No. 13-1051

IN THE

Supreme Court of the United States

ACCENTURE, L.L.P.,

Petitioner,

v.

WELLOGIX, INC.,

Respondent.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Federal Rule of Evidence 702 requires the court, and not the jury, to decide whether expert testimony is "based on sufficient facts" and "reliably applie[s] . . . principles and methods to the facts of the case," and to set aside a jury verdict that rests entirely on expert testimony that fails to meet these fundamental requirements.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

RULES:

Page(s)

OTHER AUTHORITIES:

Page(s)

INTERESTS OF *AMICUS CURIAE*[1]

The Washington Legal Foundation (WLF) is a public interest law firm and policy center with supporters in all 50 states. WLF devotes substantial resources to defending and promoting free enterprise, individual rights, a limited, accountable government, and the rule of law. To that end, WLF regularly litigates in favor of applying rules governing expert testimony in a way that prevents "junk science" from reaching the jury. WLF has frequently appeared before this Court in cases raising important questions about the admissibility of expert testimony. *See, e.g., Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

In addition, WLF's Legal Studies Division regularly publishes articles on a variety of evidentiary issues, including issues concerning the proper limits of expert testimony. *See, e.g.,* Katharine R. Latimer & Matthew J. Malinowski, *Avoiding The Sideshow: One Trial Judge's Textbook Application of* Daubert *to Exclude Dubious Testimony*, WLF LEGAL OPINION LETTER (June 3,

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days before the due date, counsel for WLF provided counsel for Respondent with notice of intent to file. All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk.

2011); David E. Bernstein, *Disinterested in* Daubert*: State Courts Lag Behind In Opposing "Junk" Science*, WLF LEGAL OPINION LETTER (June 21, 2002).

WLF believes that the quality of decision-making in the federal courts hinges in many cases on the willingness of federal judges to take seriously their responsibilities as gatekeepers, to ensure that unsound scientific and other expert evidence is not allowed to be presented to the finder of fact. WLF is concerned that the holding below, if allowed to stand, would substantially undercut the trial judge's gatekeeping role. In WLF's view, the lower federal courts—which are deeply divided—need additional guidance in this area, and this case is part of a larger trend in which courts are failing to ensure that only sound and reliable expert testimony is admitted into evidence. WLF fears that allowing the trial judge's gatekeeping function to be continually undermined in this way will create fertile ground for injustices quite apart from this particular case.

WLF believes that the arguments set forth in this brief will assist the Court in evaluating the issues of exceptional importance presented by the petition. WLF has no direct interest, financial or otherwise, in the outcome of this case. Because of its lack of a direct interest, WLF believes it can provide the Court with an informed perspective that is distinct from that of the parties.

STATEMENT OF THE CASE

Respondent Wellogix, Inc. (Wellogix) was a software development firm that offered complex business services for energy companies and related service providers. To help promote its software, Wellogix entered into several marketing agreements with Petitioner Accenture, LLP (Accenture), a leading management consulting and technology services outsourcing firm. In 2008, once it became clear that the oil and gas industry would never embrace Wellogix's software, Wellogix sued Accenture (among others) for the alleged misappropriation and theft of trade secrets.

Before trial, Accenture sought to exclude certain testimony by Wellogix's computer science expert, Kendyl Roman, on the grounds that Roman's opinions were both unsupported and unreliable (and therefore inadmissible) under Rule 702 of the Federal Rules of Evidence. The district court denied Accenture's motion, dismissively explaining that Accenture could raise any objections it had to Roman's testimony "on cross-examination." Pet. App. 133a.

At trial, Wellogix called Roman as an expert on matters (including causation and damages) far beyond his proffered field of expertise. Indeed, Roman's "computer science" testimony ranged from whether a trade secret existed, to whether Accenture stole that secret, to whether such theft caused Wellogix's decline in business value, and even to whether Wellogix's value "went to zero." Pet. App. 17a-18a. Although Roman failed to consider whether Wellogix lost any of its value for reasons unrelated to

the alleged tort, or whether the company retained some residual value based on its substantial portfolio of patents, his testimony provided Wellogix's only evidence at trial as to whether and to what extent Accenture's alleged theft of trade secrets destroyed the company's business value.

