No. 21-1100

In The Supreme Court of the United States

3M COMPANY; ARIZANT HEALTHCARE, INC.,

Petitioners,

v.

GEORGE AMADOR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF LAWYERS FOR CIVIL JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

MARY MASSARON
Counsel of Record
PLUNKETT COONEY
38505 Woodward Ave., Suite 100
Bloomfield Hills, MI 48304
(313) 983-4801
mmassaron@plunkettcooney.com

ALEXANDER DAHL
General Counsel
LAWYERS FOR CIVIL JUSTICE
1530 Wilson Blvd., Suite 1030
Arlington, VA 22209
(202) 429-0045
alex@strategicpolicycounsel.com

LEE MICKUS
EVANS FEARS & SCHUTTERT LLP
3200 Cherry Creek Dr. South, Suite 380
Denver, CO 80209
(303) 656-2199
lmickus@efstriallaw.com

Counsel for Amicus Curiae

March 9, 2022

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF THE AMICUS CURIAE

Lawyers for Civil Justice (LCJ)[1] is a national coalition of defense trial lawyer organizations, law firms, and corporations[2] that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 30 years, LCJ has advocated for procedural 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. Working through the Rules Enabling Act process, LCJ often urges proposals to reform aspects of the Federal Rules of Civil Procedure and Federal Rules of Evidence.

LCJ has specific expertise on the meaning, history, and application of Federal Rule of Evidence 702, drawing on its own efforts during the rulemaking process and the collective experience of its members who are

---

[1] Petitioners' and Respondent's counsel of record were provided timely notice in accordance with Supreme Court Rule 37.2(a), and have consented to the filing of this brief. Under Supreme Court Rule 37.6, amicus curiae LCJ certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. LCJ further certifies that neither Petitioners 3M Company and Arizant Healthcare, Inc., nor their counsel participated in writing or submitting this brief. Further, Petitioners and their counsel did not submit any monetary contribution to the preparation or submission of this brief.

[2] LCJ's membership is listed in its Annual Report, available at https://www.lfcj.com/uploads/1/1/2/0/112061707/final_lcj_annual_report_2020_-_july_13_2021.pdf.

involved in litigation in the federal courts. LCJ has submitted several extensive comments including original research to the Judicial Conference Advisory Committee on Evidence Rules.[3] LCJ's analysis reveals widespread misunderstanding of Rule 702's requirements and purposeful shifting of the expert admissibility standard away from the test set forth in Rule 702. LCJ has also filed an amicus brief with the Court in support of the petitioner in *Monsanto Co. v. Hardeman*, Case No. 21-241. In that case, LCJ also addressed deviations from Rule 702 in the lower courts and inconsistencies that have arisen when courts admit expert testimony based on court-created policy rather than following the language of Rule 702.

LCJ and its members have an interest in ensuring that the Federal Rules of Evidence be correctly and consistently interpreted, particularly Rule 702's preponderance of evidence test and enumerated admissibility criteria. That standard, not variations that modify or

---

[3] *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 Advisory Committee on Evidence Rules (Sept. 1, 2021); https://www.regulations.gov/comment/USC-RULES-EV-2021-0005-0007; *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://www.uscourts.gov/sites/default/files/20-ev-y_suggestion_from_lawyers_for_civil_justice_-_rule_702_0.pdf.

remove elements or alter the explicit admissibility requirements, reflects the result of the Rules Enabling Act's rulemaking process and is the governing law.

SUMMARY OF ARGUMENT

The Court should grant certiorari to address the Eighth Circuit's application of a gatekeeping standard that differs from Federal Rule of Evidence 702. This rule, and not any other source of law, provides the test that district courts must use to assess whether a proffered expert's opinions are admissible. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2316-17 (2016) (identifying Rule 702 as establishing the criteria under which "an expert may testify"). Review is needed because the Eighth Circuit has set aside Rule 702's requirements in favor of a less rigorous assessment that allows admission of opinion testimony without need to prove that the evidence satisfies Rule 702 by a preponderance of evidence. In this case, application of the excessively permissive Eighth Circuit standard caused unjustified reversal of the district court's ruling excluding improper expert testimony.

Review is also justified because the Eighth Circuit's erroneous departure from Rule 702 has influenced lower courts across the country. Additionally, some courts in other Circuits have taken a parallel approach to what the Eighth Circuit has done and developed alternative standards that explicitly prefer admission of opinion testimony as an outcome rather

than conducting an unbiased assessment of whether the preponderance of the evidence criteria has been satisfied. Despite Rule 702's overarching authority, courts often apply gatekeeping approaches that are less demanding than the "preponderance of the evidence" test and even overlook substantive admissibility considerations required by Rule 702.

