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**

## MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE*, PRODUCT LIABILITY ADVISORY COUNCIL, INC., IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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## MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

*Amicus Curiae*, Product Liability Advisory Council, Inc. (PLAC) respectfully moves this Court for leave to file its Brief of *Amicus Curiae* in support of the Petition for Writ of Certiorari filed by Petitioners, 3M Company and Arizant Healthcare, Inc. As required under Supreme Court Rule 37.2(b), PLAC's brief of *Amicus Curiae* is filed as one document with this Motion. PLAC considers the legal issues raised in the Petition for Writ of Certiorari to be of particular importance to its members and, more broadly, to all litigants who confront issues regarding the reliability and relevancy of expert testimony in the federal courts. PLAC has submitted *amicus curiae* briefs on the merits in each of this Court's major cases addressing the standards for determining the reliability of expert opinion testimony, including *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). PLAC has also submitted *amicus curiae* briefs in numerous other federal appellate courts and state courts of last resort concerning the appropriate standards and procedures that trial courts should employ in fulfilling their gatekeeper obligations. Because PLAC's brief provides information and arguments that bring to the attention of the Court relevant matter not already brought to its attention by the parties, its participation as *amicus curiae* may be of considerable help to the Court. *See* SUP. CT. R. 37.1.

PLAC has obtained the written consent of all parties to file its proposed *amicus* brief. However, PLAC did not provide notice to Respondent more than 10 days before filing this brief under Supreme Court Rule 37.2(a) and, therefore, files this motion under Rule 37.2(b) seeking permission to file the attached brief in support of Petitioners.

PLAC's motion and its brief have been submitted timely. No party will be prejudiced by permitting PLAC to file this brief, and the acceptance of this brief should not delay this Court in reaching its decision on the Petition.

WHEREFORE PLAC respectfully requests that the Court grant its Motion for Leave to File its Brief of *Amicus Curiae*.

Respectfully submitted,

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## QUESTIONS PRESENTED

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, this Court held that, to be admissible, expert testimony must be "not only relevant, but reliable." 509 U.S. 579, 589 (1993). In *General Electric Co. v. Joiner*, the Court firmly rejected the view that there is "a preference for admissibility" that requires a "particularly stringent standard" of appellate review of decisions to exclude expert testimony. 522 U.S. 136, 140-43 (1997). The decision below violates both those clear precedents at once. As to initial admissibility, the Eighth Circuit's lax approach—allowing expert testimony unless the testimony is "so fundamentally unsupported by its factual basis that it can offer no assistance to the jury,"—eliminates any serious inquiry into the reliability of expert testimony. As to appellate review, the decision below ignores *Joiner* and undermines the district court's gatekeeping role.

Those errors are particularly glaring here since the expert testimony—made-for-litigation complaints about a medical device that is the industry standard used 50,000 times each day—is precisely the kind of unreliable testimony *Daubert* is designed to exclude. Even the appellate decision reversing the district court's well-considered decision to exclude acknowledges the testimony's flaws. The result is that thousands of cases in a pending MDL will be adjudicated based on evidence that should be excluded twice-over based on this Court's precedents. The "fundamentally

**QUESTIONS PRESENTED**—Continued

unsupported" concept, as shown below, has had far reaching application in hundreds of district court cases throughout the country. Clearly, this is an issue that needs to be addressed by this Court.

The questions presented are:

1. Whether the Eighth Circuit's "so-fundamentally-unsupported" standard of initial admissibility for expert testimony conflicts with this Court's precedents and Federal Rule of Evidence 702.

2. Whether the Eighth Circuit's insufficiently deferential standard of appellate review of decisions excluding expert testimony conflicts with this Court's precedents and Federal Rule of Evidence 702.

PLAC has phrased the question presented in the same manner as Petitioners. However, this brief is focused on the first issue only, the question whether the "fundamentally-unsupported" concept can coexist with Federal Rule of Evidence 702 and this Court's case law construing that Rule.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

# TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

## INTEREST OF *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers.[2] PLAC seeks to contribute to the improvement and reform of law in the United States, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,200 briefs as *amicus curiae* in both state and federal courts, including this court, on behalf of its members, while presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product safety. PLAC's members, and product manufacturers throughout the nation, have a strong interest

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2(a), counsel of record for Petitioners and Respondents received notice of amicus' intent to file this brief. Petitioner's letter of blanket consent is on file. Respondent has also consented in writing to the filing of PLAC's *amicus* brief.

