Nos. 24-1865, 24-1866, 24-1867, 24-1868

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

In Re: Paraquat Products Liability Litigation

FREDERICK L. RICHTER and KAREN RICHTER, Individuals

Plaintiffs - Appellants

v.

SYNGENTA CROP PROTECTION, LLC, et al.,

Defendants - Appellees.

On Appeal from the United States District Court for the Southern District of Illinois (East St. Louis)

Chief District Court Judge Nancy J. Rosenstengel

Nos. 21-md-03004, 21-pq-00571, 21-pq-01218, 21-pq-01560, 21-pq-00836

BRIEF OF *AMICI CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC., LAWYERS FOR CIVIL JUSTICE, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLEES

Lee Mickus
EVANS FEARS SCHUTTERT
McNULTY MICKUS
3900 E. Mexico Avenue, Suite 820
Denver, CO 80210
Telephone: (303) 656-2199
lmickus@efsmmlaw.com

Attorney for Amici Curiae

CERTIFICATE OF AUTHORSHIP AND SUPPORT

Amici Curiae Product Liability Advisory Council, Inc., Lawyers for Civil Justice, and the Chamber of Commerce of the United States of America state that no attorney for either party authored this brief in whole or in part. Only *amici's* undersigned counsel prepared its content. No party or party's counsel contributed any money to *amici* for preparing or submitting this brief, and no person or entity other than *amici*, their members, and their counsel contributed money to fund the preparation or submission of this brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF INTEREST

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with 100 corporate members representing a broad cross-section of product manufacturers from a diverse array of industries. Several hundred of the leading product liability defense attorneys in the country are nonvoting members of PLAC. Since 1983, PLAC has filed over 900 briefs as *amicus curiae*, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. Many of PLAC's *amicus* briefs have addressed the expert admissibility standard and courts' gatekeeping practices.

Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, defense trial lawyer organizations, and law firms that promotes excellence and fairness in the civil justice system. Since 1987, LCJ has advocated for rule reforms that (1) promote balance in the civil justice system; (2) reduce the costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation. LCJ has submitted several *amicus* briefs that draw on its engagement in the federal rulemaking process pertaining to Federal Rule of Evidence 702.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million

companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

All three *amici* have insight on the meaning, history, and application of Rule 702 from their involvement with the rulemaking process that resulted in the December 1, 2023 amendment. These *amici* all interacted with the Judicial Conference Advisory Committee on Evidence Rules and provided research and reasoning that supported adoption of the Rule 702 amendment, which corrects misconceptions of the expert admissibility standard and promotes uniform and predictable application.

PLAC's written comment to the Advisory Committee[1] surveyed federal expert admissibility rulings across the circuits following the 2000 amendments to Rule 702. PLAC identified many post-2000 rulings that ignored the substantive changes to Rule 702, and PLAC also provided a comprehensive look at

[1] Product Liability Advisory Council, Inc., *Comment on Amendments to Fed. R Evid. 702*, Comment to the Advisory Committee of Rules of Evidence and Rule 702 Subcommittee (Feb. 2, 2022), https://www.regulations.gov/comment/USC-RULES-EV-2021-0005-0044.

misstatements of the admissibility standard in every circuit. PLAC's analysis underscored for the Advisory Committee that court misunderstandings solidify when they are repeated in subsequent decisions and imported across circuit lines.

The Chamber also submitted comments to the Advisory Committee when it was considering the most recent amendment.[2] These observations focused on the mass tort litigation boom in the federal courts since the preceding Rule 702 amendment. The Chamber pointed out that the Advisory Committee notes to the 2000 amendment highlighted the requirement that the proponent of evidence demonstrate that it is more likely than not that expert testimony satisfy Rule 702, yet many courts continued to declare that they must favor admission of expert testimony over exclusion. This misapplication of the admissibility standard has allowed claims grounded in unreliable science to remain viable. The Chamber urged adoption of an amendment that would produce a consistent approach to courts' gatekeeping mandate. In 2021, the Chamber's Institute for Legal Reform

[2] U.S. Chamber Institute for Legal Reform, *Amending Federal Rule of Evidence 702*, Comment to the Advisory Committee of Rules of Evidence and Rule 702 Subcommittee (Nov. 9, 2020), https://www.uscourts.gov/sites/default/files/20-ev-cc_suggestion_from_u.s._chamber_institute_for_legal_reform_-_rule_702_0.pdf.

also published a white paper describing patterns of errors in judicial gatekeeping and explaining why Rule 702 should be amended.[3]

LCJ provided comments and original research to the Advisory Committee at several points in the rulemaking process.[4] LCJ's analysis demonstrated widespread judicial misunderstanding of Rule 702's requirements. LCJ identified many courts – including district courts within the Seventh Circuit – which fail to recognize that the sufficiency of an expert's factual basis is an *admissibility* consideration under Rule 702(b) and fail to apply the Federal Rule of Evidence 104(a) burden of proof to expert admissibility decisions. Because it was adopted

[3] U.S. Chamber Institute for Legal Reform, *Fact or Fiction: Ensuring the Integrity of Expert Testimony* (Feb. 2021), https://instituteforlegalreform.com/wp-content/uploads/2021/02/Expert-Testimony-Paper-FINAL.pdf.

