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

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Wellogix's opposition is an exercise in wishful thinking. According to Wellogix, Rule 702 and *Daubert* are consistently applied, all circuit court decisions are in accord, and no guidance from this Court is necessary. But there is a reason why *eleven* organizations representing virtually every industry and segment of the U.S. economy have filed five *amicus* briefs strongly urging the Court to grant certiorari.

As federal judges, commentators, and the Federal Judicial Center's manual on expert testimony all recognize, lower courts are articulating fundamentally contradictory legal standards. The rift is self-evident when one court says "'[t]he soundness of the factual underpinnings of the expert's analysis'" is a "'factual matte[r] to be determined by the trier of fact,'" *Milward* v. *Acuity Specialty Prods. Grp., Inc.*, 639 F.3d 11, 22 (1st Cir. 2011), and another says the "'factual foundation'" of the expert's analysis must be assessed by the court "'before it can be submitted to the jury,'" *Elcock* v. *Kmart Corp.*, 233 F.3d 734, 754 (3d Cir. 2000). Conflicts do not come any clearer or more irreconcilable.

To be sure, some circuits have themselves created "irreconcilable conflict[s]" in their own *Daubert* jurisprudence, causing four federal judges to wonder: "What is a trial judge to do" when one case "says that the trial judge *may* exclude," another "says that the judge *must* exclude," and a third "says that the judge *must not* exclude"? *Huss* v. *Gayden*, 585 F.3d 823, 833 (5th Cir. 2009) (Elrod, J., dissenting from denial of rehearing en banc). But that chaos is all the more reason to grant review, not deny it. Because of the intractably conflicting standards, no one can predict how a judge or panel will apply Rule 702, and liti-

gants are subjected to "roulette wheel randomness." 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, 218 (2006); see also DRI Br. 10.

Compounding the problem, the spin of the *Daubert* roulette wheel is often case dispositive, as it was in this matter. And it can be just as decisive in cases that are never litigated to judgment because the disposition of *Daubert* motions "often imposes hydraulic pressure on the rest of the litigation," compelling parties "to settle, rather than take their chances with a jury, even when there are real doubts about the science involved." Chamber & BRT Br. 11.

This case is an ideal vehicle for bringing the clarity that Rule 702 demands. First, unlike recent cases in which defendants have sought interlocutory review before having to face settlement pressure, this case comes from a final judgment. Second, the purported expert, Kendyl Roman, was the crux of plaintiff's case, and his testimony was outcome determinative; indeed, both the Fifth Circuit and the district court expressly rested dispositive elements of proof *exclusively* on his testimony. Third, the decision below is manifestly wrong. Wellogix does not even attempt to defend the holding that a software expert may testify to anything "related to" software, including causation and post-tort value; and Wellogix's assertion of independent evidentiary support for Roman's opinions is baseless. Fourth, Wellogix's last-ditch waiver argument was not raised below and is meritless in any event. There is no barrier to review, only a compelling need.

I. ONLY THIS COURT CAN RESOLVE THE LOWER COURTS' DEEP-SEATED DISAGREEMENT.

It is no secret that lower court decisions on Rule 702 are in complete disarray—as eleven *amici* have explained. Some courts require judges to determine the sufficiency of the factual basis for the expert's opinion; others punt the issue to the jury. Pet. 11–13. Comparable disparity exists for questions about the application of an expert's methodology to the facts, with some cases demanding that the judge undertake the inquiry and others leaving the issue to cross-examination and the jury. *Id.* at 12–14.

The standards courts apply vary wildly. Sometimes the rule is that the court has no role in assessing the "'soundness of the factual underpinnings of the expert's analysis,'" *e.g.*, *Milward*, 639 F.3d at 22, or that "reliability of data and assumptions used in applying a methodology is tested by the adversarial process and determined by the jury," *Manpower, Inc.* v. *Ins. Co. of Pa.*, 732 F.3d 796, 808–10 (7th Cir. 2013); see also *Apple Inc.* v. *Motorola, Inc.*, No. 2012-1548, 2014 WL 1646435, at *18–30 (Fed. Cir. Apr. 25, 2014) (invoking a factual-underpinnings-are-for-the-jury rule to reverse Judge Posner's decision to exclude).

