No. 13-1051

IN THE
Supreme Court of the United States

ACCENTURE, L.L.P.,
Petitioner,

v.

WELLOGIX, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND BUSINESS ROUNDTABLE AS AMICI CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND BUSINESS ROUNDTABLE AS AMICI CURIAE IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America (the "Chamber") and Business Roundtable respectfully submit this brief as amici curiae in support of the petition for a writ of certiorari in this case.[1]

INTEREST OF AMICI CURIAE

The Chamber is the world's largest federation of business companies and associations. It directly represents 300,000 members and indirectly represents the interests of over 3 million business, trade, and professional organizations of every size, in every business sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch.

Business Roundtable is an association of chief executive officers of leading U.S. companies with $7.4 trillion in annual revenues and more than 16 million

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[1] Pursuant to Rule 37.6, counsel for amici curiae state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amici curiae, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2, counsel of record for all parties received notice of the Chamber's intent to file this brief at least ten days before filing. The parties have consented to the filing of this brief, and evidence of that consent is on file with the Clerk's office.

employees. Member companies comprise more than a third of the total value of the U.S. stock markets and invest $158 billion annually in research and development—equal to 62 percent of U.S. R&D spending.

The Chamber and Business Roundtable regularly file amicus curiae briefs in cases, like this one, that raise issues of national concern to American businesses. The decision below is illustrative of a broader, troubling trend of courts abdicating their gatekeeping duties under Rule 702 of the Federal Rules of Evidence and this Court's precedents. Too often courts are admitting unreliable expert testimony, reasoning that a jury can muddle through it with the aid of competing expert evidence and cross-examination. Members of the Chamber and Business Roundtable are frequently the targets of litigation premised on such testimony, and the courts' failure to adhere to their gatekeeping obligations and exclude unreliable "expert" evidence has resulted in significant verdicts and coercive settlements against them. The Chamber and Business Roundtable accordingly have a substantial interest in the issues raised by this case.

INTRODUCTION AND SUMMARY

Along with the 2000 amendments to Rule 702 of the Federal Rules of Evidence, this Court's decisions in *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., Ltd. v. Carmichael*, 526 U.S. 137 (1999), adopt "exacting standards of reliability" that all expert evidence must satisfy. *Weisgram v. Marley Co.*, 528 U.S. 440, 455

(2000). These authorities charge courts, not lay jurors, with ensuring that experts "in the courtroom [apply] the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho*, 526 U.S. at 152. To satisfy that mandate, a court must guarantee not only that proposed testimony is "the product of reliable principles and methods" but also that it "is based on sufficient facts or data" and that each "expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702(b)-(d).

Contrary to those requirements, the district court and Fifth Circuit in this case left to jurors the threshold obligation to determine the reliability of proffered expert testimony—testimony that was based on facially demonstrable factual errors, yet provided the only evidentiary support for the multi-million dollar verdict against petitioner. *See* Pet. 7-10. The lower courts' rulings here are quite wrong, yet they do not stand alone. Too many district and appellate courts have exhibited a similarly lax approach to what should be exacting standards for admission of expert testimony. Their common error is a fundamental one: dismissing key, demonstrable flaws in expert evidence as problems going to the "weight" of the evidence, rather than its admissibility, leaves to jurors the task of resolving the basic reliability of a given expert's testimony. By requiring lay jurors to become arbiters of the threshold question of what constitutes legitimate expert analysis, the approach adopted by the court below completely eviscerates the gatekeeping role of the judge.

The proper roles of judge and jury in evaluating expert testimony is a question of great and ever-

increasing importance. *See* Hon. Jed S. Rakoff, *Science and the Law: Uncomfortable Bedfellows*, 38 Seton Hall L. Rev. 1379, 1379 (2008). And the abdication of courts' gatekeeping responsibilities has significant adverse consequences both for businesses and for society as a whole. As the decision below illustrates, unreliable "expert" testimony sometimes constitutes the sole evidentiary basis on which a jury awards millions of dollars of damages. Pet. 7-10. And even when there is a broader factual record, expert testimony often has an outsized influence on juries. *Daubert*, 509 U.S. at 595. Because expert evidence is so influential, decisions that permit the introduction of unreliable expert testimony have a hydraulic force that frequently compels defendants to settle claims based on dubious science, rather than take their chances with a jury. In addition, such decisions may force needed products off the market, to the detriment of consumers and businesses alike.

The Court should not permit those consequences—or the widespread disregard for the demands of Rule 702 and this Court's decisions in *Daubert* and subsequent cases—to persist. The Court should grant certiorari and reverse the decision below.