Gatekeeping practices that conflict with Rule 702, as were applied here, have become a widespread, recognized problem. The Judicial Conference Advisory Committee on Evidence Rules reported that it "has determined that in a fair number of cases, the courts have found expert testimony admissible even though the proponent has not satisfied the Rule 702 (b) and (d) requirements by a preponderance of the evidence."[4] On the strength of this finding, it has proposed an amendment that would add the preponderance of the evidence test into the rule's text to clarify that courts must apply this test to each of Rule 702's considerations. The Court's guidance on the correct interpretation and application of Rule 702 would buttress these ongoing rulemaking efforts by giving much-needed definition to the highly variable gatekeeping analysis now seen in the lower courts.

Granting 3M's petition would allow the Court to resolve the lower courts' misunderstanding and reaffirm

---

[4] Hon. Patrick J. Schiltz, Report of the Advisory Committee on Evidence Rules (May 15, 2021) at 6, *in* COMMITTEE ON RULES OF PRACTICE & PROCEDURE JUNE 2021 AGENDA BOOK 818 (2021), https://www.uscourts.gov/sites/default/files/2021-06_standing_agenda_book.pdf.

Rule 702 as the primary authority that governs gatekeeping. The rulemaking process will not affect the widespread reliance on prior decisions in preference to Rule 702 itself occurring now across the district courts. This practice produces inconsistent and often inadequate scrutiny of expert testimony. The Eighth Circuit's use of a unique local standard as the basis for overturning an exclusion of opinion testimony in the context of a multidistrict litigation proceeding underscores the need for a national standard that yields uniform results across circuit boundaries. The Court should grant certiorari to clarify that courts err when they elevate caselaw-derived alternative approaches above the requirements established by Rule 702 when evaluating whether expert testimony qualifies for admission.

ARGUMENT

I. REVIEW IS NEEDED BECAUSE THE EIGHTH CIRCUIT'S LAX STANDARD FOR DECIDING WHETHER EXPERT TESTIMONY SHOULD BE ADMITTED CONFLICTS WITH RULE 702'S EXPLICIT RELIABILITY REQUIREMENTS AND EXEMPLIFIES A WIDESPREAD PROBLEM

A. The Eighth Circuit's "so fundamentally unsupported as to be unhelpful" standard for exclusion applies a less rigorous gatekeeping analysis than Rule 702 directs

The bedrock authority "governing expert testimony" and establishing criteria for its admissibility is Federal Rule of Evidence 702. *Daubert v. Merrell Dow Pharms., Inc*., 509 U.S. 579, 588-589 (1993). The Rules Enabling Act empowers the 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). Rule 702 took its present form in 2000 when the Court, under the Rules Enabling Act, adopted an amendment developed through the specified rulemaking procedures and transmitted it to Congress. *See* Order Amending the Federal Rules of Evidence, 529 U.S. 1189, 1195 (2000). As a rule of evidence adopted under the Rules Enabling Act, Rule 702 supersedes any other 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). Thus, "the elements of Rule

702, not the caselaw, are the starting point for the requirements of admissibility."[5]

Rule 702 enumerates several requirements that courts 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. Whether an expert's testimony meets Rule 702's admission criteria is a question for the court to determine in accordance with Rule 104(a). *See Daubert*, 509 U.S. at 592 ("Faced with a proffer of expert scientific testimony, then, the trial judge must determine [compliance with Rule 702] at the outset, pursuant to Rule 104(a)"). In doing so, the court must apply the preponderance of proof standard to each Rule 702 element.[6] Thus, the rules of evidence establish both the inquiries courts must make and the standard courts must apply to evaluate whether opinion testimony meets the conditions for admission.

---

[5] Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039, 2060 (2020).

[6] *Daubert*, 509 U.S. at 592 n.10 ("These matters should be established by a preponderance of proof.") (citing *Bourjaily v. United States*, 483 U.S. 171, 175-176 (1987)). *See also* Advisory Committee Note to Fed.R.Evid. 702, 2000 Amendments ("the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence.") (citing *Bourjaily*, 483 U.S. 171).

