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 *AMICI CURIAE* ATLANTIC LEGAL FOUNDATION, FEDERATION OF DEFENSE & CORPORATE COUNSEL AND INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, *amici curiae* state the following:

Atlantic Legal Foundation is a not for profit corporation incorporated under the laws of the Commonwealth of Pennsylvania. It has no corporate shareholders, parents, subsidiaries or affiliates.

The Federation of Defense & Corporate Counsel is a not for profit corporation organized under the laws of the State of Illinois. It has no corporate parents, subsidiaries, or affiliates. Its only related legal entity is the Federation of Defense & Corporate Counsel Foundation.

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INTEREST OF *AMICI CURIAE*[1]

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[1] Pursuant to Rule 37.2(a), timely notice of intent to file this *amici* brief was provided to the parties, the parties have consented to the filing of this brief; Petitioner has lodged with the Court a "universal consent"; a copy of the consent of counsel for Respondent has been lodged with the Clerk.

Pursuant to Rule 37.6, *amici* affirm that no counsel for any 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 other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

as *amici* in numerous cases before this Court, including *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). One of the Foundation's goals is to educate and inform judges about the correct scientific principles and methods to be applied to issues of causation in litigation. This case is of particular interest to the Foundation because some lower courts have deviated in important and troubling ways from the Court's approach to admissibility of expert evidence and trial courts' responsibilities as gatekeepers, deviance that should be corrected.

The Federation of Defense & Corporate Counsel ("FDCC") was formed in 1936 and has an international membership of 1,400 defense and corporate counsel. FDCC members work in private practice, as general counsel of companies, and as insurance claims executives. Membership is limited to attorneys and insurance professionals nominated by their peers for having achieved professional distinction and demonstrated leadership in their respective fields. The FDCC is committed to promoting knowledge and professionalism in its ranks and has organized itself to that end. Its members have established a strong legacy of representing the interests of civil litigation defendants.

The International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and

around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and the continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost. In support of these principles, the IADC has filed briefs in cases such as this, supporting careful screening by trial judges of expert testimony.

INTRODUCTION

The Petition arises from a $50 million judgment for alleged misappropriation and theft of trade secrets. Wellogix, a start-up company, alleged that Accenture misappropriated the trade secrets underlying Wellogix's "complex [oil and gas well drilling] services software solution" for use in the oil and gas industry exploration and production sector (*see Wellogix, Inc. v. Accenture, LLP*, 788 F.Supp.2d 523, 528 (S.D. Tex. 2011), that Accenture then used the trade secrets for the benefit of one of its clients, SAP, and that, as a result, the entire value of the company was destroyed.

Wellogix relied principally on the testimony of its computer-science expert, Kendyl Roman, in an effort to establish misappropriation.[2] The single most significant piece of evidence presented at trial by Wellogix was Roman's testimony that he had conducted a forensic code comparison (788 F.Supp.2d 523, 536) and found a computer code file in SAP's software that was identical to Wellogix's code. Based on the alleged "match," he opinedthat this "forensic evidence" established that "Accenture stole and misappropriated Wellogix'[s]

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[2] Before trial, Accenture moved to exclude Roman's testimony because, among other things, his opinions were unreliable and factually unsupported. The district court denied the motion. *See Wellogix, Inc. v. Accenture, LLP*, 788 F.Supp.2d 523 (S.D. Tex. 2011).

trade secrets." (Pet. App. 20a-21a; Tr. 805, 907-13, 1141-42).

Accenture showed in its pretrial motion to exclude Roman's testimony and for summary judgment that Roman compared the Wellogix software against ERP Central Component ("ECC"), a software product sold by SAP America, Inc. and SAP A.G., its German parent, a global business accounting software company) called. SAP also offers a software solution called Supplier Relationship Management ("SRM") which allows companies to manage a large number of business processes, such as accounting, human resources, financial planning, and plant maintenance. (*see* 788 F.Supp. 2d 523, 529-30; *Wellogix, Inc. v. Accenture, LLP*, 823 F.Supp.2d 555, 567 (S.D. Tex. 2011)) which was not mentioned in Wellogix's complaint.

