NO.

IN THE

Supreme Court of the United States

RAMESH "SUNNY" BALWANI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether plain-error review may be applied to a violation of *Napue v. Illinois*, 360 U.S. 264 (1959), where the prosecution did not merely fail to correct false testimony, but affirmatively exploited the uncorrected falsity in closing and rebuttal arguments the defense could not answer.

2. Whether a court of appeals may excuse a district court's complete failure to conduct any Rule 702 gatekeeping analysis as to whether specialized opinion testimony is based on sufficient facts or data, is the product of reliable principles and methods, and reflects a reliable application of those principles and methods, on the sole ground that the witnesses would have qualified as experts based on their credentials and experience.

LIST OF PARTIES

Petitioner is Ramesh "Sunny" Balwani, defendant-appellant below. Elizabeth A. Holmes was a defendant in the district court but was tried separately before Petitioner's trial. Holmes was a party in the Court of Appeals but is not a party here, and her case did not present the same issues.

Respondent is the United States of America.

RELATED PROCEEDINGS

Northern District of California San Jose Division
United States v. Ramesh "Sunny" Balwani,
Case No. 5:18-cr-00258-EJD

Ninth Circuit Court of Appeals
United States v. Ramesh "Sunny" Balwani,
Case No. 22-10338

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I. PETITION FOR A WRIT OF CERTIORARI

Ramesh “Sunny” Balwani respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

II. OPINIONS BELOW

The Ninth Circuit’s amended opinion is published at 163 F.4th 547 (9th Cir. 2025) and reprinted in the appendix to the petition (“Pet.App.”) at 1a. An earlier version of the Ninth Circuit’s opinion (Pet.App. 62a), amended by the decision cited above, is published at 129 F.4th 636 (9th Cir. 2025).

III. JURISDICTION

The Ninth Circuit Court of Appeals entered its opinion and judgment on December 22, 2025. Pet.App. 2a. Pursuant to Rules 13.1 and 13.3 of this Court, a petition for certiorari was initially due by March 22, 2026. By order dated February 24, 2026, under Dkt. No. 25A945, Justice Kagan extended the time for filing a petition for a writ of certiorari until May 21, 2026. This petition is timely filed on or before the extended due date. Rules 13.1, 13.3, 13.5. Petitioner invokes this Court’s jurisdiction under 28 U.S.C. §1254(1).

IV. INTRODUCTION

In affirming Petitioner’s convictions, the Ninth Circuit ruled that a government witness gave “actually false” testimony, and “assumed” the prosecution had a constitutional duty to correct it. Pet.App. 53a. The prosecution returned to the same

falsehood over a dozen times in closing and rebuttal. The court nonetheless held that Petitioner's Due Process claim must be reviewed only for plain-error on the ground that defense counsel's colloquy before the testimony—which explicitly invoked "fundamental fairness" in an unsuccessful effort to admit the recording that would have corrected the error, Docket Entry ("DE")[1] 1521:4255-56—"did not sufficiently bring to the district court's attention the substance of [the] *Napue* claim." Pet.App. 50a.

The decision below puts the Ninth Circuit in conflict with four sister circuits and this Court's decision in *Glossip v. Oklahoma*, 604 U.S. 226 (2025). The Second, Fifth, Eighth, and Eleventh Circuits do not apply plain-error review to the constitutional violation at issue here—uncorrected false testimony that the government elicits and then exploits in closing. A defendant's protection against conviction by the prosecution's capitalization in closing argument on testimony it knew or should have known is false should not depend on the circuit where the trial occurred.

The Ninth Circuit's rule cannot be squared with plain-error doctrine. That doctrine rests on the premise that a timely objection gives the trial court the ability to cure an error before it infects the verdict. But here, the prosecution itself bore the constitutional duty to correct testimony the panel acknowledged was false, and it instead reinforced the falsity in closing and rebuttal argument. By the time the case reached

[1] The district court's docket, including complete transcripts of the trials for both Petitioner and Elizabeth Holmes, is available at *United States v. Holmes, et al.*, No. 5:18-cr-00258-EJD-2 (N.D. Cal.).

the jury, the violation had already been consummated. A doctrine premised on the possibility of cure cannot govern a violation the prosecution itself completed.

This case is an ideal vehicle for this Court to decide the *Napue* issue presented. Petitioner and Elizabeth Holmes were indicted together but tried separately, before the same district judge and with the same prosecution team. At the earlier trial of Holmes, the government itself introduced Bryan Tolbert's recording of a December 2013 investor call on which Holmes spoke only about the "potential" for Theranos's technology to be used by the United States military on medevac helicopters. The words that Holmes actually used on the call were the subject of intense debate at closing in that trial, and the jury asked to rehear the recording during deliberations. The Holmes jury returned a mixed verdict on the investor-fraud counts and acquitted on every patient-fraud count.

Six months later, the same prosecutors successfully sought exclusion of the same recording at Petitioner's trial—over defense argument that the jury needed to hear "the actual words" Holmes spoke—and elicited testimony that Holmes had said Theranos devices were "employed on the medevac helicopters" and "being used" to save soldiers' lives. DE 1537:4435. This is the testimony the Ninth Circuit acknowledged was "actually false." Pet.App. 53a. The government failed to correct the testimony and returned to the false military narrative over 12 times in closing argument and rebuttal. Petitioner was convicted on all counts.

The same record presents a parallel question on a second non-delegable duty. Two government witnesses presented as percipient witnesses delivered expert scientific opinions without any district court findings regarding whether the opinions were based on sufficient facts and data, reliable principles and methods, or reliable application of the principles and methods under Fed. R. Evid. 702. The Ninth Circuit acknowledged the testimony was expert and admitted in error, but then cured the error itself with a one-sentence finding that the witnesses would have qualified as experts based on their credentials and experience. Pet.App. 30a. At least seven other circuits—the Fourth, Fifth, Sixth, Eighth, Tenth (en banc), Eleventh (en banc), and Federal (en banc)—hold that the Rule 702 gatekeeping inquiry cannot be reconstructed on appeal from credentials and experience alone. And the Ninth Circuit's own decision in a civil case, *Engilis v. Monsanto Co*., 151 F.4th 1040 (9th Cir. 2025), produces an intra-circuit asymmetry—civil litigants receive prong-by-prong Rule 702 scrutiny but criminal defendants do not.