When courts take their gatekeeping guidance from prior cases, rather than Rule 702, they often act on misdirection because "some trial and appellate courts misstate and muddle the *admissibility* standard[.]"[7] The Eighth Circuit's ruling fell into this trap: the court applied a highly permissive admissibility test taken from Eighth Circuit decisions pre-dating current Rule 702 that excludes opinion testimony only "if it is 'so fundamentally unsupported' by its factual basis 'that it can offer no assistance to the jury.'" Pet. App. 12.[8] This incorrect formulation became the linchpin,

---

[7] Schroeder, *supra* n.5, at 2039 (emphasis original). Information received by the Advisory Committee on Evidence Rules shows that courts' misunderstanding of their gatekeeping role has become widespread:

> The Reporter's research – as well as research provided by a number of parties who had submitted comments to the Committee – reveals a number of federal cases in which judges did not apply the preponderance standard of admissibility to the requirements of sufficiency of basis and reliable application of principles and methods, instead holding that such issues were ones of weight for the jury.

Minutes – Advisory Committee on Evidence Rules (Nov. 13, 2020) at 3, *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2021 AGENDA BOOK 15 (2021), https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_-_agenda_book_spring_2021_0.pdf.

[8] This passage of the Eighth Circuit's opinion identifies *United States v. Finch*, 630 F.3d 1057, 1062 (8th Cir. 2011) and *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988) as sources for its admissibility test. Pet. App. 12. The *Finch* ruling presents the standard as a quotation from *Arkwright Mut. Ins. Co. v. Gwinner Oil, Inc.*, 125 F.3d 1176, 1183 (8th Cir. 1997): "Only if an expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be

because the court relied on this outdated caselaw, rather than Rule 702, as the basis for reversing the district court's exclusion of the opinion testimony. Pet. App. 33-34.

With its focus on the expert's factual foundation, the Eighth Circuit's "so fundamentally unsupported" standard also undermines Rule 702's substantive considerations by allowing admission even when the court has not found all the rule's requirements satisfied. Rather than applying Rule 702(b)'s mandate that courts determine whether opinion testimony "is based on sufficient facts or data," the Eighth Circuit's approach places this assessment outside the scope of gatekeeping unless an extreme foundational deficiency exists:

> excluding an expert's opinion for being fundamentally unsupported is an exception to the general rule that gaps in an expert witness's knowledge go to weight, not admissibility.

---

excluded." *Finch*, 630 F.3d at 1062. The *Arkwright* opinion, however, quoted that same language from an even earlier decision, *Hose v. Chicago Nw. Trans. Co.*, 70 F.3d 968, 974 (8th Cir. 1995). *Arkwright Mut. Ins.*, 125 F.3d at 1183. The *Hose* opinion adds the word "only" to a phrase that had appeared in the pre-*Daubert Loudermill* decision to describe a reason for excluding the expert testimony, thereby completely shifting its meaning to articulate a highly permissive test for deciding admissibility. *Hose*, 70 F.3d at 974. Thus, when the Eighth Circuit references *Finch* and *Loudermill* as authority for its permissive "so fundamentally unsupported" test, Pet. App. 12, it embraces a pre-Rule 702 conception of expert admissibility that has stretched through several generations of decisions, but overlooks the fact that between those decisions the formulation flipped in perspective.

Pet. App. 13 (quotation omitted). This "general rule" exempting the expert's factual basis from the admissibility analysis carries forward this misconception of gatekeeping stemming from pre-Rule 702 caselaw.[9]

The Advisory Committee on Evidence Rules intended the amendment of Rule 702 adopted in 2000 to put in place "a more rigorous and structured approach than some courts are currently employing."[10] Under the Rules Enabling Act, once Rule 702 became effective it displaced conflicting authority. 28 U.S.C. § 2072(b). Yet the Eighth Circuit's gatekeeping analysis follows outdated caselaw rather than Rule 702. 3M's petition therefore presents a compelling opportunity to clarify the gatekeeping framework courts must apply and

---

[9] *Compare United States v. Coutentos*, 651 F.3d 809, 820 (8th Cir. 2011) (cited by Eighth Circuit decision, Pet. App. 12) ("As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility. . . . Only if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded.") (quotation omitted) *with Hose*, 70 F.3d at 974 (" 'As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination.' Only if an expert's opinion is 'so fundamentally unsupported that it can offer no assistance to the jury' must such testimony be excluded.") (quoting *Loudermill*, 863 F.2d at 570) (citation to Fed.R.Evid. 703 omitted).