At trial, Accenture's expert's testified, apparently without contradiction, that the "stolen" computer code Roman identified in SAP software had "[a]bsolutely nothing" to do with complex services in the oil and gas industry.[3] Pet. App. 21a; Tr. 1799-1802. In other words, Wellogix's key expert based his opinion that there was a theft of trade secrets on an examination of the wrong software.

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[3] It was in SAP software used by local German governments for budgeting.

The district court dealt with Accenture's pre-trial challenge to the reliability of Roman's testimony was to have the jury decide, holding "[i]f Accenture wishes to challenge Roman's reliance on ECC to support his opinion that Wellogix and SRM contained similarities, or the significance of Roman's findings with respect to ECC, it can do so on cross-examination. These issues go to the weight of Roman's opinion and not its admissibility. We decline to exclude Roman's opinion on these grounds." 788 F.Supp.2d 523, 538.

After trial, the district court recognized that Accenture had raised a "serious challenge to Roman's testimony," but concluded that his testimony was "appropriately presented to the jury" and that his significant factual errors "were relevant to the weight assigned to Roman's testimony, not to its admissibility." 823 F.Supp.2d 555, 576-77.

The Fifth Circuit panel recognized that Roman "twice misstated facts in his testimony,"and noted that the trial court was perturbed that "somebody as experienced as Mr. Roman [could] be. . .that much off the point" and make "such a rudimentary mistake." (*Wellogix, Inc. v. Accenture, L.L.P.*, 716 F.3d 867, 882 (5th Cir. 2013). But the Fifth Circuit panel dismissed Roman's significant misstatements as inconsequential because "Accenture had the chance to highlight and dispute these errors through "[v]igorous cross-examination" and the "presentation of contrary evidence. The court further concluded

that "[i]n the context of Roman's broader testimony, two misstatements do not constitute "manifest[ ] erro[r]." *Id*. [citations omitted, alterations in original].

Relegating to the jury the fundamental question of an expert's reliability is an abdication of the gatekeeping role Fed.R.Evid. 702 vests in the judge. This Court should now step in to correct these fundamental errors.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO PREVENT SEVERAL CIRCUITS, INCLUDING THE COURT BELOW, FROM MISAPPLYING OR IGNORING RULE 702 AND THIS COURT'S DECISIONS REQUIRING TRIAL JUDGE SCREENING AND EXCLUSION OF UNRELIABLE EXPERT EVIDENCE.

The Fifth Circuit's decision misapplies Rule 702 and this Court's precedents. Rule 702 establishes that the court must decide before allowing a jury to consider expert testimony that : (1) the expert is "qualified"; (2) the expert has "specialized knowledge" which will "help the trier of fact to understand the evidence or to determine a fact in issue"; (3) the expert's testimony is "based on sufficient facts or data"; (4) "the testimony is the product of reliable principles and methods"; and (5) "the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702.

For well over a century it has been recognized that case outcomes can and often do turn on expert evidence. *See, e.g.*, Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 50-52 (1901). The trial court's "gatekeeping role" is essential because "'[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.'" *Daubert* at 595, quoting Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991).

The district court's decision to admit Roman's testimony and opinions and the Fifth Circuit's affirmance are inconsistent with Rule 702 and this Court's decisions in *Daubert*, *Kumho*, and *Joiner* . Unless corrected, the decision of the Fifth Circuit in this case, and others like it in other circuits, will encourage federal trial courts to abdicate their critical, but smetimes intense and time-consuming "gatekeeping role" of screening out unreliable, but powerful and often dispositive expert testimony. This is particularly troubling given the rise of data usage and expert testimony in litigation.[4]

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[4] As Justice Breyer noted in his concurrence in *Joiner*, "Economic, statistical, technological, and natural and social scientific data are becoming increasingly important in both routine and complex litigation," citing Judicial Conference of the United States, Report of the Federal Courts Study Committee 97 (Apr. 2, 1990). 522 U.S. 136, 149.

