

No. 14-297

IN THE
Supreme Court of the United States

SQM NORTH AMERICA CORPORATION,
Petitioner,

v.

CITY OF POMONA,
Respondent.

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

**BRIEF OF *AMICUS CURIAE*
COALITION FOR LITIGATION JUSTICE, INC.
IN SUPPORT OF PETITIONER**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY	3
REASONS WHY THE PETITION SHOULD BE GRANTED	4
I. THE NINTH CIRCUIT FAILED TO REQUIRE THE NECESSARY “SEARCHING” EXAMINATION OF EVERY ELEMENT OF THE EXPERT’S OPINION.	4
II. THE COURT SHOULD GRANT <i>CERTIORARI</i> TO ENSURE THE RIGOR OF <i>DAUBERT</i> ANALYSIS.....	11
CONCLUSION	16

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Chapman v. Proctor & Gamble Distributing, LLC, No. 12-14502, 2014 WL 4454979 (11th Cir. Sept. 11, 2014)</i>	14
<i>Daubert v. Merrell Dow Pharmaceuticals, 43 F.3d 1311 (9th Cir. 1995)</i>	5, 12
<i>Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993)</i>	<i>passim</i>
<i>General Elec. Co. v. Joiner, 522 U.S. 136 (1997)</i>	3
<i>Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999)</i>	3, 13
<i>Manpower, Inc. v. Insurance Co. of Pa., 732 F.3d 796 (7th Cir. 2013)</i>	15
<i>Martin v. Cincinnati Gas & Elec. Co., 561 F.3d 439 (6th Cir. 2009)</i>	14
<i>McLain v. Metabolife Int’l, Inc., 401 F.3d 1233 (11th Cir. 2005)</i>	14
<i>Milward v. Acuity Specialty Prods Group, 639 F.3d 11 (1st Cir. 2011), cert. denied, 132 S. Ct. 1002 (2012)</i>	2, 14, 15

TABLE OF AUTHORITIES—Continued

Moore v. Ashland Chem. Inc.,
151 F.3d 269 (5th Cir. 1998) 13

Nelson v. Tennessee Gas Pipeline Co.,
243 F.3d 244 (6th Cir. 2001) 13

In re Paoli R.R. Yard PCB Litig.,
35 F.3d 717 (3d Cir. 1994)..... 12

Pluck v. BP Oil Pipeline Co.,
640 F.3d 671 (6th Cir. 2011) 13

Tamraz v. Lincoln Elect. Co.,
620 F.3d 665 (6th Cir. 2010) 13-14

Rule

Fed. R. Evid. 702..... 2, 3, 4, 15

Other Authorities

Bernstein, D., *The Misbegotten
Judicial Resistance to the Daubert
Revolution*, 89 NOTRE DAME L. REV.
27 (2013) 2

Twerski, A., *Sufficiency of the Evidence
Does Not Meet Daubert Standards:
A Critique of the Green-Sanders
Proposal*, 23 WIDENER L.J. 641
(2014) 2

INTEREST OF *AMICUS CURIAE*¹

The Coalition for Litigation Justice, Inc. (“Coalition”) is a nonprofit association formed by insurers in 2000 to address and improve the litigation environment for toxic tort and mass tort claims.² To that end, the Coalition files *amicus curiae* briefs in cases that may have a significant impact on the direction of toxic tort, product liability, and similar litigation. The Coalition files briefs in many cases like this one that address whether the theories advanced by the claimant are scientifically supportable and viable.

The Coalition’s interest in this Petition derives from the Ninth Circuit’s fundamental misunderstanding of the requirements for the admission of expert scientific testimony in federal court. This misunderstanding is apparently shared by a growing number of other federal courts, as reflected in their decisions and practices. Decisions like the one at issue here allow, and in fact encourage, the introduction of speculative scientific

¹ No party or counsel for a party authored or funded the preparation of this *amicus* brief or made any monetary contribution intended to fund the preparation or submission of this brief. No entities other than the Coalition and its members contributed to the funding of this brief. A letter consenting to the filing of amicus briefs is on file, and counsel for Respondent City of Pomona received timely notice of intent to file this brief.