[10] Hon. Fern M. Smith, Report of the Advisory Committee on Evidence Rules (May 1, 1999) at 7, *in* ADVISORY COMMITTEE ON EVIDENCE RULES OCTOBER 1999 AGENDA BOOK 52 (1999), https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-october-1999.

identify formulations inconsistent with Rule 702 and that amount to error.

B. The Eighth Circuit's standard permitting opinion testimony unless it is "so fundamentally unsupported as to be unhelpful" influences courts within and outside the Eighth Circuit to disregard Rule 702 and the applicable preponderance of proof test

The permissive "so fundamentally unsupported" test has substantially affected district court gatekeeping practices. Within the Eighth Circuit, district courts routinely decide whether to admit opinion testimony using this gauge.[11] Although no other Circuit has adopted the "so fundamentally unsupported" standard, district courts outside the Eighth Circuit often use this test, rather than the preponderance of proof assessment, to decide admissibility.[12] Further, while the

---

[11] *See*, *e.g.*, *Jaunich v. State Farm Life Ins. Co.*, ___ F. Supp. 3d ___, ___, No. CV 20-1567 (PAM/JFD), 2021 WL 5054461, at *3-*4 (D. Minn. Nov. 1, 2021) (denying motion to exclude after declaring "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility," and describing the gatekeeping standard as "[t]he Court should exclude an expert witness only if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury.") (quotation omitted); *Senior Hous. Managers, LLC v. Highway 2 Dev., LLC*, No. 4:18-CV-3167, 2021 WL 2652454, at *2 (D. Neb. June 28, 2021) (similar statement).

[12] *See*, *e.g.*, *Matzkow v. United N.Y. Sandy Hook Pilots Assoc.*, 18-CV-2200 (RER), 2022 WL 79725, at *9-*10 (S.D.N.Y. Jan. 7, 2022) ("Martucci's testimony is not so fundamentally unsupported

Eighth Circuit's opinion suggests the "so fundamentally unsupported" test can be seen as a re-articulation of the "analytical gap" basis for excluding opinion testimony described in *Gen. Elec. Co v. Joiner*, 522 U.S. 136, 146 (1997),[13] in practice district courts apply it to replace both Rule 702(b) and the preponderance of evidence standard in determining admissibility. *See Leus v. C.R. Bard, Inc.*, No. 4:13-cv-00585-NKL, 2021 WL 4313607, at *5 (W.D. Mo. Sept. 22, 2021) ("[T]he concessions *Leus* highlights . . . do not render his opinion so fundamentally unsupported that it could provide no assistance to the jury."); *In re C.R. Bard, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2187, 2018 WL

---

that it offers no possible assistance to the jury."); *Beebe v. Colorado*, No. 18-cv-01357-CMA-KMT, 2019 WL 6044742, at *7 (D. Colo. Nov. 15, 2019) ("A review of the facts and data subject to Plaintiff's latter challenges does not reveal that Mr. Page's opinions are 'so fundamentally unsupported' that his opinions would be unhelpful.") (quoting *First Union Nat. Bank v. Benham*, 423 F.3d 855, 862 (8th Cir. 2005)); *In re C.R. Bard, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2187, 2018 WL 513975, at *3 (S.D.W.Va. Jan. 23, 2018) ("nothing in the record permits the inference that Dr. Reitman's opinions are so fundamentally unsupported that they cannot assist the fact-finder.").

[13] Pet. App. 12:

> a district court may exclude expert testimony if it finds "that there is simply too great an analytical gap between the data and the opinion proffered," *Joiner*, 522 U.S. at 146, 118 S.Ct. 512. Or, to put it in the language we have frequently used both before and after *Daubert* and *Joiner*, a district court may exclude an expert's opinion if it is "so fundamentally unsupported" by its factual basis "that it can offer no assistance to the jury." (citing *Loudermill*, 863 F.2d at 570; *Finch*, 630 F.3d at 1062.

513975, at *4 (S.D.W.Va. Jan. 23, 2018) ("the plaintiffs have failed to demonstrate that Dr. Reitman's opinions are so fundamentally unsupported that they cannot assist the fact-finder.").