[4] *E.g.*, Lawyers for Civil Justice, *Clarity and Emphasis: The Committee's Proposed Rule 702 Amendment Would Provide Much-Needed Guidance About the Proper Standards for Admissibility of Expert Evidence and the Reliable Application of an Expert's Basis and Methodology*, Comment to the Advisory Committee of Rules of Evidence and Rule 702 Subcommittee (Sept. 1, 2021), https://static1.squarespace.com/static/640b6c7e5b8934552d35ab05/t/64872bd8aa883f4ddeae6382/1686580184749/lcj_public_comment_on_rule_702_amendment_sept_1_2021.pdf; Lawyers for Civil Justice, *Why Loudermill Speaks Louder than the Rule: A "DNA" Analysis of Rule 702 Case Law Shows that Courts Continue to Rely on Pre-Daubert Standards Without Understanding that the 2000 Amendment Changed the Law*, Comment to the Advisory Committee of Rules of Evidence and Rule 702 Subcommittee (Oct. 20, 2020), https://20-ev-y_suggestion_from_lawyers_for_civil_justice_-_rule_702_0.pdf (uscourts.gov).

by the U.S. Supreme Court[5] and enacted under the Rules Enabling Act, Rule 702 supersedes any other source of law. But courts nonetheless often rely on caselaw that cannot be reconciled with Rule 702's directives. LCJ advocated for specific changes, including adding into the rule's text an explicit reference to the court as the decision-maker, so that Rule 702 would give unmistakable direction about judges' gatekeeping responsibilities.[6]

This brief will assist the Court in addressing the issues presented by relaying from *amici*'s experience how Rule 702's amendment aimed to correct errant practices, even as Plaintiffs essentially urge this Court to ignore that recent clarification of the gatekeeping function and overturn the District Court's exclusion of Plaintiffs' proffered expert testimony. *Amici*'s brief will address what spurred the amendment and identify misunderstandings it was designed to clarify.

---

[5] *See* Communication from the Chief Justice Transmitting Amendments to the Federal Rules of Evidence (Apr. 24, 2023) at 1, 7, https://www.govinfo.gov/content/pkg/CDOC-118hdoc33/pdf/CDOC-118hdoc33.pdf.

[6] *See* Memorandum from Daniel J. Capra and Liesa L. Richter, Reporters, Advisory Committee on Evidence Rules, to Advisory Committee on Evidence Rules, *Possible Amendment to Rule 702* (Oct. 1, 2021) at 4, *in* ADVISORY COMMITTEE ON EVIDENCE RULES NOVEMBER 2021 AGENDA BOOK 135 (2021),https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_agenda_book_november_202110-19_0.pdf ("LCJ's suggestion to reinsert a reference to the court has much to commend it. . . . Given the fact that the reason the rule is being amended is that some courts did not construe the 2000 amendment properly, it makes eminent sense to make it as explicit as possible.").

Accordingly, PLAC, LCJ, and the Chamber have simultaneously filed an unopposed motion for leave to file this proposed *amicus* brief in support of Defendants-Appellees urging affirmance with clarifying guidance.

ARGUMENT

Before the 2023 amendment of Rule 702, "many courts" incorrectly applied the rule and stated that "the critical questions of sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility." Fed. R. Evid. 702 advisory committee's note to 2023 amendment. Thus, the text of Rule 702 was consequently changed "to clarify and emphasize that expert testimony *may not be admitted* unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule." *Id*. (emphasis added); *see also Brown v. City of Chicago*, No. 19 CV 4082, 2024 WL 3791634, at *1 (N.D. Ill. Aug. 13, 2024) (observing that "[r]ecent amendments to Rule 702 correct a common misunderstanding" that the expert's factual basis and application of methodology "are questions of weight and not admissibility.") (quotation omitted).

Nonetheless, courts and litigants in the Seventh Circuit remain considerably confused about the gatekeeping function, and this case provides a compelling opportunity for the Court to cure these misunderstandings. Indeed, Plaintiffs raise arguments that reiterate the erroneous conceptions that prompted the corrective 2023

amendment. Ignoring the explicit requirement that "the court" must determine whether Rule 702's admissibility criteria have been met, Plaintiffs contend:

- "[A] court *cannot* exclude expert testimony based on the 'quality of the data used in applying the methodology or the conclusions produced." Pl. Br. at 21 (quoting *Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 806 (7th Cir. 2013) (emphasis added)).

- "[T]he quality of Dr. Wells's explanations and the correctness of his conclusions are for the jury to consider in deciding whether to credit his testimony[,] . . . not grounds for exclusion under Rule 702." Pl. Br. at 38.

- "[T]he district court erred in excluding Dr. Wells because he supposedly inconsistently applied aspects of his methodology." Pl. Br. at 19.

Plaintiffs also overlook Rule 702's requirement that they prove by a preponderance of the evidence that their expert's testimony satisfies the rule, arguing that:

- "A reasoned explanation was all that was required of [the expert]." Pl. Br. at 49.

- "[I]f an expert offers suspect reasoning, the answer is not exclusion but to ensure 'opposing counsel has been provided the opportunity to cross-examine the expert regarding his conclusions and the facts on which they are based.'" Pl. Br. at 21 (quoting *Smith v. Ford Motor Co*., 215 F.3d 713, 719 (7th Cir. 2000)).

These assertions are incompatible with amended Rule 702.

