No. 24-991

In the Supreme Court of the United States

JOSHUA HERRERA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in excluding a portion of testimony from a defense psychologist, on the ground that it violated Federal Rule of Evidence 704(b) because it expressed an opinion about whether petitioner had the mental state to commit the charged crime.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is available at 2025 WL 40265. The opinion and order of the district court (Pet. App. 22a-34a) are available at 2023 WL 2731863.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 2025. The petition for a writ of certiorari was filed on March 14, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of attempting to entice a minor to engage in sexual activity, in violation of 18 U.S.C. 2422(b). Judgment 1; Pet. App. 1a. The district court sentenced

him to 235 months of imprisonment, to be followed by a life term of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-18a.

1. Over a three-month period beginning in November 2014, petitioner exchanged "about 400 messages" online with a person he believed to be the mother of an underage girl interested in arranging for an adult to have sex with her daughter. Pet. App. 3a; see *id.* at 2a-3a. The exchange began when petitioner responded to an online classified ad on a website ("Fetlife.com") "that hosts classified ads for people looking to act on sexual fetishes." *Id.* at 2a. The ad, posted under the username "daughterlover_11," stated that a "Mom" was "looking for [a] like minded no limits perv," and it included information for contacting the poster via a smartphone app. *Ibid.*

Unbeknownst to petitioner, the ad had been posted by an undercover FBI agent. Pet. App. 2a. When petitioner responded to the ad, the undercover agent asked him whether he had "any age limits," and he responded, "Not particularly." *Id.* at 2a-3a. Over the course of their subsequent messages, the agent told petitioner that her (fictitious) daughter was 11 years old "and sent a photograph of a young girl lying on a bed." *Id.* at 3a. The pair discussed "how [petitioner] would teach the girl how to have sex, including oral and penetrative sex, which he would engage in with her with and without a condom." *Ibid.* Petitioner assured the ersatz mother "that he had 'papers' showing he was free of sexually transmitted diseases." *Ibid.*

Petitioner and the undercover agent ultimately made plans to meet—along with the supposed 11-year-old girl—at a Waffle House in Duluth, Georgia. Pet. App. 3a. Petitioner drove to the meeting from his home in

Athens, Georgia, and was arrested in the parking lot when he arrived. *Ibid.* Police seized his phone and later obtained a warrant to search it. *Ibid.* The phone confirmed that petitioner had been the person exchanging messages with the undercover agent. *Ibid.* It also contained a web browser open to a document containing the results of a medical test that petitioner had apparently taken to be cleared of sexually transmitted diseases, as well as "thirty images of child erotica and suspected child pornography." *Ibid.*; see Gov't C.A. Br. 5.

2. A grand jury in the Northern District of Georgia returned an indictment charging petitioner with knowingly attempting to entice a person under the age of 18 to engage in sexual activity, in violation of 18 U.S.C. 2422(b). Indictment 1. Section 2422(b) prohibits using a facility or means of interstate commerce to "knowingly persuade[], induce[], entice[], or coerce[] any individual who has not attained the age of 18 years, to engage in * * * any sexual activity for which any person can be charged with a criminal offense," or to "attempt[] to do so." 18 U.S.C. 2422(b). The indictment specified that the sexual activity that petitioner sought to entice could have been charged as child molestation in violation of Ga. Code Ann. § 16-6-4 (2019). Indictment 1.

Petitioner claimed that he had traveled to the Waffle House "because he 'thought there was a child in danger.'" Pet. App. 4a. "He admitted messaging with the FBI agent but claimed he was attempting to gather information and arrange a meeting to rescue the child," although he did not claim to have taken any steps to contact law enforcement before the Waffle House meeting to report a child in danger. *Ibid.* To support his defense, petitioner gave pretrial notice of his intent to call a clinical psychologist, Dr. Tyler Whitney, to testify that

petitioner has an autism spectrum disorder, that he exhibits traits common in individuals with such a disorder, and that he had exhibited behavior in this case potentially consistent "with the inability of many autistic persons to imagine how others might view certain behavior." *Id.* at 5a. Petitioner also proposed to have Dr. Whitney testify that a "psychosexual assessment [of petitioner] showed no indications that he has a sexual interest in children of either gender." *Ibid.*

The government moved to exclude the proposed expert testimony on several grounds, including Federal Rule of Evidence 704(b). Pet. App. 5a-6a, 25a. Rule 704(b) specifies that, in a criminal case, "an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." Fed. R. Evid. 704(b). The government maintained that petitioner was proposing to have Dr. Whitney testify about whether petitioner had the mens rea of intent necessary for conviction on the Section 2422(b) count as charged. See Gov't C.A. Br. 7-8.

