No. 21-241

In The Supreme Court of the United States

MONSANTO COMPANY,

Petitioner,

v.

EDWIN HARDEMAN,

Respondent.

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

BRIEF OF LAWYERS FOR CIVIL JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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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,

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[1] Petitioner's 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. Pursuant to 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, although Petitioner Monsanto Company's corporate parent Bayer is a member of LCJ, neither it nor its counsel in this case participated in writing or submitting this brief. Nor did it submit any monetary contribution to the preparation or submission of this brief beyond whatever support was derived from its payment of normal membership dues.

[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.

drawing on both its own efforts undertaken during the rulemaking process and the collective experience of its members who are 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 in the Tenth Circuit addressing the intent of Rule 702 and the inconsistencies that have arisen when courts decide the admissibility of expert testimony based on court-created policy rather than the language of Rule 702.[4]

LCJ and its members have an interest in ensuring that the Federal Rules of Evidence be correctly and consistently interpreted across the nation, particularly

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[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

[4] *Fischer v. BMW of North Amer., LLC*, No. 20-01399.

with respect to the burden of production and the reliability criteria set forth in Rule 702. That standard, and not local variations that modify or remove elements or alter the explicit admissibility requirements, reflects the result of the Rules Enabling Act's rule-making process and is the governing law.

SUMMARY OF ARGUMENT

The Court should grant certiorari to address the Ninth Circuit's purposeful application of a gatekeeping standard that departs 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 Ninth Circuit has developed an alternative standard that bends Rule 702's rigorous assessment downward, leaving a less stringent requirement for proffered opinion testimony to meet to be deemed admissible. In this case, application of the excessively lenient Ninth Circuit standard resulted in unjustified admission of expert testimony.

Review in this case is also justified because the Ninth Circuit's erroneous departure from Rule 702 mirrors what other circuits are doing. Despite Rule 702's overarching authority, courts frequently and inconsistently apply gatekeeping that are less rigorous

than the "preponderance of the evidence" test and even discard substantive considerations required by Rule 702(b) or 702(d). Such problematic rulings often draw on circuit decisions that pre-date the present version of Rule 702.[5]

Gatekeeping practices that are fundamentally inconsistent with Rule 702, as was the case here, have become a widespread, recognized problem. The Judicial Conference Advisory Committee on Evidence Rules recently 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."[6] Based on this finding, it has proposed an amendment that would add the preponderance of the evidence test into the rule's text to clarify that this is the test courts must apply to each of Rule 702's considerations. The Court's taking up a matter of how to correctly interpret and apply Rule 702

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[5] *See*, *e.g.*, *In re: Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*, 9 F.4th 768, 785, 787 (8th Cir. 2021) (identifying *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988) as authority for assessing only whether expert's opinions were "fundamentally unsupported," rather than scrutinizing the expert's factual basis using the preponderance of the evidence standard; also asserting "general rule" that "deficiencies in an expert's factual basis go to weight and not admissibility").

[6] 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.

would buttress the ongoing rulemaking efforts by giving much-needed definition to the highly variable gatekeeping analysis presently seen in the lower courts.

Granting Monsanto's petition therefore would allow the Court to resolve the lower courts' widespread misunderstanding and reaffirm Rule 702 as the primary authority that governs gatekeeping. Reliance on prior decisions in preference to the explicit criteria set forth in Rule 702 itself has produced inconsistent and often inadequate scrutiny of expert testimony. The Court should grant certiorari in this case to clarify that courts err when they elevate caselaw-derived alternative approaches above the requirements established in Rule 702 when evaluating whether expert testimony qualifies for admission.