Like Plaintiffs, some district courts within the Seventh Circuit still insist, despite the mandate of Rule 702(b), that "[a]s a general rule, questions relating to the bases and sources of an expert's opinion affect only the weight to be assigned that opinion rather than its admissibility." *Gibson v. Chubb Nat'l Ins. Co.*, No. 20

C 1069, 2024 WL 2209494, at *5 (N.D. Ill. May 14, 2024) (quotation omitted). Other courts mistakenly declare that challenging "the data the expert relied upon" does not constitute "a basis to exclude an opinion." *Olson v. Gomez*, No. 18 CV 2523, 2024 WL 3455066, at *4 (N.D. Ill. July 28, 2024). In such courts' restrictive conception of gatekeeping, they must adhere to the notion that the "soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact," despite Rule 702's corrective changes. *See*, *e.g.*, *Jenson v. Lowe's Home Centers, LLC*, No. 1:22-cv-1100-JRS-CSW, 2024 WL 1340324 (S.D. Ind. Mar. 29, 2024) (quoting and following *Smith*). And some courts inexplicably ignore Rule 702's requirement that the testimony's proponent demonstrate by a preponderance of evidence that the testimony satisfies the rule, instead declaring that the rule favors admission over exclusion.[7]

[7] *See*, *e.g.*, *Pogorzelska v. Vandercook College of Music*, No. 19-cv-05683, 2023 WL 3819025, at * (N.D. Ill. June 5, 2023) ("the standard for admitting expert testimony is liberal, and rejection . . . is the exception rather than the rule.") (quotation omitted); *Auto-Owners Ins. Co. Makita USA, Inc.*, 20-cv-220-wmc, 2021 WL 6196975, at *3 (W.D. Wis. Dec. 30, 2021) (expert testimony is "liberally admissible under the Federal Rules of Evidence"); *United States v. Harris*, Case No. 17-CR-167-2-JPS, 2019 WL 117982, at *1 (E.D. Wis. Jan. 7, 2019) (expert testimony "should be liberally admitted"); *Est. of Freiwald by Freiwald v. Fatoki*, No. 18-C-896, 2020 WL 6712467, at *6 (E.D. Wis. Nov. 16, 2020) ("The rule on expert testimony is liberal, however, and doubts about the usefulness of an expert's testimony are generally resolved in favor of admissibility."); *Saccameno v. Ocwen Loan Servicing, LLC*, No. 15 C 1164, 2018 WL 10609657, at *1 (N.D. Ill. Mar. 21, 2018) (same).

Here, by contrast, the District Court properly applied Rule 702's requirements. Consistent with Rule 702(b)'s directive to evaluate the sufficiency of the expert's facts or data, the court observed that the expert's analysis involves "a selective presentation of supportive evidence that fails to meaningfully account for data points that refute his conclusions[,]" among other flaws. Memorandum and Order, App. at A92, R. Doc. 5237 at 92; *see also id*. at A63, R. Doc. 5237 at 63 (finding that "the lack of replicability . . . is a foundational deficiency in the application of Dr. Wells' chosen methodology."). The court also could not conclude that Dr. Wells applied his methodology reliably to the facts of the case, as Rule 702(d) directs, and instead determined that Plaintiffs "d[id] not show that Dr. Wells faithfully applied the necessary steps of his chosen methodology[.]" *Id*. at A64, R. Doc. 5237 at 64; *see also id*. at 67, R. Doc. 5237 at 67) (Dr. Wells engaged in "methodological shapeshifting"). By assessing the sufficiency of the proffered expert's factual basis and the reliability of his methodology's application as questions of admissibility subject to Plaintiffs' preponderance burden of proof, the court faithfully applied amended Rule 702.

Although the District Court followed Rule 702 and so should be affirmed, courts and litigants within the Seventh Circuit remain confused about the gatekeeping standard. A significant number of rulings fail to apply the corrections directed by amended Rule 702. Courts voicing these misstatements sow confusion

with litigants, including Plaintiffs, about the nature of Rule 702's admissibility criteria and the applicable burden of proof. They need direction. This case provides the Court the chance to provide necessary guidance.

THE SEVENTH CIRCUIT SHOULD CLARIFY THAT FEDERAL RULE OF EVIDENCE 702 GOVERNS THE ADMISSIBILITY OF EXPERT TESTIMONY.

The Court should identify Rule 702 as the authority directing the admissibility analysis district courts must undertake, and should also highlight descriptions of the gatekeeping function that amount to error. In particular, the Court should confirm that judges must consider an expert's factual basis and methodological reliability as matters of admissibility rather than weight, and that the gatekeeping analysis does not favor admission over exclusion. Plaintiffs' embrace of these misconceptions shows the need for this Court to align the gatekeeping function with the requirements of amended Rule 702.

1. Rule 702, Not Caselaw, Establishes the Admissibility Standard.

Federal Rule of Evidence 702 is the bedrock authority "governing expert testimony" – it establishes the criteria for admission. *Daubert v. Merrell Dow Pharms., Inc*., 509 U.S. 579, 588-589 (1993). The Rules Enabling Act empowers the Supreme Court to prescribe "rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals." 28 U.S.C. § 2072(a). As a rule of evidence adopted by the Supreme

Court[8] and enacted under the Rules Enabling Act, Rule 702 supersedes any other source of law: "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072(b).[9] Courts do not have discretion to alter the standard for admissibility. Thus, "the elements of Rule 702, not the caselaw, are the starting point for the requirements of admissibility."[10]

Rule 702 enumerates several admissibility requirements that "*the court*" must find established before admitting expert opinions into evidence: helpfulness to the trier of fact, sufficient factual basis, use of reliable principles and methods, and reliable application of the methodology to the facts of the case. Fed. R. Evid. 702 (emphasis added). Rule 702 also specifies the burden of proof courts must use to decide whether these admissibility criteria are established: it is necessary that "the proponent demonstrate to the court that *it is more likely than not.*" *Id*. (emphasis added). This neutral standard leaves no room for presumptions of

---

[8] *See* Communication from the Chief Justice, *supra* n. 5, at 1, 7.