Roman twice misstated crucial facts during his testimony. For example, Roman opined that a certain Wellogix design specification was "an incredibly valuable trade secret" and "would not be known publicly"—even though it was available on Wellogix's public website. Pet. App. 21a. Roman also "compared Wellogix's source code to the wrong software," causing even the district court to question how "somebody as experienced as Mr. Roman [could] be . . . that much off the point" and make "such a rudimentary mistake." *Id.*

Undoubtedly swayed by Roman's expert testimony, the jury found in favor of Wellogix, awarding it $26.2 million in compensatory damages and $68.2 million in punitive damages ($50 million more than Wellogix had requested). Pet. App. 5a. Accenture renewed its motion for judgment as a matter of law and moved for a new trial. *Id.* The district court denied both motions but suggested a remittitur of the jury's punitive damages award to $18.2 million, which reduced the total award to $48.9—the full amount Wellogix had sought at trial. *Id.* As to Accenture's renewed challenges to the reliability and admissibility of Roman's testimony, the district court again held that "[t]he various challenges that Accenture raises to Roman's expert testimony were issues appropriately presented to the jury, and were relevant to the weight assigned to

Roman's testimony, not to its admissibility." *Id.* at 100a.

On appeal, the Fifth Circuit affirmed. Pet. App. 31a-60a. While conceding that Roman "twice misstated facts in his testimony," including the "rudimentary mistake" of examining the wrong software, the appeals court reiterated that "Accenture had the chance to highlight and dispute these errors through 'vigorous cross-examination' and 'presentation of contrary evidence.'" *Id.* at 51a (citations omitted). In the panel's view, because "Rule 702 does not mandate that an expert be *highly* qualified in order to testify about a given issue," Roman's training in computer science qualified him to testify on any subject "related to Wellogix's software," including causation, damages, and Wellogix's post-tort value. *Id.* at 52a.

Accenture unsuccessfully sought rehearing and rehearing en banc. *See* Pet. App 159a.

REASONS FOR GRANTING THE PETITION

The lower courts are deeply divided, and there is an increasing need for this Court to enforce and clarify the standards that govern the admissibility of expert testimony in federal court. This Court confirmed in *Daubert* the importance of screening all expert testimony to ensure that it is reliable before admitting it into evidence. The Court later confirmed in *Kumho Tire* that *Daubert*'s framework for analyzing the admissibility of evidence applies to *all* types of expert testimony, not merely to expert testimony relating to the physical sciences. Failure by federal courts to exercise their gatekeeping

function with respect to expert testimony diminishes the utility of such testimony, reduces its credibility, creates the possibility of unjust and perverse results, and undermines the rule of law.

This case provides a paradigmatic example of the necessity for judicial gatekeeping, as it makes little sense to allow Mr. Roman, a technical expert with training as a software engineer, to opine on the purported cause of Wellogix's loss in value and then to offer up a post-tort business valuation of zero. The district court failed to meaningfully address serious questions Accenture raised concerning the reliability of Roman's testimony. The appeals court similarly failed to come to grips with the threshold reliability issue, reasoning that "Accenture had the chance to highlight and dispute these errors through 'vigorous cross-examination' and 'presentation of contrary evidence.'" Pet. App. at 51a (citations omitted).

These failings are part of a broader trend that finds federal courts shifting the reliability inquiry from the judge as gatekeeper to the jury as fact-finder. Unless reined in by this Court, this trend all but ensures that junk science will determine the outcome in many trials—and to outsized effect when the supposed expertise pertains, as here, to causation and damages in high-stakes litigation over the alleged misappropriation of trade secrets.

Review is also needed to ensure that reliability remains a threshold question for the court, not the jury. It is not enough for a trial court merely to note the fact of competing testimony while leaving any dispute about reliability to the "weight" a jury gives the evidence. And while cross–

examination has its purposes, it is no panacea; it cannot readily distinguish valid expert conclusions from junk science for the jury, and so cannot take the court's place in determining an expert's reliability in the first instance.

Finally, the widening split of authority among lower federal courts detailed in the petition involves the application and interpretation of Federal Rule of Evidence 702. As the holding below further demonstrates, Rule 702 is increasingly subject to wildly inconsistent application throughout the federal judiciary. But the entire policy behind enactment of the Federal Rules of Evidence was to create a uniform standard for the admissibility of evidence in the federal courts. Only this Court can now salvage that important policy by enforcing a single, uniform standard for the admissibility of expert testimony.

The interests of fairness, predictability, and stare decisis were all injured in this case. WLF joins Petitioner in urging this Court to grant the petition for writ of certiorari.