[2] *See* https://plac.com/PLAC/Membership/Corporate_Membership.aspx.

in the formulation and application of the standards governing the admission of expert testimony in the federal courts. PLAC has had a leading role in briefing expert-evidence cases, including *Daubert*, 509 U.S. 579; *Joiner*, 522 U.S. 136; and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), and numerous circuit court cases throughout the country.

Trial courts' gatekeeper role in evaluating the reliability of proffered expert testimony is vitally important to PLAC members. If this role is not properly exercised, the fundamental fairness of civil jury trials in complex cases such as this one is compromised. PLAC's members are involved in defending an increasing number of product-liability lawsuits, in which expert testimony is the rule, not the exception. Because both state and federal trial courts look to the federal appellate courts for guidance on these complex issues, this brief is submitted to address the broad public importance of this Court's decision on these issues.



## SUMMARY OF ARGUMENT

The Court should grant the petition for a writ of certiorari, particularly with respect to the interpretation and application of Federal Rule of Evidence 702. The Eighth Circuit's opinion—which broadly paraphrased, but never quoted or applied Rule 702—focused on whether the expert opinions at issue were "so fundamentally unsupported" in their factual bases that they "can offer no assistance to the jury." That

language originated in a pre-*Daubert* Eighth Circuit decision announced in 1988, and owes its existence to a still earlier Fifth Circuit opinion construing Federal Rules of Evidence 703 and 403. Even assuming the "no assistance to the jury" rubric is capable of being reconciled with *Daubert*'s watershed interpretation of Rule 702 in 1993, there is no basis for it to continue to apply under the current version of Rule 702, twice amended since 1988. Excluding expert testimony only "if it is so fundamentally unsupported that it cannot help the factfinder" waters down the reliability element of the Rule 702 analysis to the point that nearly all expert evidence is admissible so long as the expert is qualified. Allowing expert evidence to pass judicial gatekeeping unless it is devoid of any helpfulness is not the test for admissibility.

Unfortunately, this concept has spread far beyond the boundaries of the Eighth Circuit, and it has found its way into hundreds of district court decisions elsewhere, undermining the integrity of the Rules and this Court's decisions. has found its way into hundreds of district court decisions elsewhere, undermining the integrity of the Rules and this Court's decisions. This Court should take the opportunity to clarify the governing standard.

## ARGUMENT

### I. Where did the fundamentally-unsupported concept come from? It has no foundation in Rule 702 or this Court's *Daubert* jurisprudence.

#### A. The source of the fundamentally-unsupported concept was a pre-*Daubert* Fifth Circuit case that articulated this approach under Rule 703, not 702; the concept was later modified by the Eighth Circuit to exclude "only" testimony that was "fundamentally unsupportable."

The origin story for the fundamentally-unsupported concept starts six years before this Court announced its watershed opinion in *Daubert*. In 1987, the Fifth Circuit articulated a standard for the resolution of expert testimony reliability issues, stating in part that: "In some cases . . . the source upon which an expert's opinion relies is of such little weight that the jury should not be permitted to receive that opinion. . . . *If an opinion is fundamentally unsupported, then it offers no expert assistance to the jury*." *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987) (emphasis added). In *Viterbo*, the court examined the admissibility of expert testimony under Rules 703 and 403—not Rule 702. *Id.* (citing *Barrel of Fun, Inc. v. State Farm Fire & Cas. Co.*, 739 F.2d 1028, 1035 (5th Cir. 1984)). Rule 702 did not figure into the Fifth Circuit's effort to evaluate the reliability of expert testimony in the pre-*Daubert* era. In its original formulation, the

fundamentally-unsupported concept expressed a truism: expert testimony that is totally unsupported should not be presented to the jury. The *Viterbo* court did not apply this as an exclusive test for admissibility and did not rule out the possibility that expert testimony might still be excluded as unreliable even if it was not totally lacking in support. In *Loudermill v. Dow Chemical Co*., 863 F.2d 566, 570 (8th Cir. 1988), the Eighth Circuit first cited *Viterbo* for the proposition that fundamentally-unsupported expert testimony was incapable of assisting the jury and, therefore, was subject to exclusion. But as applied in the Eighth Circuit, the fundamentally-unsupported concept was cited alongside Rule 702, rather than 703.[3]