The district court granted in part and denied in part the government's motion. Pet. App. 22a-34a. For the most part, the court agreed with petitioner that Dr. Whitney's proposed testimony was "admissible for the purpose of providing context for [petitioner's] actions and communications." *Id.* at 26a. The court observed that Dr. Whitney's proposed testimony that petitioner has an autism spectrum disorder, and about autism in general, could "contextualize [petitioner's] behaviors" for the jury and could "provide insight into his mental state," while still properly leaving "the ultimate question of [petitioner's] actual intent within the purview of the jury." *Id.* at 31a. The only portion of the proposed

testimony that the court found to be inadmissible was Dr. Whitney's opinion that petitioner's "psychosexual assessment showed no indications that he has a sexual interest in children." *Id.* at 31a.

The district court viewed that opinion as indistinguishable from the testimony at issue in a prior Rule 704(b) case in the Eleventh Circuit, *United States* v. *Gillis*, 938 F.3d 1181 (2019) (per curiam), which had affirmed the exclusion of an expert's opinion that a defendant "was not sexually attracted to prepubescent girls" from a prosecution in which intent to entice a minor into sexual activity was an ultimate issue for the jury to resolve. Pet. App. 32a. The district court also found that, in any event, Dr. Whitney's proposed testimony about petitioner's purported lack of sexual interest in children was inadmissible under Rule 403, "as the potential prejudicial effect" of the testimony "substantially outweighs any probative value." *Id.* at 34a. The court made clear that Rule 403 was a "sufficient and independent basis to exclude" the testimony, regardless of Rule 704(b). *Ibid.*

The case proceeded to trial. Consistent with the district court's pretrial ruling, Dr. Whitney was allowed to testify as an expert about autism spectrum disorders, about how such disorders affect a person's demeanor, and about how they are diagnosed. Gov't C.A. Br. 8. Dr. Whitney also testified about his evaluation of petitioner, offered an expert opinion that petitioner has an autism spectrum disorder, and testified that petitioner exhibits specific traits associated with autism. *Id.* at 8-9.

The jury found petitioner guilty. Pet. App. 6a. The district court sentenced him to 235 months of imprisonment, to be followed by a life term of supervised release. Judgment 2-3.

3. The court of appeals affirmed in an unpublished, per curiam decision. Pet. App. 1a-18a.

Petitioner contended that the district court had "abused its discretion by wrongfully applying Federal Rules of Evidence 403 and 704(b) to exclude Dr. Whitney's testimony about" petitioner's purported lack of sexual interest in children. Pet. App. 7a. Petitioner also contended that the exclusion, together with another asserted evidentiary error, had deprived him of "his constitutional right to present his preferred defense." *Ibid.* The court of appeals determined, however, that petitioner's constitutional arguments were merely derivative of his assertion that the "district court wrongly applied the rules" of evidence. *Id.* at 9a. Petitioner did not challenge the constitutionality of the relevant rules themselves, in general or as applied at his trial, nor did he argue for any constitutional exception to the rules. *Ibid.*

The court of appeals determined that "the district court did not abuse its discretion when it limited Dr. Whitney's testimony under Rule 704(b)," which obviated any need to address Rule 403. Pet. App. 9a. The court observed that in *Gillis*, it had upheld the exclusion, under Rule 704(b), of expert testimony that a "psychosexual assessment[]" of the defendant showed lack of sexual attraction to children, when offered in a prosecution under Section 2422(b). *Id.* at 13a. And the court applied that precedent here. See *id.* at 13a-17a. In doing so, the court observed, *inter alia*, that *Gillis* had not been abrogated or undermined by this Court's later decision in *Diaz* v. *United States*, 602 U.S. 526 (2024), which had addressed the application of Rule 704(b) to a different scenario. Pet. App. 10a-12a, 17a.

ARGUMENT

The court of appeals correctly determined that the district court was acting within the scope of its discretion when it relied on Federal Rule of Evidence 704(b) to prohibit petitioner's expert witness from opining that petitioner lacked sexual interest in children, where one of the ultimate issues for the jury to decide in the case was whether petitioner intended to entice a minor into engaging in sexual activity. Petitioner contends (Pet. 6-11) that the decision below conflicts with *Diaz* v. *United States*, 602 U.S. 526 (2024), and with the approach taken by other courts of appeals. Those contentions do not warrant further review. The decision below is consistent with *Diaz*, and petitioner fails to show that any other circuit would have treated the exclusion of similar evidence as an abuse of discretion. In any event, the court of appeals' decision is fact-bound and nonprecedential, and any evidentiary error was harmless—not least because the district court found the same testimony also inadmissible under Rule 403. Accordingly, the petition for a writ of certiorari should be denied.