Sometimes the rule is that the court's role is all but illusory because "'the factual basis of an expert opinion'" is for the jury, unless it "'is so fundamentally unsupported that it can offer no assistance,'" *Hartley* v. *Dillard's, Inc.*, 310 F.3d 1054, 1061 (8th Cir. 2002), or the expert's opinion is "entirely unsupported" and "pulled … out of thin air," *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 531 (6th Cir. 2008).

Sometimes Rule 702 actually means something, and facts underlying expert testimony are carefully

scrutinized. *E.g.*, *ZF Meritor, LLC* v. *Eaton Corp.*, 696 F.3d 254, 294 (3d Cir. 2012) (any "suggestion that the reasonableness of an expert's reliance on facts or data to form his opinion is somehow an inappropriate inquiry under Rule 702 results from an unduly myopic interpretation of Rule 702 and ignores the mandate of *Daubert*"); see also Pet. 12.

As everyone but Wellogix seems to recognize, there is no way to square these decisions. Chamber & BRT Br. 3–10; ACC, ACA, NAM, & PhRMA Br. 9–23; DRI Br. 3–7; WLF Br. 12–17; ALF, FDCC & IADC Br. 7–17. And Wellogix barely tries. It does not address cases ignoring Rule 702(d), which requires a court to ensure the expert's methodology is reliably applied. Pet. 13–14. Nor does it dispute that courts have articulated conflicting legal standards.[1]

Instead, Wellogix broadly proclaims there are no inconsistencies because the admissibility of expert testimony is "fact-bound" and "specific to each case." BIO 13. But, in "each case," there are facts *and* there is a legal standard applied to those facts. The fundamental problem is that courts are applying conflicting legal standards, with some faithfully following Rule 702 and others blithely concluding that infirmities in expert testimony can be addressed in cross-examination. The significance of the conflicting legal standards is underscored by the broad array of industries urging this Court to grant review. Yet under Wellogix's logic, the Court should *never* grant certio-

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[1] Wellogix's assertion that this case "has nothing to do" with the split, BIO 14, is mystifying given Wellogix's own recognition that the courts below held that "disagreement" as to the factual basis for Roman's opinions "was for the jury to weigh and decide as the finder of fact," *id.* at 10. This case directly takes the side that the gatekeeper function is more like a sieve.

rari because every *Daubert* challenge involves facts and is not litigated in a vacuum.

Next, Wellogix asserts that, if there is any "debate among the lower courts," it is implicated only "at the frontiers of scientific and technical knowledge." BIO 14–20. Wrong again. Cases applying conflicting legal standards or flouting Rule 702 are not confined to any particular subject, as the petition and the *amicus* briefs show in painstaking detail. See, *e.g.*, Pet. 11–14 (citing decisions addressing expert testimony in economics, fluid dynamics, choices in cruise ship flooring, and the societal costs of power saws, among others); Chamber & BRT Br. 6–9; ACC, ACA, NAM, & PhRMA Br. 16–18. This is hardly surprising given that Rule 702 "applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 141 (1999). And a decision reaffirming that judges cannot sidestep Rule 702's requirements would apply to *all* experts.

Twenty years ago, when federal courts were applying divergent legal standards to proposed expert testimony, this Court intervened and provided considerable guidance on the admissibility inquiry. *Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579, 585 (1993). Over time, however, the lower courts have again drifted miles apart, and the standards have become badly muddled. Litigants and the lower courts need the Court to step in once more and clear up the morass. The problem will not solve itself.

I. THE DECISION BELOW IS WRONG AND PRESENTS AN IDEAL VEHICLE TO ADDRESS THE QUESTION PRESENTED.

Because the lower courts are hopelessly at sea and in dire need of guidance, Wellogix spends much of its

brief attempting to manufacture vehicle problems. Yet eleven *amici* have weighed in for a simple reason: this case presents an optimal vehicle for resolving the profoundly important question presented.

Accenture is seeking review of a final judgment that could not have been entered without Wellogix's software expert, who was the centerpiece of the trial and both decisions below. Lacking any business, industry, or valuation experience, Roman opined about nearly every aspect of the case, and the courts cited his testimony in practically every section of their opinions. Pet. App. 8a, 10a, 13a, 18a, 20a–22a, 71a–76a, 79a, 82a–83a, 96a–100a.