This Petition thus presents two questions about the most basic truth-protecting safeguards of a federal criminal trial—both recurring, outcome-determinative, and of national importance. Actual or deemed defense silence cannot discharge the prosecution's constitutional duty to correct false testimony and convert it to a closing argument advantage. The judicial duty to gatekeep expert testimony cannot be omitted at trial and invented on appeal. The decision below permits both, in conflict with other circuits. Review by this Court is warranted.

V. STATEMENT OF THE CASE

This case arose from the collapse of Theranos, Inc., a company founded by Elizabeth Holmes in 2003 to develop blood-testing technology that used a small sample from a finger prick rather than a venous draw. The indictment charged two counts of conspiracy and ten counts of wire fraud. Petitioner was convicted on all counts and is currently serving a 155-month prison sentence. The essence of the charges was that defendants defrauded investors and patients by claiming Theranos's technology worked and was being successfully used to test patients when that was not true. Pet.App. 182a-190a.

The government's primary evidence that Theranos's technology did not work was the testimony of two laboratory scientists the district court allowed to testify with no Rule 702 findings. The Ninth Circuit later agreed that key portions of their testimony was expert in nature. The government did not obtain, and so could not present, Theranos's comprehensive clinical database with the patient testing and quality control data these laboratory scientists had relied on during their work at Theranos. DE 1534:3599-604; DE 1549:6819-21.

A key theme the government employed to support its claim that defendants misrepresented how Theranos's technology was being used involved alleged misrepresentations to investors about Theranos's work with the United States military. The indictment alleged that the defendants:

> represented to investors that Theranos presently had a profitable and revenue generating business relationship with

> the United States Department of Defense, and that Theranos's technology had deployed to the battlefield; when, in truth, HOLMES and BALWANI knew that Theranos had limited revenue from military contracts and its technology was not deployed in the battlefield.

Pet.App. 184a. The evidence at trial established that Theranos had worked extensively with the United States military to develop blood-testing technology that *could* serve soldiers if ever deployed on battlefields. *E.g.*, DE 1531:2736-80. Military personnel tested the devices' ability to travel on helicopters and function in extreme conditions. DE 1531:2753-62. Theranos sent one of its devices to Africa, where it traveled on a military helicopter to assess how it fared in harsh weather. DE 1531:2759-63; DE 1531:2829-30. The device "travelled well and functioned well" on these trips. DE 1531:2760. Theranos's military work was ultimately interrupted by government sequestration in 2013, and Theranos's launch of retail projects. DE 1531:2774-80.

The evidence thus established that Theranos had done substantial work to prepare its devices for deployment with the military *in the future*. The government, however, set out to prove the very different allegation in the indictment that defendants falsely told investors that the military had *actually* deployed Theranos's technology to the battlefield.

A. The December 20, 2013 Investor Call And Tolbert's Recording

In December 2013, Elizabeth Holmes held a conference call with potential investors. DE 1278:4466-71. Investor representative Bryan Tolbert recorded the call. *Id.* On the recording, Holmes discussed the deployment of Theranos's technology with the military as a future possibility: "[T]he ability to take a technology like this and put it in flight, specifically on a medevac [helicopter], has the potential to change the survival rates." DE 1278:4503-04. Tolbert turned the recording over to the government, which thus possessed, from the outset of both prosecutions, the authoritative record of what Holmes had said.

B. The Holmes Trial: The Same District Judge, The Same Prosecutors, The Same Witness, And The Jury's Verdict

Holmes and Petitioner were indicted together but tried separately before the same district judge. Holmes's trial proceeded first. At her trial, the government introduced the Tolbert recording, played selected clips, and the defense supplemented under Federal Rule of Evidence 106 so the jury could hear Holmes's statements in context. DE 1278:4466, 4522. The issue of what Mr. Tolbert and other investors said on the witness stand and the actual words Holmes spoke on the recorded call was addressed extensively in closing arguments. *See* DE 1302:9156-58, 9160-62, 9164.

During deliberations, the Holmes jury asked to rehear the recording. DE 1218; DE 1305:9362; DE

1278:4469-72. It then returned a mixed verdict: it hung on some investor-fraud counts, convicted on others, and acquitted on all counts alleging fraud against patients. DE 1235. The same district judge that would later try Petitioner thus heard the content of the recording and saw firsthand how the jury weighed the recording when it had access to Holmes's actual words.

C. The Balwani Trial And The April 29, 2022 Colloquy

At Petitioner's trial, the government did not introduce the Tolbert recording. It relied instead on witness recollections of what Holmes had said nearly a decade earlier. Anticipating the inaccurate witness testimony, the defense moved before Tolbert took the stand to be permitted to play the recording. The matter was argued at length on April 29, 2022. DE 1537:4248; DE 1537:4389-96.

Petitioner argued for admission, framing the request in terms of fairness: "The rule of completeness and just fairness . . . I think it's important for the jury to be able to hear the actual words if that's what the government is going to assert were misleading and false rather than recollection from an individual conversation . . . 12 years ago or 10 years ago almost." DE 1537:4391; *see also* DE 1537:4254-55 (defense argument that jury should hear actual words on recording out of "fundamental fairness"). This identified the substance of the *Napue* concern: the government would rely on witness recollections rather than the recording, creating a substantial risk that the testimony would be inaccurate. The Ninth Circuit panel later agreed the testimony was "actually false."

Pet.App. 53a. The government opposed admission on hearsay grounds. DE 1537:4250-51; DE 1537:4390-91. The district court sustained the objection, DE 1537:4391-95, and the jury never heard the recording.

D. The False Testimony And The Government's Capitalization In Closing Argument

Tolbert then testified. On direct, he volunteered unprompted that the call with Holmes was recorded. DE 1537:4434-35. The prosecutor elicited that Tolbert's testimony was "based on having reviewed the transcript since the call" but did not introduce the recording. DE 1537:4435. The government then elicited the false testimony: Tolbert told the jury Holmes had said Theranos's "devices were employed on the medevac helicopters and being used to kind of improve survival rates of military personnel who had been injured in combat." DE 1537:4435-38. Another witness on the same recorded call, Chris Lucas, followed with similar testimony that Holmes told the investors the "technology was being used in the Middle East . . . on the battlefield." Pet.App. 52a; DE 1537:4437-38.