[9] *See also Kan. City S. Ry. Co. v. Sny Island Levee Drainage Dist.*, 831 F.3d 892, 900 (7th Cir. 2016) (stating that the litigants "should have paid more attention to Federal Rule of Evidence 702, which superseded *Daubert* many years ago"); *United States v. Parra*, 402 F.3d 752, 758 (7th Cir. 2005) ("At this point, Rule 702 has superseded *Daubert*").

[10] Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039, 2060 (2020). Judge Schroeder was Chair of the Advisory Committee on Evidence Rules' Subcommittee on Rule 702 during the rulemaking process that resulted in the 2023 amendments. *Id*. at 2039, n. a1.

admissibility. Fed. R. Evid. 702 advisory committee's note to 2023 amendment ("expert testimony *may not be admitted* unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in [Rule 702]."") (emphasis added). Rule 702 establishes both the inquiries courts must make and the threshold courts must use to determine whether proposed opinion testimony should be admitted.

2. Rule 702 Was Amended to Reject the Gatekeeping Characterizations that Plaintiffs and Some District Courts Erroneously Repeat.

Rule 702 was amended effective December 1, 2023, to correct erroneous practices in which courts applied an improper burden of proof and failed to consider all of the admissibility prerequisites. Before the amendment, courts often misstated and misapplied these aspects of Rule 702:

> It is clear that a judge should not allow expert testimony without determining that all requirements of Rule 702 are met by a preponderance of the evidence. . . . *It is not appropriate for these determinations to be punted to the jury, but judges often do so*.[11]

---

[11] Minutes - Committee on Rules of Practice & Procedure, Report of the Advisory Committee on Evidence Rules (Jan. 5, 2021) at 25, *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2021 AGENDA BOOK 36 (2021), https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_-_agenda_book_spring_2021_0.pdf (emphasis added). Commenting on research revealing the breadth of the problem, the Reporter to the Advisory Committee similarly observed:

> Many opinions can be found with broad statements such as "challenges to the sufficiency of an expert's basis raise questions of

The Advisory Committee designed the 2023 amendment to stop courts from repeating these errors:

> the Committee resolved to respond to the fact that many courts have declared that the reliability requirements set forth in Rule 702(b) and (d) – that the expert has relied on sufficient facts or data and has reliably applied a reliable methodology – are questions of weight and not admissibility, and more broadly that expert testimony is presumed to be admissible. *These statements misstate Rule 702*, because its admissibility requirements must be established to a court by a preponderance of the evidence.[12]

The 2023 changes to Rule 702 make "quite clear" as "a simple matter of textual analysis" that it is "wrong" to state "[t]here is a presumption in favor of admitting expert testimony."[13] Likewise, it is "certainly incorrect" for a court to declare,

---

> weight and not admissibility" – *a misstatement made by circuit courts and district courts in a disturbing number of cases*.

Memorandum from Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules, to Advisory Committee on Evidence Rules, *Possible Amendment to Rule 702* (Apr. 1, 2021) at 11, *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2021 AGENDA BOOK 90 (2021), https://www.uscourts.gov/sites/default/files/ advisory_committee_on_evidence_rules_-_agenda_book_spring_2021_0.pdf (emphasis added).

[12] Hon. Patrick J. Schiltz, Report of the Advisory Committee on Evidence Rules (May 15, 2022) at 6, *in* COMMITTEE ON RULES OF PRACTICE & PROCEDURE JUNE 2022 AGENDA BOOK 866 (2022), https://www.uscourts.gov/sites/default/files/2022-6_standing_committee_agenda_book_final.pdf (emphasis added).

[13] Memorandum from Daniel J. Capra and Liesa L. Richter, Reporters, Advisory Committee on Evidence Rules, to Advisory Committee on Evidence Rules,

following enactment of the amendment, that "[t]he sufficiency of facts or data supporting an expert opinion is a question for the jury, not the court."[14]

The course correction established by the 2023 amendment has been recognized by several courts. For example, the Sixth Circuit observed that the Rule 702 changes "were drafted *to correct* some court decisions incorrectly holding 'that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility.'" *In re Onglyza (Saxagliptin) and Kombiglyze (Saxagliptin and Metformin) Prods. Liab. Litig*., 93 F.4th 339, 348 n.7 (2024) (emphasis added); *see also Harris v. Fedex Corp. Svcs., Inc*., 92 F.4th 286, 303 (5th Cir. 2024) (district court "abdicated its role as gatekeeper" by allowing expert "to testify without a proper foundation" in contravention of Rule 702(b)); *Sardis v. Overhead Door Corp*., 10 F.4th 268, 283-84 (4th Cir. 2021) (reversing admission of expert testimony and observing that the proposed Rule 702 amendments address and reject "incorrect" decisions finding expert's factual basis and methodological application to present issues of weight rather than admissibility). Amended Rule

---

Possible Amendment to Rule 702 (Apr. 1, 2022) at 24-25, *in* ADVISORY COMMITTEE ON EVIDENCE RULES MAY 2022 AGENDA BOOK 125 (2022), https://www.uscourts.gov/sites/default/files/evidence_agenda_book_may_6_2022.pdf; *see also id*. at 24 ("the wrong-ness of these statements is absolutely apparent from the inclusion of the preponderance standard in the text.").