1. Rule 704 contains both a "general rule" set out in 704(a) and an exception set out in 704(b). *Diaz*, 602 U.S. at 531. Under Rule 704(a), witness testimony in the form of an opinion "is not objectionable just because it embraces an ultimate issue." Fed. R. Evid. 704(a). Under Rule 704(b)'s exception, however, "[i]n a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of defense." Fed. R. Evid. 704(b). Rule 704(b) declares that "[t]hose matters are for the trier of fact alone." *Ibid.*

As this Court recently explained, the provision that is now Rule 704(a) was included in the original Federal Rules of Evidence to abolish an evidentiary doctrine known as "the ultimate issue rule." *Diaz*, 602 U.S. at 533. Under that doctrine, some state and federal courts had "categorically barred witnesses from 'stating their conclusions on' any "ultimate issue'—*i.e.*, issues that the jury must resolve to decide the case." *Id.* at 531 (brackets and citation omitted). The ostensible purpose of the doctrine was to "prevent[] witnesses from taking over the jury's role," but many courts and scholars had come to view expansive versions of it as unjustified and "'impracticable.'" *Id.* at 532-533 (citation omitted). Following a trend of state-law reforms, Congress enacted what is now Rule 704(a) to "specifically abolish[]" the ultimate-issue doctrine in federal court. Fed. R. Evid. 704 advisory committee's notes (Proposed Rules).

Congress later added the exception in Rule 704(b) in the wake of public concerns about the expert testimony offered in the trial of would-be presidential assassin John Hinkley, Jr., who was found not guilty by reason of insanity. See *Diaz*, 602 U.S. at 533. The exception in Rule 704(b) "does not apply in civil cases or affect lay witness testimony." *Id.* at 534. Instead, it applies only when an expert opines in a criminal trial on a mental-state issue that is an "element of the crime charged or of a defense." Fed. R. Evid. 704(b). Specifically, Rule 704(b) prohibits "expert opinions in a criminal case that are about a particular person ('the defendant') and a particular ultimate issue (whether the defendant has 'a mental state or condition' that is 'an element of the crime charged or of a defense')." *Diaz*, 602 U.S. at 534.

2. The district court acted within the scope of its discretion when it precluded petitioner's expert witness

from opining that a "psychosexual assessment showed no indications that [petitioner] has a sexual interest in children." Pet. App. 25a (citation omitted). Petitioner does not dispute the proposed expert testimony was "about a particular person ('the defendant')," *Diaz*, 602 U.S. at 534, rather than about persons with autism spectrum disorders in general. And the court also reasonably determined that, at least in the context of this trial, the proposed testimony was "an opinion about whether [petitioner] did or did not have" the requisite mental state necessary for conviction. Fed. R. Evid. 704(b).

To prove a conviction under 18 U.S.C. 2422(b) on an attempt theory, the government was required to prove that petitioner "had the specific intent to induce a minor to engage in [unlawful] sexual activity." *United States* v. *Gillis*, 938 F.3d 1181, 1190 (11th Cir. 2019) (per curiam); see D. Ct. Doc. 129, at 8-9 (Mar. 30, 2023) (jury instructions). Petitioner's intent was therefore a "mental state * * * that constitute[d] an element of the crime charged." Fed. R. Evid. 704(b). Indeed, petitioner's intent was perhaps the central issue at trial. Petitioner's theory of the defense was that, although he took various steps that might be perceived as suggesting an intent to arrange to have sex with an 11-year-old girl, he was in fact intending to rescue her, and his behavior had been misunderstood. See pp. 3-4, *supra*.

The district court gave petitioner considerable leeway to present expert testimony in support of that theory—for example, by allowing Dr. Whitney to testify that petitioner has an autism spectrum disorder and about characteristic behaviors and traits associated with such a disorder. Gov't C.A. Br. 8-9; see Trial Tr. 512-541. The only portion of Dr. Whitney's proposed testimony that the court excluded was his opinion

regarding petitioner's supposed lack of "sexual interest in children." Pet. App. 25a. The court reasonably viewed that proposed opinion as "nothing more than a 'thinly veiled attempt' by the defense to offer an expert's opinion on the ultimate issue of intent." *Id.* at 32a (summarizing *Gillis*); see *id.* at 33a.