The government did not correct the testimony. Instead, it returned to the false military representations over a dozen times in closing and rebuttal closing, weaving them into the heart of the government's case. *See, e.g.,* DE 1551:6950 ("Holmes told Bryan Tolbert that the Theranos device had been deployed by the military and was being used in the treatment of soldiers"); DE 1551:6950 ("investors like Mr. Tolbert heard false statements about what Theranos had done with the DOD, and Mr. Tolbert

heard that on a phone call with Elizabeth Holmes."); DE 1551:6987 ("investors heard that Theranos's technology had been deployed by the Department of Defense on the battlefield, was saving soldiers' lives, was in Afghanistan, was on Medevac helicopters, all kinds of things."); DE 1551:7026 ("You know that investors thought that Theranos was testing, its technology was being used by the military on deployed soldiers on medevac helicopters in the treatment of soldiers in the battlefield."); DE 1551:7027 ("they told investors that the technology was saving lives, that it was deployed on medevac helicopters and on the battlefield."); DE 1551:7028 (investors heard "one version or another of this story that Theranos technology was deployed actually treating soldiers in the battlefield, sometimes on medevac helicopters."); DE 1554:7574 (rebuttal: "the technology was being used on the battlefield, and that it was actually saving the lives of soldiers fighting for this country"); DE 1554:7607 ("You've also heard evidence that Mr. Balwani and Ms. Holmes misrepresented to investors the nature of Theranos's dealing with the military. And you heard that people were left with the impression because they were told that Theranos devices were being used clinically by the military[.]"); DE 1554:7681 (rebuttal: "They borrowed the credibility of the U.S. military by claiming that organization was relying on the company's technology").

The government argued that "Holmes's role in the investor conspiracy was to recruit investors" and that "[s]he communicated false statements directly to investors like Tolbert." DE 1551:6970. The government further told the jury "You heard the Tolbert phone call when Holmes brags about DOD or military work that Theranos did," even though the

jury did not hear the recording because the government objected. *Id.* It argued that the jury could trust witnesses' recollections because they "all heard . . . that Theranos technology was deployed actually treating soldiers in the battlefield, sometimes on medevac helicopters." DE 1551:7028.

E. The Ninth Circuit's Decision On The N*apue* Violation

The Ninth Circuit found Tolbert's testimony "actually false." Pet.App. 53a (Tolbert's account that the devices were "employed on the medevac helicopters" was "in fact 'actually false.'"). The panel "assume[d] without deciding that the government had a duty to correct the inaccurate statement." *Id.* It nonetheless rejected the claim under plain-error review. The panel acknowledged that defense counsel had "[i]nvok[ed] the best evidence rule and the rule of completeness" but held those arguments "did not sufficiently bring to the district court's attention the substance of his *Napue* claim." Pet.App. 50a.

The panel's preservation analysis cited only Petitioner's invocations of the best evidence rule and the rule of completeness, not his invocation of "fundamental fairness." *See* DE 1537:4254-55. In footnote 10, the panel reasoned that the district court's hearsay ruling had "left open the possibility of introducing the tape at a later point." Pet.App. 50a n.10. On prejudice, the panel held the violation did not affect substantial rights, relying in part on the fact that "Balwani did not attempt to use the recording to impeach Tolbert," the very recording the government

had excluded. Pet.App. 54a. The amended opinion did not cite or address *Glossip*.

F. The Indictment's Accuracy-And-Reliability Theory And The Government's Lay-Witness Strategy.

The same indictment that grounded the false testimony claim also charged Petitioner with defrauding investors and patients about the accuracy and reliability of Theranos's proprietary blood testing technology. Pet.App. 188a-190a. The government called no expert witnesses in Petitioner's trial to prove the allegations in the indictment concerning systemic inaccuracy in Theranos's technology. It also failed to obtain Theranos's comprehensive clinical database—the patient testing and quality control data that would have permitted objective scientific assessment. DE 1549:6819-23. Theranos' scientific team used the database as a key tool for determining whether test results were valid. DE 1534:3603.

With no experts and no comprehensive data, the government built its systemic inaccuracy case on the testimony of three former Theranos employees it called as percipient lay witnesses: laboratory associate Erika Cheung and laboratory directors Dr. Adam Rosendorff and Dr. Mark Pandori.[2] The district court conducted no *Daubert* hearing and made no findings under Rule 702. Defense objections to the expert testimony were overruled. *See* DE 1524:1608-09; DE 1525:1733-34; DE 1535:3731; DE 1384; DE 1385.

[2] Dr. Kingshuk Das, whose testimony the panel addressed at length in discussing Holmes's separate trial, Pet.App. 37a-39a, did not testify at Petitioner's trial.

G. Rosendorff And Pandori's Specialized Opinion Testimony

The government elicited from Rosendorff a series of opinions requiring specialized scientific training. The panel identified his hemolysis testimony as "plainly expert opinion"—Rosendorff explained the "bursting of red blood cells," why hemolysis more commonly occurs in fingerstick than venous draws, how the resulting cellular debris interfered with detection of analytes, and how that interference affected the accuracy of Theranos tests. Pet.App. 27a-28a; DE 1535:3730-32. Defense counsel raised contemporaneous Rule 702 objections. DE 1533:3265-66, 3268-69; DE 1535:3730-31. Rosendorff also opined on laboratory bias and dilution effects, the concerns raised by Theranos's fingerstick-specific reference ranges, and whether individual patient-result errors indicated systemic accuracy problems. DE 1533:3264-69.

Dr. Pandori testified at length about Theranos's proficiency testing. He explained that Theranos ran proficiency tests on "extraordinarily vetted" third-party machines while running patient samples on its own devices, and that the disparities raised scientific concerns about accuracy. Pet.App. 28a-29a. Pandori himself told the jury that "you would need to be an expert to appreciate the differences because the differences don't look large." Pet.App. 29a; DE 1524:1649. He further opined on whether Theranos's technology was groundbreaking given the industry state of the art and whether Theranos testing was more accurate than competitors'. DE 1524:1608-09. Defense counsel raised contemporaneous Rule 702 objections. DE 1524:1608-09, 1634, 1664; DE 1524:1679-82; DE 1525:1700-12, 1733-34; *see also* DE

1384; DE 1385. The panel concluded that Pandori's proficiency-testing testimony "constituted expert opinion." Pet.App. 28a.