REASONS FOR GRANTING THE PETITION

I. TOO MANY COURTS TOO OFTEN DISREGARD THE MANDATES OF RULE 702 AND *DAUBERT*

Along with Rule 702 of the Federal Rules of Evidence, this Court's decisions in *Daubert*, *Joiner*, and *Kumho* announce "exacting standards of reliability" that all expert evidence must meet. *Weisgram*, 528 U.S. at 455. These authorities require courts, not

juries, to ensure that experts "in the courtroom [apply] the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho*, 526 U.S. at 152. The court's gatekeeping inquiry is a broad one, as it must ensure that: (1) proposed testimony "is based on sufficient facts or data"; (2) the testimony "is the product of reliable principles and methods"; *and* (3) "the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702(b)-(d); *see Joinder*, 522 U.S. at 146 ("A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered"); *Kumho*, 526 U.S. at 150 ("[T]he gatekeeping inquiry must be tied to the facts of a particular case") (quotation omitted).

In other words, a "trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case." Fed. R. Evid. 702, Advisory Committee Note to 2000 Amendments. "*[A]ny* step that renders the analysis unreliable ... renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology." *Id.* (emphasis in original; some emphasis omitted) (quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994)). Testimony that fails to take into account sufficient facts and data is not evidence for the jury to weigh; it is "fatal[ly] flawed" and should be excluded. *Wills v. Amerada Hess Corp.*, 379 F.3d 32, 50 (2d Cir. 2004) (Sotomayor, J.).

Despite the unequivocal demands of Rule 702 and this Court's precedents, lower courts have become

increasingly content to leave to jurors critical threshold inquiries into reliability that should be made by judges in the first instance. In particular, several courts have confined their gatekeeping analysis to the second prong of Rule 702—which asks whether the expert's methodology is sound—and have held that fundamental flaws in the factual basis of expert testimony are for the jury to evaluate.

The Eighth Circuit made just that mistake in *Larson v. Kempker*, 414 F.3d 936 (8th Cir. 2006). The district court in *Larson* expressly determined that the expert's "calculations and conclusions were not accurate" and "not based on sufficient facts or data as 702 requires." *Id.* at 941 (quotation omitted). The court of appeals, however, held that "the factual basis of an expert opinion goes to the credibility of the testimony, not [its] admissibility," and that those foundational flaws were "an issue for cross-examination." *Id.* Rule 702, the court insisted, has only "two requirements": (1) the expert knowledge presented "must be scientific, technical, or other specialized knowledge; and (2) the knowledge must assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* The court cited as authority for those erroneous claims cases pre-dating Rule 702's 2000 amendments—including a case that predated *Daubert* itself. *Id.* at 940-41 (citing *Hose v. Chicago NW Transp. Co.*, 70 F.3d 968, 974 (8th Cir. 1995); *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988)).

The court took a similar approach in *Synergetics, Inc. v. Hurst*, 477 F.3d 949 (8th Cir. 2007), where it admitted expert testimony that failed to consider

third-party competition in a relevant market when calculating damages from the misappropriation of trade secrets. *Id.* at 955. The court reiterated that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility," and explained that, "so long as the methods employed are scientifically valid," objections to assumptions on which a methodology is based "do[] not warrant [the] exclusion of expert testimony." *Id.* at 955-56. The court allowed that testimony to support not only a sizeable compensatory award, but also substantial awards of punitive damages. *Id.* at 959-961.[2]

The Federal Circuit has likewise held that challenges to the factual bases of an expert's testimony are for the jury to resolve. In *Liquid Dynamics Corp. v. Vaughan Co.*, 449 F.3d 1209 (Fed. Cir. 2006), for example, the plaintiff's expert admitted that the parameters of the simulations on which he relied "did not match the real-world parameters" of the defendant's equipment. *Id.* at 1220. But that flaw, the court ruled, went "to the weight of the evidence rather than the admissibility" of the testimony; it was sufficient that the models "were … subject to cross examination and the proffering of further scientific analysis by" the defendant. *Id.* at 1221.

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[2] District courts relying on the Eighth Circuit's misinterpretation of Rule 702 have also dismissed challenges to the factual bases of expert testimony as matters of weight, not admissibility. *See, e.g.*, *Mason v. Safeco Ins. Co. of Am.*, 2010 WL 5070723, at *3-4 (E.D. Mo. 2010) (citing *Larson* and rejecting challenge to expert testimony about boat repair costs where expert had not examined boat or construction plans of boat in question and instead examined what the manufacturer allegedly told him was a "sister boat").

The First and Tenth Circuits have reached similar conclusions. In *Currier v. United Technologies Corp.*, 393 F.3d 246 (1st Cir. 2004), an employment discrimination case, the First Circuit affirmed the admission of statistical evidence that not only "failed to take into account the wide differences in circumstances among the terminated employees" but also was allegedly based on the wrong set of employees—it encompassed an entire salaried workforce, rather than the subset of employees who (like the plaintiff) were actually susceptible to layoff. *Id.* at 250, 252. The court acknowledged that the "analysis skittered near the line of inadmissibility," but the court upheld its admission because the defendant's cross-examination of the expert "amply brought to the jury's attention" "[c]hallenges to the probative value of" the evidence. *Id.* at 252-53.