In 1989, the Eight Circuit made a critical revision to the fundamentally-unsupported concept, transforming it into the exclusive test for admissibility under which "only" testimony that was "so fundamentally unsupported that it cannot help the factfinder" should be excluded. *Hurst v. United States*, 882 F.2d 306, 311 (8th Cir. 1989). Unlike its original iteration that identified expert testimony that is "fundamentally unsupported" and "cannot help the fact finder" as merely one

[3] One Fifth Circuit decision followed the original formulation of the fundamentally-unsupported concept but, like the Eighth Circuit, seemed to link that standard to Rule 702 rather than 703. *See Edmonds v. Ill. C. G. R. Co.*, 910 F.2d 1284, 1287 (5th Cir. 1990). Another Fifth Circuit case quoted the fundamentally-unsupported language from *Viterbo* without linking it to any of the Federal Rules of Evidence. *See Guile v. United States*, 422 F.3d 221, 227 (5th Cir. 2005).

category of expert evidence that was subject to exclusion, the new formulation was stated as an exclusive—and extremely narrow—exception to a broad rule favoring the admissibility of all expert testimony. That language was copied with only minor deviations in case after case, both before and after the Supreme Court's trilogy of expert-evidence decisions in *Daubert*, *Joiner*, and *Kumho Tire*, and even after the amendment of Rule 702 in 2000. It appears in the panel decision in this case, stating: "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.'" *Amador v. 3M Co.* (*In re Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*), 9 F.4th 768, 778 (8th Cir. 2021).

At the time of the Eighth Circuit's prior decision in *Hurst*, federal circuit court approaches to the admissibility of expert testimony varied widely, with some circuits still applying the general-acceptance test announced in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). *See United States v. Shorter*, 809 F.2d 54, 60 (D.C. Cir. 1987). Other circuits applied a variety of standards rooted in Rule 702, Rule 703, the common law, or some combination thereof to assess the reliability of expert testimony. *See generally United States v. Downing*, 753 F.2d 1224, 1238 (3d Cir. 1985); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223, 1243-45 (E.D.N.Y. 1985). Although this Court's decision in *Daubert* was still four years off, the foundations for a vigorous reliability test for expert testimony were already being constructed in this Court and in the

lower federal courts. *See*, *e.g.*, *Barefoot v. Estelle*, 463 U.S. 880, 926 (1983) (Blackmun, J., dissenting and foreshadowing much of his thoughts on scientific evidence that were later expressed in *Daubert*).

Before this Court announced its opinion in *Daubert*, federal circuit court decisions were split on the extent to which the Federal Rules of Evidence empowered district court judges to evaluate the reliability of expert testimony. The Fifth Circuit—the source of the *Viterbo* decision—at one time perceived Rule 703 as the basis for district courts to "examine the reliability of th[e] sources" on which expert witnesses base their testimony. *Soden v. Freightliner Corp.*, 714 F.2d 498, 505 (5th Cir. 1983). Courts in other circuits also found Rule 703 to be the basis for a trial court's authority to police the reliability of expert testimony. *See*, *e.g.*, *In re "Agent Orange"*, 611 F. Supp. at 1244; *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1313, 1327-28 (E.D. Pa. 1980). Other courts found that Rule 702 was the textual source for a standard of evidentiary reliability. *DeLuca v. Merrell Dow Pharms., Inc.*, 911 F.2d 941, 954-55 (3d Cir. 1990) ("While no Federal Rule of Evidence specifically addresses the methodological fundamentals for expert testimony, Rule 702's helpfulness requirement implicitly contains the proposition that expert testimony that is based on unreliable methodology is unhelpful and therefore excludable.").

In the 35 years since the fundamentally-unsupported concept was first articulated, its parentage has never been seriously scrutinized. It has been

cited over and over in Eighth Circuit opinions, and in district court decisions in multiple circuits, but evaded review by this Court.[4] Yet, reversing the district court's decision in this case, the Eighth Circuit incorrectly assumed that this concept was, in essence, a part of the Rule 702 inquiry, without express consideration of the actual text of Rule 702 or whether the fundamentally-unsupported concept has any relationship to that text. As discussed below, the panel's failure to apply the standard articulated in the text of Rule 702 was error.

