Supreme Court, U.S.
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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 FOR DRI—THE VOICE OF THE DEFENSE BAR AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE[1]

DRI—The Voice of the Defense Bar is an international organization that includes approximately 23,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys and the civil justice system, to promote the role of the defense attorney, to improve the civil justice system, and to preserve the civil jury. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—where national issues are involved—consistent. To promote these objectives, DRI participates as amicus curiae in cases raising issues of importance to its members, their clients, and the judicial system.

This case presents an important question on which there is a recognized division in the lower courts: the correct understanding of Federal Rule of Evidence 702, and specifically whether the principal responsibility for enforcing Rule 702's mandates falls to the trial court through its gatekeeping power or is to be left to juries. DRI, its members, and their clients have a profound interest in seeking this Court's guidance to resolve the conflict in the lower federal courts with respect to Rule 702. DRI thus respectfully urges the Court to grant certiorari to clarify the proper interpretation and administration of Rule 702.

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus, its members, and its counsel has made any monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received timely notice of amicus's intention to file this brief, and letters from all parties consenting to the filing are on file with the Clerk.

SUMMARY OF ARGUMENT

The need for this Court's guidance on the proper interpretation of Federal Rule of Evidence 702 is both obvious and pressing. It is, of course, settled that trial courts have an important "gatekeeping obligation" with regard to expert evidence. *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 147 (1999); *see also General Elec. Co.* v. *Joiner*, 522 U.S. 136, 146-147 (1997); *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993). The text of Rule 702 itself sets forth the content of that gatekeeping obligation, permitting admission of expert testimony only when four separate requirements are satisfied. *See* Fed. R. Evid. 702(a)-(d) (setting forth independent requirements for admissibility). Under Rule 702, therefore, "the 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 notes.

Nonetheless, decisions in the lower federal courts have produced considerable disagreement with respect to the respective roles of the trial court and the jury in enforcing Rule 702's requirements. In particular, there is an acknowledged and growing divide between, on the one hand, courts that leave assessment of the reliability of an expert opinion to the jury and, on the other hand, courts in which the trial judge independently determines whether each of Rule 702's requirements is satisfied before allowing expert testimony to reach the jury. This case squarely implicates that divide, as the Fifth Circuit's decision falls into the former category.

The division in the lower federal courts has profound and harmful consequences for all litigants. Counsel, and particularly defense counsel, are hampered by this

confusion in authority in their ability to provide sound or meaningful advice to clients about the likelihood of the admissibility of expert testimony—testimony that in many cases can be outcome determinative. The chance that unreliable expert testimony might be admitted, on the theory that unreliability is a question for the jury, not the judge, currently turns on the particular circuit in which the issue arises or even on the particular trial judge assigned to the case. Outcome dispositive questions in bet-the-company or other high-stakes litigation should not turn on the happenstance of where the case is brought.

Rule 702 was amended 14 years ago, yet lower courts continue to be divided on the role of the court and the jury in enforcing the Rule's requirements. Only a decision by this Court can cut through such confusion and produce a fair, consistent, and rational application of Rule 702 in federal courts nationwide.

ARGUMENT

I. THE LOWER FEDERAL COURTS ARE DIVIDED WITH RESPECT TO THE PROPER APPLICATION OF RULE 702

Following the Court's decisions in *Daubert*, *Joiner*, and *Kumho Tire*, Rule 702 was amended in 2000. It currently provides as follows:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. Although Rule 702 imposes clear requirements for the admission of expert testimony, lower courts have struggled with the very question raised in this case: whether those requirements should be primarily enforced by the trial court as gatekeeper or by the jury as finder of fact.

On one side of the divide are circuits that require trial courts to exercise a rigorous gatekeeping function with respect to each of Rule 702's requirements. As Petitioner correctly explains (Pet. 11-13), these courts closely review whether expert testimony meets the requirements of Rule 702 before allowing it to be presented to a jury. *See, e.g.*, *Estate of Barabin* v. *AstenJohnson, Inc.*, 740 F.3d 457, 463-464 (9th Cir. 2014) (en banc); *Elcock* v. *Kmart Corp.*, 233 F.3d 734, 749, 754-756 & n.13 (3d Cir. 2000); *Concord Boat Corp.* v. *Brunswick Corp.*, 207 F.3d 1039, 1055-1057 (8th Cir. 2000). Courts on this side of the divide consider whether an expert witness is competent to testify on particular issues. *See Mike's Train House, Inc.* v. *Lionel, L.L.C.*, 472 F.3d 398, 407-408 (6th Cir. 2006) (finding that the district court "abandoned its gate-keeping function" where, among other things, there was "clear evidence" the expert "lacked a rudimentary understanding" of the relevant industry); *LifeWise Master Funding* v. *Telebank*, 374 F.3d 917, 928 (10th Cir. 2004) (rejecting proposed damages expert testimony under Rule 702 because the expert "was not

