

No. 25-919

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IN THE

**Supreme Court of the United States**

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UNION CARBIDE CORPORATION; COVESTRO LLC,  
*Petitioners.*

v.

LEE ANN SOMMERVILLE, individually, and on behalf  
of all others similarly situated,  
*Respondent.*

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On Petition for a Writ of Certiorari to the  
U.S. Court of Appeals for the Fourth Circuit

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**REPLY BRIEF FOR PETITIONERS**

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JOHN L. EWALD  
SUSANNA MOLDOVEANU  
KIRKLAND & ELLIS LLP  
601 Lexington Avenue  
New York, NY 10022  
(212) 446-4800

DAVID A. FUSCO  
WESLEY A. PRICHARD  
T. NATHAN TOWNSEND  
K&L GATES LLP  
210 Sixth Avenue  
Pittsburgh, PA 15222  
(412) 355-6500

DONALD B. VERRILLI, JR.  
*Counsel of Record*  
ELAINE J. GOLDENBERG  
RACHEL G. MILLER-ZIEGLER  
KYLE A. SCHNEIDER  
MUNGER, TOLLES & OLSON LLP  
601 Massachusetts Ave. NW  
Suite 500E  
Washington, DC 20001-5369  
(202) 220-1100  
Donald.Verrilli@mtto.com

*Counsel for Petitioners*

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## INTRODUCTION

Respondent’s brief in opposition seeks to bury this Court beneath a blizzard of factual minutiae in the evident hope of obscuring the central reality that justifies granting certiorari: the Fourth Circuit continues to apply the toothless standard for admitting expert testimony that Federal Rule of Evidence 702 was amended in 2023 to repudiate. But no amount of irrelevant factual detail can hide the seriousness of the Fourth Circuit’s legal error or diminish the need for this Court’s intervention.

Rule 702 precludes admitting an expert’s testimony into evidence unless its proponent “demonstrates to the court that it is more likely than not” that “the testimony is based on sufficient facts or data.” Fed. R. Evid. 702(b); see Fed. R. Evid. 104(a). The Rule’s plain text thus *requires* a district court to determine by a preponderance of the evidence that the factual underpinnings of an expert’s proffered opinion are sufficiently reliable before allowing a jury to consider it.

Yet the Fourth Circuit held that the district court committed a “fundamental[]” error when it did exactly what Rule 702 prescribes, assertedly because “questions regarding the factual underpinnings of the [expert witness] opinion affect the weight and credibility of the witness’ assessment, not its admissibility.” Pet.App.22a. The Fourth Circuit went so far as to chastise the district court for a “glaring abuse of discretion.” Pet.App.21a. And the court of appeals cited its pre-amendment decision in *Bresler v. Wilmington Trust*, 855 F.3d 178 (4th Cir. 2017), no fewer than four times to justify its withering criticism of the district court’s careful consideration of the factual basis for the opinion at issue.

*Bresler* is, of course, the very case that the chair of the committee that drafted the 2023 amendment identified as a prime exemplar of the misguided approach that the Rule was amended to foreclose. Pet.24. By persisting in its adherence to *Bresler*, the Fourth Circuit defied Rule 702’s clear text, perpetuated the circuit conflict that the 2023 amendment was meant to resolve, placed itself in conflict with post-amendment decisions of numerous other circuits that have faithfully applied the amended Rule, and entrenched the risk of junk science distorting jury outcomes and settlement incentives in cases filed in the Fourth Circuit—a risk so serious that an unusually large coalition of amici have urged this Court’s immediate intervention to ensure that Rule 702 is applied with uniform rigor throughout the country. See Chamber of Commerce *et al.* Br.

This Court’s review is plainly warranted.