In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony; in *Kumho Tire* the Court clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science[5]; and in *Joiner* the Court required that "the trial judge must perform a screening function to ensure that the expert's opinion is reliable and relevant to the facts at issue." 522 U.S. at 143.

In *Kumho Tire*, the Court reemphasized the need for judicial scrutiny of the factual foundation of expert testimony, writing that where the [expert] testimony's "factual basis, data, principles, methods, or their application are called sufficiently into question . . . the trial judge *must* determine whether the testimony has '*a reliable basis* in the knowledge and experience of [the relevant] discipline.'" *Kumho Tire*, 523 U.S. at 149 (quoting *Daubert*, 526 U.S. at 592) (emphasis added).

Of particular relevance to this case,"nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. When a court concludes that there is simply too great an analytical gap between

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[5] Consistent with *Kumho*, Rule 702, as amended, provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful. *See* Advisory Committee Notes to the 2000 Amendments to Rule 702.

the data and the opinion proffered," *Joiner*, 522 U.S. at 146, it should not permit that expert opinion to go to the jury.

The "*Daubert* trilogy" tightened the standards for the admissibility of expert testimony, and in 2000, Federal Rule of Evidence 702 was amended to codify a test that requires trial judges to apply a stringent reliability test to expert testimony. The 2000 amendment reinforced the Court's insistence that all adversarial expert testimony be subject to a reliability test. The new rule 702 mandates that for expert testimony to be admissible, an expert witness must not only utilize reliable principles and methods, but also that "the expert has reliably applied the principles and methods to the facts of the case." Rule 702(d); *see* Memorandum from Fern M. Smith, Chair, Advisory Comm. on Evidence Rules, to Alicemarie H. Stotler, Chair, Standing Comm. on Rules of Practice and Procedure 8 (May 1, 1998), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ EV5-1998.pdf.[6]

Some federal trial judges seem to be uncomfortable with the changes brought to bear by the "*Daubert* revolution." *See* David L. Faigman, *The Daubert Revolution and the Birth of Modernity: Managing Scientific Evidence in the*

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[6] The party offering expert testimony has the burden of establishing that the admissibility requirements are met by a preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171 (1987).

Age of Science, 46 U.C. DAVIS L. REV. 893, 895 (2013).[7] These judges often ignore the text of Rule 702, and instead rely on precedents that predate and are inconsistent with amended Rule 702 and the *Daubert* trilogy.

In this case and others, trial courts have applied the pre-*Daubert* approach that any flaws in an expert's testimony are issues of weight, not admissibility (*see, e.g.*, 788 F.Supp.2d 523, 539), and to the extent there are problems with an expert's methodology or reasoning, opposing counsel's recourse is to bring these flaws to the attention of the jury through "vigorous cross-examination" (*see, e.g.*,716 F.3d 867, 881). *See generally* DAVID H. KAYE, ET AL., THE NEW WIGMORE: A TREATISE ON EVIDENCE – EXPERT EVIDENCE, § 2.2.2 (Supp. 2012).

Some courts rely on cases preceding the 2000 changes to Rule 702, or pre-*Daubert* precedent inconsistent with more recent authority. Others cite to pro-admissibility *dicta* in *Daubert*, while ignoring stricter language in *Kumho* and *Joiner*, and this Court's own characterization of the post-*Daubert* standards of reliability expert evidence must meet as "exacting," *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000).

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[7] Rule 702 places substantial demands on judges, requiring a far more active role for judges than they are accustomed to, and, ideally, requiring that they become educated about the scientific or technical discipline at issue. *See* Faigman, *supra* at 10-11.

Those interpretations ignore *Joiner*'s statement that district courts may reject testimony when there is an "analytical gap" between the expert's methodology and conclusions (522 U.S. 136, 146), and amended Rule 702's insistence that courts ensure that a witness has applied the principles and methods reliably to the facts of the case, another, and mandatory, verbal formulation of the "analytical gap" concept. *See* David Bernstein, *The Misbegotten Judicial Resistance to the Daubert Revolution*, 89 NOTRE DAME L. REV. 27 (2013).