C. The Eighth Circuit's overly permissive standard has parallels in the lax assessments used in some other Circuits

In addition to the "so fundamentally unsupported" test, courts employ other admissibility standards that depart from the analysis directed by Rule 702 and its preponderance of proof assessment. Based on a belief that the rule holds an unstated policy preference for admission over exclusion of opinion testimony, some courts bend the gatekeeping assessment to achieve that result. The Third Circuit has declared that the "Rules of Evidence embody a strong preference for admitting any evidence that may assist the trier of fact," and that Rule 702 in particular "has a liberal policy of admissibility." *In re SemCrude L.P.*, 648 F. App'x 205, 213 (3d Cir. 2016). District courts have acted on this direction to evaluate admissibility with a focus on the result, rather than the Rule 702 criteria. *See Kenney v. Watts Regulator Co.*, 517 F. Supp. 3d 565, 581 (E.D. Pa. 2021) ("Cognizant of our Court of Appeals' 'strong preference for admitting any evidence that may assist the trier of fact' and Rule 702's 'liberal policy of admissibility,' we find the testimony of Engineer Clauser admissible.") (quoting *Pineda v. Ford Motor Co.*, 520 F.3d 237, 243 (3d Cir. 2008)); *Knecht v. Jakks Pac., Inc.*, No. 4:17-CV-2267, 2021 WL 3722854, at *6 (M.D. Pa. Aug. 23,

2021) ("given Rule 702's 'liberal policy of admissibility,' we will admit Dr. Pope's testimony as fit for this case.") (quoting *Pineda*, 520 F.3d at 244).

Similarly, the Ninth Circuit applies its own unique standard derived from a policy preference it attributes to the *Daubert* holding: "Rule 702 should be applied with a 'liberal thrust' favoring admission[.]" *Messick v. Novartis Pharms. Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014) (quoting *Daubert*, 509 U.S. at 588).[14] Elevating this characterization over the content of Rule 702, the Ninth Circuit re-casts the admissibility standard to give a "slight deference to experts" with "borderline opinions[.]" *Hardeman v. Monsanto Co.*, 997 F.3d 941, 962 (9th Cir. 2021) (quotation omitted). District courts understand that this approach tilts the standard to favor admission and leads to rulings "more tolerant of borderline expert opinions" such that "a wider range of expert opinions (arguably much wider) will be admissible in this circuit." *In re Roundup Prod. Liab. Litig.*, 358 F. Supp. 3d 956, 959-960 (N.D. Cal. 2019).

As in the Ninth Circuit, some district courts in the Sixth Circuit use the "liberal thrust" notion to guide their gatekeeping. *See*, *e.g.*, *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, No. 2:18-CV-00136, 2019 WL 6894069, at *2 (S.D. Ohio Dec. 18, 2019)

[14] Judge Schroeder warns against overreliance 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.5, at 2060.

(observing Sixth Circuit's emphasis on "liberal thrust" statement in *Jahn v. Equine Services, PSC*, 233 F.3d 382, 388 (6th Cir. 2000) and evaluating objections with the overlay that "[a]ny doubts regarding the admissibility of an expert's testimony should be resolved in favor of admissibility."); *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 45 F. Supp. 3d 724, 757 (N.D. Ohio 2014) ("Given Rule 702's liberal policy of admissibility, Bresnahan provides sufficient grounds for the majority of his assumptions.").

Even within the Second Circuit, which directs that gatekeeping involve a "rigorous examination" of the Rule 702 elements,[15] some district courts instead apply "a presumption that expert testimony is admissible[.]" *Campbell v. City of New York*, No. 16-cv-8719 (AJN), 2021 WL 826899, at *2 (S.D.N.Y. Mar. 4, 2021) (quotation omitted); *Cates v. Trustees of Columbia Univ.*, 16 Civ. 6524 (GBD)(SDA), 2020 WL 1528124, at *6 (S.D.N.Y. Mar. 30, 2020) (same).

The widespread use of watered-down admissibility standards favoring admission warrants this Court's attention. There is no provision in Rule 702 specifying an outcome preference, and there is no room for a presumption of admissibility in application of the

---

[15] *See Electra v. 59 Murray Enterp., Inc.*, 987 F.3d 233, 254 (2d Cir. 2021) ("To decide whether a step in an expert's analysis is unreliable, the district court should undertake a rigorous examination of the facts on which the expert relies, the method by which the expert draws an opinion from those facts, and how the expert applies the facts and methods to the case at hand.") (quotation omitted).

preponderance of the evidence standard. When courts rely on presumptions or depleted standards, they leave unanswered the actual question posed by Rule 702: were the experts' factual bases, methods employed, and methodological applications all demonstrated to be sufficient and reliable by a preponderance of the evidence?[16]

