No. 19-6277

IN THE SUPREME COURT OF THE UNITED STATES

MARIO RUVALCABA-GARCIA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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INTRODUCTION

In his petition for a writ of certiorari, Mr. Ruvalcaba asked this Court to harmonize the different remedies courts of appeals employ when a trial court fails to exercise its "gatekeeping role" under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). Mr. Ruvalcaba pointed out that while some courts of appeals conduct their own *Daubert* determinations in the first instance, others remand for the trial court to do the task for them, while still others remand for a new trial altogether. Pet. 8-9a. Because these approaches lead to very different results and frequently determine the outcome of the case, Mr. Ruvalcaba urged the Court to grant certiorari.

In its response, the government agrees that the trial court here failed to perform its "gatekeeping role" of "ensuring that the testimony is both relevant and reliable." Government Brief in Opposition (BIO) at 7. And the government raises no

procedural or vehicle concerns with Mr. Ruvalcaba's petition. Instead, it simply claims that "[t]he court of appeals' methodology is correct and does not conflict with any decision of this Court or another court of appeals." BIO at 7.

This assertion is wrong in two respects. First, the government's claim—that the circuit courts' conflicting precedent represents a single "flexible, case-specific" approach—glosses over the very real divisions in legal standards that lead to geographically-based outcomes. Second, the Ninth Circuit's fractured approach is not "correct," and even if it were, it would still require a grant of certiorari to bring the circuits who take a contrary approach in line. And because parties on all sides of a trial deserve fair notice of the correct legal remedy for failing to conduct a *Daubert* analysis, the Court should grant Mr. Ruvalcaba's petition for certiorari.

ARGUMENT

I. The courts of appeals use conflicting methodologies to remedy a trial court's abdication of its *Daubert* "gatekeeping" role.

In his petition, Mr. Ruvalcaba showed how the courts of appeals have remedied a trial court's failure to vet an expert witness's testimony in three different ways. Pet. 8-9a. Some circuits consider whether the admission or exclusion of the expert testimony affected the outcome of the trial; if it did, they remand for a new trial. Pet. 8a. Some circuits make a *Daubert* finding in the first instance based on their own fact-finding. Pet. 8a. And some circuits take a hybrid approach by conducting the initial *Daubert* determination when the record is sufficiently developed and remanding to the trial court when it is not. Pet. 8-9a.

Predictably, the government begins by denying the existence of this circuit split. BIO 12. But the government admits that when a trial court abdicates its *Daubert* "gatekeeping" role, the prosecutor may "prove harmlessness in either of two ways." BIO 9. First, the prosecutor may show that the result of the trial "would likely have been the same without [the expert's] testimony." BIO 9. Alternatively, the prosecutor may demonstrate that the expert's testimony was admissible "under a proper application of *Daubert* and [Federal Rule of Evidence] 702." BIO 9.

In other words, the government concedes that the courts of appeals are applying at least two different harmlessness tests: one that that considers whether the *expert evidence was admissible* even though the trial court abdicated its gatekeeping role (the "admissibility test") and one that considers whether the *verdict would have been different* without the expert's testimony (the "trial-outcome test"). But because each court of appeals is using one of these tests to the exclusion of the other, and because the test employed will frequently determine the outcome of the case, the government's acknowledgment of these dueling tests automatically concedes the circuit split.

Take, for example, the Tenth Circuit's decision in *Dodge v. Cotter Corp.*, 328 F.3d 1212 (10th Cir. 2003). As the government admits (BIO at 13), the court repeatedly stated that it lacked the evidence necessary to determine whether the expert testimony was admissible. *See id.* at 1227-29. And while it was "reluctant" to delay a final resolution, it concluded that "we must be faithful to our precedents which dictate that we reverse and remand to the district court for a new trial." *Id.*

at 1229. So rather than create an "undue risk of post-hic rationalization" by remanding to the trial court for a *Daubert* hearing under the admissibility test (as the First, Third, and Federal Circuits would have done), the court ordered a new trial under the trial-outcome test. *Id.* (quotations omitted).

By contrast, the Fifth Circuit in *Carlson v. Bioremedi Therapeutic Sys.*, spent three paragraphs discussing the expert's background and qualifications before concluding there was "no evidence to suggest" he was qualified to testify. 822 F.3d 194, 200 (5th Cir. 2016). But the court then pivoted, explaining that it "need not decide" whether his testimony was admissible because it must remand for a *Daubert* hearing. *Id.* at 201. Had this case arisen in the Fourth, Sixth, Seventh, or Eleventh Circuits, those courts would have used the admissibility test to find the expert unqualified and remanded for a new trial. But because it arose in the Fifth Circuit, the court merely remanded for a *Daubert* hearing.