² The Coalition includes Century Indemnity Company; Chubb & Son, a division of Federal Insurance Company; Fireman’s Fund Insurance Company; Liberty Mutual Insurance Group; Great American Insurance Company; and Nationwide Indemnity Company.

evidence into the courtroom. Such opinions thereby increase the likelihood of unjustifiable jury verdicts (and risk-induced settlements) for which the Coalition's members may ultimately bear the cost.

The Ninth Circuit's approach relies on an artificial distinction between an expert's "method" – defined narrowly by the panel – and the processes or procedures by which an expert applies that method. That distinction virtually eliminates from the inquiry two basic elements of any reliable scientific conclusion: reliable data sources and reliable execution of methods. It thus weakens the scope of a Federal Rule of Evidence 702 *Daubert* review to the point that only the most obvious "nonsense opinions" – the panel's exact words – are likely to be excluded from federal court. Indeed, in conducting its own cursory examination of the expert's "method" at issue here, the panel failed to look beyond the expert's own self-serving pronouncements, a common failure among courts that do not apply *Daubert* correctly. Most troubling is the appearance of a similar approach to *Daubert* review in more than one recent federal court opinion, including the widely criticized 2011 *Milward* decision by the United States Court of Appeals for the First Circuit.³ The result of this

³ *Milward v. Acuity Specialty Prods Group*, 639 F.3d 11 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1002 (2012) (allowing expert testimony largely without inquiry into the reliability of the expert's self-serving declarations). As to the criticisms of *Milward*, see Bernstein, D., *The Misbegotten Judicial Resistance to the Daubert Revolution*, 89 NOTRE DAME L. REV. 27 (2013); Twerski, A., *Sufficiency of the Evidence Does Not Meet Daubert Standards: A Critique of the Green-Sanders Proposal*, 23 WIDENER L.J. 641 (2014).

trend, if left unchecked, will be the repeated admission of unreliable testimony, justified on the grounds that expert disputes should go to the jury. This is not what Rule 702 and *Daubert* review requires.

Decisions succumbing to the temptation to simply send such issues to the jury have created confusion and uncertainty in the fields of toxic tort, product, and environmental litigation, where claims are frequently predicated on scientific opinions and the financial stakes are often high. The Coalition therefore has an interest in urging the Court to address the confusion and conflict created (or at least furthered) by the decision below, and to restore the rigor that Rule 702 and this Court's decision in *Daubert* and subsequent cases require.

SUMMARY

In a trilogy of cases issued between 1993 and 1999,⁴ beginning with *Daubert*, this Court described a rigorous process by which federal trial judges must scrutinize proffered expert testimony. The Court has not addressed the application of *Daubert* standards since its 1999 *Kumho Tire* decision and the year 2000 changes to Rule 702. The rigor of the process described in *Daubert*, and prescribed by Rule 702, however, appears to be wilting under opinions seeking to return basic questions about the reliability of expert testimony to the jury. The Court thus needs to correct this approach.

⁴ *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993); *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

Many courts applying *Daubert* over the last two decades have recognized that Rule 702 requires a searching inquiry into whether the opinion the expert is offering is reliable and appropriate to be admitted as evidence in federal court, in each of three ways identified by that Rule. The decision below, however, reflects a tendency and perhaps a trend to allow unreliable expert testimony into the courtroom under the misapprehension that the court need not dig very deeply into the reliability of the testimony if the court feels that reliability rests on “processes” or “facts,” as reported by the expert, that the jury might be able to evaluate on its own. Thus, except for perhaps those rare opinions that are so ill-conceived and unrehearsed that they fail even to pass the “nonsense” test, almost everything goes to the jury. The result of these divergent rulings on the rigor and comprehensiveness required in a Rule 702 analysis is a new and growing inconsistency among courts, and the circuits, in what is required before scientific opinion testimony can be presented in federal court.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. THE NINTH CIRCUIT FAILED TO REQUIRE THE NECESSARY “SEARCHING” EXAMINATION OF EVERY ELEMENT OF THE EXPERT’S OPINION.

When this Court issued its *Daubert* ruling in 1993, directing federal courts to engage in a searching review of expert opinion as a precondition to its admission into evidence, no one said it would be easy. The issues posed in federal science and medical litigation can be complex. Trial judges

sometimes have to examine scientific literature and perplexing tomes to determine whether the expert is properly using the tools of science, and whether the opinion he or she presents is sufficiently reliable to allow a verdict to stand or fall on it. The Ninth Circuit itself, in the remanded *Daubert* opinion, called this approach a “brave new world” but did not shy away from the responsibility it imposed. *Daubert v. Merrell Dow Pharmaceuticals*, 43 F.3d 1311, 1315 (9th Cir. 1995).