[14] *Id.*

702 also leaves no room for courts to presume that opinion testimony is admissible, because "the proponent of expert testimony must show by a preponderance of the evidence that the proposed testimony satisfies each of the rule's requirements." *Farmers Ins. Co. of Ariz. v. DNS Auto Glass Shop LLC*, No. CV-21-01390-PHX-DGC, 2024 WL 1256042, at *7 (D. Ariz. Mar. 25, 2024);[15] *see also Sardis*, 10 F.4th at 283 (noting the Advisory Committee's declaration that judges must "apply the preponderance standard of admissibility to Rule 702's requirements").

3. Plaintiffs' Interpretation of the Courts' Gatekeeping Role Rests on Caselaw That Does Not Follow Rule 702.

Plaintiffs fail to recognize that Rule 702 itself, not superseded caselaw, establishes the admissibility standard courts must apply. Amended Rule 702 is the governing law, and it directs a specific analysis: "Now, courts must ensure the proponent of expert testimony establishes that each of the four elements of Rule 702 are satisfied by a preponderance of the evidence." *West v. Home Depot U.S.A., Inc*., No 21 CV 1145, 2024 WL 2845988, at *3 (N.D. Ill. June 5, 2024).

[15] Judge David G. Campbell, who wrote the *Farmers Ins*. decision, chaired the Judicial Conference Committee on Rules of Practice and Procedure and participated in the Advisory Committee's discussions on amending Rule 702. *See* Daniel J. Capra, *Symposium on Forensic Expert Testimony, Daubert, and Rule 702*, 86 FORDHAM L. REV. 1463, 1464 (2018).

This Court should underscore that caselaw statements that do not reflect the Rule 702 standard are not good law and should not influence how courts approach gatekeeping.[16]

A. The Rule 702 Factors Are Admissibility Determinations Courts Must Decide.

Plaintiffs contend that courts' gatekeeping authority extends only to a narrow range of methodology concerns, but those arguments cannot be squared with Rule 702. Plaintiffs assert that "the court's role is generally limited to assessing the reliability of the methodology – the framework – of the expert's analysis." Pl. Br. at 22, quoting *Manpower*, 732 F.3d at 807. According to Plaintiffs, "a court *cannot* exclude expert testimony based on the 'quality of the data used in applying the methodology or the conclusions produced.'" Pl. Br. at 21, quoting *Manpower*, 732 F.3d at 806 (emphasis added).[17] Plaintiffs mistakenly

---

[16] *See Knight v. Avco Corp.*, No. 4:21-CV-00702, 2024 WL 3746269, at *7 (N.D. Ill. Aug. 9, 2024) ("this Court is not obliged to follow precedent which represents an erroneous application of Rule 702"); *see also* Schroeder, *supra* n. 10, at 2060:

> In the vast majority of cases under question, while Rule 702 and relevant cases are cited, there is no acknowledgement that the gatekeeper function requires application of Rule 104(a)'s preponderance test, much less for *each* of the elements of the Rule. Instead, courts tend to defer to statements from caselaw, even if it is outdated. (emphasis original).

[17] *See also* Pl. Br. at 24 (claiming the District Court exceeded its role in finding Plaintiffs' expert "failed to reliably apply his chosen methodology"), 38 (arguing

attempt to elevate outdated caselaw declarations above the Rule 702 admissibility standard.

Indeed, in making these arguments, Plaintiffs rely heavily on pre-amendment decisions such as *Smith* and *Manpower*. Pl. Br. at 18, 21, 22, 23, 24, 28, 37, 38 (citing cases). But these opinions rest on a narrow understanding of gatekeeping that does not accurately reflect Rule 702, particularly in its current state. *Smith* wrongly places analysis of the expert's factual foundation beyond courts' authority:

> The soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact[.]

215 F.3d at 718 (citing *Daubert*, 509 U.S. at 595).[18] Building on this statement, *Manpower* concludes that courts may not exclude an expert despite finding that the facts on which the opinions rest reveal a lack of reliability. *See* 732 F.3d at 806,

---

that an inconsistently applied methodology is "at best fodder for cross-examination, not grounds for exclusion"); 38-39 ("the quality of Dr. Wells's explanations and the correctness of his conclusions are for the jury to consider in deciding whether to credit his testimony—after Defendants had an opportunity to use cross-examination to attack—not grounds for exclusion under Rule 702"), 49 ("the court overstepped *Daubert*'s bounds, improperly characterizing its skepticism of Dr. Wells's explanations for study selection as methodological defects").

[18] *See also id*. at 718 ("we emphasize that the court's gatekeeping function focuses on an examination of the expert's methodology.").

810 (faulting district court because its assessment of "the reliability of [the expert's] testimony" involved addressing "the soundness of the factual underpinnings of his calculation.").[19] *Manpower*, at its core, holds that "an expert's reliance on faulty information is a matter to be explored on cross-examination; it does not go to admissibility." *Id*. at 809.