The government repeatedly assures the Court that these inconsistencies merely reflect the "flexible," "case-specific," and "context-dependent" approach that harmless error review requires. BIO 11, 12, 15, 16. But the government points to no other prejudice analysis in which courts may select from *different* harmless error tests. Nor does it explain why courts should be able to select a harmless error test that it knows in advance will engineer the outcome. In other words, the government's characterization of these dueling tests as a "flexible, case-specific" approach is simply appellate code for "anything goes."

The government also attempts to minimize the impact of this conflicting precedent by claiming that none of these opinions held that "every *Daubert* gatekeeping error must be treated the same way." BIO at 14. *See also* BIO at 13 (court of appeals "did not suggest that such an approach was mandatory"); BIO at 15 (cases did not establish an "inflexible rule"); BIO at 15 (opinions "did not suggest that such an approach was mandatory or always appropriate").

But all of the cases Mr. Ruvalcaba cited are precedent decisions. They bind future panels and district courts. Contrary to the government's claim, their very existence demands that future cases presenting the same or similar fact patterns must "be treated the same way"—regardless of whether the opinion explicitly said so. Indeed, one need not look hard to find cases where judges followed the remedy in these cases, treating them as a "mandatory" or "inflexible rule." *See, e.g., United States v. Murra*, 879 F.3d 669, 678 (5th Cir. 2018) (requiring remand for a new trial "if the court is 'sure, after reviewing the entire record, that the error did not influence the jury or had but a very slight effect on its verdict.'") (quoting *Carlson*, 822 F.3d at 202); *Tuato v. Brown*, 85 F. App'x 674, 678 (10th Cir. 2003) (relying on *Dodge* to conclude that "[b]ecause the court abrogated its *Daubert* gatekeeping duty, we reverse and remand for a new trial").

And the government never denies that the outcome in Mr. Ruvalcaba's own case turned on this circuit split. No one—including the government—ever doubted that the fingerprint expert's testimony was the primary evidence linking Mr. Ruvalcaba to a set of documents that bore another man's name. *See* Brief of the

United States, 2018 WL 5608411 (C.A.9), 21-24 (never denying that the admission of the expert's testimony affected the verdict). And the government admits that the jury in the first trial could not reach a verdict even *with* the expert's testimony. BIO at 4. So under the trial-outcome test, the expert's testimony unquestionably affected the verdict and entitled Mr. Ruvalcaba to a new trial. But under the admissibility test, the outcome was preordained, since the Ninth Circuit had previously found the same expert qualified to testify. *See United States v. Flores*, 901 F.3d 1150, 1165 (9th Cir. 2018). This is precisely the type of geographic happenstance that should *not* determine whether someone is convicted of a crime and deprived of their liberty for years on end.

II. The Ninth Circuit's methodology is incorrect.

The government also claims that certiorari is not warranted because "[t]he court of appeals' methodology is correct." BIO at 7. Specifically, the government champions the Ninth Circuit's "flexible and context-dependent" approach because it purportedly avoids the kind of "mandatory presumptions and rigid rules" that can lead to reversal for "inconsequential errors." BIO at 11 (citing *Shinseki v. Sanders*, 556 U.S. 396, 407-08 (2009)).

But the government fails to disclose that the Court in *Shinseki* expressly limited this holding to *civil* cases. It explained that "[i]n criminal cases the Government seeks to deprive an individual of his liberty, thereby providing a good reason to require" a more stringent standard. *Shinseki*, 556 U.S. at 410. And the beyond-a-reasonable-doubt burden in criminal proceedings "justifies a rule

that makes it more difficult for the reviewing court to find that an error did not affect the outcome of a case." *Id.* at 410–11. So *Shinseki* actually supports Mr. Ruvalcaba's argument that the trial-outcome test is more appropriate for criminal cases such as his own.

In his petition, Mr. Ruvalcaba also pointed out that requiring courts to make a *Daubert* finding as a matter of first impression not only wastes valuable judicial resources, it also violates the long-held principle that a court of appeals is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Pet. 11-12a. The government shrugs off this concern, noting that any harmless error analysis is "fact-intensive and performed in the first instance by the court of appeals." BIO 10.