Perhaps the most revealing recent example of such lower courts' resistance to the exacting criteria for admissibility is, perhaps, *Milward v. Acuity Specialty Products Group, Inc.*, 639 F.3d 11 (1st Cir. 2011). In *Milward*, the First Circuit reversed as an abuse of discretion a district court's ruling excluding causation evidence in a toxic tort case. 639 F.3d at 26. In doing so, the circuit court ignored Rule 702, disregarded *Joiner* and relied on obsolete precedents. The district court excluded *Milward*'s general causation evidence because, in its view, the expert testimony failed to satisfy Rule 702. *Milward v. Acuity Specialty Prods. Grp., Inc.*, 664 F. Supp. 2d 137, 142 (D. Mass. 2009), *rev'd*, 639 F.3d 11 (1st Cir. 2011), *cert. denied sub nom. U.S. Steel Corp. v. Milward*, 132 S.Ct. 1002 (2012).

The First Circuit held that the district court abused its discretion, remanded, and ordered the evidence admitted on remand. 639 F.3d 11, 26. Like the Fifth Circuit here, the court contended that "the alleged flaws identified by the court go to

the weight of [the expert's] opinion, not its admissibility," and "'When the factual underpinning of an expert's opinion is weak, it is a matter affecting the weight and credibility of the testimony – a question to be resolved by the jury.'" 639 F.3d at 22. This Court denied *certiorari*, *U.S. Steel Corp. v. Milward*, 132 S. Ct. 1002 (2012).

On remand, the district court granted summary judgment to the remaining defendants, holding that the testimony of plaintiffs' causation expert was inadmissible under Rule 702. *See Milward v. Acuity Specialty Products*, No. 07-11944-DPW (D. Mass., September 6, 2013). Plaintiffs appealed that order, and the case was argued in the First Circuit Court of Appeals on April 9, 2014 (1st Cir. No. 13-2132). It remains to be seen whether the First Circuit's earlier decision in *Milward* will remain the law in that circuit.

Nevertheless, *Milward* has influenced other federal courts in a number of circuits in recent cases. *See, e.g., Kuhn v. Wyeth, Inc.*, 686 F.3d 618, 625 (8th Cir. 2012) quoting *Milward*, 639 F.3d at 15 and holding "[T]rial courts are not empowered 'to determine which of several competing scientific theories has the best provenance.'" *See also In re Fosamax (Alendronate Sodium) Prods. Liab. Litig.*, Nos. 11–5304, 08–08, 2013 WL 1558690, at *4 (D.N.J. April 10, 2013) (citing *Milward* for the statement that "Defendant is free to address these issues on cross-examination, but Defendant's concerns do not prohibit [plaintiffs' expert] from testifying as an expert because he is qualified and

the methodology he used is sufficiently reliable"); *Johns v. Bayer Corp.*, 2013 WL 1498965, at *21 (S.D. Cal. Apr. 10, 2013) (citing only *Milward* as authority to deny defense motion to exclude expert testimony).

Rule 702 and the *Daubert* line of cases require that, as "gatekeeper," a trial judge should not admit an expert's testimony unless the judge understands the logic and facts underlying the expert opinion and determines that the expert's reasoning is well-founded. *See* David S. Caudill and Lewis H. LaRue, *Why Judges Applying the Daubert Trilogy Need to Know About the Social, Institutional and Rhetorical – and Not Just the Methodological – Aspects of Science*, Washington & Lee Public Law and Legal Theory Research Paper Series, Accepted Paper No. 03-22 at 57 (October 2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=462740.

The *Daubert* trilogy and the amended Rule 702 represent a shift away from judicial "deference" to experts' conclusory opinions toward a "pedagogical model" for evaluating expert testimony, which requires the trial judge to understand the facts underlying and the reasoning behind the expert's conclusions – the whole process from evidence, to analytic principles, to application of those principles to the evidence, and finally to the expert's conclusion. Likewise, if the expert's testimony goes before a jury, the jury needs to be

able apply the expert's methodology to the facts before them. *Id*. at 61.