The restricted view of judicial gatekeeping set forth in *Smith* reflects an interpretation of the 1975 version of Rule 702. *Smith*, 215 F.3d at 718. At that time, Rule 702 stated:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The Court in *Smith* did not have the benefit of the explicit reference in Rule 702(b) to "sufficient facts or data" as a reliability consideration. This text was not added until 2000, when Rule 702 was strengthened to put in place "a more rigorous and structured approach than some courts are currently employing."[20] In particular, the

---

[19] *See also id*. at 807 ("the selection of data inputs to employ in a model is a question separate from the reliability of the methodology reflected in the model itself."); *id*. at 808 ("[T]he reliability of data and assumptions used in applying a methodology is tested by the adversarial process and determined by the jury[.]").

[20] *See* Hon. Fern M. Smith, Report of the Advisory Committee on Evidence Rules (May 1, 1999) at 7, *in* ADVISORY COMMITTEE ON EVIDENCE RULES

2000 amendments added subparts (a) through (d) to Rule 702, which provide "general standards that *the trial court must use* to assess the reliability and helpfulness of proffered expert testimony." Fed. R. Evid. 702 advisory committee's note to 2000 amendment (emphasis added).[21]

Nonetheless, *Manpower* reiterated *Smith*'s "factual underpinnings are factual matters" statement and embraced the distinction *Smith* drew between gatekeeping assessments focused on methodology and those that address the expert's factual basis. *Manpower*, 732 F.3d at 806 (quoting *Smith*, 215 F.3d at 718). The *Manpower* opinion took this approach even though Rule 702 had been amended in 2000 after the *Smith* ruling, and those modifications added to Rule 702(b) and its explicit direction that courts must consider the sufficiency of an expert's factual basis. *Manpower* did not address whether the expansion of Rule 702's enumerated admissibility elements required reconsideration of the limitation articulated in *Smith*. Unsurprisingly, restricting courts' authority to evaluate the expert's factual

---

OCTOBER 1999 AGENDA BOOK 52 (1999), https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-october-1999.

[21] *See also* Fed. R. Evid. 702 advisory committee's note to 2000 amendment ("The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative *before it can be admitted*.") (emphasis added); Capra (2021), *supra* n. 11, at 10 ("The Rule provides that the requirements of sufficient basis and reliable application *must be treated as questions of admissibility*") (emphasis added).

foundation, as *Manpower* did, does not follow the prevailing understanding of gatekeeping:

> The *Manpower* Court's understanding of the line between data and methodology . . . and its rigidity is not in keeping with the approach taken by other federal appellate courts. Instead, many federal courts have explained the *Daubert* standard in ways that reject this sharp line and acknowledge that problems with data and data selection (which itself can involve its own methodology) can bear on admissibility before the judge and not just weight before the jury.

Katz, Abosch, Windesheim, Gershman & Freedman, P.A., v. Parkway Neuroscience and Spine Institute, LLC, 301 A.2d 335, 372-73 (Md. 2023) (citations omitted).

The 2023 amendment dispels any question about courts' current authority to exclude expert testimony where it lacks adequate factual foundation. *See id.* at 379 ("The direction of analogous Federal Rule 702 [with its forthcoming amendment] confirms our understanding of meaningful gatekeeping as to an expert opinion's factual basis."). The Advisory Committee explained that opinions restricting judicial gatekeeping to evaluating only the expert's methodology reflect error:

> many courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a).[22]

[22] Fed. R. Evid. 702 advisory committee's note to 2023 amendment; *see also* Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Forensic Evidence, Daubert and*

Even though Rule 702 now requires exclusion of expert opinions that are not supported by adequate data or facts, some courts within this Circuit continue to quote and follow the "factual underpinnings are factual matters" statement that originated in *Smith*.[23] Some litigants, including Plaintiffs, encourage courts to apply this approach rather than conform to the directives of Rule 702. *See* Pl. Br. at 18, 21-24, 37-38. This ongoing misunderstanding highlights the need for the Court to articulate that Rule 702 itself sets the standard that courts must use to determine expert admissibility and supersedes inconsistent caselaw. 28 U.S.C. § 2072(b); *Kan. City S. Ry.*, 831 F.3d at 900.[24]

Rule 702 (Apr. 1, 2018) at 49 *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2018 AGENDA BOOK 49 (2018), https://www.uscourts.gov/sites/default/files/agenda_book_advisory_committee_on_rules_of_evidence_-_final.pdf (uscourts.gov) ("[T]here are a number of lower court decisions that do not comply with Rule 702(b) or (d). . . . [S]ome courts have defied the Rule's requirements – which stem from *Daubert* – that the sufficiency of an expert's basis and the application of methodology are both admissibility questions requiring a showing to the court by a preponderance of the evidence.").

[23] *See, e.g.*, *Jose-Nicolas v. Wexford Health Sources, Inc.*, Case No. 20 C 5507, 2024 WL 3251368, at *5 (N.D. Ill. July 1, 2024); *Gibson*, 2024 WL 2209494, at *5; *Jenson*, 2024 WL 1340324, at *1; *Signal Fin. Holdings LLC v. Looking Glass Fin. LLC*, No. 17 C 8816, 2022 WL 540662, at *2 (N.D. Ill. Feb. 23, 2022); *see also Olson*, 2024 WL 3455066, at *1, *4 (quoting and following similar statement from *Manpower*, 732 F.3d at 806).