ARGUMENT

Review Is Needed Because Courts Are Using Divergent Approaches to Evaluate the Admissibility of Expert Evidence under Rule 702, Many of Which Depart from Rule 702's Explicit Criteria

A. Rule 702 establishes the standard for admissibility, but courts often overlook Rule 702

The Rules Enabling Act gives the power to make procedural rules—along with the responsibility to

explain changes to those rules[7]—to the Supreme Court[8] and the Judicial Conference committees.[9] Federal Rule of Evidence 702 is the enactment "governing expert testimony[.]" *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993). Its present form resulted from an amendment adopted by the Court and submitted to Congress in 2000 following rulemaking actions conducted pursuant to the Rules Enabling Act. *See* Order Amending the Federal Rules of Evidence, 529 U.S. 1189, 1195 (2000).

The text of Rule 702 provides the criteria courts must find established before admitting expert opinions into evidence. *See Whole Woman's Health*, 136 S. Ct. at 2316-17 (2016). Specifically, courts following Rule 702 must determine if the necessary elements for admission of opinion testimony—helpfulness to the jury, sufficient factual basis, use of reliable principles and methods, and reliable application of the methodology to the facts of the case—have been demonstrated by a preponderance of the evidence.[10]

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[7] The Rules Enabling Act requires that a rule proposed by a Judicial Conference committee be accompanied by "an explanatory note on the rule, and a written report on the body's action." 28 U.S.C. § 2073(d).

[8] 28 U.S.C. § 2072(a).

[9] 28 U.S.C. § 2073(a) and (b).

[10] Federal Rule of Evidence 702. *See also* Advisory Committee Note to Fed.R.Evid. 702, 2000 Amendments ("the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence.") (citing *Bourjaily v. United States*, 483 U.S. 171 (1987)).

In practice, however, courts often overlook Rule 702:

> a surprising number of cases start and end with *Daubert* and its progeny and fail to mention Rule 702. Of course, Rule 702 was amended in 2000, and the elements of Rule 702, not the caselaw, are the starting point for the requirements for admissibility.[11]

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[.]"[12] The Ninth Circuit's decision provides a stark example: it followed earlier Ninth Circuit rulings that read *Daubert* as "favoring admission" and affirmed the challenged experts' admission on the basis of that diluted standard, rather than on fulfillment of the actual Rule 702 test. Pet. App. 23a, 26a (quoting *Messick v. Novartis Pharms. Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014) and citing *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1237 (9th Cir. 2017)). Monsanto's petition therefore presents a compelling need to clarify the gatekeeping framework courts should apply and

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[11] Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039, 2060 (2020). *See also Kansas City S. Ry. Co. v. Sny Island Levee Drainage Dist.*, 831 F.3d 892, 900 (7th Cir. 2016) (indicating that the litigants "should have paid more attention to Federal Rule of Evidence 702, which superseded *Daubert* many years ago").

[12] *Schroeder*, *supra* n. 11, at 2039 (emphasis original).

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

B. Some courts assess expert admissibility using alternative conceptions of the standard that are inconsistent with Rule 702, including the Ninth Circuit, which purposely applies a substantively different standard

Far from reflecting a rule-based approach to admissibility, the courts currently use a patchwork of varied approaches that often overlook Rule 702's preponderance of proof standard. Believing that the rule is rooted in a policy that prefers admission of opinion testimony, some circuits employ judicially-created formulations that tilt the gatekeeping assessment. In the Eighth Circuit's re-conception of the admissibility test, "[o]nly if an expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded." *United States v. Finch*, 630 F.3d 1057, 1062 (8th Cir. 2011) (quotation omitted). *See also Johnson v. Mead Johnson & Co*., 754 F.3d 557, 562 (8th Cir. 2014) (reversing district court's exclusion of expert testimony because it "violated these liberal admission standards" including the "only if it is so fundamentally unsupported" test). The Third Circuit has also diminished the standard, declaring that the "Rules of Evidence embody a strong preference for admitting any evidence that may assist the trier of fact," and Rule 702 in particular "has a liberal policy of admissibility."

In re SemCrude L.P., 648 F. App'x 205, 213 (3d Cir. 2016); *accord Knecht v. Jakks Pac., Inc.*, No. 4:17-CV-2267, 2021 WL 3722854, at *3 (M.D. Pa. Aug. 23, 2021).