H. The District Court's Non-Performance Of Rule 702 Gatekeeping And The Government's Closing Argument

The district court did not conduct the required gatekeeping analysis under Rule 702. Because the government designated both witnesses as percipient observers, the court made no findings on whether their specialized opinions were based on sufficient facts or data, the product of reliable principles and methods, and were reliably applied to the facts at issue. Fed. R. Evid. 702(b)-(d). Theranos's clinical database that would have enabled any such assessment was never obtained. DE 1549:6819-23.

In closing argument, the government described Rosendorff's testimony as "technical [and] specialized" and cited his credentials to the jury. DE 1554:7592. It urged the jury to "be cautious when a lawyer asks you to accept his judgment on a technical specialized issue and to accept that judgment over the testimony of a witness who does this for a living, who is a medical doctor, who is a clinical pathologist and a lab director." *Id*. It identified the specialized-witness opinions as the evidentiary core of its case: "[t]he simplest evidence" on accuracy and reliability "was testimony from at least three individuals who worked within Theranos working in the lab. That was of course Erika Cheung and then Drs. Mark Pandori and Adam Rosendorff." DE 1554:7576. The government referred to Rosendorff alone over one hundred times in closing and rebuttal. DE 1551:6938-80; DE 1551:6981-7086; DE 1554:7572-685.

I. The Ninth Circuit's Decision On The Rule 702 Claim

The Ninth Circuit affirmed. The panel held that portions of Rosendorff's and Pandori's testimony "veered into expert territory" and were governed by Rule 702—in particular Rosendorff's hemolysis testimony as "plainly expert opinion," Pet.App. 28a, and Pandori's proficiency-testing testimony as having "constituted expert opinion," *Id.* The panel held the error harmless on a single ground: both witnesses "would have easily qualified as experts, and their extensive experiences allowed them to draw reliable conclusions about problems with Theranos's device and testing services." Pet.App. 30a. The record the panel recited for that conclusion addressed only credentials—medical school and fellowships for Rosendorff; a doctoral degree and laboratory appointments for Pandori. Pet.App. 29a-30a. The panel made no findings under Rule 702(b), (c), or (d).

The lower court denied panel rehearing and rehearing en banc, and issued an amended opinion on December 22, 2025 that left the Rule 702 harmlessness analysis intact. Pet.App. 7a-8a.

VI. REASONS FOR GRANTING THE PETITION: *NAPUE* QUESTION

This case presents a recurring constitutional question of national importance: whether plain-error review may be applied to a *Napue* violation where the government did not merely elicit and fail to correct false testimony, but affirmatively exploited the falsehood in closing and rebuttal closing arguments the defense could not answer. The question is case-dispositive. The Ninth Circuit's answer to the *Napue*

question here puts it in conflict with four sister circuits and this Court's recent reaffirmation of the prosecution's correction duty in *Glossip v. Oklahoma,* 604 U.S. 226 (2025).

A. The Decision Below Deepens A Circuit Split On Applying Plain-Error Review To *Napue* Violations When The Government Capitalizes On False Testimony In Summation

The panel reviewed Petitioner's *Napue* claim only for plain error, reasoning that defense counsel's colloquy with the district judge before the testimony "did not sufficiently bring to the district court's attention the substance of [the] *Napue* claim. Pet.App. 50a. But in the Second, Fifth, Eighth, and Eleventh Circuits, the standard of review does not turn on how the defense framed its pretrial objection. These circuits evaluate substantially similar *Napue* violations that include prosecutorial capitalization under *Napue*'s ordinary materiality rather than a plain-error framework. The decision below squarely conflicts with this approach.

The Eleventh Circuit firmly rejects the Ninth Circuit's approach. "[W]here the government not only fails to correct materially false testimony but also affirmatively capitalizes on it, the defendant's due process rights are violated" even "despite the government's timely disclosure of evidence showing the falsity." *United States v. Stein*, 846 F.3d 1135, 1147 (11th Cir. 2017); *accord DeMarco v. United States*, 928 F.2d 1074, 1077 (11th Cir. 1991) ("[T]he prosecutor's argument to the jury capitalizing on the perjured testimony reinforced the deception of the use of false testimony and thereby contributed to the

deprivation of due process.”). In *DeMarco*, a case arising under 28 U.S.C. § 2255, the Eleventh Circuit held that the government’s duty to correct false testimony is not excused by defense knowledge of the falsity if the government capitalizes on the false testimony at closing. 928 F.2d at 1076-77.[3]

The Fifth Circuit applies the ordinary *Napue* materiality standard regardless of whether “defense counsel could have apprised the jury of the” falsity. *United States v. Sanfilippo*, 564 F.2d 176, 178 (5th Cir. 1977). *Sanfilippo* reversed where the prosecution elicited false testimony from a cooperating witness about the substance of his plea agreement and then capitalized on it in closing to suggest the witness had “absolutely nothing hanging over his head.” *Id.* at 179. As the court stated, “the Government not only permitted false testimony of one of its witnesses to go to the jury, but argued it as a relevant matter for the jury to consider. Whether either instance alone would merit reversal, we need not decide, for together they do.” *Id.* The court rejected the government’s argument that its violation should be excused because the defense could have corrected the falsity. *Id.* at 178.

The Eighth Circuit applies the same rule, expressly grounded in the Fifth Circuit’s *Sanfilippo* decision. In *United States v. Bigeleisen*, 625 F.2d 203 (8th Cir. 1980), the court reversed where the prosecutor failed to correct a witness’s false denial of

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[3] The Third Circuit has also captured the principle: “[H]ow can a defendant possibly enjoy his right to a fair trial when the state is willing to present (or fails to correct) lies told by its own witness and then vouches for and relies on that witness’s supposed honesty in its closing?” *Haskell v. Superintendent Greene SCI*, 866 F.3d 139, 152 (3d Cir. 2017).

cooperation and then capitalized on the uncorrected falsity in rebuttal. Citing *Sanfilippo*'s holding that "the duty to correct the false testimony of a Government witness is on the prosecutor," 564 F.2d at 178 (quoting *Napue*, 360 U.S. at 269), the Eighth Circuit held that "[a]lthough the case against Bigeleisen was strong, we are unable to say that there is no reasonable likelihood that the false testimony and the misleading closing argument could have affected the judgment of the jury." *Id.* at 207-08. The *Bigeleisen* court rejected the government's argument that its *Napue* duty was discharged because it partially disclosed the cooperator's plea agreement during opening statement. *Id.* at 208.