But this excuse ignores the critical difference between *reviewing for prejudice* (which courts of appeals routinely do) and *making a factual finding in the first instance* (which they do not). For instance, if a court of appeals considers whether the admission of expert testimony affected the jury's verdict, it analyzes facts that are normally within its purview—the weight of other evidence submitted at trial, statements of the attorneys, and the actions of the jury. By contrast, if a court makes a factual finding about whether an expert is qualified to testify, it must put itself in the shoes of the trial court and consider voluminous evidence relating to that expert's qualifications, peer review, error rates, and scientific methodologies as a matter of first impression. *See* Oral Argument, *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457 (9th Cir. 2014) (en banc), at 4:13, 23:04, 23:29 (noting the two

notebooks "about eight inches thick" of *Daubert* evidence). What's more, "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." *Anderson v. Bessemer City,* 470 U.S. 564, 573 (1985) (quotations omitted). So the initial factual finding of an expert's admissibility is an act of *first* view that trial courts are better equipped to handle, while an analysis of prejudice is an act of *review* that appellate courts are better equipped to handle.

Finally, even if the government's position is correct, this provides all the more reason to grant certiorari. According to the government, decisions such as *Dodge* are employing the wrong methodology by ordering a new trial that is "pointless," rather than remanding for a *Daubert* hearing. BIO at 14 (quoting then-Judge Gorsuch's opinion in *StorageCraft Tech. Corp. v. Kirby*, 744 F.3d 1183, 1190-91 & n.2 (10th Cir. 2014)). But the only way to eliminate these "pointless" trials is for the Court to grant certiorari and correct the wayward courts that are still remanding for a new trial when they should be remanding for a *Daubert* hearing. *See, e.g., Dodge,* 328 F.3d 1229 ("[W]e must be faithful to our precedents which dictate that we reverse and remand to the district court for a new trial.").

Indeed, then-Judge Gorsuch's opinion in *Storagecraft* confirms that such guidance is sorely needed. In that case, Judge Gorsuch applied the admissibility test but had to reckon with a prior Tenth Circuit decision that had applied the trial-outcome test. *Storagecraft Tech. Corp*, 744 F.3d at 1191 n.2 (citing *United States v. Roach*, 582 F.3d 1192, 1208 n.7 (10th Cir. 2009)). Judge Gorsuch resolved this conundrum by noting that "*Roach* did not seek to explain how this statement could

be squared with our earlier decision in *Kinser* [*v. Gehl Co.*, 184 F.3d 1259, 1269 (10th Cir. 1999)]." *Id.* And because "one panel of our court cannot overrule prior panel decisions," he concluded that *Kinser* controlled and applied the admissibility test. *Id.* So not only did Judge Gorsuch decline to treat this as a "flexible, case-specific" question, he acknowledged that courts were applying their precedent unevenly.

The government also contends that the Ninth Circuit's decision in *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457 (9th Cir. 2014) (en banc), is the only case that "explicitly discusses the question presented." BIO at 16. Even assuming this is true, it does not bode well for the government, as that case involved a contentious 6-5 split where the majority believed the correct remedy was to remand for a new trial under the trial-outcome test, while the dissent believed the correct remedy was to remand for a *Daubert* hearing under the admissibility test. *See id.* at 468 ("The majority thus unnecessarily burdens both the parties and the judicial system by ordering a new trial without having a sufficient basis to determine whether the disputed expert testimony was admissible.") (Nguyen, J., dissenting). As these cases in the Ninth and Tenth Circuits show, serious judicial discord exists over the proper remedy for a trial court's failure to conduct a *Daubert* analysis.

So contrary to the government's theory, the current state of the law does not represent a "flexible, case-specific" approach—it represents a free-for-all where judges may conduct a *Daubert* analysis when they feel like it and remand for an evidentiary hearing or a new trial when they don't. Parties like Mr. Ruvalcaba (and

countless others) deserve more consistency than this—they should be able to rely on a standard that determines when courts of appeals may conduct their own *Daubert* determinations, when they should remand for the trial court to hold an evidentiary hearing, and when they should remand for a new trial altogether. Only this Court can provide such a standard, and this confusion and inconsistency will continue to plague litigants and courts until it does.

CONCLUSION

For these reasons, the Court should grant Mr. Ruvalcaba's petition for certiorari.

Respectfully submitted,

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