These lax standards are influencing district courts even beyond the boundaries of their own circuits. *See*, *e.g.*, *Pacific Indem. Co. v. Dalla Pola*, 65 F. Supp. 3d 296, 302 (D. Mass. 2014) (quoting *Larson v. Kempker*, 414 F.3d 936, 941 (8th Cir. 2005) and employing the Eighth Circuit's "only if an expert's opinion is so fundamentally unsupported" standard); *accord Beebe v. Colorado*, No. 18-cv-01357-CMA-KMT, 2019 WL 6044742, at *7 (D. Colo. Nov. 15, 2019); *Wischermann Partners, Inc. v. Nashville Hosp. Capital LLC*, No. 3:17-CV-00849, 2019 WL 3802121, at *3 (M.D. Tenn. Aug. 13, 2019). Even within the Second Circuit, which directs that gatekeeping involve a "rigorous examination" of the Rule 702 elements,[13] 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).

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[13] *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.' ") (quoting *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002)).

Like these courts, the Ninth Circuit does not resolve questions of expert admissibility with Rule 702's "preponderance of the evidence" test. Instead, the Ninth Circuit applies its own particular standard derived from a policy preference it attributes to the *Daubert* holding. The Court in *Daubert* observed, in considering the propriety of the "general acceptance" test that had supplied the justification for excluding expert testimony in that case, that "a rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony.'" 509 U.S. at 588 (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)). Based on the Court's specific comparison, the Ninth Circuit reads into Rule 702 an outcome preference "favoring admission[.]" *Messick*, 747 F.3d at 1196.[14]

In Monsanto's case, the Ninth Circuit's policy preference likely changed the result. The district court did not evaluate if the opinion testimony at issue was demonstrated by a preponderance of proof to have sufficient factual basis, arose from reliable methods, and resulted from reliable application of the methodology to the facts of the case. Instead, the

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[14] Judge Schroeder has noted the limited significance of *Daubert's* "liberal thrust" statement in light of Rule 702's status as the governing authority and the circumstances giving rise to the Court's use of that phrase: "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. 11, at 2060.

district court shaded the analysis because Ninth Circuit precedents have "placed great emphasis" on the idea that courts should take a permissive approach to gatekeeping. Pet. App. 101a. Specifically, the district court observed that Ninth Circuit rulings overshadow Rule 702's preponderance test with the conception that the analysis "should be applied with a liberal thrust favoring admission[.]" Pet. App. at 23a. This outcome-presumptive approach to expert testimony has a considerable history in Ninth Circuit decisions, having previously been deployed in both *Wendell v. GlaxoSmithKline, LLC*, 858 F.3d 1227, 1232 (9th Cir. 2017) and *Messick v. Novartis Pharms. Corp*., 747 F.3d 1193, 1196 (9th Cir. 2014).

The district court recognized that this approach amounts to a judicial thumb on the admissibility scale that "could matter in close cases"—but nonetheless applied this purposely slack standard to give the jury disputed expert testimony that the court acknowledged involved just such a "close question" about "shaky" opinions. Pet. App. 179a–180a. The district court later observed in its ruling on specific causation experts that the admissibility standard it felt bound by Ninth Circuit precedent to apply is "more tolerant of borderline expert opinions" with the result that "a wider range of expert opinions (arguably much wider) will be admissible in this circuit." Pet. App. 84a. Despite noting that it was "skeptical of their conclusions, and in particular of the assumption built into their opinions from the general causation phase," the court found that the experts' opinions were "consistent

with Ninth Circuit caselaw" and ruled them admissible. Pet. App. 85a. Left unanswered by the district court's analysis is 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?[15]

