor is careful to select an expert who is not personally familiar with a scheme involving an unknowing courier in the defendant's situation, defense counsel is powerless to attack the expert's generalizations. NACDL Br. 22-23.

3. The Government also notes that the Federal Rules allow juries to be instructed that they are free to "accept or reject" classwide *mens rea* testimony, just like any other expert testimony. U.S. Br. 37. Juries, however, are also instructed to render verdicts consistent with the evidence. *See, e.g.*, 1A Kevin F. O'Malley *et al.*, Federal Jury Practice and Instructions § 10:01 (6th ed. 2024). And, for the reasons just stated, the defense is usually unable to contradict a

governmental expert's "say-so" that people like the defendant generally have the requisite *mens rea.*

In any event, jury instructions cannot enable the admission of expert testimony that is inadmissible in the first place. If an expert testified that the defendant himself had the requisite *mens rea*, it would not matter that the jury was also told it was free to disbelieve that testimony. Rule 704(b) prohibits such testimony regardless. So too with classwide *mens rea* testimony.[5]

D. Legal principles that animate Rule 704(b) underscore the importance of excluding classwide *mens rea* testimony.

1. To hear the Government tell the story of Rule 704(b), Congress had no good reason to single out *mens rea* from all other elements of criminal offenses for a special buffer against ultimate-issue testimony; it is as if Congress reacted at random to a particular, high-profile trial where *mens rea* happened to be at the center of the prosecution. *See* U.S. Br. 31-33, 36-37. So too with the law professors appearing as amici,

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[5] Amici law professors suggest that juries also be instructed (although the jury here was not) that they should consider whether the defendant was truly a "member of the group to which the expert testified." Br. of John Monahan *et al.* 29 (emphases and brackets omitted). But this suggestion adds nothing where the prosecution's expert defines the group necessarily to include the defendant. This case illustrates the point: Agent Flood defined the relevant class as all "drivers" crossing the border with "large quantities of drugs." Pet. App. 15a. That group necessarily encompassed petitioner. If it had not—say, if petitioner had arrived at LAX on an airplane—the testimony would not have been relevant in the first place.

who appear to believe Rule 704(b) itself is simply misguided. *See* Br. of John Monahan *et al.* 3 ("There is nothing unique about Rule 704(b) testimony that warrants blocking the jury from assessing its credibility."); *id.* 14 (arguing that the admissibility of "704(b) testimony and expert testimony on eyewitness identification" should be governed by the same test).

But it is no mystery why Congress singled out *mens rea* for special treatment: The requirement that the jury find "consciousness of wrongdoing" is the cornerstone of our Anglo-American system of criminal justice. *Ruan v. United States*, 142 S. Ct. 2370, 2376 (2022); *see also Morissette v. United States*, 342 U.S. 246, 250 & n.4 (1952); Petr. Br. 30-32. That factfinding requirement is particularly sensitive and demanding. It reflects the "intense individualism" that animates our criminal law, *Morissette*, 342 U.S. at 251-52, and forbids objective tests or generalizations about people in the defendant's position from sufficing to inflict criminal punishment. Petr. Br. 32-33; *see also Bridges v. Wixon*, 326 U.S. 135, 163 (1945) (Murphy, J., concurring) ("The doctrine of personal guilt is one of the most fundamental principles of our jurisprudence. . . . It prevents the prosecution of the innocent for the beliefs and actions of others."). In sum, the Government must prove *mens rea* with evidence of "the mental state of the defendant *himself or herself*." *Ruan*, 142 S. Ct. at 2381 (emphasis added). And the assessment whether the prosecution has done so is "for the trier of fact alone." Fed. R. Evid. 704(b).

If the Government had a persuasive explanation why its understanding of Rule 704(b) comported with these fundamental precepts, one would have expected it to appear in the Government's brief. Instead, the

Government ignores *Morissette* entirely and never grapples with *Ruan.* Its inability to confront the special nature of *mens rea* is telling.