an expert in damages analysis or in any of the techniques used to create the ... damages model"). These courts also pay considerable attention to whether an expert's conclusions are supported by a proper application of the methodology. *See United States* v. *Dukagjini*, 326 F.3d 45, 54 (2d Cir. 2003) ("Under *Daubert* and Rule 702, expert testimony should be excluded if the witness is not actually applying [their] expert methodology."); *Amorgianos* v. *National R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002) ("In deciding 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."); *Concord Boat Corp.*, 207 F.3d at 1055-1057 (excluding expert evidence where it was "mere speculation" (internal quotation marks omitted)).

On the other side of the divide are courts that leave questions about the reliability of expert testimony for juries to sort out. *See Stollings* v. *Ryobi Techs., Inc.*, 725 F.3d 753, 765-768 (7th Cir. 2013); *Milward* v. *Acuity Specialty Prods. Grp., Inc.*, 639 F.3d 11, 22-23 (1st Cir. 2011), *cert. denied sub nom. U.S. Steel Corp.* v. *Milward*, 132 S. Ct. 1002 (2012). These courts often conclude that "whether the expert is credible or whether his or her theories are correct given the circumstances of a particular case is a factual one that is left for the jury to determine after opposing counsel has been provided the opportunity to cross-examine the expert." *Smith* v. *Ford Motor Co.*, 215 F.3d 713, 719 (7th Cir. 2000).

These courts thus assign considerable importance to cross-examination in providing a check on unreliable

expert testimony. Specifically, if the expert incants a generally-accepted scientific or technical principle or method, these courts will typically not examine whether the expert "reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702(d). As the Eleventh Circuit put it, "[t]he identification of such flaws in generally reliable scientific evidence is precisely the role of cross-examination." *Quiet Tech. DC-8, Inc.* v. *Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1345 (11th Cir. 2003); *see also Rosenfeld* v. *Oceania Cruises, Inc.*, 654 F.3d 1190, 1193-1194 (11th Cir. 2011) (arguments relating to the application of a methodology may be addressed "on retrial through vigorous cross-examination" and "presentation of contrary evidence" (internal quotation marks omitted)). These courts also typically conclude that misapplications of a methodology go to the weight of expert testimony, not its admissibility. *See Liquid Dynamics Corp.* v. *Vaughan Co.*, 449 F.3d 1209, 1221 (Fed. Cir. 2006) (applying Seventh Circuit law, and finding that flaws and admitted errors in the application of a methodology go "to the weight of the evidence rather than the admissibility"); *Cummings* v. *Standard Register Co.*, 265 F.3d 56, 65 (1st Cir. 2001) ("whatever shortcomings existed in [the expert's] calculations went to the weight, not the admissibility, of the testimony"); *United States* v. *Shea*, 211 F.3d 658, 668 (1st Cir. 2000) ("flaws in [an expert's] application of an otherwise reliable methodology went to weight and credibility and not to admissibility").

This divide is longstanding, entrenched, and shows no signs of abating. As commentators have recognized, "[a]lthough almost 20 years have passed since *Daubert* was decided, a number of basic interpretive issues remain." Berger, *The Admissibility of Expert Testimony*, *in* Fed. Judicial Ctr., *Reference Manual on*

Scientific Evidence 11, 19 (3d ed. 2011); *see* Schwartz & Silverman, *The Draining of* Daubert *and the Recidivism of Junk Science in Federal and State Courts*, 35 Hofstra L. Rev. 217, 218 (2006) (identifying "five general areas of inconsistency in the application of expert testimony standards"). For example, while some courts believe Rule 702 requires exclusion of expert testimony "if it finds that the expert's model did not incorporate the appropriate data that fit the facts of the case," others believe that question is for the jury to consider. Berger, *Reference Manual on Scientific Evidence* at 22 n.57 (comparing cases).

Indeed, commentators have described lower court decisions on admissibility under Rule 702 as exhibiting a "roulette wheel randomness," Schwartz & Silverman, 35 Hofstra L. Rev. at 218, as some courts have complied "with the new order created by the *Daubert* trilogy as codified by amended Rule 702" while other courts "have continued to apply more liberal rules," Bernstein, *The Misbegotten Judicial Resistance to the* Daubert *Revolution*, 89 Notre Dame L. Rev. 27, 50-51 (2013); *see also* Schwartz & Silverman, 35 Hofstra L. Rev. at 218 ("while most trial judges take their role as gatekeepers very seriously and closely examine expert testimony to ensure its reliability and applicability, some have failed to follow both the letter and spirit of *Daubert*" (footnote omitted)).