In the Second Circuit, the standard of review does not turn on a pretrial label or doctrinal framing when the government capitalizes on falsity in summation. In *United States v. Valentine*, 820 F.2d 565 (2d Cir. 1987), the court reversed where the prosecutor misrepresented grand jury testimony in summation. The Court ruled that partial defense knowledge and failure to follow up "does not allow the prosecutor to make misrepresentations." *Id.* at 571. And in *United States v. Wallach*, the court reversed convictions on direct appeal because "the government through its redirect and in its closing argument made much of [the witness's] motive for telling the truth[,]" thereby bolstering testimony the government should have known was false. 935 F.2d 445, 458–59 (2d Cir. 1991), *abrogated on other grounds by Ciminelli v. United States*, 598 U.S. 306 (2023); *see also Jenkins v. Artuz*, 294 F.3d 284, 292–96 (2d Cir. 2002). The court in *Jenkins* found a *Napue* violation even under the Antiterrorism and Effective Death Penalty Act's (AEDPA) deferential standard where the prosecutor's summation "placed the State's credibility behind [the

witness's] untruthful testimony." *Id.* at 293.[4]

At least one state appellate court, the Michigan Supreme Court, has adopted the same approach. In *People v. Smith*, 498 Mich. 466, 870 N.W.2d 299 (2015), the court ruled that "[a] prosecutor's capitalizing on the false testimony . . . is of particular concern because it 'reinforce[s] the deception of the use of false testimony and thereby contribute[s] to the deprivation of due process.'" *Id.* at 304 (quoting *DeMarco,* 928 F.2d at 1077) (alterations in original). The court was "not convinced that plain-error analysis applies to *Napue* errors[.]" *Id.* at 310 n.15. The court also found that "an error like this, in which the prosecutor deliberately exploited misleading evidence before the jury, clearly affects 'the fairness, integrity or public reputation of judicial proceedings.'" *Id.*

The principle fits this Court's decision in *Puckett v. United States*, 556 U.S. 129 (2009). *Puckett* rests on the basic premise that a contemporaneous objection lets the trial court cure the error in real time, and a defendant who "sandbag[s]" the court forfeits de novo review by depriving the court of that opportunity. *Id.* at 134. That rationale has no purchase where the government itself elicits testimony it knows or should have known was false, declines to correct it, and then exploits the resulting falsity in a rebuttal closing argument the defense has no procedural means to answer.

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[4] The Tenth Circuit, in an unpublished opinion, has taken a plain-error approach similar to the Ninth Circuit panel. *See United States v. Mickling*, 642 Fed. Appx. 821, 823–24 (10th Cir. 2016). The weight of authority from four circuits rejects that framework.

The constitutional violation at the heart of this case occurred when the prosecutor stood before the jury in closing and again in rebuttal, repeatedly invoking Tolbert's false account of Holmes's December 2013 military representations. Federal Rule of Criminal Procedure 29.1 gives the government the final word at trial by design. The defense that hears false testimony reframed into a closing-argument theme has no viable procedural vehicle for real-time response—no cross-examination, no rebuttal witness, no objection the trial court can meaningfully sustain without disrupting the prosecutor and risking that overruling the objection will reinforce the false testimony before the jury. By the time the case is submitted, the violation has occurred and is consummated. *See, e.g., United States v. Freeman*, 650 F.3d 673, 683 (7th Cir. 2011) (because the misconduct occurred "during the rebuttal portion of the government's closing argument . . . there was no opportunity for the defense to counter the statement. And a curative instruction would have had little effect." As such, the harm "left an indelible impression on the jury.").[5]

[5] The Seventh Circuit en banc in *Long v. Pfister*, 874 F.3d 544, 549 (7th Cir. 2017) (cert. denied, 584 U.S. 950 (2018)), expressly identified open *Napue* questions on which this Court had not spoken, including whether a conviction stands "when the prosecutor does not correct but also does not rely on the falsehood" and whether one stands when "all material evidence is presented to the jury before it deliberates[.]" *Id.* This case presents the inverse—and the sharpest form—of both: the prosecution exploited the uncorrected falsity over a dozen times in summation, and the recording—the corrective evidence—never reached the jury. *Long* arose from AEDPA habeas review of defense-elicited testimony and presented whether the Seventh Circuit's four-question framework was "clearly established" federal law for purposes of 28 U.S.C. § 2254(d)(1), not whether

Nor can a rule that requires the defense to overcome the government's own obstruction be squared with this Court's holding in *Banks v. Dretke*, 540 U.S. 668, 696 (2004), that "[a] rule . . . declaring prosecutor may hide, defendant must seek is not tenable in a system constitutionally bound to accord defendants due process." (Internal quotations and citations omitted). The panel's footnote 10 enshrines the parallel rule "prosecutor may block, defendant must impeach."

B. The Decision Below Conflicts With This Court's Recent Decision In *Glossip v. Oklahoma*.

The decision below is in direct conflict with this Court's decision in *Glossip v. Oklahoma*, 604 U.S. 226 (2025), a conflict made more acute by the fact that *Glossip* was decided after the panel's original analysis was complete but was not addressed in the panel's amended opinion of December 22, 2025. This Court reaffirmed in *Glossip* that the prosecution's duty under *Napue* is not contingent on what the defense could have done. Even where the defense had information that might have permitted impeachment of the false testimony on its own, "that would be irrelevant" because the prosecutor's duty to correct false testimony is a constitutional obligation

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the framework is correct on direct review. The *Long* majority held the prosecutor there did not affirmatively rely on the falsity. *Id*. at 548–49. The dissent characterized the conduct as "soft-pedal[ing]" rather than reliance. *Id*. at 552 (Hamilton, J., dissenting). The record in this Petition forecloses both characterizations: undisputed, sustained capitalization in closing and rebuttal.

independent of the defense's litigation choices. *Id.* at 253 n. 10. That reasoning is in direct conflict with the panel's footnote 10 premise that the defense's ability to impeach Tolbert with the recording defeats the *Napue* violation.