On appeal, the Ninth Circuit reiterated its support for gatekeeping applied "with a liberal thrust favoring admission" and concluded that the district court in so doing "employed the correct legal standard for reliability." Pet. App. 23a, 26a. The court grounded its reasoning in Ninth Circuit precedent and its interpretation of policy signals expressed in *Daubert*, rather than reviewing whether the district court assessed the challenged expert testimony in accordance with Rule 702. In fact, the court rationalized that its gatekeeping approach granting "slight deference to experts with borderline opinions"[16] represents the proper standard because "[t]he Supreme Court has not directed courts to follow a different rule since it first decided *Daubert* almost 28 years ago"—entirely overlooking the fact that the Court adopted Rule 702 in 2000. Pet. App. 26a. *See also* Order Amending the

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[15] Judge Schroder notes the uncertainty that exists about the propriety of an admissibility ruling when the trial court cites Rule 702 but proceeds to rule by applying an alternative standard and does not indicate if a preponderance of proof showed that the expert met all Rule 702's elements. *See* Schroeder, *supra* n. 11, at 2050 n. 90, 2060.

[16] Pet. App. 26a (quotation from *Wendell*, 858 F.3d at 1237 omitted).

Federal Rules of Evidence, 529 U.S. at 1195 (presenting amended Rule 702 to Congress).

The Ninth Circuit's instruction that admissibility rulings should be guided by its policy preference for admitting opinion testimony has caused district courts to fail at gatekeeping. Like the district court in Monsanto's case, other judges recognize that the "Ninth Circuit has placed great emphasis" on its conception that "a district court should conduct the analysis 'with a "liberal thrust" favoring admission.'" *In re Viagra (Sildenafil Citrate) and Cialis (Tadalafil) Products Liability Litigation*, 424 F. Supp. 3d 781, 790 (N.D. Cal. 2020) (quoting *Messick*, 747 F.3d at 1196, internally quoting *Daubert*, 509 U.S. at 588).[17] Because the Ninth Circuit directs courts to presume admissibility, rather than focus on whether the Rule 702 elements have been established by a preponderance of proof, district courts in the Ninth Circuit limit gatekeeping to excluding "only those expert opinions that are 'unreliable nonsense opinions.'" *Park Plaza Condo. Asso. v. Travelers Indem. Co.*, No. CV 17-112-GF-JTJ, 2019 WL 4307952, at *2 (D. Mont. Mar. 25, 2019) (quoting *Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 969 (9th Cir. 2013)). The Ninth Circuit's approval in Monsanto's case of giving "slight deference to experts with borderline opinions"

[17] A Westlaw search performed on Sept. 19, 2021 returned 46 decisions from district courts in the Ninth Circuit that have quoted the "liberal thrust favoring admission" re-casting of the expert admissibility standard first declared in 2014 in *Messick*, 747 F.3d at 1196.

will only further signal to district courts that they should proceed on the basis of outcome preference rather than employ even-handed application of the Rule 702 standard.

Beyond revising Rule 702's preponderance of evidence standard, some courts replace the rule's mandated considerations with local formulations that eliminate the rule's requirements. The Eighth Circuit and the Fifth Circuit have discarded Rule 702(b)'s directive that admissible opinion testimony must have sufficient factual support in favor of a "general rule" that "deficiencies in an expert's factual basis go to weight and not admissibility[.]" *In re: Bair Hugger Forced Air Warming Dev. Prods. Liab. Litig.*, 9 F.4th 768, 786 (8th Cir. 2021). *See also Puga v. RCX Sols., Inc.*, 922 F.3d 285, 294 (5th Cir. 2019) (announcing similar "general rule").[18] The Ninth Circuit, too, has ignored Rule 702(b) to declare instead that the "factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility[.]" *Mighty Enterp., Inc. v. She Hong Industrial Co.*, 745 F. App'x 706, 709 (9th Cir. 2018) (quotation omitted). District courts within