2. The Government similarly fails to account for the constitutional considerations that animate Rule 704(b).

The Government claims that petitioner offers "no reason" why expert testimony on *mens rea*, as opposed to other elements, "uniquely raises Sixth Amendment problems." U.S. Br. 39. But petitioner does indeed offer a reason. Juries represent the conscience of the community and are distinctively charged with determining moral culpability. *See* Petr. Br. 35-39. Therefore, as a case that the Government itself relies upon succinctly states, Rule 704(b) "recognizes that expert testimony concerning a defendant's mental state poses a uniquely heightened danger of intruding on the jury's function." *United States v. DiDomenico*, 985 F.2d 1159, 1164 (2d Cir. 1993) (cited in U.S. Br. 22-23). When an expert's *mens rea* testimony "leav[es] it to the jury merely to murmur, 'Amen,'" *id.* at 1165, the jury's core function has been outsourced.

The Government also fails to engage with the due process problems raised by the Ninth Circuit's construction of Rule 704(b). *See* Petr. Br. 39-41. The Government asserts that testimony like Agent Flood's does not create any "legal presumption[]" that the defendant had the *mens rea* required to convict. U.S. Br. 39. This formalistic response elides the special imprimatur that a government agent possesses while on the witness stand as an expert, Petr. Br. 39—especially where, as here, defendants have no meaningful way to challenge their testimony with a

comparable expert of their own. *See* NACDL Br. 23-24. In this special circumstance, there is no real difference between jury instructions stating that jurors should presume intent and a government expert witness telling the jury the same thing.

II. Agent Flood's testimony violated Rule 704(b).

The Government does not contest that Agent Flood gave classwide *mens rea* testimony at petitioner's trial. For that reason alone, this Court should reverse.

But even if, as the Government suggests, classwide *mens rea* testimony violates Rule 704(b) only if it "leaves no room for [the] inference . . . that the defendant had the requisite mental state," U.S. Br. 36 (internal quotation marks and citation omitted), this Court should still reverse. That is because Agent Flood did not just testify that, "in most circumstances," a driver transporting large quantities of drugs "knows they are hired" to do so. Pet. App. 15a. Agent Flood added that he was aware of only three "possible" blind-mule schemes, none of which mapped onto petitioner's conduct. *Id.* 23a; *see also* Petr. Br. 42-43.

The Government does not deny that the totality of this testimony created an "inescapable syllogism" that petitioner had the requisite *mens rea*, Petr. Br. 42-43. Instead, citing a case applying the invited error doctrine, the Government argues that petitioner cannot rely upon Agent Flood's testimony regarding the only other "possible schemes" because petitioner elicited it on cross-examination. U.S. Br. 41.

The Government is wrong. The doctrine of invited error cannot be invoked "to defeat an appellant's right to complain of prejudicial matter first introduced by

his adversary and then developed by the appellant in an effort to mitigate its prejudicial effect." 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2885 n.14 (3d ed. 2012) (citation omitted); *see also, e.g.*, *Elsayed Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1063 n.6 (9th Cir. 2002), *overruled on other grounds by United States v. Bacon*, 979 F.3d 766 (9th Cir. 2020). That is exactly what happened here. Once the trial court rejected petitioner's objection to Agent Flood's testimony, petitioner was entitled to try to "mitigate its prejudicial effect" by asking Agent Flood on cross-examination to elaborate on what he meant by "most circumstances," Pet. App. 15a. That being so, Agent Flood's elaboration of his testimony on cross-examination is just as much fodder for reversal as his testimony on direct examination.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.[6]

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[6] Petitioner acknowledges that the Government may renew its harmless-error argument on remand. U.S. Br. 41 n.5. But that is all. The Government never argued below that "petitioner 'opened the door' to otherwise objectionable Rule 704(b) testimony by calling her own expert." *Id.* (The Government argued only that petitioner's blind-mule defense "opened the door" to any testimony from Agent Flood that would otherwise have violated Rule 401 or 403. Gvt. CA9 Br. 55-56.) It is too late to raise any such argument now. And the argument is meritless in any event; petitioner was entitled to introduce evidence in accord with the district court's erroneous interpretation of Rule 704(b) once the Government did so. *See supra* at 8.

Respectfully submitted,

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