Glossip is equally irreconcilable with the burden the panel placed on Petitioner. Once a *Napue* violation is shown, *Glossip* reaffirmed, a new trial is warranted if the false testimony could "'in any reasonable likelihood ... have affected the judgment of the jury[.]'" *Id.* at 246 (quoting *Giglio v. United States,* 405 U.S. 150, 154 (1972), in turn quoting *Napue*, 360 U.S. at 271). This standard "in effect" requires "the beneficiary of [the] constitutional error to prove beyond a reasonable doubt that the error ... did not contribute to the verdict obtained." *Id.* at 246 (quoting *United States v. Bagley*, 473 U.S. 667, 680 n. 9 (1985), in turn quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). The panel inverted that allocation: it assumed the violation, then denied relief because Petitioner had not proven prejudice and "ample evidence otherwise supported the convictions." Pet.App. 48a. But the government was the "beneficiary" of this error in the most concrete sense—it obtained exclusion of the recording that would have exposed Tolbert's testimony as false, left that testimony uncorrected, and then made the false military narrative a centerpiece of summation. *Glossip* places the burden of that falsity on the party that created the false impression and capitalized on it, not on the defense. *Id.* at 252 and 253 n. 10.

C. The Question Is Of Recurring Importance And This Case Is An Ideal Vehicle

This case presents the question in its sharpest

form. The panel itself decided every fact this Court would need to answer the question presented: it found Tolbert's testimony "actually false," Pet. App. 47a (citing *Dickey v. Davis*, 69 F.4th 624, 636 (9th Cir. 2023) (*Napue* violation where prosecutor's closing "sought to exploit the false impression he had created")); it "assume[d] without deciding" that the duty to correct attached, Pet.App. 53a; and it acknowledged that defense counsel had "urged the district court" to admit portions of the recording before Tolbert testified, Pet.App. 50a. The question is therefore answerable as a pure question of law on the panel's own factual record. The record establishes beyond dispute that the government invoked Tolbert's testimony during closing and rebuttal over a dozen times. *See* pages 9-11, supra. The prosecution arguments directly invited the jury to convict on the basis of testimony the panel later found "actually false."

The panel disposed of the violation by ruling that Tolbert's "testimony did not seriously affect Balwani's substantial rights" because "ample evidence in the record" supported the convictions. Pet.App. 53a-54a. That is not the *Napue* materiality test. The standard *Napue* itself articulated, and which this Court reaffirmed in *Wearry v. Cain*, 577 U.S. 385, 392 (2016) (per curiam), and again in *Glossip*, asks whether the false testimony could in any "reasonable likelihood" have "affected the judgment of the jury." *Glossip*, 604 U.S. at 246.

The Fifth Circuit explained the difference more than four decades ago in *United States v. Barham*, 595 F.2d 231, 242 (5th Cir. 1979), holding that "the defendant is entitled to a jury that is not laboring under a Government-sanctioned false impression of

material evidence when it decides the question of guilt or innocence with all its ramifications"—not the harmless-evidence sufficiency analysis the panel used. *Brown v. Wainwright*, 785 F.2d 1457, 1464 (11th Cir. 1986) captured the materiality principle as a constitutional duty: "[t]he government has a duty not to exploit false testimony by prosecutorial argument affirmatively urging to the jury the truth of what it knows to be false."

This point is reinforced by the habeas precedent applying the same materiality principle under a more demanding standard. In *Jenkins v. Artuz*, 294 F.3d 284 (2d Cir. 2002), the Second Circuit reviewed a Napue violation under AEDPA's deferential "unreasonable application" standard, 28 U.S.C. § 2254(d)(1), and held that the prosecutor's summation conduct "placed the State's credibility behind [the witness's] untruthful testimony," and thereby "eliminated" "[a]ny doubts" about the "'increment of incorrectness beyond error'" required for habeas relief. *Id.* at 293 (quoting *Francis S. v. Stone,* 221 F.3d 100, 111 (2d Cir. 2000)). If capitalization at summation clears the AEDPA's deferential bar, it satisfies direct review materiality *a fortiori*.

The case provides an unusual comparative anchor. Petitioner and Elizabeth Holmes were indicted together but tried separately, before the same district judge and with the same prosecution team. At Holmes's trial, the government itself introduced the Tolbert recording; the Holmes jury asked to rehear the recording during deliberation; and then hung on some investor-fraud counts and acquitted on every patient-fraud count. At Petitioner's trial, the same prosecutors did not introduce the recording, elicited testimony that the recording would have shown to be

inaccurate, emphasized the false testimony over a dozen times at closing and rebuttal closing, and obtained convictions on every count. Notably, despite seventy-five pages of Ninth Circuit briefing, the government has never defended the factual accuracy of its own closing argument—only the sincerity of its witnesses. That silence underscores that the question this Court should resolve turns on law, not contested facts.

VII. REASONS FOR GRANTING THE PETITION: RULE 702 QUESTION

The error here is not in dispute. The Ninth Circuit agreed that two government witnesses gave specialized opinion testimony governed by Rule 702, and that the district court conducted no gatekeeping inquiry at all as to sufficient facts or data, and reliable principles and methods and their application. What the panel did next leads to the question presented. The panel supplied its own substitute: a finding that the witnesses' credentials and experience would have qualified them as experts. On that ground alone, it held the error harmless. The decision lets a court of appeals reconstruct the reliability determination Rule 702 commits to the trial court, and resolve it on the basis of subsection (a) of Rule 702 only—credentials and experience—eliminating any analysis under subsections (b), (c), and (d).

Three features of the decision below independently warrant this Court's review: a deep and acknowledged inter-circuit conflict anchored in en banc authority; an irreconcilable intra-circuit conflict within the Ninth Circuit itself; and an asymmetry that gives criminal defendants less Rule 702 protection than civil litigants in the same circuit.

A. The Decision Below Deepens An Inter-Circuit Conflict On Whether A Court Of Appeals May Substitute Post-Hoc Credential Analysis For Rule 702 Gatekeeping.

1. Seven Circuits Require Preponderance-Of-Evidence Proof On Each Rule 702 Requirement—Not Merely On Qualifications.

The majority rule is anchored in en banc authority. The Eleventh Circuit held en banc in *United States v. Frazier*, 387 F.3d 1244, 1261 (11th Cir. 2004), that experience "standing alone" does not render expert opinion reliable, that "[t]he trial court's gatekeeping function requires more than simply 'taking the expert's word for it[,]'" and that the proponent must establish how the experience leads to the conclusion, why it is sufficient, and why it is reliably applied. *Id.* (citing Fed. R. Evid. 702). The *Frazier* court was able to affirm the district court's rulings as to the admissibility of expert testimony under Rule 702 because there was extensive record of the district court performing its gatekeeping function, not an after-the-fact analysis based on only one of the four Rule 702 factors. *Id.* at 1263–66.