[24] *See also* Capra (2021), *supra* n. 11, at 11 (indicating the need for clarification of the governing standard because "statements such as 'challenges to the sufficiency of an expert's basis raise questions of weight and not admissibility' . . . [are]

B. Rule 702 Does Not Prefer Admission Over Exclusion.

Rule 702 does not allow courts to put a judicial thumb on the scale when deciding whether proffered opinion testimony is admissible, although that is what Plaintiffs would have this Court do. *See* Pl. Br. 23-24 (indicating that exclusion is only appropriate where an expert has not "followed accepted practice"), 49 ("A reasoned explanation was all that was required of him."). Plaintiffs parrot the appropriate preponderance standard from Rule 702 but in the next breath claim that "[s]o long as scientific testimony rests on 'good grounds,' it should be admitted[.]" *See* Pl. Br. 21. Some district courts in this Circuit have also suggested Rule 702 is a "liberal" standard that prefers admission over exclusion of a proffered expert's testimony.[25]

Although *Daubert* describes the Federal Rules of Evidence as having a "liberal thrust" that relaxes "the traditional barriers to opinion testimony,"[26] that observation must be considered in context. The statement contrasts Rule 702, as it existed in 1993, against the "rigid 'general acceptance' requirement" of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) that was under consideration.

---

misstatements of the law [that] can have a pernicious effect beyond the specific case.").

[25] *See* n. 7, *supra* (listing cases).

[26] *Daubert*, 509 U.S. at 588 (quotation omitted).

Daubert, 509 U.S. at 588-89. The Court in *Daubert* concluded that Rule 702, not case law, sets the standard courts must use to determine admissibility of expert opinions. *Id*. at 589. In fact, Rule 702 "displaced" alternative conceptions of gatekeeping that are "incompatible" with the rule. *Id*.; *see also Jaurequi v. Carter Mfg. Co.*, 173 F.3d 1076, 1081 (8th Cir. 1999) ("In *Daubert*, the Supreme Court determined that the *Frye* test . . . had been superseded by Rule 702 of the Federal Rules of Evidence.").[27]

Because Rule 702 controls the admissibility analysis, courts must apply the steps the rule now describes. *See* 28 U.S.C. § 2072(b). Reading the rule to favor admission would fail to hold the proponent responsible for establishing that the expert's analysis more likely than not meets all the Rule 702 requirements. On the contrary, such a reading would improperly flip the burden to the opposing party. To the extent cases suggest that courts can presume experts' admissibility and tilt the gatekeeping analysis, "[t]hese statements misstate Rule 702[.]"[28] To correct

---

[27] Judge Schroeder warns against reliance on *Daubert's* "liberal thrust" statement given Rule 702's status as the governing authority: "statements as to the 'liberal thrust' of Rule 702 and 'flexible' standard trial judges should apply must be contextualized. Expansion of the gatekeeper inquiry is necessarily cabined by the elements of Rule 702." Schroeder, *supra* n. 10, at 2060. *See also* Capra (2021), *supra* n. 11, at 11, n. 4 (declaring that it "is decidedly not the case" that expert testimony can be described as "presumptively admissible").

[28] Schiltz, *supra* n. 12, at 6; *see also* Capra & Richter (2022), *supra* n. 13, at 25 (such statements "are wrong as a simple matter of textual analysis.").

these misconceptions and prevent similar misunderstandings, this Court should explain that ignoring or altering the preponderance of evidence standard constitutes a misapplication of Rule 702.

4. Rule 702 Gatekeeping Is an Indispensable Judicial Responsibility.

Gatekeeping is a critical court function that safeguards the integrity of jury trials. Contrary to Plaintiffs' contention that cross-examination is the solution when an expert offers "suspect reasoning,"[29] the recognized "key to *Daubert* is that *cross-examination alone is ineffective* in revealing nuanced defects in expert opinion testimony and that the trial judge must act as a gatekeeper *to ensure that unreliable opinions don't get to the jury in the first place*."[30] By definition, expert testimony "is outside the realm of an ordinary juror's knowledge," and so the juror's lay "knowledge and life experience offers little value in determining whether an expert is telling the truth about a matter requiring specialized study or training."[31] This information gulf impeding jurors' ability to identify expert

---

[29] Pl. Br. at 38; *see also id*. at 38-39 ("the quality of Dr. Wells's explanations and the correctness of his conclusions are for the jury to consider in deciding whether to credit his testimony— after Defendants had an opportunity to use cross-examination to attack—not grounds for exclusion under Rule 702.") (quotation omitted).

[30] Minutes of the Meeting of May 3, 2019, Advisory Comm. on Evidence Rules at 23, in ADVISORY COMMITTEE ON EVIDENCE RULES OCTOBER 2019 AGENDA BOOK 73 (2019) (emphasis added).

[31] U.S. Chamber Institute for Legal Reform, *supra*. n. 3, at 3.

missteps or exaggerations exists not just with respect to assessing the expert's chosen methodology, but also the sufficiency of the expert's factual basis and the application of the methodology.[32]

The Advisory Committee recognized jurors' limitations and structured Rule 702's requirements to protect the truth-finding purpose of jury trials:

> Judicial gatekeeping is essential because just as jurors may be unable, due to lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert's basis and methodology may reliably support.

Fed. R. Evid. 702 advisory committee's note to 2023 amendment. The responsibility to safeguard the integrity of trial proceedings falls on courts in enforcing Rule 702 by ensuring that an expert fulfills the admissibility criteria. *See*, *e.g.*, *Knight v. Avco Corp.*, No. 4:21-CV-00702, 2024 WL 3746269, at *6 (M.D. Pa. Aug. 9, 2024) ("because 'expert evidence can be both powerful and quite misleading,' courts have recognized that "the importance of the gatekeeping function cannot be overstated.'") (quoting *Sardis*, 10 F. 4th at 283). The Court

---

[32] Capra (2018), *supra* n. 22, at 50 ("The same 'white lab coat' problem – that the jury will not be able to figure out the expert's missteps – would seem to apply equally to basis, methodology and application.").

should remind district courts in this Circuit of the essential nature of their gatekeeping role.