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS SHARPLY WITH THIS COURT'S *DAUBERT* PRECEDENTS

When the district court permitted Respondent's computer science expert, Kendyl Roman, to testify on issues far afield from his area of expertise, it departed from this Court's clear teaching that unreliable expert testimony must be withheld from the jury. Under this Court's *Daubert*

trilogy, district courts play a critical "gatekeeping" role in shielding jurors from unreliable expert evidence. It is therefore incumbent upon every trial judge to "ensure that any and all [expert] testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589. To satisfy this requirement, all expert testimony must meet "exacting standards of reliability." *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000).

Daubert established a non-exhaustive list of guideposts to evaluate the reliability, and thus admissibility, of an expert's opinions, including whether the expert's methods have been tested and subjected to peer review and publication, and whether that methodology is generally accepted in the relevant scientific or technical community. *Daubert*, 509 U.S. at 593-94. In addition, the 2000 Advisory Committee's Notes to Rule 702 suggested additional benchmarks, including whether the expert's opinions resulted from independent research or are a product of litigation; whether the expert has accounted for alternative explanations; and whether the expert was as careful in forming his opinions for litigation as he would be in his non-testifying professional work. *See* Fed. R. Evid. 702, 2000 Advisory Comm. Note.

The purpose of *Daubert*'s threshold inquiry is to prevent jurors from being improperly influenced by opinions cloaked with unwarranted legitimacy and authority. Expert witnesses can have an extremely prejudicial impact on a jury, which "more readily accepts the opinion of an expert witness as true simply because of his or her designation as an expert." *E.I. du Pont de Nemours & Co. v. Robinson*,

923 S.W.2d 549, 553 (Tex. 1995). After all, the simple but unfortunate truth is that "[w]hen the court hears the testimony of an 'expert,' especially someone recognized as a 'scientific expert,' the jury may be overly impressed by the credentials presented and terminology used by this individual, hindering the jury's ability to fully understand and evaluate the evidence presented by the expert." M. Neil Browne & Ronda R. Harrison-Spoerl, *Putting Expert Testimony in Its Epistemological Place: What Predictions of Dangerousness in Court Can Teach Us*, 91 Marq. L. Rev. 1119, 1132-33 (2008).

Legal commentators have increasingly emphasized the need to place the reliability determination required by *Daubert* in the hands of judges, rather than entrusting it to a lay jury's assessment of credibility. *See, e.g.*, 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, 237-38 (2006) ("When a court looks to the data underlying expert opinion but neglects to evaluate its relation to the expert's conclusion . . . ostensibly legitimate data may serve as a Trojan horse that facilitates the surreptitious advance of junk science and spurious, unreliable opinions."); Note, *Reliable Evaluation of Expert Testimony*, 116 Harv. L. Rev. 2142, 2150 (2003) ("Taking reliability determinations out of the 'black box' of the jury . . . is justified by judicial rulings' greater transparency and consistent decisions.").

The district court in this case failed to meaningfully address serious questions raised by Accenture concerning the reliability of Roman's

testimony. The appeals court similarly failed to come to grips with the threshold reliability issue, reasoning that "Accenture had the chance to highlight and dispute these errors through 'vigorous cross-examination' and 'presentation of contrary evidence.'" Pet. App. at 51a (citations omitted). The decision below is thus symptomatic of decisions in which courts have "rubber stamped" expert opinions in a manner that has marred litigation, leaving lay juries to undertake the reliability inquiry that *Daubert* exclusively reserves for trial judges. *See, e.g., Stollings v. Ryobi Techs., Inc.*, 725 F.3d 753, 765-68 (7th Cir. 2013); *Milward v. Acuity Specialty Prods. Grp., Inc.*, 639 F.3d 11, 22 (1st Cir. 2011); *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1345 (11th Cir. 2003). This error is all the more egregious in light of the serious flaw in the testimony offered here, where Roman, an expert in computer science, was allowed to offer Wellogix's only evidence of causation and the post-tort value of Wellogix's business.

Of course, evidence that is inadmissible under Rule 702 of the Federal Rules of Evidence cannot assist a plaintiff in meeting its burden. As Rule 702 makes clear, an expert's opinion is not admissible simply because it is based on reliable principles and methodology. See Fed. R. Evid. 702(2)-(3). The application or "fit" of that methodology to the facts of the case must also be reliable. *Id*. But in opining that Accenture caused Wellogix's value to drop to "zero," Roman failed to consider whether Wellogix lost any of its value for reasons having nothing to do with the alleged tort, or whether the company retained any residual value after the alleged tort. Incredibly, Roman's testimony constituted the *only*

evidence of causation and the post-tort value of Wellogix's business. Nevertheless, the district court admitted Roman's damages testimony at face value, allowing the jury to rely on it in finding liability—without first evaluating that opinion against the *Daubert* criteria.