In the circumstances of this case, to opine that petitioner "lacked interest" in having sex with children was simply another way of saying that he lacked intent to induce an 11-year-old victim into engaging in unlawful sexual activity with him. Petitioner is therefore wrong to suggest (Pet. 7) that the proposed testimony was inherently about only his putative lack of propensity, rather than about his mental state. And at a minimum, whether opining about petitioner's lack of sexual interest in children was sufficiently the same as opining about his lack of intent is a matter properly left to the district court's discretion. See *General Elec. Co.* v. *Joiner*, 522 U.S. 136, 141 (1997) ("We have held that abuse of discretion is the proper standard of review of a district court's evidentiary rulings."); cf. *United States* v. *Sepulveda-Barraza*, 645 F.3d 1066, 1072 (9th Cir. 2011) (Rule 704(b) requires a "case-by-case" analysis).

3. Petitioner identifies no sound basis for further review.

a. To the extent that petitioner seeks to renew any constitutional argument (Pet. 10-11), the court of appeals correctly determined that he failed to preserve any challenge to the constitutionality of Rule 704(b) as applied. See Pet. App. 9a. A constitutional challenge to Rule 704(b) would be unavailing in any event.

The Due Process Clause and the Sixth Amendment protect a criminal defendant's "meaningful opportunity to present a complete defense." *Crane* v. *Kentucky*, 476

U.S. 683, 690 (1986) (citation omitted). The Constitution does not, however, give the accused "an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor* v. *Illinois*, 484 U.S. 400, 410 (1988). Rather, the right to present a complete defense is abridged only "by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *Holmes* v. *South Carolina*, 547 U.S. 319, 324-325 (2006) (brackets, citation, and internal quotation marks omitted).

This Court has applied that constitutional standard to find that certain state-law rules prohibiting categories of evidence were unconstitutionally "'arbitrary'" insofar as they "excluded important defense evidence but * * * did not serve any legitimate interests." *Holmes*, 547 U.S. at 324-325 (collecting cases). But the Court "has never held that a federal rule of evidence violated a defendant's right to present a complete defense" or "overturned a district court's proper application of a Federal Rule of Evidence" on that ground. *United States* v. *Mitrovic*, 890 F.3d 1217, 1221-1222 (11th Cir.) (emphasis omitted), cert. denied, 586 U.S. 898 (2018).

Here, petitioner has never developed any argument that the Constitution compelled the inclusion of Dr. Whitney's testimony, even if Rule 704(b) otherwise prohibited it. Pet. App. 8a. Petitioner instead contended below "only that the district court misapplied the Federal Rules of Evidence." *Ibid.* That fact-bound contention is mistaken for the reasons discussed above and, at all events, does not warrant further review.

b. Petitioner contends (Pet. 8) that the decision below conflicts with this Court's decision in *Diaz*, *supra*. That contention lacks merit. The court of appeals properly treated *Diaz* as setting forth this Court's controlling view of "the scope of Rule 704(b)." Pet. App. 9a; see *id.* at 9a-12a (citing *Diaz* more than a dozen times). The court of appeals also recognized, however, that *Diaz* was not "squarely on point" for the testimony at issue here. *Id.* at 16a (citation and emphasis omitted).

In *Diaz*, the defendant claimed to be unaware of 54 pounds of methamphetamine hidden in a car she attempted to drive across the U.S.-Mexico border. 602 U.S. at 529. The government called an expert witness, who opined that "'in most circumstances'" the driver of a car carrying a large quantity of illicit drugs into the country "'knows they are hired'" to do so because entrusting such a high-value shipment to "an unknowing courier * * * would expose the drug-trafficking organization to substantial risk." *Id.* at 530.

This Court "conclude[d] that the testimony did not violate Rule 704(b)," *Diaz*, 602 U.S. at 528, because the expert witness "did not express an opinion about whether [the defendant] herself knowingly transported methamphetamine," *id.* at 534. The Court emphasized that Rule 704(b) "applies only to opinions about the defendant." *Ibid.* The Court also emphasized that testimony about what "most" drug couriers know still left the jury to decide on its own whether the defendant was "like the majority of couriers" or instead like "one of the less-numerous-but-still-existent couriers who unwittingly transport drugs." *Id.* at 535-536 (emphasis omitted).

In this case, in contrast, the excluded expert testimony was indisputably about *petitioner*. As explained

above, the district court allowed petitioner's expert to testify extensively about persons with autism spectrum disorders as a group. The only portion of the expert's proposed testimony that the court excluded was an opinion directed specifically to petitioner's own mental state, *i.e.*, his purported lack of desire (intent) to engage in sexual activity with children. As the court of appeals recognized, *Diaz* does not support petitioner's arguments for excluding that testimony. Pet. App. 16a-17a.

c. Petitioner also contends (Pet. 9-10) that the Eleventh Circuit's case law on Rule 704(b) is in conflict with decisions of other circuits. But petitioner fails to show that the outcome of this case would have been different in any of those circuits.