### B. The fundamentally-unsupported concept is textually inconsistent with and unsupported by Rule 702.

#### 1. As originally enacted and construed by this Court, Rule 702 contained a robust reliability standard that is incompatible with the fundamentally-unsupported concept.

Rule 702's original text—which is still largely embedded in the Rule—provides that a qualified expert may testify based on "scientific, technical, or other specialized *knowledge*" if the testimony will help the jury

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[4] The closest the fundamentally-unsupported concept came to Supreme Court review was a passing reference in a *dissenting* opinion in *Weisgram v. Marley Co.*, 169 F.3d 514, 525 (8th Cir. 1999) (Bright, J., dissenting). But certiorari was sought and granted on a different issue, 527 U.S. 1069 (1999), so this Court was able to affirm the Eighth Circuit's judgment without addressing the viability of the fundamentally-unsupported concept. 528 U.S. 440 (2000).

"to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702 (emphasis added). The Rule's use of the word "knowledge" "establishes a standard of evidentiary reliability." *Kumho Tire*, 526 U.S. at 147 (quoting *Daubert*, 509 U.S. at 590). This reliability standard is "exacting." *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000). It "requires a valid . . . connection to the pertinent inquiry as a precondition to admissibility." *Kumho Tire*, 526 U.S. at 149 (quoting *Daubert*, 509 U.S. at 592). When a reliability challenge is made to proffered expert testimony, the trial court must determine whether the testimony has "a reliable basis in the knowledge and experience of [the relevant] discipline." *Id.* (quoting *Daubert*, 509 U.S. at 592). The goal of this process is to allow the trial court to determine "whether that [expert] testimony is likely to promote accurate factfinding." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2317 (2016) (quoting 29 Charles Wright & Victor Gold, *Federal Practice and Procedure: Evidence* § 6266, at 302 (2016)).

Rule 702's "helpfulness" standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility. *Daubert*, 509 U.S. at 591-92. This "helpfulness" requirement "goes primarily to relevance," as expert testimony that does not relate to any issue in the case is irrelevant and, therefore, nonhelpful. *Id.* When the connection is too attenuated or when the connection is based solely on the *ipse dixit* of the expert, "the court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Joiner*, 522 U.S. at 146.

Here, the Eighth Circuit's decision excluding expert testimony "only if it is so fundamentally unsupported that it cannot help the factfinder" improperly ignores the reliability requirement of Rule 702, and allows exclusion only if the expert testimony is so completely unreliable as to be irrelevant. *Daubert* and its progeny allow even arguably relevant expert testimony to be excluded if it is insufficiently reliable.[5]

### 2. The 2000 amendment to Rule 702 should have been the death knell for the fundamentally-unsupported concept.

In 2000, Rule 702 was substantially amended to add three subparts identifying specific findings that a trial court had to make before expert testimony could be admitted, with the criteria framed using the conjunctive word "and." *Cf. St. Clair v. United States*, 154 U.S. 134, 146 (1894). The amended text requires that expert opinions must be based on "sufficient facts or data" and "reliable principles and methods," and that

[5] The *Daubert* Court explained, for example, that expert testimony about the phases of the moon would be subject to exclusion if offered to show that "an individual was unusually likely to have behaved irrationally on [the] night" of a full moon. 509 U.S. at 591. In *Joiner*, the Court referred to "the testimony of a phrenologist who would purport to prove a defendant's future dangerousness based on the contours of the defendant's skull" as an example of expert testimony that was fundamentally unreliable "junk science." 522 U.S. at 153 n.6. Excluding this kind of evidence was a foregone conclusion under the *Daubert* rubric. But the fundamentally-unsupported concept renders this sort of absurd evidence the *only* kind of evidence that is subject to exclusion.

these principles and methods must be reliably applied in the specific case. *See Whole Woman's Health*, 136 S. Ct. at 2316 (citing Fed. R. Evid. 702). The fundamentally-unsupported concept cannot be squared with the text of the Rule or commentary thereon. The subpart of Rule 702 requiring that expert testimony must be "based upon sufficient facts or data" "calls for a quantitative rather than qualitative analysis." Fed. R. Evid. 702 (advisory committee notes 2000 amendment); *see* 29 *Federal Practice & Procedure*, *supra* § 6266. The word "data" encompasses the reliable opinions of other experts, and the words "facts or data" are broad enough to allow an expert to rely on hypothetical facts that are supported by the evidence. But an expert's testimony cannot be based on suppositions or unduly rely on anecdotal evidence. 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 702.05 (2021) (Mark S. Brodin, ed., Matthew Bender 2d ed. 2022).