5. The District Court's Analysis Follows Rule 702.

The District Court properly applied Rule 702's admissibility criteria and burden of proof to find that it was "unable to conclude, based on a preponderance of the evidence, that Dr. Wells' proffered opinions are sufficiently reliable to be presented to a jury." Memorandum and Order, App. at A35, R. Doc. 5237 at 35. Among other inadequacies, the court observed "a foundational deficiency" in the "application of Dr. Wells' chosen methodology," that he "*inconsistently applied*" his data selection criteria, engaged in "selective reliance on favorable evidence," and made "methodological flip-flop[s]." *Id*. at A63-66, 73, 75, 89, R. Doc. 5237, at 63-66, 73, 75, 89 (emphasis original). The court's finding that Plaintiffs failed to carry their burden of demonstrating that Dr. Wells had a sufficient factual basis and reliably applied his methodology to the facts of the case follows Rule 702. *United States v. Uchendu*, No. 2:22-cr-00160-JNP-2, 2024 WL 1016114, at *2 (D. Utah Mar. 8, 2024) (Under amended Rule 702 "questions as to the sufficiency of the basis for an expert's opinion and the application of his methodology go to admissibility rather than weight").

Each element of amended Rule 702 provides an independent basis for exclusion, and the District Court's findings provide multiple grounds for rejecting

Dr. Wells's testimony. Compliance with Rule 702(b) is lacking where, as here, the expert's foundation is incomplete and fails to account for relevant information that contradicts the expert's understanding. *Harris*, 92 F.4th at 303; *West*, 2024 WL 2845988, at *3 - *5; Memorandum and Order, App. at A92, R. Doc. 5237 at 92 (finding that Dr. Wells's analysis involved "a selective presentation of supportive evidence that fails to meaningfully account for data points that refute his conclusions."). Further, selecting study data using a "results-driven" approach, as the court observed with Dr. Wells, amounts to cherry-picking that constitutes "a quintessential example of applying methodologies (valid or otherwise) in an unreliable fashion" and is properly excluded under Rule 702(d). *In re Onglyza*, 93 F.4th at 347 (quotation omitted); Memorandum and Order, App. at A81, n.51, R. Doc. 5237 at 81, n.51. And in applying the preponderance standard to Rule 702's requirements, the court properly held Plaintiffs, as Dr. Wells's proponents, to their burden of affirmatively demonstrating Dr. Wells's opinions to be admissible.[33]

[33] *See*, *e.g.*, *DeWolff, Boberg & Asso. v. Pethick*, No. 3:20-CV-3649-L, 2024 WL 1396267 (N.D. Tex. Mar. 31, 2024) ("Contrary to Plaintiff's assertion, Defendants were not required to come forward with any evidence or legal authority regarding alternative methodologies or to establish that CAPM is an unacceptable method for calculating the discount rate in this case; rather, the burden of establishing the reliability of Dr. Miller's testimony is Plaintiff's alone.") (emphasis removed).

Memorandum and Order, App. at A35, R. Doc. 5237 at 35. Thus, the District Court's ruling faithfully applied amended Rule 702.

CONCLUSION

The District Court here correctly evaluated the proffered opinion testimony using Rule 702's burden of proof and its full set of admissibility criteria, and so should be affirmed. In challenging the expert's exclusion, Plaintiffs rely on the same misconceptions of gatekeeping that led to the 2023 amendment of Rule 702. This Court should dispel the lingering misunderstandings of the admissibility standard and remind district courts to apply the admissibility standard set forth in Rule 702 itself as they fulfill their essential gatekeeping role. Judge Schroeder has explained the need for this guidance:

> No doubt, in some cases the courts are misstating and misapplying Rule 702. Correction by the courts of appeals will go a long way to remedying the most obvious outliers.[34]

Litigants and courts will benefit from this Court's disavowal of caselaw statements that disregard the preponderance of evidence test or fail to consider the sufficiency of an expert's factual basis or methodological application as admissibility issues.

[34] Schroeder, *supra* n. 10, at 2059.

Dated: September 26, 2024

Respectfully Submitted

/s/ Lee Mickus

EVANS FEARS SCHUTTERT
McNULTY MICKUS
3900 E. Mexico Avenue
Suite 820
Denver, CO 80210
Telephone: (303) 656-2199

Attorney for Amici Curiae Products Liability Advisory Council, Inc., Lawyers for Civil Justice and the Chamber of Commerce of the United States of America

CERTIFICATE OF COMPLIANCE

Under Fed. R. App. P. 29(a)(4)(G), I certify that this brief complies with the type-volume limitation of Circuit Rule 29 because it contains 6,828 words excluding parts of the brief exempted by Fed. R. App. P. 32(f). This number of words is less than the 7,000 words allowed for an *amicus curiae* brief under Circuit Rule 29. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32, and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced 14-point Times New Roman font using Microsoft Word.

/s/ Lee Mickus

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2024, I electronically filed the foregoing Amicus Brief with the Clerk of Court using the CM/ECF System, which will send a notification of electronic filing to all counsel of record who are registered CM/ECF users.

/s/ Lee Mickus