On appeal, the Fifth Circuit compounded this error by holding that because "Rule 702 does not mandate that an expert be *highly* qualified in order to testify about a given issue," Roman's training in computer science qualified him to testify on any subject "related to Wellogix's software," even including causation, damages, and Wellogix's post-tort value. Pet. App. 52a. This is a remarkable statement in that it reveals that the appeals court views "qualified" as an extremely low standard, contrary to the "exacting standard" this Court requires. *Weisgram*, 528 U.S. at 455. Under this approach, once an expert is "qualified" for any purpose, he can testify on matters outside his expertise so long as they are loosely "related" to that expertise. Rule 702 is thus transformed from a red flag, intended to keep out unreliable testimony, into a matador's cape. It also sidesteps the fact that no court subjected Roman's opinions to *Daubert*'s rigorous scrutiny in the first place.

Rule 702 was adopted to implement, not repudiate, the *Daubert* trilogy's rigor. Many courts have not yet learned that lesson. This case is a paradigmatic example of the necessity for judicial gatekeeping, as it makes little sense to allow a technical expert with training as a software engineer to opine on the purported cause of Wellogix's loss in value and then to offer up a post-tort business

valuation of zero. Allowing what is essentially expert economic testimony to be presented with no reliable basis defeats the intent of *Daubert* and trivializes the role of the judge as gatekeeper in the courtroom. Without discretionary review by this Court, this disturbing trend among the lower courts will surely continue.

II. REVIEW IS NEEDED TO ENSURE THAT RELIABILITY REMAINS A QUESTION FOR THE COURT, NOT THE JURY

Notwithstanding this Court's repeated instructions, the district court in this case failed to perform the searching inquiry required by *Daubert* when it admitted Wellogix's expert testimony. The district judge quoted the text of Rule 702, Pet. App. 125a, but then proceeded to ignore it, justifying its approach on the theory that Accenture could raise any objections to Roman's testimony "on cross-examination," *Id.* at 133a, and that such reliability concerns "were relevant to the weight assigned to Roman's testimony, not to its admissibility." *Id.* at 100a. This was an abdication of responsibility.

To further confuse matters, the appeals court doubled down on the district court's reliance on cross-examination as a substitute for *Daubert*'s searching inquiry, ruling that Roman's misstatements of facts during his testimony were admissible because "Accenture had the chance to highlight and dispute these errors through vigorous cross examination." Pet. App. 51a.

It is not enough for a trial court merely to note the fact of competing testimony while leaving any

dispute about reliability to the "weight" a jury gives the evidence. Reliability is a threshold question for the court, not for the jury, and Rule 702 demands that district courts reject expert testimony that is not based on "sufficient facts or data," or is not the product of "reliable principles and methods," or when the witness has not "applied the principles and methods reliably to the facts of the case." Fed. R. Evid. 702. The appeals court's dismissive approach thus ignores that Accenture's challenges went directly to the guideposts established by *Daubert* and Rule 702, including, for example, whether Roman's opinion was based on sufficient facts, whether Roman reliably applied principles and methods to the facts of the case, or whether Roman accounted for alternative explanations in reaching his conclusion. *See Daubert*, 502 U.S. at 593-94; Fed. R. Evid. 702.

If an expert's testimony is inadmissible under *Daubert*, it should not be considered as evidence for *any* purpose. As this Court has recognized, "[i]nadmissible evidence contributes nothing to a 'legally sufficient evidentiary basis'" for a jury verdict. *Weisgram*, 528 U.S. at 454. And so, when it comes to the question of how much "weight" a jury should give such evidence, there is only one possible answer: *none*. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict."). As this Court has come to realize, the only way to ensure that a jury does not weigh unreliable evidence is not to admit such

evidence in the first place. For that reason, any questions about the "factual basis, data, principles, [or] methods" of expert testimony, or "their application," require the trial judge to first determine that the testimony is reliable *before* sending it to the jury. *Kumho Tire Co.*, 526 U.S. at 149.