[18] In addition to Rule 702(b), some courts also overlook the requirements of Rule 702(d), finding that "[c]oncerns surrounding the proper application of the methodology typically go to the weight and not admissibility[.]" *Murphy-Sims v. Owners Ins. Co.*, No. 16-CV-0759-CMA-MLC, 2018 WL 8838811, at *7 (D. Colo. Feb. 27, 2018). *See also AmGuard Ins. Co. v. Lone Star Legal Aid*, No. CV H-18-2139, 2020 WL 60247, at *8 (S.D. Tex. Jan. 6, 2020) ("[O]bjections [that the expert could not link her experienced-based methodology to her conclusions] are better left for cross examination, not a basis for exclusion.").

the Ninth Circuit are following that direction. *See*, *e.g.*, *Scripps Health v. nThrive Rev. Sys., LLC*, No. 19-cv-00760-H-DEB, 2021 WL 3372835, at *3 (S.D. Cal. May 10, 2021) (rejecting admissibility challenge to expert's factual basis using same statement set forth in *Mighty Enterp.*; *Bluetooth SIG, Inc. v. FCA US LLC*, No. 2:18-cv-01493-RAJ, 2020 WL 3446342, at *4 (W.D. Wash. June 24, 2020) (same).

Although presented as Rule 702 interpretations, these rulings that omit consideration of the experts' factual basis or methodological application often arise from recycled pre-Rule 702, even pre-*Daubert* views of expert admissibility that the adoption of amended Rule 702 in 2000 rendered obsolete.[19] For example, the Ninth Circuit in *Mighty Enterp*. cited *Hangarter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1014 n. 14 (9th Cir. 2004)) as authority for the broad proposition that the factual basis of an expert's opinion is a matter of weight for the jury to determine, not an admissibility issue for the court to decide. 745 F. App'x 709. Before it was embraced by the Ninth Circuit in *Hangarter*, however, that language had been carried forward sequentially by several Eighth Circuit decisions following its first appearance in a 1988 decision, *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir.). Similarly, the Fifth Circuit's proclamation in

[19] *See Schroeder*, *supra* n. 11, at 2060 ("courts should read cases predating the 2000 amendments to Rule 702 with caution. Rule 702 has changed, and thus so have the admissibility requirements. *City of Pomona*[, 750 F.3d 1036] illustrates this problem.").

Puga, 922 F.3d at 294, that "[a]s a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility" originated prior to *Daubert* in *Viterbo v. Dow Chem. Co*., 826 F.2d 420, 422 (5th Cir. 1987).[20] In *Bair Hugger*, the Eighth Circuit drew the "fundamentally unsupported" test it applied in place of the preponderance of evidence standard from *Loudermill*, 863 F.2d at 570, directly referencing that pre-*Daubert* ruling. *Bair Hugger*, 9 F.3d at 788.

The lower courts' widespread disregard of certain substantive Rule 702 elements and use of purposely weakened admissibility standards favoring admission warrants this Court's attention. A jury is most likely to be misled by expert opinions when they have the patina of scientific or technical expertise but are not based on reliable methodology, reliably applied to the facts of the case. And that is what the Rule is intended to guard against. Yet, the Ninth Circuit's approach to expert testimony departs from the Rule 702 preponderance of proof test to favor an outcome, and that enfeebled approach to gatekeeping likely resulted

[20] Although the quoted language from the *Puga* holding repeats verbatim text that appears in *Viterbo*, 826 F.2d at 422, the *Puga* court cites *Rock v. Arkansas*, 483 U.S. 43, 61 (1987) as support for the statement. This citation is puzzling, as *Rock* considered Arkansas' rule excluding all hypnotically refreshed testimony, not opinion testimony admissibility. *Id*. at 45. It pre-dates *Daubert* by several years, does not discuss Rule 702, and provides only a passing mention that unreliable testimony may be excluded.

in admission of expert testimony incapable of meeting Rule 702's requirements. Monsanto's petition reflects a systemic need to clarify the analytical framework courts should apply and to identify formulations that are inconsistent with Rule 702 and therefore amount to error.