Roman's inadmissible testimony should never have reached the jury and, in all events, cannot support the $50 million verdict. Pet. 16–19. The Fifth Circuit allowed that verdict to stand by applying a legal standard that defies Rule 702 and that not even Wellogix can bring itself to defend. *Id.* Instead, Wellogix tries mightily to locate factual support for Roman's opinions in the record, but that support is nonexistent, which is precisely why the courts below relied on Roman, and why his opinions were inadmissible under Rule 702. None of Wellogix's attempts to change the subject undermines the need for immediate review.

1. Wellogix focuses primarily on its most obvious predicament—its failure to prove causation and post-tort value without Roman. At trial, Roman opined that the alleged theft suddenly caused Wellogix's business to be completely worthless. This inadmissible speculation strayed far beyond Roman's personal knowledge and expertise, had no factual basis, and cannot be squared with Wellogix's ongoing assertion that its patents are worth millions. Pet. 16–17. Nonetheless, both the court of appeals and the district

court refused to properly scrutinize these flaws under Rule 702 and then relied on Roman's testimony—*and it alone*—to plug a gaping hole in Wellogix's case. Pet. App. 18a, 83a.

Wellogix does not even attempt to defend the Fifth Circuit's legal rule that Roman's testimony was admissible because causation and post-tort value "related to" Wellogix's software and Accenture had the opportunity to cross-examine him. Pet. App. 18a n.6, 22a. Instead, it offers up two arguments, both of which fail.

a. Wellogix first claims that "independent evidence" supported Roman's testimony and that its admission was therefore harmless. BIO 25–28, 32. But that was not the basis of the decisions below, both of which held that Roman's "went to zero" testimony was admissible and then relied *exclusively* on it to support the verdict. Pet. App. 18a, 83a. Indeed, the Fifth Circuit pointedly underscored just how indispensible Roman was when it amended its opinion to delete the only other evidence it had cited, erroneously, in its first opinion (testimony from Wellogix's CEO, Ike Epley). *Id.* at 18a, 48a.

The courts below relied solely on Roman because there was nothing else. Wellogix's damages expert, Michael Wagner, opined only on Wellogix's pre-tort value in 2005 (using a projection that admittedly failed to account for the fact that the company was hemorrhaging cash *before* the tort occurred). And he expressly disclaimed any opinion on causation and post-tort value, Tr. 1101, and confirmed that Roman's "went to zero" testimony was necessary to quantify damages, *id.* at 1092. Therefore, Wagner's testimony cannot help Wellogix.

Nor can Epley's. The bare facts that Wellogix ceased operating, had no further sales, and laid off employees, BIO 26–27, 32, merely pose, and do not answer, the relevant questions: whether the alleged tort—as opposed to other factors—caused Wellogix's failure, and whether the company retained residual value through its patents. On both topics, Epley's testimony provides no support. As to causation, he recognized that his company (which was "ahead of its time" and *never* had any paying customers past the pilot stage) was burning through cash and was written off by investors *before* the purported theft. Pet. 4–5. And as to post-tort value, Epley recognized that Wellogix held "residual assets," BIO 2—namely, the patents purportedly worth millions. Pet. 4–5.

Nevertheless, Wellogix contends that the jury actually accounted for the value of its patents by deducting $1.6 million from Wagner's valuation. BIO 27. But this is just misdirection. The $1.6 million figure allegedly represented the amount Wellogix had *already received* from licensing its patents *to two companies*, not the entire value of the patent portfolio going forward. Tr. 2146. In concurrent patent litigation, Wellogix is asserting additional value by seeking millions in damages. Indeed, the testimony Wellogix cites concerns the claim of Wellogix's corporate representative that the patents were worth *$160 million*. BIO 9 (citing BIO App. 50).

The only other evidence Wellogix cites is from *Roman himself*—and thus is not "other" evidence. For example, in an effort to show that SAP incorporated Wellogix's technology into its software (which it did not), Wellogix points to Roman's testimony (at BIO App. 34–35) concerning a version of SAP's software that was not even released until 2009, Tr. 1784—three years *after* the theft supposedly destroyed

Wellogix in 2006, Pet. App. 105a. Wellogix's citations merely highlight how central—and how completely disconnected from reality—Roman's testimony was.