II. The Question Presented Is Important And Has Profound Consequences For Litigants

Disagreement with respect to the proper application of Rule 702 has serious consequences for the fairness and efficiency of federal litigation because of the outsized role expert testimony plays in affecting trial outcomes.

Expert witnesses can have an "extremely prejudicial impact on the jury, in part because of the way in which the jury perceives a witness labeled as expert." *E.I. du Pont de Nemours & Co.* v. *Robinson*, 923 S.W.2d 549, 553 (Tex. 1995); *see also Cunningham* v. *Wong*, 704 F.3d 1143, 1167 (9th Cir.) ("Scientific and expert testimony contains an 'aura of special reliability and trustworthiness.'"), *cert. denied sub nom. Cunningham* v. *Chappell*, 134 S. Ct. 169 (2013). Thus, as this Court has explained, an expert's opinion "can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert*, 509 U.S. at 595 (internal quotation marks omitted); *see also United States* v. *Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1973) (jurors often attribute an "aura of special reliability and trustworthiness" to expert opinions); *State* v. *O'Key*, 899 P.2d 663, 672 (Or. 1995) ("Evidence perceived by lay jurors to be scientific in nature possesses an unusually high degree of persuasive power."); *Robinson*, 923 S.W.2d at 553 ("A witness who has been admitted by the trial court as an expert often appears inherently more credible to the jury than does a lay witness."); *People* v. *Leahy*, 882 P.2d 321, 325 (Cal. 1994) ("'Lay jurors tend to give considerable weight to "scientific" evidence when presented by "experts" with impressive credentials.'").

Adding to the likelihood that jurors will be swayed by expert testimony is the fact that jurors presume that, because the judge has admitted the evidence, it must meet a minimum level of reliability. A recently published study confirmed this point by asking mock jurors to evaluate the "persuasive impact" of a scientific report that supported the plaintiff's side of a case. Schweitzer & Saks, *The Gatekeeper Effect: The Impact of Judges' Admissibility Decisions on the Persuasiveness of Expert Testimony*, 15 Psychol. Pub.

Pol'y & L. 1, 7 (2009). Researchers varied the "credibility of the researcher who conducted" the report as well as "the scientific merit of the research" in order to isolate the effect of the report's admission from the effect of aspects of the report itself. *Id.* at 5, 7. The study found that "no effect of research validity or source credibility emerged ... suggesting that the admissibility status of the [report] as determined by the gatekeeper was the sole predictor of the perceived quality of the research." *Id.* at 8. The study further found that "jurors operate under the assumption that judges review scientific evidence (perhaps all evidence) before its presentation at the trial." *Id.* at 11-12; *see also id.* at 12 (concluding that "jurors assume that judges review scientific evidence before it is presented to them, and that any evidence used in a trial must be above some threshold of quality"). The study concluded that "jurors credit the scientific evidence unduly because of their apparent assumption about judicial filtering." *Id.* at 12.

For these reasons, "the outcomes of criminal, paternity, first amendment, and civil liability cases ... often turn on scientific evidence." Foster & Huber, *Judging Science: Scientific Knowledge and the Federal Courts* 1 (1997); *see* Cheng, *Independent Judicial Research in the* Daubert *Age*, 56 Duke L.J. 1263, 1265 (2007) ("the scientific admissibility decision can be incredibly influential, if not outcome-determinative"). Accordingly, disagreement about and inconsistent application of Rule 702 have serious consequences for litigants, particularly defendants facing potentially multi-million-dollar liability. Given the confused state of the law, it is difficult if not impossible for defense attorneys to advise clients meaningfully with respect to whether questionable or unreliable expert testimony will be excluded by the trial court or put before the jury.

The inability of defense attorneys and defendants to predict whether expert testimony will be admitted, or even to understand fully the neutral principles that will be applied in making that determination, make it exceptionally challenging for defendants to decide whether to settle unmeritorious claims or to proceed to trial. While all litigation necessarily involves uncertainty, the uncertainty should not depend on which federal jurisdiction the plaintiff has chosen as a venue or which trial judge is assigned to a case—particularly given that Rule 702 was designed to implement a *national* rule governing expert testimony.

This Court's review is warranted, indeed urgently needed, to cut through this confusion and to bring clarity to this important issue. This Court has not weighed in on Rule 702 since it was amended in 2000. As demonstrated above and in the petition for certiorari, courts have taken widely different approaches to Rule 702 since that time. There is no reason to believe that this longstanding divide will resolve itself, and there is no reason to defer resolution of this pressing issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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