Rule 702's next subpart requires that "the testimony is the product of reliable principles and methods." This mirrors *Daubert*'s focus on the reliability of the expert's "principles and methodology. . . ." 509 U.S. at 595. This component of Rule 702 invites an inquiry involving the *Daubert* factors, among the non-exclusive factors that trial judges may consider in evaluating the reliability of principles and methods. *See Kumho Tire*, 527 U.S. at 149-50.

The final subpart requires that "the expert has reliably applied the principles and methods to the facts of the case." This reflects *Daubert*'s overarching focus on reliability; its specific concern about "whether

expert testimony proffered in the case is sufficiently tied to the facts of the case," *id.* at 591; and *Joiner*'s holding that "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." 522 U.S. at 146.

Some courts opined that the 2000 amendment codified aspects of *Daubert*. *United States v. Mitchell*, 365 F.3d 215, 234 (3d Cir. 2004). Others, focusing on the text of the Rule, held that the amendment superseded *Daubert*, but that *Daubert* and its progeny remain *persuasive* authority. *United States v. Parra*, 402 F.3d 752, 758 (7th Cir. 2005); *Huber v. JLG Indus., Inc.*, 344 F. Supp. 2d 769, 773 (D. Mass. 2003).[6] Many courts

[6] Scholarly commentators have reached a similar range of conclusions about the intent of the 2000 amendment. *See* 5 Christopher Mueller & Laird Kirkpatrick, *Federal Evidence* § 11:8 (3d ed. 2007 & Supp. 2011) (2000 amendment to Rule 702 was a "blockbuster amendment" and "perhaps the most significant of all of the amendments to the Rules adopted to date"); 3 David Faigman et al., *Modern Scientific Evidence* § 22:15 (2010) (Rule 702(1) embodies a "fit" analysis "as discussed in *Daubert* and *Joiner*"); 4 *Weinstein's Federal Evidence*, *supra*, § 702.05 ("the 2000 amendments to Rule 702 codified the principle that trial courts must perform their gatekeeping role for all proffered expert testimony"); *see also* Jonathan M. Hoffman, *If the Glove Don't Fit, Update the Glove: The Unplanned Obsolescence of the Substantial Similarity Standard for Experimental Evidence*, 86 Neb. L. Rev. 633, 652 (2008) ("In 2000, *Kumho's* holding was codified by amending Rule 702 to its current form"); William Childs, *The Overlapping Magisteria of Law and Science: When Litigation and Science Collide*, 85 Neb. L. Rev. 643, 680 n.23 (2007) (acknowledging the theory that the amended Rule 702 superseded *Daubert*); David Owen, *A Decade of Daubert*, 80 Denv. U. L. Rev. 345, 362 (2002) ("the amendment (including the

merely acknowledged the Rule, and then analyzed the testimony without any effort to apply the Rule's precepts. This error is visible in the panel's decision here. Basic canons of construction require that courts give effect to the full text of the amended Rule. In construing such amendments, courts must presume that the changes were intended to have a "real and substantial effect." *See Pierce Cty., Wash. v. Guillen*, 537 U.S. 129, 145 (2003) (construing statutory amendment). The unsupported assumption that the amendment did nothing more than ratify the pre-existing case law is contrary to this canon. Further, courts should presume that the amended and original parts were designed to function as an integrated whole, giving effect to both. *See Markham v. Cabell*, 326 U.S. 404, 411 (1945) (construing statutory amendment).

The fundamentally-unsupported concept ignores the additional subparts added to Rule 702 in 2000. In it, there is no focus on the sufficiency of the facts or data, the reliability of principles and methods, or the reliable application of those principle and methods. As long as the evidence is not completely unsupported, it passes the gatekeeper. This concept is so contrary to the legal standard as written and implemented by this Court that it must be addressed by granting the petition for writ of certiorari.

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Committee Note) to [Rule] 702 doesn't provide a conclusive roadmap for each specific aspect of expert testimony, but it does provide helpful guidance").

## II. The fundamentally-unsupported concept has spread far beyond the Eighth Circuit, allowing unreliable expert testimony to pass without judicial gatekeeping.