The bottom line is that there was no basis for Roman's case-dispositive testimony, and the legal standard the Fifth Circuit created to sidestep meaningful scrutiny under Rule 702 cannot save it.

b. Defenseless on the merits, Wellogix resorts to a waiver argument, BIO 33, but it fares no better. First, Wellogix did not make any waiver argument in its Fifth Circuit brief, so it has waived the right to argue forfeiture. See, *e.g.*, *EPA* v. *EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1602–03 (2014).

Second, Accenture did not waive any arguments. At trial, Accenture objected to a question asking Roman about the "damage" Accenture caused Wellogix. BIO App. 22. The court *allowed* the question, prohibiting only a response that "put a dollar figure" on damages. *Id.* at 22–23. Once the court permitted Roman to answer, and he testified that Accenture completely destroyed Wellogix, there was no need for Accenture to reassert its objection.

Nor did Accenture waive its arguments in post-judgment briefing. BIO 10 & n.1, 33. Accenture argued that there was no competent evidence of causation or post-tort value. Rule 50(b) Mot. 17–28. After Wellogix's opposition cited Roman for support, Accenture explained that Roman's testimony was inadmissible and could not sustain the verdict. Rule 50(b) Reply 13. The issue was fully preserved.

Finally, and in all events, the Fifth Circuit (and the district court) clearly passed on the issue, and neither court asserted that Accenture had waived anything. That alone is sufficient to preserve the issue for this Court's review. See, *e.g.*, *United States* v. *Williams*,

504 U.S. 36, 41 (1992) (pressed *or* passed upon rule operates in the disjunctive).

2. The Fifth Circuit failed to properly scrutinize other aspects of Roman's testimony under Rule 702, and Wellogix again has no answer. Before even getting to causation and damages, Wellogix had to prove that it held trade secrets and that Accenture used them, and once more it relied heavily on Roman. His errors on these topics were plentiful, but two of the most blatant ones were his opinions that a public document was a trade secret and that he had discovered "forensic evidence" of misappropriation based on his analysis of the wrong software. Both opinions were unsupported and only served to confuse and inflame the jury. Pet. 7–8, 18.

In response, Wellogix fights against the opinion below by contending there actually was factual support for Roman's testimony. BIO 11–12, 30–31. The Fifth Circuit, however, correctly recognized that these were "misstatements." Pet. App. 21a–22a. The trouble was that the court went on to hold that the jury was entitled to weigh those misstatements with the aid of cross-examination and contrary evidence. *Id.* The district court committed the same error when it held that critical questions about the opinion's factual basis were "appropriately considered by the jury." Pet. App. 99a, 132a–133a.[2]

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[2] Wellogix's attempts to salvage Roman's testimony also are meritless. Saying that the local-German-government software in which Roman purported to find evidence of theft (ECC) "feeds directly into" SAP's oil-and-gas software (SRM), BIO 30–31, is just *ipse dixit*. No one testified that ECC mutated SRM into a program that contained Wellogix's trade secrets or functionality. And the suggestion that Roman's testimony regarding the XML schema was accurate because other portions of the document were secret ignores Roman's specific claim that the XML schema

3. Wellogix concludes with a one-paragraph plea that this case does not implicate bigger problems with lower courts disregarding Rule 702 and this Court's precedent. BIO 33–34. This too is mere wishful thinking. The legal issue transcends industries and has enormous cross-cutting significance for all litigation. See Pet. 19–21; Chamber & BRT Br. 10–14; ACC, ACA, NAM, & PhRMA Br. 12–23; DRI Br. 7–10; WLF Br. 7–15; ALF, FDCC & IADC Br. 7–17. The lower courts' application of conflicting legal standards to expert testimony—including the recurring neglect of entire portions of Rule 702—is undeniably important and all-too-often outcome determinative. This is the case to put an end to it.

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itself was a trade secret even though, unbeknownst to him, it was publicly available. Tr. 1027. The Fifth Circuit rightly rejected Wellogix's attempt to explain away these "misstatements."

CONCLUSION

The petition should be granted.

Respectfully submitted,

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