In *United States* v. *Hite*, 769 F.3d 1154 (D.C. Cir. 2014), the district court entirely prohibited the defendant's expert psychiatrist from testifying in a Section 2422(b) prosecution, see *id.* at 1158, 1168. The D.C. Circuit vacated and remanded for a new trial on other grounds. *Id.* at 1167. In its opinion, the D.C. Circuit also stated that the defendant's expert should be allowed to testify at any retrial. *Id.* at 1169-1170. But the case did not present that court with an occasion to address a circumstance like the one that this case presents.

Although the D.C. Circuit referred in passing to the expert's testimony as his "testimony that [the defendant] is not sexually interested in children," *Hite*, 769 F.3d at 1170, the expert in fact proposed to testify "on his diagnosis that [the defendant] does not suffer from any of the psychiatric conditions that are 'associated with a desire to have sexual contact with children or that may predispose an individual to want to engage in sexual activity with a child,'" *id.* at 1168 (citation

omitted). The testimony at issue here is meaningfully different. Petitioner's expert was allowed to testify about his diagnosis of petitioner; he was stopped short, under Rule 704(b), only of directly opining on petitioner's mental state—a step that the expert in *Hite* had apparently not proposed to take.

Petitioner's reliance (Pet. 7) on *United States* v. *Hofus*, 598 F.3d 1171 (9th Cir.), cert. denied, 562 U.S. 943 (2010), is misplaced. In that case, the defendant sought to have an expert opine that the defendant had sent a series of lewd and importuning text messages to two underage girls as "fantasy alone." *Id.* at 1177. The district court excluded the proffered opinion on relevancy grounds, not under Rule 704(b). See *id.* at 1177-1178. The Ninth Circuit affirmed, explaining that the proffered testimony was "directed solely at the propensity to actually commit the underlying sexual act, which was not before the jury." *Id.* at 1179.

The Ninth Circuit also made clear that, even if the expert testimony had been "offered to show an absence of intent," it would have been properly excluded under Rule 704(b) as going "to the ultimate issue the jury must decide." *Hofus*, 598 F.3d at 1179. In the court's view, "[t]o say that [the defendant] meant the texting only as fantasy is simply another way of saying he did not really intend to entice or persuade the young girls, which is precisely the question for the jury." *Id.* at 1180. That reasoning is fully consistent with the decision below. And to the extent that petitioner's short parenthetical about the case focuses on a different portion of the expert's testimony, concerning hebophilia, the Ninth Circuit did not directly address whether it was properly admitted under Rule 704(b). See *id.* at 1177, 1180 & n.6.

Finally, in *United States* v. *Gladish*, 536 F.3d 646 (7th Cir. 2008), the defendant's expert was precluded from testifying that the defendant sought "sexual gratification in Internet chat rooms" because of his fear of rejection from "'adult interpersonal relationships,'" *id.* at 650. The district court apparently viewed that evidence as amounting to an expert opinion on the defendant's intent, and the Seventh Circuit disagreed. See *ibid.* But the Seventh Circuit emphasized that the precise nature and scope of the proposed expert opinion was unclear; that it appeared principally to address not the defendant's intent, but whether the defendant would "*act* on his intent"; and that Rule 704(b) would prohibit any expert opinion that "the defendant did not intend to have sex with" the fictitious underage victim. *Id.* at 650-651 (emphasis added). The decision in *Gladish* would not compel a future Seventh Circuit panel to find that the district court abused its discretion on the different facts here.

4. At all events, this case would be an unsuitable vehicle in which to address Rule 704(b) for two reasons.

First, the district court determined that the same proposed testimony was inadmissible under Rule 403. Pet. App. 33a-34a. That alternative determination was correct and would render any question about the application of Rule 704(b) to the same testimony academic. See *ibid.*; Gov't C.A. Br. 16-18.

Second, any evidentiary error in the exclusion of a portion of Dr. Whitney's expert testimony was harmless in light of the overwhelming evidence of petitioner's guilt. See Fed. R. Crim. P. 52(a); *Brecht* v. *Abrahamson*, 507 U.S. 619, 631-632 (1993). Among other things, the government presented evidence about petitioner's extensive, months-long series of messages with the

undercover agent in which petitioner arranged to have sex with a person he believed to be 11 years old; the apparent child pornography found on petitioner's phone; and the additional evidence from his phone that he had come to the arranged rendezvous prepared to show that he was free of sexually transmitted diseases. See pp. 2-3, *supra*; cf. Gov't C.A. Br. 19-22.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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