In this case the trial judge admitted that he found it "very hard. . .to follow" Roman's testimony. Pet. App. 21a; Tr. 1827. This is all the more significant because the trial judge, acting as sole arbitrator, had already presided over an arbitration involving similar issues arising out of the same transactions, but different parties and had already heard evidence about Wellogix and SAP computer code. 788 F.Supp.2d 523, 531-34. It was thus illogical for the district court to believe that a lay jury would be able to sort out Roman's testimony and reach an informed judgment.

Roman's "rudimentary" mistakes, 716 F.3d 867, 882, should have resulted in the exclusion of his testimony, because, as the Third Circuit noted in *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994), "*any* 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." (emphasis supplied).

The courts below should not have permitted Roman's theft of trade secrets testimony to reach the jury, and without that testimony there could not have been a plaintiff's verdict because "[i]nadmissible evidence contributes nothing to a 'legally sufficient evidentiary basis,'" *Weisgram*, 528 U.S. at 454.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG CIRCUITS REGARDING THE PROPER APPLICATION OF RULE 702 AND THIS COURT'S DECISIONS WITH RESPECT TO TRIAL COURTS' "GATEKEEPING" ROLE.

The Fifth Circuit panel's decision conflicts with numerous decisions of other circuits correctly applying the searching inquiry and "exacting criteria" for the admission of expert testimony required by Rule 702 and the *Daubert* line of cases. *See, e.g., Ruggiero v. Warner-Lambert Co.*, 424 F.3d 249 (2d Cir. 2005) and *Amorgianos v. National R.R. Passenger Corp.*, 303 F.3d 256 (2d Cir. 2002); *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012); *United States v. Johnson*, 617 F.3d 286 (4th Cir. 2010); *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665 (6th Cir. 2010); *Chapman v. Maytag Corp.*, 297 F.3d 682 (7th Cir. 2002) and *Fuesting v. Zimmer, Inc.*, 421 F.3d 528 (7th Cir. 2005), *vacated in part on other grounds*, 448 F.3d 936 (7th Cir. 2006); *Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706 (8th Cir. 2001); *Daubert v. Merrell Dow Pharmaceuticals,* 43 F.3d 1311 (9th Cir. 1995) and *Jinro Am. Inc. v. Secure Invs., Inc.*, 266 F.3d 993 (9th Cir. 2001); *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233 (11th Cir. 2005) (later Eleventh Circuit cases have deviated from the correct view, *see infra*).

Other circuits, however, like the court below, do not undertake the required painstaking examination of expert testimony required by Rule 702. These circuits hold, like the district court and the Fifth Circuit in this case, that identifying flaws in the application of reliable scientific evidence is the role of cross-examination. *See*, *e.g.*, *Milward v. Acuity Specialty Prods. Grp., Inc.*,*supra*.(First Circuit); *Stollings v. Ryobi Techs., Inc.*, 725 F.3d 753 (7th Cir. 2013); *Rosenfeld* v. *Oceania Cruises, Inc.*, 654 F.3d 1190 (11th Cir. 2011); *Liquid Dynamics Corp.* v. *Vaughan Co.*, 449 F.3d 1209 (Fed. Cir. 2006).

The Federal Judicial Center's *Reference Manual on Scientific Evidence* recognizes the profound circuit split. Margaret A. Berger, *The Admissibility of Expert Testimony*, *in* Fed. Judicial Ctr., *Reference Manual on Scientific Evidence* 11, 22 & n.57 (3d ed. 2011); *see also*, *e.g.*, David E. Bernstein, *supra*, 89 Notre Dame L. Rev. 27, 50-53 (2013).

The result of these different judicial approaches is that a case that pivots on expert evidence becomes "a sporting game [ ]or a lottery" (Lee Loevinger, *Science as Evidence*, 35 JURIMETRICS J. 153, 176 (1995)) in which winning becomes a matter of venue, not reason.

Certiorari review will bring the lower courts into accord with Rule 702, to correct these errors of law, and reconcile the decisions of the various circuits.

CONCLUSION

For the foregoing reasons, *amici curiae* urge the Court to grant the petition for a writ of certiorari.

April 21, 2014

Respectfully submitted,

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