## ARGUMENT

### I. The Circuits Are Split Over Whether Courts Can Consider Challenges to the Factual Basis of an Expert’s Opinion

For many years, there has been a persistent, acknowledged conflict among the courts of appeals as to the proper application of Rule 702(b) where a party raises challenges to the factual basis of an expert’s opinion. Indeed, the conflict became so intractable that, in 2023, Rule 702 was amended to “clarify and emphasize” that the “many courts” that had “held that the critical question[] of the sufficiency of an expert’s basis” is a “question[] of weight and not admissibility” were “incorrect[ly] appl[ying]” the Rule. Fed. R. Evid. 702 advisory committee’s notes to 2023 amendments. The point of that amendment, of course, was to ensure

that Rule 702's judicial gatekeeping function was carried out with uniform rigor across the country. Although many circuits have fallen in line, the First and Fourth Circuits continue to hew to their lax pre-amendment approach—and, as in this case, to rely on the very decisions that announced the “incorrect application” of the law. *Ibid.*

Respondent asserts that this conflict is illusory. But respondent does not even try to explain why Rule 702 was amended in 2023. Nor does respondent have any explanation for all the commentators who have concluded that the Fourth Circuit, like the First Circuit, takes an approach that is out of step with other courts of appeals. See, e.g., Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 *Notre Dame L. Rev.* 2039, 2044-2050 (2020); Pet.29-30 (collecting other acknowledgments of the split).

Instead, respondent insists that the First and Fourth Circuits “take seriously their obligation to ‘gatekeep’ expert testimony that rests on an unsound factual basis.” Opp.25. But all that she demonstrates is that those circuits occasionally exclude expert testimony—and that proves nothing. Everyone agrees that district courts *sometimes* should exclude testimony and *sometimes* should admit it; the question is where Rule 702(b) draws the line. The First and Fourth Circuits did not and still do not apply the same legal test as other courts of appeals. Those two circuits abjure their gatekeeping role whenever *some* evidence supports the expert's testimony. Pet.14-18. They exclude expert testimony only in extreme cases in which *no* evidence supports the expert's view. That is an obviously improper application of Rule 702's gatekeeping requirement, which authorizes a court to admit expert

testimony only where *the court finds it more likely than not* that the testimony has a sufficient factual basis to be reliable. It instead flings the gate open wide, sending almost all challenges to the factual sufficiency of an expert’s testimony to the jury—precisely what Rule 702 was amended to stop.

A closer examination of the First and Fourth Circuit cases that respondent cites makes this perfectly clear. Most predated the 2023 amendments, Opp.26-31—and there is no question that, prior to those amendments, those circuits “incorrect[ly] appl[ied]” Rule 702. Fed. R. Evid. 702 advisory committee’s notes to 2023 amendments. Indeed, the chair of the subcommittee that wrote the 2023 amendments called out decisions from the First and Fourth Circuits as “a prime example” of the way that some courts were “effectively vitiat[ing]” the rule that expert testimony is admissible only if a court finds it to have a sufficiently reliable factual basis under a preponderance-of-the-evidence standard. 95 Notre Dame L. Rev. at 2044, 2049-2050.

Respondent’s lead case—*Tyger Construction v. Pensacola Construction*, 29 F.3d 137 (4th Cir. 1994), is instructive. Opp.26. There the Fourth Circuit excluded expert testimony because it was “based on assumptions which find *no* support in the record.” 29 F.3d at 144 (emphasis added). *Tyger* is thus not a case in which there were “questions regarding the factual underpinnings” of the expert’s testimony, *Bresler*, 855 F.3d at 195; it is a case where there were *no* factual underpinnings for that testimony. It does not show that the Fourth Circuit would—as the majority of circuits would—exclude an expert report that had *some* factual basis but was not sufficiently reliable based on the preponderance of the evidence. And the other pre-

amendment decisions respondent identifies are unhelpful to her for the same reason. See Opp.29-30 (relying on case holding that “district courts ‘may exclude expert testimony that has no foundation or rests on obviously incorrect assumptions’” (quoting *Casas Off. Machines v. Mita Copystar Am.*, 42 F.3d 668, 681 (1st Cir. 1994) (citation modified))).<sup>1</sup>