C. Disregarding Rule 702 in favor of re-imagined standards has become a recognized problem

Decisions that depart from the Rule 702 admissibility standard and that restrict the admissibility considerations in reliance on archaic conceptions of courts' gatekeeping function undermine the purpose of Rule 702. The Advisory Committee on Evidence Rules intended amended Rule 702 to put in place "a more rigorous and structured approach than some courts are currently employing."[21] Courts that use pre-*Daubert* expert screening practices fail to fulfill this objective. Likewise, courts that begin their analysis deliberately favoring admission rather than neutrally applying the preponderance of evidence standard have placed their policy preferences ahead of the governing law, Rule 702. As a result, a gaping inconsistency has developed between the courts that disregard Rule 702's requirements and those that follow its directives.

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[21] 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.

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.").[22] *See also Sardis v. Overhead Door Corp.*, 10 F.4th 268, 281–283 (4th Cir. 2021) (indicating Rule 702 reliability considerations are "*preconditions* to the admissibility of expert testimony.") (emphasis in original).

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

[22] The Ninth Circuit in the present case identified the policy-based guidance in *City of Pomona* as indicative of the Ninth Circuit's "*Daubert* approach," and relied upon the direction presented in *City of Pomona* in affirming the district court. Pet. App. at 25a. Judge Schroeder, however, identifies the admissibility analysis presented in *City of Pomona* as inconsistent with Rule 702: "the court's blanket conclusion that challenges to the expert's deviation from the protocols merely raised questions as to the weight of the evidence and presented a question for the fact finder, not the trial court, appears facially wrong." Schroeder, *supra* n. 11, at 2051.

preponderance standard[.]"[23] The pervasiveness of rulings 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.[24]

Misunderstanding of Rule 702 has, in the Advisory Committee's determination, resulted in "a fair number of cases" of improperly admitted expert testimony because "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."[25]

Departures from Rule 702 have become so widespread and created such entrenched inconsistency

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[23] 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.

[24] 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.

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

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."[26] The Committee on Practice and Procedure on July 30, 2021 announced this proposed amendment to Rule 702 and requested public comment. 86 Fed. Reg. 41087, 41088 (July 30, 2021).

The proposed amendment would establish the preponderance of the evidence standard within the text of Rule 702.[27] This step would communicate that the even-handed preponderance of proof test, and not a policy preference for allowing opinion testimony, is how judges must determine experts' admissibility. The accompanying Draft Committee Note explains that the amendment seeks "to clarify and emphasize that the admissibility requirements set forth in the Rule must be established to the court by a preponderance of the evidence."[28] Also, the amendment would direct judges to find all of Rule 702's elements established before admitting a challenged expert's testimony. The Draft Committee Note rejects those cases—such as the

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[26] Minutes—Committee on Rules of Practice & Procedure, Report of the Advisory Committee on Evidence Rules (Jan. 5, 2021) at 25, *supra* n. 23.

[27] 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.

[28] *Id.*

decisions from the Fifth, Eighth and Ninth Circuits discussed above—that describe an expert's factual foundation as 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)[.]

The Fourth Circuit recently took notice of this proposed amendment as underscoring "the indispensable nature of district courts' Rule 702 gatekeeping function in all cases in which expert testimony is challenged[.]" *Sardis v. Overhead Door Corp*., 10 F.4th 268, 281–283 (4th Cir. 2021) (emphasis added). A national evidentiary rule only has room for a single admissibility standard.

D. Court direction would complement the proposed amendment by focusing attention 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 not to change the standard for evaluating opinion testimony admissibility, but rather to change the practices in those courts that incorrectly look to judicial pronouncements, and not Rule 702 itself, as their primary authority on the

gatekeeping function.[29] The Ninth Circuit in the present case followed the very pattern that has sparked the Advisory Committee to act: it mentioned in passing but did not apply the terms of Rule 702, employed an alternative admissibility standard derived from caselaw precedent, and indicated that signals from the Court and not the content of the rule would drive its approach to assessing expert testimony. Pet. App. 22a–26a.