The Ninth Circuit’s ruling here harkens back to the not-so-brave old world that pre-dated *Daubert*. The panel below tried to draw a bright line beyond which the trial judge need not go, and indeed *cannot* go, to investigate reliability – *even if that bright line results in the admission of unreliable testimony*. According to the panel, the trial judge need only review the expert’s “methods” with the minimal goal of keeping out “nonsense opinions.” The rest goes to the jury.

The panel determined that the only review necessary to keep out nonsense opinions is a fairly superficial examination of the expert’s purported methodology, and no examination at all of the “protocol” or “process” aspects that the panel declared off limits. The gatekeeper, according to the panel, is only allowed to scan the carpenter’s toolbox to see if it contains a proper hammer, saw, and screwdriver. This is the panel’s narrow view of an expert’s “methods” or “theories.” But the judge *must* not question whether the carpenter uses the tools correctly. This approach is flawed. If the carpenter uses the hammer to cut boards, the saw to drill screws, and the screwdriver to hammer nails, the resulting “house” will likely be entirely unreliable.

But the panel would let the expert testify and the jury has to sort the whole mess out. The trial judge must check at the door her intelligence, her nose for scientific error, and her ability to discern the difference between reliable opinion evidence and unreliable hypothesis.

By narrowly defining what an expert's "method" is, this panel effectively declared the bulk of the expert's work unreviewable by the court. The panel's truncated view of *Daubert*, reflected in its "methods/process" dichotomy, resulted in a rejection of the district court's analysis and the admission of the testimony, based almost entirely on the expert's own comments. The result was no independent analysis whether the opinion *was in fact reliable*. Some examples include:

- The panel criticized the trial court's reliance on the "ongoing refinement" of the isotope analysis quality assurance/quality control procedures as a reason to find unreliability. But the panel held only that "[t]he existence of ongoing research ... does not necessarily invalidate the reliability of expert testimony." Pet. App. 10a. The panel never *itself* considered whether the "ongoing research" *did* invalidate the expert's work.
- The panel rejected the trial court's determination that the U.S. EPA had not sufficiently vetted and approved the expert's methodology. But the panel contented itself with the holding that a "disagreement over, not an absence of, controlling standards' is not a basis to exclude expert testimony." Pet. App. 11a. The panel never inquired whether the expert's approach was in fact

valid, and/or whether EPA's withholding of its validation reflected an underlying problem with the approach.

- The panel noted that two other laboratories “reviewed” Dr. Sturchio’s methodology, but the Guidance Document shows only that these laboratories participated in some unknown way in Dr. Sturchio’s work. Pet. 20-21. The panel stopped short of inquiring whether those laboratories actually did review or test the expert’s methodology, and in what depth. Pet. App. 12a, 13a-14a.
- The panel accepted Dr. Sturchio’s questionable reliance on samples of perchlorate from only three geographic areas (none from Pomona itself) as mere “facts” that go to the jury, without examining the quality and use of the samples to see if they could indeed support the derived opinion. Pet. App. 18a.
- The panel disregarded the lack of dual sampling and outside laboratory review as inappropriate subjects for the trial court analysis, but never questioned whether the expert effectively hid his work behind his own closed doors and in the process produced unreliable test results. Pet. App. 15a.
- The panel accepted Dr. Sturchio’s declaration that his methods were “fully disclosed” in the Guidance Document – though this point was heavily disputed – without the panel examining whether the

Guidance Document did fully disclose the methods. Pet. App. 14a.

The panel apparently declined any inquiry into these critical aspects of the expert's testimony because they arose from "processes" rather than "methods."