Opinion testimony is likely to mislead the jury when presented with the patina of scientific expertise, but without an adequate factual basis or a reliable methodology reliably applied to the facts of the case. Rule 702 seeks to prevent that deception from occurring. Psychologists agree that when jurors are presented with complex information beyond their ability to understand, "they rely more on external cues such as the expert's credentials" to evaluate the testimony. Jonathan J. Koehler, et al., *Science, Technology, or the Expert Witness: What Influences Juror's Judgments About Forensic Science Testimony?*, Psychology, Public Policy, and Law, Vol. 22, No. 4, 401-413 (2016). Thus, when confronted with complex technical information that they cannot understand, jurors will look to an expert's credentials or other peripheral cues – such as the expert's "likeability" – as the basis for evaluating their testimony. Accordingly, placing credentialed, but still unreliable expert testimony before a jury, particularly in cases involving complex scientific or statistical principles, undermines the jury system and the inherent fairness that the rules are intended to guarantee.

---

[16] *See* Schroeder, *supra* n.5, at 2050 n.90, 2060.

The Eighth Circuit's standard exacerbates this problem by ignoring the critical requirement that expert testimony be based on reliable methodology reliably applied to the facts. Gatekeeping that departs from the Rule 702 preponderance of proof test to employ instead an outcome-oriented standard, as the Eighth Circuit did in this case, results in admission of expert testimony incapable of meeting Rule 702's requirements. 3M's petition addresses the systemic need for clarifying the analytical framework courts should apply and identifying formulations that are inconsistent with Rule 702 and therefore amount to error.

II. DISREGARDING RULE 702 IN FAVOR OF SUBSTANTIVELY DIFFERENT STANDARDS IS A RECOGNIZED PROBLEM, ESPECIALLY IN THE MDL CONTEXT, THAT CRIES OUT FOR THE COURT'S ATTENTION

A. Erroneous deviations from Rule 702 and the preponderance of proof standard have become a concern

A wide gap has developed between the courts that disregard Rule 702's requirements to favor admission and those that neutrally apply the preponderance of evidence standard. *Compare*, *e.g.*, *In re Mirena IUS Levonorgestrel-Related Prods. Liab. Litig.*, 982 F.3d 113, 123 (2d Cir. 2020) (under Rule 702, courts are "required" to "take a hard look" at experts' methodology to ensure reliability) *with City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1048 (9th Cir. 2014) (reversing

expert's exclusion under Rule 702, declaring a "more measured approach to an expert's adherence to methodological protocol is consistent with the spirit of *Daubert* and the Federal Rules of Evidence: there is a strong emphasis on the role of the fact finder in assessing and weighing the evidence."). The Advisory Committee on Evidence Rules has noted the ongoing disregard for Rule 702's burden of production and recently observed that "federal judges are not uniformly finding and following the preponderance standard[.]"[17] The pervasiveness of decisions that incorrectly articulate and apply Rule 702's admissibility test has convinced the Advisory Committee on Evidence Rules that a serious problem exists:

> 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.[18]

Misunderstanding of Rule 702 has led to "a fair number of cases" in which opinion testimony was improperly

---

[17] Minutes – Advisory Committee on Evidence Rules (Nov. 13, 2020) at 3-4, *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2021 AGENDA BOOK 15 (2021), https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_-_agenda_book_spring_2021_0.pdf.

[18] 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.

allowed into evidence because courts "found expert testimony admissible even though the proponent has not satisfied the Rule 702(b) and (d) requirements by a preponderance of the evidence."[19]

At the root of the problem lie opinions like the Eighth Circuit's decision at issue here, which declare that admissibility should be determined using caselaw-derived standards that are inconsistent with Rule 702. Lower courts then perpetuate that error when they rely on it.[20] In fact, district courts have already issued rulings following the Eighth Circuit's opinion and deciding admissibility based on its approval of the "so fundamentally unsupported" standard. *See*, *e.g.*, *MPAY Inc. v. Erie Custom Computer Apps., Inc.*, No. 19-704 (PAM/BRT), 2021 WL 3661507, at *1, *4 (D. Minn. Aug. 18, 2021) (quoting *In re Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*, 9 F.4th 768, 777 (8th Cir. 2021), as authority for the "fundamentally unsupported" test, noting "cases are legion that, correctly, under *Daubert*, call for the liberal

---

[19] Hon. Patrick J. Schiltz, Report of the Advisory Committee on Evidence Rules (May 15, 2021) at 6, *supra* n.4.