Court review of the Ninth Circuit's gatekeeping approach would inform the consideration of the proposed amendment in an important way: reinforcing to the lower courts that Rule 702 establishes the burden of production and substantive considerations that must be used. For the proposed amendment to have the intended effect, the lower courts must understand the error of relying on outdated but familiar precedent and the need to turn instead to the text of Rule 702 and its explanatory Advisory Committee Note. Questions have been raised about the ability of an amendment alone to effect meaningful

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[29] *See* Hon. Patrick J. Schiltz, Report of the Advisory Committee on Evidence Rules (May 15, 2021) at 6, *supra* n. 6. ("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."). *See also Schroeder*, *supra* n. 11, at 2060 ("In the vast majority of cases under question, while Rule 702 and relevant cases are cited, there is no acknowledgement that the gatekeeper function requires application of Rule 104(a)'s preponderance test, much less for *each* of the elements of the Rule. Instead, courts tend to defer to statements from caselaw, even if it is outdated.") (emphasis original).

change.[30] The Ninth Circuit, however, indicated in this case that signals from the Court about the proper approach to gatekeeping, if given, would change the way it conducts the gatekeeping function. *See* Pet. App. 26a ("The Supreme Court has not directed courts to follow a different rule since it first decided *Daubert* almost 28 years ago.). Accordingly, the Court should grant certiorari to focus courts' attention on the text of Rule 702 and reject the current practice of divining a preferred outcome to admissibility challenges from perceived cues in prior decisions.

The Court's guidance is urgently needed in conjunction with the rulemaking efforts to elucidate and correct lower courts' misguided approaches. Due to the prevalence of opinion testimony, courts frequently address motions to exclude expert witnesses. Even in the short period that has elapsed since the filing of Monsanto's petition, district courts have issued rulings seemingly deciding admissibility on the basis of a standard that significantly departs from the preponderance of proof test. *See*, *e.g.*, *Knecht*, 2021 WL 3722854, at *6 ("given Rule 702's 'liberal policy of admissibility,' we will admit Dr. Pope's testimony as fit for this case.") (quoting *Pineda v. Ford Motor Co.*, 520 F.3d 237, 244 (3d Cir. 2008); *MPAY Inc. v. Erie Custom Computer Apps., Inc.*, No. 19-704 (PAM/BRT), 2021 WL 3661507, at *1, *4 (D. Minn. Aug. 18, 2021) (noting "'cases are legion that, correctly, under *Daubert*, call

[30] *See* Schroeder, *supra* n. 11, at 2059 ("If courts are currently ignoring the Supreme Court and the 2000 amendments, is it likely they would follow a new amendment?").

for the liberal admission of expert testimony'" and concluding that "Defendants have not established that *MPAY*'s expert witnesses should be precluded from testifying.") (quoting *Bair Hugger*, 9 F.4th at 777). The Court should review the legal standard used by the Ninth Circuit in Petitioner's case to instruct the lower courts on following Rule 702 when evaluating the admissibility of proffered expert testimony.

CONCLUSION

Courts current widespread failure to follow Rule 702 and review expert testimony as the Rule requires undermines the truth-seeking process and therefore the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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No. 21-241

MONSANTO COMPANY,
Petitioner,
v.
EDWIN HARDEMAN,
Respondent.

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the BRIEF OF LAWYERS FOR CIVIL JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER in the above entitled case complies with the typeface requirement of Supreme Court Rule 33.1(b), being prepared in New Century Schoolbook 12 point for the text and 10 point for the footnotes, and this brief contains 5786 words, excluding the parts that are exempted by Supreme Court Rule 33.1(d), as needed.

Subscribed and sworn to before me this 30th day of September, 2021.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

GENERAL NOTARY-State of Nebraska
RENEE J. GOSS
My Comm. Exp. September 5, 2023

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AFFIDAVIT OF SERVICE

I, Andrew Cockle, of lawful age, being duly sworn, upon my oath state that I did, on the 30th day of September, 2021, send out from Omaha, NE 2 package(s) containing 3 copies of the BRIEF OF LAWYERS FOR CIVIL JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

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