The panel similarly stopped short of anything that could be called a "searching" review by repeatedly accepting at face value the declarations of the expert himself. The panel did not analyze whether the expert's testimony was in fact accurate or represented what he actually did, or whether he correctly utilized his sources and facts. The task of a reviewing court surely must extend beyond quoting the expert's views on his own reliability. The court must look behind the curtain and see what exists in the rooms where scientific reliability must reside. This panel chose the former, and unacceptable, course, as illustrated by findings on pages 17 and 18 of the opinion:

- "Dr. Sturchio's testimony, however, belies this conclusion. He explained that he had documentation verifying that the sampling procedures were followed." Pet. App. 17a.
- "Dr. Sturchio ... explained that the database was sufficiently large to permit him reasonably to draw a connection to the Atacama perchlorate." *Id.* 18a.
- "Dr. Sturchio [argued] that Dr. Aravena's [contrary] opinion was based on disclosures and quotations from old and outdated publications." *Id.*

- “Dr. Sturchio also explained that when the Pomona study was conducted, synthetic and Atacama sources of perchlorate were well known and well characterized.” *Id.*

Nowhere did the panel test these expert assertions in any way.

If any of these statements are untrue, that reality would potentially undercut the reliability of Dr. Sturchio’s testimony. As only one example, if the sampling database was *not* large enough reliably to support Dr. Sturchio’s conclusions, then despite Dr. Sturchio’s representations to the contrary, his opinions are invalid. The panel, however, merely declared that all of these statements could be tested at trial and the criticisms only go to the weight of his testimony. “SQMNA’s arguments challenging Dr. Sturchio’s expert testimony are not uncontroverted, and they go to the weight that a fact finder should give to his expert report.” Pet. App. 17a.

The flaw in this deferential approach to the expert’s assertions is highlighted by the red flags attending this expert’s work, especially in the manner in which the expert utilized studies and facts and applied his methodology.

This expert claims to be able to do an incredibly difficult thing – track the perchlorate underneath the City of Pomona to one specific source (Chile), deposited decades earlier, despite the existence of multiple potential sources of the same chemical in this aquifer. Dr. Sturchio’s lab is the only lab ever to perform this analysis. He not only failed to have another lab confirm his results, he declined to take duplicate samples so such analyses could even be

done – the bulk of his work cannot be checked. The methodology he used was developed by him and supported by publications that he wrote. The methodology did not appear in print until a week before trial. And, not least, the opinion conveniently puts all of the blame on the one entity sued in the lawsuit. This is not a case where the opinion is so mainstream as to justify, at least potentially, a minimalist approach to *Daubert*. It is a case instead where a court had every reason to delve deeply into not just the overall “method” used but the reliability of the data and application of the method to that data.

Finally, the panel’s opinion is peppered with language seen in other, similar opinions where courts abdicate their *Daubert* gatekeeping roles in favor of letting the jury cope with the hard issues. The criticisms “go to the weight of the evidence.” Pet. App. 10a. This is a classic “battle of the experts.” *Id.* 19a. The *Daubert* test is “flexible.” *Id.* 9a. The court should only analyze the expert’s methodology, and not his conclusions. *Id.* 10a.

The proof of the flaw in the panel’s attempted distinction between what it called *methodology* and *protocols* or *processes* is the extremely narrow category of unreliable opinions that would be excluded under such an approach: “The judge is ‘supposed to screen the jury from **unreliable nonsense opinions**, but not exclude opinions merely because they are impeachable.” Pet. App. 9a (emphasis added). That is an entirely too narrow view of *Daubert’s* and the trial court’s function.

II. THE COURT SHOULD GRANT *CERTIORARI* TO ENSURE THE RIGOR OF *DAUBERT* ANALYSIS.

Although many federal courts continue to require careful and thorough review of expert testimony, the “let-it-in” philosophy behind the Ninth Circuit *methodology/process* distinction, in part by admitting testimony without looking behind the basis for the testimony, is unfortunately reflected in other recent opinions.

Science-based litigation is unquestionably challenging for trial court judges. Experts frequently accompany their pronouncements with impressive credentials and intimidating scientific testimony. With new technologies arriving on an almost daily basis, sorting of the insufficiently reliable from the actually reliable is no easier today than when courts first considered fingerprinting, polygraph tests, and DNA analysis as courtroom evidence.