Respondent identifies just two post-amendment Fourth Circuit cases that excluded expert testimony—but those too are cases where there was *no* factual support at all for the testimony. In *United States v. Hudak*, 156 F.4th 405 (4th Cir. 2025), an expert sought to opine that a defendant’s mental-health issues had “more likely than not” caused his criminal conduct in 2021 and 2022, even though the expert’s report was focused on the defendant’s competency to stand trial in September 2023, *id.* at 409—i.e., a different issue and a different period of time. As the district court explained, exclusion was proper because the expert “offers *no factual basis* for her opinion as to any active symptoms during” the period when the offenses occurred. Order 9, *Hudak*, No. 23-cr-231 (M.D.N.C. Dec. 22, 2023), ECF No. 54 (emphasis added). The Fourth Circuit affirmed, concluding that “[i]t was reasonable for the court to conclude that this analytical gap” made the opinion unreliable. 156 F.4th at 410.

The same is true of *Le Doux v. Western Express*, 126 F.4th 978 (4th Cir. 2025). The Fourth Circuit excluded

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<sup>1</sup> That a 2021 Fourth Circuit decision “praised the proposal that preceded the [2023] amendments” in no way demonstrates that the Fourth Circuit has correctly applied those amendments. Opp.28-29 (emphasis omitted). To the contrary, respondent concedes that the Fourth Circuit has continued to apply its pre-amendment precedent, see Opp.28; p.7, *infra*.

the testimony of plaintiff's expert, who sought to reconstruct an accident, because his use of "inaccurate time stamps" made his testimony unreliable. Opp.27 (quoting 126 F.4th at 985). Critically, the Fourth Circuit reasoned that exclusion was proper because the plaintiff "never argue[d]" that his expert's interpretation of the time stamps was "right," but only that the potential *inaccuracy* "goes to the weight of the evidence, not admissibility." 126 F. 4th at 985. Put differently, the Fourth Circuit affirmed exclusion of expert testimony because even its proponent would not defend its factual sufficiency. That only emphasizes how extreme an expert opinion's factual insufficiency must be for the Fourth Circuit to exclude it.

Respondent's discussion of circuits that take the majority approach—consisting of just a string cite—is likewise beside the point. See Opp.32-33. Showing that the Fifth, Sixth, Eighth, Ninth, and Federal Circuits sometimes conclude that expert testimony is admissible does not establish that those circuits apply the same legal test for admissibility applied in the First and Fourth Circuits. To the contrary, as respondent does not contest, the decisions she cites from that larger group of circuits uniformly hold that a court must exercise a significant gatekeeping role in examining the factual underpinnings of an expert's opinion and deciding whether the testimony is sufficiently reliable by a preponderance of the evidence in light of challenges to those underpinnings. See, *e.g.*, *Exafer v. Microsoft*, 169 F.4th 1089, 1093 (Fed. Cir. 2026) (concluding expert opinion was sufficiently reliable for admission where "[t]he facts \* \* \* illustrate[d] the methodological soundness"); *Teradata v. SAP*, 124 F.4th 555, 571 (9th Cir. 2024) (expert report admissible where expert's assumption was "sufficiently plausible").

All in all, respondent establishes only that the First and Fourth Circuits would not admit “obviously incorrect” expert testimony and that courts in the majority of circuits would not exclude expert testimony with “sufficiently plausible” factual support. Opp.30, 33. But she does nothing to show what she claims: that, where an expert’s testimony is supported by *some* evidence that is subject to significant challenge, the First and Fourth Circuits are aligned with the majority of circuits in requiring a ruling by the court that it is “more likely than not that an expert has a sufficient basis to support an opinion” before the testimony can be admitted. *Engilis v. Monsanto*, 151 F.4th 1040, 1049 (9th Cir. 2025). She does not cite a single First or Fourth Circuit case that so holds, or that could even be characterized as applying that standard. To the contrary, respondent concedes (as she must) that the First and Fourth Circuits’ widely criticized, pre-amendment precedent remains good law in those circuits and holds that whenever some facts support an expert’s testimony, challenges to its admissibility get punted to the jury. See Opp.28, 30-31 (discussing *Bresler*, 855 F.3d 178, and *Milward v. Acuity Specialty Prods. Grp.*, 639 F.3d 11 (1st Cir. 2011)). That precedent cannot be squared with the rule applied by the majority of the courts of appeals. See, e.g., *EcoFactor v. Google*, 137 F.4th 1333, 1344 (Fed. Cir. 2025) (en banc).