The Tenth Circuit employed similar reasoning in *United States v. Nacchio*, 555 F.3d 1234, 1258 (10th Cir. 2009) (en banc). As in *Frazier*, the *Nacchio* court had an extensive record to work with on appeal, including "a sufficiently developed record, a concrete reliability determination, and specific findings and discussion by the district court." *Id*. at 1257. Neither permits reconstruction of the gatekeeping inquiry

from credentials and experience alone.

Other circuits are in accord. The Fourth Circuit in *Sardis v. Overhead Door Corp.*, 10 F.4th 268, 282-83 (4th Cir. 2021), reversed a multi-million-dollar verdict because the district court had "abdicated its critical gatekeeping role." *Id.* at 279. The appellate court could not bless the admissibility of expert testimony in circumstances where it had no record. The Federal Circuit en banc in *EcoFactor, Inc. v. Google LLC*, 137 F.4th 1333, 1340 (Fed. Cir. 2025), confirmed that distinguishing the judicial gatekeeping role from a jury's factfinder's role is "essential." The 2023 amendment "did not substantively change the relevant standard." *Id.* at 1339 n.8. The Fifth, Sixth, and Eighth Circuits are in agreement. *See Harris v. FedEx Corp. Servs.*, 92 F.4th 286, 303 (5th Cir. 2024) (Rule 702 gatekeeping requires "more than a glance at the expert's credentials; the court must also ensure that the expert has reliably applied the methods in question.") (citing *U.S. v. Valencia*, 600 F.3d 389, 423–24 (5th Cir. 2010)); *In re Onglyza Prods. Liab. Litig.*, 93 F.4th 339, 345 (6th Cir. 2024) (gatekeeping requires court to determine that expert scientific opinion has reliable foundation and thus must account for contrary evidence); *U.S. v. Smithers*, 212 F.3d 306, 318 (6th Cir. 2000) (remand required where trial court fails to conduct gatekeeping analysis of expert testimony); *Sprafka v. Medical Devices Bus. Servs.*, 139 F.4th 656, 661 (8th Cir. 2025) ("'As the gatekeeper, the district court's role is to discern expert opinion evidence based on 'good grounds' from subjective speculation that masquerades as scientific knowledge.'") (quoting *Ackerman v. U-Park, Inc.*, 951 F.3d 929, 933 (8th Cir. 2020)).

In *In re: Taxotere (Docetaxel) Products Liability Litigation*, 26 F.4th 256 (5th Cir. 2022), the court

reversed because the manufacturer "effectively smuggled inadmissible opinion testimony past the expert-disclosure and expert-discovery obligations imposed by the discovery and evidentiary rules by offering [a former employee] as a lay witness," *Id.* at 267. The court found that this "calculated and troubling end-run around Rule 702 and *Daubert,*" *id.* at 264, warranted a new trial because the testimony was central to the case and "featured prominently in Sanofi's closing argument to the jury," *id.* at 269.

Across these decisions, the recognized remedy when a district court has failed to perform reliability analysis is reversal or remand, not appellate substitution of credentials and experience for the missing findings. The majority of circuits treat subsections (b), (c), and (d) of the rule as preconditions to admission that the proponent must affirmatively satisfy on the trial record, not as gaps an appellate court may fill from qualifications and experience alone. This reading tracks this Court's foundational gatekeeping framework. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993) (the trial judge's role is to "ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand"); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (the gatekeeping obligation applies to all expert testimony, not only scientific testimony).

2. The Decision Below Holds That Appellate Review Of Qualifications Alone Suffices To Excuse Non-Performance Of Rule 702 Gatekeeping.

The decision below departs from the uniform framework. The panel agreed that two of the government's key witnesses—former Theranos

Laboratory directors Adam Rosendorff and Mark Pandori—delivered specialized opinion testimony within the meaning of Rule 702. Pet.App. 27a-29a. The panel's diagnosis was correct, but its remedy was not. The panel held the error harmless because Rosendorff and Pandori "would have qualified as experts, and their extensive experiences allowed them to draw reliable conclusions." Pet. App 27a.[6] The first clause addresses Rule 702(a) qualifications. The second conflates qualifications with reliability—the very error this Court's foundational gatekeeping framework warns against, *see Daubert*, 509 U.S. at 597—and that the Eleventh Circuit en banc rejected categorically in *Frazier*: experience "standing alone" does not establish reliability. 387 F.3d at 1261.

The panel's invocation of *United States v. Holguin*, 51 F.4th 841, 855 (9th Cir. 2022) (Pet.App. 90a) does not supply the missing analysis. *Holguin* reached its reliability conclusion through a record-specific examination of how the witness's particular experience produced the opinions offered, while the panel here only recited credentials, cited the rule, and announced a conclusion—no record-specific linkage between experience and opinion appears at Pet.App. 29a-30a.[7] And neither the panel nor the district court

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[6] The decision below invoked *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1247 (9th Cir. 1997), which found a lay/expert error harmless based on the witness's qualifications. But *Figueroa-Lopez* drew that analysis from *United States v. Maher*, 645 F.2d 780 (9th Cir. 1981), decided before *Daubert* and before the 2000 amendments added Rule 702(b), (c), and (d). Its harmlessness inquiry could not have assessed reliability under subsections that did not yet exist.

[7] The panel concluded that "because the facts of this case demonstrate that Rosendorff and Pandori would have met all the

made any findings under Rule 702(b), (c), or (d).

3. **The 2023 Amendment Clarified Rule 702's Always Existing Preponderance Standard.**

The Advisory Committee was explicit that the 2023 amendment to Rule 702 "simply intended to clarify that Rule 104(a)'s requirement applies to expert opinions under Rule 702." Fed. R. Evid. 702 advisory committee's note to 2023 amendments. The amendment was the rulemaking process's diagnostic response to lower-court drift. The post-2023 federal-appellate consensus has been uniform: the Federal Circuit, en banc, in *EcoFactor*, 137 F.4th at 1339 n.8 (2025); the Fifth Circuit in *Harris*, 92 F.4th at 303 (2024); the Eighth Circuit in *Sprafka*, 139 F.4th at 661–62 (2025); and the Ninth Circuit's own civil-side decision in *Engilis v. Monsanto Co.*, 151 F.4th 1040, 1049 n.9 (9th Cir. 2025), all confirm that Rule 702 has always required the proponent of expert testimony to demonstrate all Rule 702 requirements.