And while cross–examination has its purposes, it is no panacea; it cannot readily distinguish valid expert conclusions from junk science, and so cannot take the court's place in determining an expert's reliability in the first instance. As Professor Jules Epstein explains:

> This treatment of cross-examination as the palliative of choice has its flaws, not merely in its expectation that cross-examination without other resources can fairly respond to an expert witness. The mythic status of cross-examination in this regard actually impedes accurate fact-finding because leading questions are not always an appropriate or sufficient tool for truth finding. Courts have not acknowledged these limitations.

Jules Epstein, *Cross-Examination: Seemingly Ubiquitous, Purportedly Omnipotent, and "At Risk,"* 14 Widener L. Rev. 427, 436-37 (2009) (internal citations omitted).

In this case, the jury's verdict itself provides perhaps the best proof that vigorous cross-examination, standing alone, is no substitute for judicial gatekeeping. During his testimony, Roman twice misstated crucial facts, opining "that a

Wellogix design specification was 'an incredibly valuable trade secret' and 'would not be known publicly' even though it was available on Wellogix's public website." Pet. App. 21a. Roman also "compared Wellogix's source code to the wrong software," causing even the district court to question how "somebody as experienced as Mr. Roman [could] be . . . that much off the point" and make "such a rudimentary mistake." *Id.* Despite Accenture's counsel's thorough cross-examination of Roman on these factual misstatements, the jury found completely in favor of Wellogix, ultimately crediting Roman's unsupported testimony on these issues as well as his testimony that Wellogix's post-tort value dropped to "zero." Of course, under this Court's *Daubert* precedents, Roman's testimony should have been excluded entirely because it lacked any factual connection to the case and only served to confuse the jury.

The jury's verdict thus highlights the "problematic nature of relying on experts subject to adversarial bias to present opinions to lay jurors that relied solely on the experts' say-so, unsupported by objective evidence such as peer-reviewed, published studies." David E. Bernstein, *The Misbegotten Judicial Resistance to the* Daubert *Revolution*, 89 Notre Dame L. Rev. 27, 40 (2013) (internal citations omitted). This was precisely the sort of problem that *Daubert* and Rule 702 were meant to address. This is not a problem that can be left to the jury. And, as the flawed decisions below make clear, it is no longer a problem that this Court can rely on the lower courts to faithfully address. The petition for certiorari should be granted.

III. REVIEW IS ALSO WARRANTED TO PRESERVE THE IMPORTANT GOAL OF UNIFORMITY BEHIND THE FEDERAL RULES OF EVIDENCE

In 2000, Rule 702 of the Federal Rule of Evidence was amended to help implement this Court's *Daubert* trilogy. That rule now requires that all expert testimony be "based on sufficient facts" and "reliably appl[y] . . . principles and methods to the facts of the case." Fed. R. Evid. 702. In doing so, Rule 702 "not only codifies revolutionary changes in the substantive law, but also places substantial new demands on judges by requiring a far more managerial role for judge than they are used to assuming in the American adversarial system." Bernstein, *Judicial Resistance*, at 65.

Despite these amendments, the lower federal courts remain hopelessly divided on the issue of when the court, and not a jury, should decide whether expert testimony satisfies the stringent requirements of the rule. *See* Pet. at 11-15. Review is thus warranted for the independent reason that the lower courts' increasingly disparate application of this Court's *Daubert* precedents arises from a fundamental disagreement about the proper application and interpretation of a Federal Rule of Evidence.

It was precisely this widespread disparity among courts with regard to the admissibility of evidence that served as the primary catalyst for adopting "federal" rules of evidence in the first place. *See generally* Jack B. Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal*

Rules of Evidence, 69 Colum. L. Rev. 353 (1969). Indeed, the creation of federal evidentiary rules was bottomed entirely on the need for uniformity and predictability in the federal courts. Kimberly S. Moore, *Exploring the Inconsistencies of Scrutinizing Expert Testimony Under the Federal Rules of Evidence*, 22 Tex. Tech. L. Rev. 885, 885 (1991)("[T]he purpose of codified rules of evidence is to ensure consistency, uniformity, and fairness throughout the judicial system.").

It is difficult to overestimate the detrimental effect that the decision below, and countless others like it, will come to have on the uniformity that the Federal Rules of Evidence are intended to foster. More than 20 years after this Court's seminal holding in *Daubert*, the time is ripe to put these divisions to rest. Only discretionary review by this Court can ensure a single uniform standard for the application of Rule 702.

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court grant the petition.

Respectfully submitted,

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