[20] *See* Hon. John D. Bates, Report of the Judicial Conference Committee on Rules of Practice and Procedure (Sept. 2021) at 31, *in* ADVISORY COMMITTEE ON EVIDENCE RULES NOVEMBER 5, 2021 AGENDA BOOK (2021) 71; https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_agenda_book_november_202110-19_0.pdf:

> The problem is that many judges have not been correctly applying Rule 702 and there is a lot of confusing or misleading language in court decisions, including appellate decisions.

admission of expert testimony" and concluding that "Defendants have not established that *MPAY*'s expert witnesses should be precluded from testifying."). The Eighth Circuit itself recently reiterated its "general rule," incompatible with Rule 702, that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility." *S&H Farm Supply, Inc. v. Bad Boy, Inc.*, 25 F.4th 541 (8th Cir. 2022) (quoting *In re Bair Hugger*, 9 F.4th at 778).

Departures from Rule 702 have become so prevalent and created such entrenched inconsistency[21] that the Advisory Committee on Evidence Rules unanimously recommended an amendment "that would clarify that expert testimony should not be permitted unless the judge finds by a preponderance of the evidence that each of the prerequisites are met."[22] The Committee on Practice and Procedure on July 30, 2021, announced and requested public comment on this proposed amendment. 86 Fed. Reg. 41087, 41088 (July 30, 2021).

---

[21] *See* Minutes – Advisory Committee on Evidence Rules (Nov. 13, 2020) at 3-4, *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2021 AGENDA BOOK 15 (2021); https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_-_agenda_book_spring_2021_0.pdf:

> Twenty years later [after adoption of current Rule 702] – when it is clear that federal judges are not uniformly finding and following the preponderance standard – the justification for a clarifying amendment exists.

[22] Minutes – Committee on Rules of Practice & Procedure, Report of the Advisory Committee on Evidence Rules (Jan. 5, 2021) at 25, *supra* n.20.

The proposed change would place the preponderance of the evidence standard into the text of Rule 702.[23] This step would signal that application of the even-handed preponderance of proof test, and not an outcome-focused preference for allowing opinion testimony, is how judges must determine admissibility. The accompanying Draft Committee Note explains that the amendment seeks to "emphasize that the admissibility requirements set forth in the Rule must be established to the court by a preponderance of the evidence."[24] Also, the amendment would direct judges that they must find all the Rule 702 elements established before admitting a challenged expert's testimony. The Draft Committee Note explicitly rejects prior opinions declaring an expert's factual foundation to be an issue of credibility and not admissibility:

> 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 generally questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a)[.][25]

The Eighth Circuit's analysis matches the Advisory Committee's description of a case that reflects "an

---

[23] Appendix to Report of the Advisory Committee on Evidence Rules (May 15, 2021), *in* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE AGENDA BOOK JUNE 22, 2021 AGENDA BOOK 836 (2021); https://www.uscourts.gov/sites/default/files/2021-06_standing_agenda_book_final_6-23_0.pdf.

[24] *Id.*

[25] *Id.*

incorrect application of Rules 702 and 104(a)." *See* Pet. App. 29 ("this was an instance in which our 'general rule' that deficiencies in an expert's factual basis go to weight and not admissibility should have been followed.").

B. Court guidance would complement the proposed amendment by focusing on the rule as the source of authority, rather than legacy case rulings that depart from its directives

The Advisory Committee on Evidence Rules published its proposed amendment to change the practice of those courts that incorrectly look to judicial pronouncements, and not Rule 702 itself, as their primary authority on the gatekeeping function.[26] The Eighth Circuit's decision follows the pattern that sparked the Advisory Committee to act: the opinion mentioned but did not apply Rule 702, it employed an admissibility standard recycled from pre-Rule 702 caselaw precedent rather than the preponderance of proof test, and revealed that the "liberal thrust" statement from *Daubert* shaped its approach to gatekeeping more than the requirements of the rule. Pet. App. 10-13, 34.