Although the Eighth Circuit is the only federal *circuit* court to adopt the fundamentally-unsupported concept as a legal standard governing the admission of expert testimony,[7] over 200 federal district court opinions in non-Eighth-Circuit jurisdictions have cited to this concept in addressing admissibility issues, with cases originating in every federal circuit.[8]

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[7] In *Wing Enterprises, Inc. v. Tricam Indus.*, 829 F. App'x 508, 512 (Fed. Cir. 2020), the Federal Circuit applied the fundamentally-unsupported standard because the evidentiary decision it was reviewing had originated within the Eighth Circuit, noting that "district court's exclusion of evidence under the law of the regional circuit."

[8] A search of the LEXIS database for "fundamentally unsupported" /25 help! or assist! /25 expert, using the "All Federal District Courts" database, and applying filters to remove cases from Eighth Circuit jurisdictions was the primary search methodology. Exemplar cases from each federal circuit include the following: ***First Circuit:*** *Sandoe v. Bos. Sci. Corp*., 333 F.R.D. 4, 10 (D. Mass. 2019); ***Second Circuit:*** *United States Bank Nat'l Ass'n v. PHL Variable Life Ins. Co*., 112 F. Supp. 3d 122, 134 (S.D.N.Y. 2015); ***Third Circuit:*** *Orson, Inc. v. Miramax Film, Corp*., 983 F. Supp. 624, 635 (E.D. Pa. 1997), *rev'd on other grounds*, 189 F.3d 377 (3d Cir. 1999), *cert. denied*, 529 U.S. 1012 (2000); ***Fourth Circuit:*** *Williams v. BP Prods. N. Am., Inc*., No. WDQ 03-00027, 2005 U.S. Dist. LEXIS 46073, at *4, 2005 WL 5995758 (D. Md. Oct. 20, 2005); ***Fifth Circuit:*** *Lamar Advert. Co. v. Zurich Am. Ins. Co.*, 533 F. Supp. 3d 332, 341 (M.D. La. 2021); ***Sixth Circuit:*** *Ellipsis, Inc. v. Color Works, Inc*., 428 F. Supp. 2d 752, 760 (W.D. Tenn. 2006); ***Seventh Circuit:*** *Dana Corp. v. Am. Std.*, 866 F. Supp. 1481, 1499 (N.D. Ind. 1994); ***Ninth Circuit:*** *Kendall Dealership Holdings, LLC v. Warren Distribution, Inc*.,

Paradoxically, district court citation to the fundamentally-unsupported concept outside the Eighth Circuit increased dramatically *after* the 2000 amendment to Rule 702, with the biggest increase in district court citations occurring after 2008.[9] From 1987 to the December 1, 2000 effective date of the amended Rule 702, only 15 non-Eighth-Circuit district court cases favorably cited to the concept that expert testimony should be excluded if it is so fundamentally unsupported that it cannot assist the factfinder. The near exponential spread of the fundamentally-unsupported concept occurred only after Rule 702's reliability requirement was strengthened by amendment.[10] In the last 12 months alone, 26 such cases were announced outside

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No. 3:18-cv-0146-HRH, 2021 U.S. Dist. LEXIS 192650, at *13, 2021 WL 4620738 (D. Alaska Oct. 6, 2021); ***Tenth Circuit:*** *Smithwick v. BNSF Ry. Co.*, 447 F. Supp. 3d 1239, 1246 (W.D. Okla. 2020); ***Eleventh Circuit:*** *Darby v. Carnival Corp.*, No. 19-21219-CIV-MORENO, 2021 U.S. Dist. LEXIS 227077, at *9-10, 2021 WL 6428039 (S.D. Fla. Nov. 23, 2021).

[9] The Eighth Circuit's fundamentally-unsupported approach "can lead appellate courts to affirm the admission of questionable expert testimony with little examination, communicating to trial courts that something just short of whimsical is acceptable." The result is a "drain[ing] of the core thrust of the *Daubert* decision." *See* Victor E. Schwartz & Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 Hofstra L. Rev. 217, 266 (2006).

[10] Applying date filters to the search described in footnote 8, *supra*, reveals an uneven staircase pattern to the growth in the district court cases citing the fundamentally-unsupported concept, even though federal circuit court citations to the concept remained almost nonexistent outside the Eighth Circuit.

the Eighth Circuit and 51 were announced within the Eighth Circuit.