And in the design-defect case *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235 (10th Cir. 2000), the Tenth Circuit affirmed the admission of testimony that the defendant's milling machine incorporated "improper safety measures," "lack[ed] adequate visibility," and was "unreasonably dangerous and defective," even though the testifying experts lacked "firsthand experience with milling machines" and "firsthand knowledge of the particular machine" at issue. *Id.* at 1243-44. The court reasoned that, "to the extent [the experts'] lack of firsthand experience is relevant, it goes … to the weight and not the admissibility of the testimony." *Id.* at 1244. That testimony was used to support not only a $10 million award of compensatory damages but also a $17 million award of punitive damages. *Id.* at 1253-54.

Beyond the appellate decisions in these four circuits, district courts in other circuits have issued similarly flawed rulings. In *Traharne v. Wayne Scott Fetzer Co.*, 156 F. Supp. 2d 717 (N.D. Ill. 2001), for example, the defendant objected to testimony from an expert who "never personally examined the sump pump" or electrical cord involved in the decedent's accident but proposed to opine that the defendant had employed a defectively designed seal that resulted in "the decedent experienc[ing] considerable, tremendous, horrific pain as well as other extreme effects brought on by [an] electric shock." *Id.* at 723-24. The district court rejected that argument, reasoning that, "even if [the expert] was mistaken about a particular fact," or the expert's "conclusions are incorrect and his analysis is flawed," it is the "defendant's job to bring this out on cross-examination. … [I]t does not affect admissibility." *Id.* at 724.

Furthermore, in *Pirolozzi v. Stanbro*, 2009 WL 1441070, at *6-7 (N.D. Ohio 2009), the defendant objected to expert calculations of economic loss that did "not factor in the decedent's disability at the time of death, his risky behaviors, or an offset for personal consumption" that was required by state law. The court nonetheless admitted the testimony. It ruled that the identified deficiencies went "to the weight of … [the] testimony, not [its] admissibility," and reasoned that "both parties will have expert testimony on these economic issues, and … both parties can cross-examine the other's experts." *Id.* at *7; *compare id. and Carbo v. Chet Morrison Servs., LLC*, 2013 WL 5774948, at *1 (E.D. La. 2013) ("The factual basis of an expert opinion goes to the credibility of

the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination." (internal quotation and alteration omitted)), *with Wills*, 379 F.3d at 50 (Sotomayor, J.) (holding that "failure to account for decedent's smoking habit and alcohol consumption as possible causes of decedent's squamous cell carcinoma, strongly indicated that [the expert's] conclusions were not grounded in reliable scientific methods, as required by *Daubert*").

II. THE ABDICATION OF COURTS' GATEKEEPING RESPONSIBILITIES HAS SIGNIFICANT ADVERSE CONSEQUENCES

The proper roles of judge and jury in evaluating expert evidence—already a matter of obvious importance—increases in significance with every judicial departure from the requirements of Rule 702. "[S]cience in all its forms—hard science, soft science, even so-called 'junk' science—has in recent years invaded the courtroom to an unparalleled extent." Rakoff, *supra*, at 1379. Indeed, scientific issues now "permeate the law." Hon. Stephen Breyer, *Introduction*, *in* Federal Judicial Center, Reference Manual on Scientific Evidence 3 (3d ed. 2011). The failure of courts to take science seriously, and to welcome only reliable expert testimony into the judicial process, undermines the judicial system and injures the parties—including but not limited to business defendants—who depend on that system for fair and accurate determinations of legal liability.

As the case below demonstrates, unreliable expert testimony sometimes is the only evidence on which a multimillion dollar award of damages rests.

Pet. 7-10. And even when expert testimony is coupled with other evidence, the expert evidence often has an oversized impact on the jury. The Federal Rules of Evidence "grant expert witnesses testimonial latitude unavailable to other witnesses," *Kumho*, 526 U.S. at 148, allowing them to "offer opinions … that are not based on firsthand knowledge or observation," *Daubert*, 509 U.S. at 592, including opinions on the "ultimate issue" in a case, Fed. R. Evid. 704(a). Experts are granted this authority even though their "testimony often will rest upon an experience confessedly foreign in kind to [the jury's] own." *Kumho*, 526 U.S. at 149 (quotation omitted). As a result, "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert*, 509 U.S. at 595.