## **II. The Fourth Circuit’s Decision Is Incorrect**

Respondent tries to distract from the serious error at the heart of the Fourth Circuit’s decision by dwelling extensively on the district court’s supposed fact-bound mistakes. See Opp.14-23. But the Fourth Circuit’s dispositive reliance on an incorrect legal test is plain.

Try as she might, respondent cannot mask the Fourth Circuit’s unambiguous holding that challenges to the factual basis of an expert’s testimony affect the weight of the evidence and not its admissibility. The Fourth Circuit emphasized repeatedly that it was applying that test (citing *Bresler*), and that test undeniably drove the majority’s ruling. Pet.App.20a-21a (district court’s conclusion was “abuse of discretion because ‘questions regarding the factual underpinnings of the [expert’s] opinion affect the weight and credibility of the witness’ assessment, not its admissibility” (quoting *Bresler*, 855 F.3d at 195)); *id.* at 22a (district court “again violated *Bresler*’s holding”); *id.* at 24a-25a (“district court again conflated admissibility with the weight a factfinder might attribute Dr. Sahu’s testimony based on his choice of data”); *id.* at 26a (“weight to give Dr. Sahu’s choice of EtO background data had nothing to do” with “admissibility”).

That reliance on *Bresler*’s “weight not admissibility” rule is incorrect, as commentators—including an unusually large collection of concerned amici—all agree. Pet.App.36a (Diaz, C.J., dissenting); see, e.g., Lee Mickus, *Amended Rule 702 in 2025*, Wash. Legal Found. (Oct. 7, 2025); Chamber of Commerce Br.14. It cannot be reconciled with Rule 702(b)’s text or with the stated purpose for the 2023 amendment. Pet.21-25. Respondent does not seriously contend otherwise. She desultorily suggests that the “*Bresler*’s rule” is “fully consonant with *Daubert*’s principle of reliability.” Opp.28. But she never grapples with the specific rejection of *Bresler* in Rule 702 itself. See Fed. R. Evid. 702 advisory committee’s notes to 2023 amendments (“many courts” had “incorrect[ly]” “held that the critical question[] of the sufficiency of an expert’s basis” is “always” a “question[] of weight”); 95 Notre Dame L. Rev. at 2043, 2049-2050.

Instead, respondent devotes page after page to a slanted attack on the district court's factual assessment. In respondent's view, because her expert occasionally offered some explanation of his choice of inapposite data, or simply did not have access to the data necessary to draw the conclusions that he did, his testimony necessarily passes through the *Daubert* gate. Compare Pet.8-9, 25, with Opp.14-23.<sup>2</sup> That reproduces the Fourth Circuit's error of assuming that any factual basis is enough for admissibility, even if the preponderance of the evidence shows a lack of reliability. And respondent ignores Chief Judge Diaz's explication of the serious flaws in the factual basis for her expert's testimony, including that the expert's "model purports to estimate actual emissions," "[y]et he relied on values that *expressly* didn't represent actual emissions"; "his model shows that in 1984 the cumulative EtO exposure \* \* \* was 100 times greater than in other years, yet that outlier raised no red flags" for him; he "never explained why the data from some distance away was representative of the conditions near the facility"; and, "[i]n many instances, [he] held a value \* \* \* from one year constant over several years," or even over "the entire thirty-year period at issue," without "explain[ing] why such values were unlikely to change significantly from year to year." Pet.App.38a-39a.