Invariably, many of the district court judges who authored some of the earlier decisions relying on the fundamentally-unsupported concept reached outside their own circuits' precedents to embrace a highly permissive test. But the near exponential increase in citations to the fundamentally-unsupported concept in district court decisions shows that this is not an isolated issue of a few rogue courts. Further, the repeated citation of the concept has created a reservoir of intra-circuit district court cases capable of being cited, so that trial judges today do not need to reach cases outside their circuit to find support for the fundamentally-unsupported concept. Without action from this Court to clarify the standard, it is predictable that the fundamentally-unsupported concept will continue to fester in the district courts across the country, just has it has in the Eighth Circuit, undermining the gatekeeping obligation imposed by Rule 702 and this Court's jurisprudence.

## III. The Court should grant certiorari to clarify the gatekeeping requirement embodied in Rule 702 as amended and to reaffirm the need for rigorous judicial gatekeeping of proffered expert testimony.

With minor variations, the erroneous fundamentally-unsupported concept has become embedded in the Rule 702 DNA in every circuit over the last three

decades. It persists despite *Daubert*'s establishment of a rigorous gatekeeping regime, looking only to relevance as the touchstone for admissibility. *See*, *e.g.*, *Hose v. Chicago Nw. Transp. Co.*, 70 F.3d 968, 974 (8th Cir. 1995) (repeating the concept after *Daubert*). It persists despite the amended Rule 702's four-element reliability standard that expands the importance of scrutinizing factual foundations, including a specific requirement that the trial court assure that an expert's opinion is supported by "sufficient facts or data." *See*, *e.g.*, *Bonner v. ISP Tech., Inc.*, 259 F.3d 924, 929-30 (8th Cir. 2001); *Children's Broadcasting Corp. v. Walt Disney Co.*, 357 F.3d 860, 865 (8th Cir. 2004); *Meterlogic Inc. v. KLT, Inc.*, 368 F.3d 1017, 1019 (8th Cir. 2004); and *Larson v. Kempker*, 414 F.3d 936, 941 (8th Cir. 2005). This erroneously permissive standard, which entirely sidesteps the "exacting" gatekeeping standards of *Daubert* and its progeny (*see Weisgram*, 528 U.S. at 455, and the 2000 amendments to Rule 702) has, nevertheless, been allowed by the lower courts to alter the law of the land.

Although the Court's cases construing Rule 702 have provided uniform standards for the lower federal courts grappling with the admissibility of expert testimony, the Court has not had occasion to construe Rule 702 since the 2000 amendment. As a result, courts across the country persist in reaching back to pre-*Daubert* circuit-law standards to support their rationale for permitting the testimony in question and avoiding the gatekeeping requirements of Rule 702. This case offers an important opportunity for the Court

to clarify the applicable legal standard and determine whether the fundamentally-unsupported concept should be applied by federal courts.

## CONCLUSION

Rule 702 places the burden on the proponent of expert evidence to prove that the expert testimony meets each of the separately identified criteria in the Rule before the testimony can be admitted.[11] The fundamentally-unsupported concept shifted the burden to 3M to show that the Respondent's evidence was both fundamentally-unsupported (unreliable) and unable to help the jury (irrelevant), an approach unsupported by the text of Rule 702 and incompatible with *Daubert* and its progeny. While the anticipated amendment to Rule 702 may provide valuable assistance to the federal courts in exercising the gatekeeping function, the fact that amendments are under consideration is no reason to deny the pending petition. The fundamentally-unsupported concept survived the significant 2000 amendment to Rule 702. Indeed, as shown herein, that misguided concept spread faster *after* the amendment to Rule 702 than it did before. The Court should

[11] Rule 702 is on the cusp of another important amendment that embeds the Rule 104(a) preponderance-of-the-evidence standard within Rule 702 and requires the expert's ultimate opinion to reflect the reliable application of the underlying methodology. This amendment further clarifies how far the standard has moved away from the fundamentally-unsupported concept conceived over 30 years ago.

clarify the standard and reject the fundamentally-unsupported concept once and for all.

* * *

For these reasons, PLAC respectfully requests that this Court grant Petitioners' Petition for a Writ of Certiorari.

Done this 10th day of March 2022.

Respectfully submitted,

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