Review of the Eighth Circuit's gatekeeping approach would inform the consideration of the proposed

[26] *See* Hon. Patrick J. Schiltz, Report of the Advisory Committee on Evidence Rules (May 15, 2021) at 6, *supra* n.4 ("emphasizing the preponderance standard in Rule 702 specifically was made necessary by the decisions that have failed to apply it to the reliability requirements of Rule 702.").

amendment in an important way: reinforcing to the lower courts that Rule 702 establishes the burden of production and substantive considerations that they must use. For the proposal to have the intended effect, the lower courts must understand the error of taking guidance from outdated but familiar precedent and the need to rely instead of the text of Rule 702 and its explanatory Advisory Committee Note. Because the proposed amendment has been described as "clarifying" the admissibility standard rather than changing Rule 702's substance,[27] courts entrenched in their practice of applying incorrect standards and resolving admissibility challenges based on perceived outcome preferences may not recognize the need to change how they conduct gatekeeping. By granting the petition, the Court could ensure the lower courts understand that they must follow Rule 702 as the governing authority.

C. The MDL context of the Eighth Circuit's decision presents particularly compelling circumstances for ensuring that courts apply Rule 702 and not a local deviation

Cases consolidated into multidistrict litigation proceedings represent the lion's share of civil suits within the federal courts. LCJ's analysis of data released by the U.S. Judicial Panel on Multidistrict

---

[27] *See* Hon. John D. Bates, Report of the Judicial Conference Committee on Rules of Practice and Procedure (Sept. 2021) at 31, *supra* n.22 ("The amendment would not change the law but would clarify the rule so that it is not misapplied.").

Litigation for fiscal year 2020 found that MDL cases now comprise 62.7% of the entire federal civil docket.[28] Representing this share of the federal civil caseload, the core goal of achieving uniform treatment of the many lawsuits involving parallel allegations brought together in a multidistrict litigation has become increasingly important.[29]

Although an MDL proceeding collects cases from across the country into a single court for pretrial matters, the individual suits are expected to be returned to the transferor courts for trial.[30] The MDL procedure therefore creates a risk of inconsistency when the MDL court does not apply the preponderance of evidence test to determine whether Rule 702's requirements have been met when deciding the admissibility of opinion testimony. If, instead, the court employs a local misconception, such as the Eighth Circuit's "so fundamentally unsupported" standard, a conflict will arise between the MDL court's gatekeeping approach and the standard to be applied on remand by a transferor

---

[28] *MDLs Reach 1 Million Case Milestone* (March 18, 2021); https://www.rules4mdls.com/mdls-reach-1-million-case-milestone.

[29] *See* Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PENN. L. REV. 1669, 1682 (2017) ("One of the main problems MDLs aim to solve is therefore horizontal federal duplication and disuniformity.").

[30] *See*, *e.g.*, *Torkie-Tork v. Wyeth*, 739 F. Supp. 2d 895, 898-899 (E.D.Va. 2010) (case had been included in MDL proceeding in the Eastern District of Arkansas, and at the conclusion of the MDL proceedings returned to the Eastern District of Virginia for all further proceedings, including trial.).

court in a different circuit. That disparity in the admissibility analysis may regularly produce divergent rulings for the same expert offering the same opinions in two different federal courts.[31]

Rule 702 should receive uniform application. The Eighth Circuit insisted in this MDL case that its unique "so fundamentally unsupported" standard must govern the admissibility determination, and even used its local test as the basis for reversal. Pet. App. 34. A national evidentiary rule should only allow a single admissibility standard, and this case warrants review to confirm that point.

[31] *See*, *e.g.*, *In re Roundup Prods. Liab. Litig.*, 390 F. Supp. 3d 1102, 1112-1113 (N.D. Cal. 2018), *aff'd sub. nom. Hardeman v. Monsanto Co.*, 997 F.3d 941 (9th Cir. 2021) (gatekeeping conducted "with a liberal thrust favoring admission," as directed by the Ninth Circuit, "has resulted in slightly more room for deference to experts in close cases than might be appropriate in some other Circuits. This is a difference that could matter in close cases.") (quotation and citations omitted).

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

MARY MASSARON
Counsel of Record
PLUNKETT COONEY
38505 Woodward Ave., Suite 100
Bloomfield Hills, MI 48304
(313) 983-4801
mmassaron@plunkettcooney.com

ALEXANDER DAHL
General Counsel
LAWYERS FOR CIVIL JUSTICE
1530 Wilson Blvd., Suite 1030
Arlington, VA 22209
(202) 429-0045
alex@strategicpolicycounsel.com

LEE MICKUS
EVANS FEARS & SCHUTTERT LLP
3200 Cherry Creek Dr. South, Suite 380
Denver, CO 80209
(303) 656-2199
lmickus@efstriallaw.com

Counsel for Amicus Curiae

March 9, 2022