This Court need not wade into those details to rule that the Fourth Circuit applied the wrong legal test under Rule 702(b). It is plain that the Fourth Circuit

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<sup>2</sup> Respondent also repeatedly insists that the district court incorrectly applied a "test" under which an expert's testimony is admissible only if it pays "excruciating attention to detail." Opp.2, 6, 15, 17. The court did no such thing. It simply quoted a different court's discussion of the process undertaken by experts engaged in modeling like that here. Pet.App.62a-63a.

applied the demonstrably incorrect *Bresler* test, thereby giving a pass to serious problems with the expert's testimony that go directly to admissibility. That places in the hands of a jury a scientific determination that it is completely ill equipped to make. Pet.26-28.

### **III. This Case Cleanly Presents an Issue of Exceptional Importance**

Respondent nowhere disputes the exceptional importance of the question presented. The issue recurs frequently and is often outcome-determinative—or at least powerfully influences how cases progress and how much settlement pressure defendants face. Pet.25-28. And the Fourth Circuit's erroneous ruling below has *already* influenced district courts in that circuit to admit expert testimony without adequately addressing whether it has a sufficient factual basis to be reliable, Pet.28-29, with more sure to follow absent this Court's correction—making the Fourth Circuit a magnet for class actions predicated on junk science. Application of that ruling is deeply problematic for (among others) the nation's business community. Chamber of Commerce Br.20.

This case is also an ideal vehicle. The Fourth Circuit squarely held that the district court abused its “discretion because questions regarding the factual underpinnings of the [expert witness'] opinion affect the weight and credibility of the witness' assessment, not its admissibility.” Pet.App.20a-21a. That error—which the court of appeals described as an error of law, *ibid.*—was the *only* reason that court gave for displacing the district court's decision about the inadequacy of the factual basis for the expert's testimony. *Ibid.* And respondent does not dispute that a ruling for petitioner would end this case. Pet.31-32; Opp.24.

Respondent mysteriously claims that there are “alternative grounds on which to affirm,” Opp.14, but identifies no such grounds—doubtless because none exist. The district court identified multiple independent “substantive issues” with the factual underpinnings of the expert’s testimony, Pet.App.60a, any of which would warrant excluding it.

Respondent also contends that this case is “fact-bound,” Opp.24—but every *Daubert* case involves applying Rule 702 to particular testimony, and that does not mean that lower courts should never get this Court’s guidance on what legal standard properly governs *Daubert* inquiries.<sup>3</sup> Pet.29-30. “[Q]uestions regarding the factual underpinnings of the [expert witness] opinion” either affect the testimony’s admissibility or they do not. Pet.App.20a-21a. That is a pure legal question that this Court will have no difficulty answering. In all events, whether the expert’s testimony here should be excluded under the correct standard could be addressed in the first instance on remand. See, e.g., *Daubert*, 509 U.S. at 597-598; *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 430 (2014). What is badly needed is clarity on the law.

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<sup>3</sup> *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999)—a case also turning on an engineer’s expert testimony—confirms that complex subject matter is not a hindrance to the Court announcing a clear legal rule.

**CONCLUSION**

The petition should be granted.

Respectfully submitted,

JOHN L. EWALD  
SUSANNA MOLDOVEANU  
KIRKLAND & ELLIS LLP  
601 Lexington Avenue  
New York, NY 10022  
(212) 446-4800

DAVID A. FUSCO  
WESLEY A. PRICHARD  
T. NATHAN TOWNSEND  
K&L GATES LLP  
210 Sixth Avenue  
Pittsburgh, PA 15222  
(412) 355-6500

DONALD B. VERRILLI, JR.  
*Counsel of Record*  
ELAINE J. GOLDENBERG  
RACHEL G. MILLER-ZIEGLER  
KYLE A. SCHNEIDER  
MUNGER, TOLLES & OLSON LLP  
601 Massachusetts Ave. NW  
Suite 500E  
Washington, DC 20001-5369  
(202) 220-1100  
Donald.Verrilli@mto.com

*Counsel for Petitioners*

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