B. The Decision Below Creates An Irreconcilable Intra-Circuit Conflict And A Civil-Criminal Asymmetry.

1. **The Decision Below Cannot Be Reconciled With The Ninth Circuit's Own Controlling Decision In *Engilis*.**

Four months before the decision below issued, the

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requirements under Rule 702 and *Daubert,* any error in admitting their testimonies was harmless." Pet.App. 30a. Nothing in the record shows that any assessment of Rule 702(b), (c), and (d) was ever conducted.

Ninth Circuit in *Engilis v. Monsanto Co.*, 151 F.4th 1040 (9th Cir. 2025) announced that "a proponent of expert testimony must always establish the admissibility criteria of Rule 702 by a preponderance of the evidence" and that "there is no presumption in favor of admission." 151 F.4th at 1049. The court emphasized that prior Ninth Circuit references to a "liberal thrust" cannot support a presumption of admission, *id.* at 1050, and confirmed that the 2023 amendments clarified what Rule 702 had always required. *Id.* at 1049 n.9. The decision below does not cite *Engilis*, does not distinguish it, and cannot be squared with it.

2. **The Decision Below Creates A Civil-Criminal Asymmetry.**

The panel decision creates a fundamentally unfair asymmetry. Under *Engilis*, a civil tort plaintiff in the Ninth Circuit must prove by a preponderance that an expert satisfies every Rule 702 prong. 151 F.4th at 1051–52. Under the decision below, a criminal defendant in the same circuit facing imprisonment on a scientific fraud theory has no corresponding protection: the government may present specialized opinion through witnesses designated as percipient witnesses, without any analysis under Rule 702(b)-(d), and if an appellate court later finds the designation erroneous, the error is deemed harmless on credentials and experience alone. The Due Process Clause and Sixth Amendment exist to ensure that protections surrounding adjudication of liberty are at least as robust as protections surrounding adjudication of money. The decision below inverts that ordering.

The panel decision also creates a perverse

incentive that rewards prosecutorial evasion of Rule 702. A prosecutor who designates a credentialed witness as an expert must face *Daubert* scrutiny and accept appellate reliability review. A prosecutor who designates the same witness as simply a percipient witness triggers none of those obligations—and if the designation is later found erroneous, credentials and experience alone render the error harmless. The rational prosecutor will never voluntarily trigger Rule 702 where the witness holds recognizable credentials and experience. The defense has no corresponding option. The decision below does not merely fail to deter that evasion; it rewards it.

C. The Question Presented Is Of Exceptional Importance And This Case Is An Ideal Vehicle.

Rule 702 is one of the most frequently invoked rules of federal evidence. A rule that permits non-performance of gatekeeping to be cured on appeal through qualifications findings converts Rule 702's mandatory reliability requirements into precatory suggestions, and produces disparate outcomes on identical trial records depending on the circuit. The question affects every federal criminal prosecution that turns on specialized opinion testimony.

The question recurs across the most common patterns in federal criminal practice. Government witnesses routinely straddle the lay-expert line—DEA case agents testifying about drug-trafficking organization structure, gang investigators interpreting coded communications, forensic analysts opining on identifications and methodologies, and corporate insiders explaining specialized industry practices. In each of these settings, prosecutors can

elect to designate qualified specialists as percipient observers, bypassing the Rule 702 findings that would otherwise apply. Whether an appellate court can ratify that election by supplying a missing reliability finding from credentials and experience therefore controls a recurring evidentiary strategy in federal criminal prosecutions nationwide.

This case is an exceptionally clean vehicle. The Court need not resolve a single disputed factual or doctrinal predicate; every premise the question presented depends upon is conceded on the panel's own findings or appears on the face of the record. The panel held that specified portions of Rosendorff's and Pandori's testimony "constituted expert opinion" within the meaning of Rule 702. Pet.App. 27a-29a. The district court conducted no Rule 702 reliability analysis and held no *Daubert* hearing. The district court made no findings under Rule 702(b), (c), or (d). *Id.* The government tendered both witnesses as percipient witnesses at trial and then, in closing argument, treated them as credentialed scientific authorities whose judgment should displace defense reasoning. *See* page 14, *supra.* The panel's sole basis for affirmance was a single sentence: "[b]oth Rosendorff and Pandori would have easily qualified as experts, and their extensive experiences allowed them to draw reliable conclusions about problems with Theranos's device and testing services." Pet.App. 30a.

The question is also outcome-determinative. The testimony admitted in violation of Rule 702 went to the core issue in this case of whether Theranos's proprietary technology was accurate and reliable. The government offered no other experts on that subject. Rosendorff and Pandori were the heart of the government's case on the alleged systematic

inaccuracy of Theranos's technology.

The question is preserved and purely legal. Petitioner preserved the underlying Rule 702 challenge, and the panel reached its merits. Pet.App. 26a-30a. The panel found error and disposed of the case on a harmlessness rule that is itself a pure question of law: whether a court of appeals may declare admission of expert testimony harmless based only on credentials and experience when the district court performed no Rule 702 gatekeeping. That question is reviewed de novo and is answerable on this record without further factual development. *Cf. Dupree v. Younger*, 598 U.S. 729, 737 (2023).

The consequences of denying review are substantial. The Ninth Circuit encompasses almost 20 percent of federal criminal prosecutions in this country. Unless corrected, the decision below will leave criminal defendants in that circuit with diminished Rule 702 protections and encourage continued evasion of Rule 702's gatekeeping requirements.

VIII. CONCLUSION

The decision below permits the prosecution to elicit and exploit uncorrected falsity and shield the conviction by invoking the defense's failure to incant a doctrinal label. It permits an appellate court to omit Rule 702 gatekeeping at trial and reconstruct it on credentials and experience alone. Both rules conflict with this Court's precedents and with the law of multiple sister circuits. This Court should grant the Petition for a Writ of Certiorari.

Respectfully Submitted

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