Because expert testimony can have such a disproportionate influence on juries, the admission of unreliable testimony often imposes hydraulic pressure on the rest of the litigation. Defendants that confront adverse expert rulings are often compelled to settle, rather than take their chances with a jury, even when there are real doubts about the science involved. *See* Margaret A. Berger, *The Admissibility of Expert Testimony*, *in* Federal Judicial Center, Reference Manual on Scientific Evidence 19 (3d ed. 2011) ("[A]n inability by the defendant to exclude plaintiffs' experts undoubtedly affects the willingness of the defendant to negotiate a settlement"); Rakoff, *supra*, at 1391 (explaining that, after the court issued its Rule 702 ruling in the "Ephedra Litigation," "most of the 800 cases settled, for amounts that seemingly reflected the mid-point nature of

what [the court] allowed in the way of expert testimony").

In multi-plaintiff toxic tort and product liability cases in particular, if plaintiffs' expert testimony is admitted, "a defendant often feels irresistible pressure to settle the action rather than risk a battle of the experts at trial that, if the defendant loses, can cost exponentially more than the settlement cost of the action." Christopher R.J. Pace, *Admitting and Excluding General Expert Testimony: The Eleventh Circuit Construct*, 37. Am. J. Trial Advoc. 47, 48 (2013). Indeed, such "plaintiffs' likelihood of success is commonly driven by the admissibility of their experts' general causation testimony under Rule 702 of the Federal Rules of Evidence and *Daubert*." *Id*. For example, the maker of Bendectin, the morning sickness medication at issue in *Daubert*, at one point offered plaintiffs $120 million for a global settlement, but the deal fell through and the company ultimately paid more than $100 million in direct litigation costs and significantly more in indirect costs. David E. Bernstein, Review Essay, *The Breast Implant Fiasco*, 87 Cal. L. Rev. 457, 461 (1999). This case (like *Daubert*) thus presents an excellent vehicle for the Court to reach an issue that in many instances is not fully litigated through verdict or appeal.

The silicone breast implant litigation of the 1990s also illustrates the devastating financial toll that faulty expert testimony rulings can have on a company. Although some district courts admirably discharged their gatekeeping responsibilities in these suits, *see* Justice Breyer, *supra*, at 6-7, others failed to live up to the demands of Rule 702, *see* Victor E. Schwartz & Cary Silverman, *The Draining of* Daub-

ert *and the Recidivism of Junk Science in Federal and State Courts*, 35 Hofstra L. Rev. 217, 225 (2006). The litigation eventually forced manufacturer Dow Corning to file Chapter 11 bankruptcy, even though scientists found no link between the implants and autoimmune disorders, cancer, or any other serious disease. *Id.*

But concerns about the courts' gatekeeping failures extend much more broadly than the individual business defendants forced to endure erroneous expert testimony rulings and unjust verdicts and settlements. Unfounded damages awards "can improperly force abandonment" of a product and "improperly deprive the public of what can be far more important benefits—those surrounding a drug that cures many while subjecting a few to less serious risk." Justice Breyer, *supra*, at 4.

Indeed, history provides strong support for Justice Breyer's prediction that "it may … prove particularly important to see that judges fulfill their *Daubert* gatekeeping function, so that they help assure that the powerful engine of tort liability … points toward the right substances and does not destroy the wrong ones." *Joiner*, 522 U.S. at 148-49 (Breyer, J., concurring). In the 1980s, courts faced a wave of litigation alleging that the drug Bendectin caused birth defects. Schwartz & Silverman, *supra*, at 224. During this pre-*Daubert* era, courts generally allowed both sides to present expert testimony, even though the plaintiffs' testimony generally did not satisfy threshold reliability standards *Daubert* later identified. *Id.* Although there was "overwhelming scientific evidence finding no link between the drug and birth defects," many juries confronted with the

conflicting testimony reached multimillion-dollar verdicts. *Id.* at 224-25. Those verdicts were ultimately reversed on appeal, but in the meantime the manufacturer was forced to remove the drug from the market, "depriving women of the only Food and Drug Administration-approved medication" combatting morning sickness. *Id.* at 225; *see* David E. Bernstein, *Learning the Wrong Lessons from 'An American Tragedy': a Critique of the Berger-Twerski Informed Choice Proposal*, 104 Mich. L. Rev. 1961, 1968 (2006) (citing medical study concluding that "the absence of Bendectin had caused American women unwarranted and preventable suffering").

Rule 702 and the Court's precedent hold that jurors cannot and should not be expected to make the determinations of reliability necessary to ensure that the judicial process—including its outcomes through verdict and settlement alike—is based on sound science. Courts in recent years, however, have increasing strayed from that mandate, threatening a return to a pre-*Daubert* approach of requiring lay jurors to evaluate scientific reliability, rather than decide factual questions based on reliable but differing scientific opinions. Certiorari should be granted to set the lower courts back on course on this important issue.

CONCLUSION

For the foregoing reasons, and for those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 21, 2014