It is evident, however, that many courts routinely perform the required level of *Daubert* review, as the trial judge below did prior to the Ninth Circuit’s reversal. These judges not only hear the testimony, they retrieve the studies relied on, read them, and make judgments about whether the expert is fairly relying on those studies. These judges examine new methodologies and look for evidence of independent verification. They look carefully for analytical gaps between the proffered testimony and the relied-on materials. In addition to excluding “nonsense opinions,” these judges also exclude many other opinions that do not appear as

nonsense on the surface but under close examination reveal themselves as unreliable.⁵ A brief review of the circuits illustrates the more rigorous approach:

The Third Circuit Court of Appeals: The Third Circuit has held that “**any step that renders the analysis unreliable** ... renders the expert’s testimony inadmissible.” *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994) (emphasis added). The *Pomona* panel itself acknowledged that the Ninth Circuit’s “methodology or theory” approach is different from the Third Circuit’s “any step” approach. Pet. App. 16a. *In re Paoli* is a landmark decision issued shortly after *Daubert* that, at least until recently, reflected the standard approach to *Daubert* review. The decision at issue is inconsistent with *Paoli*.

The Fifth Circuit Court of Appeals: At least one important *Daubert* opinion from the Fifth Circuit requires more than a passive review of the purported methods or theory. That circuit instead requires “some objective, independent validation of the expert’s methodology. The expert’s assurances that he has utilized generally accepted scientific

⁵ The Ninth Circuit’s initial response to *Daubert*, in the remanded matter, required rigorous review of all elements of the expert’s opinion. This early Ninth Circuit panel rejected the expert’s testimony but only after reviewing the studies themselves along with the expert’s claimed “metaanalysis” of the studies. *Daubert v. Merrell Dow Pharmaceuticals*, 43 F.3d 1311 (9th Cir. 1995). The more recent panel here, in contrast, likely would have forbidden the trial court even from reviewing the studies to see how the expert applied his presumably acceptable “metaanalysis” methodology, because this would require delving into the expert’s “processes.”

methodology is insufficient.” *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 276 (5th Cir. 1998). In *Moore*, the court refused to allow an expert to testify to a speculative link between toluene and a specific respiratory disease – not necessarily a “nonsense” opinion – because of the expert’s “process” error of failing to correctly assess the dose (much higher in the single study the expert relied on than those in the case at issue). The *Moore* court could not have discovered the unreliability of the expert’s testimony if it had followed the approach in the decision below.

The Sixth Circuit Court of Appeals: Several decisions from the Sixth Circuit clearly are inconsistent with the limited review approach adopted in this case. That court has repeatedly rejected expert testimony by looking closely at both the methodology used and the application of that methodology to the studies and facts involved. In *Nelson v. Tennessee Gas Pipeline Co.*, 243 F.3d 244 (6th Cir. 2001), the Sixth Circuit rejected an expert’s attempt to tie PCB exposures to neurological injuries after reviewing the claimed supporting studies and finding unreliability in the failure to conduct any dose assessment. The court rejected plaintiffs’ contention that *Kumho Tire* reflected a “retrenchment’ ... that favored the admission of expert testimony... [C]lose judicial analysis of expert testimony is necessary.” *Id.* at 252. The Sixth Circuit repeated its “close judicial analysis” in several other cases excluding expert testimony after a detailed review and analysis of more than the expert’s mere pronouncements and basic approach. *See, e.g., Pluck v. BP Oil Pipeline Co.*, 640 F.3d 671 (6th Cir. 2011) (rejecting expert claim that benzene exposures caused non-Hodgkins lymphoma); *Tamraz v. Lincoln Elect. Co.*, 620 F.3d 665 (6th Cir.

2010) (rejecting expert claim that welding rod exposure caused Parkinson's disease as speculative); *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439 (6th Cir. 2009) (rejecting expert claim that exposure to asbestos in gaskets caused his mesothelioma).

Eleventh Circuit: The Eleventh Circuit likewise has recently applied a more stringent *Daubert* review standard than the decision below would allow. In *Chapman v. Proctor & Gamble Distributing, LLC*, No. 12-14502, 2014 WL 4454979 (11th Cir. Sept. 11, 2014), the court rejected a claim linking dental cream to copper-deficient myelopathy under an exacting *Daubert* review reserved for novel claims of causation. *Id.* at *3-4. The court engaged in a thorough hearing and consideration of “thousands of pages of filings by the parties, including the experts' reports and depositions, and scientific literature.” *Id.* at *4. “It is ‘proper’ and ‘necessary’ for the trial judge ‘to focus on the reliability’ of a proffered expert's ‘sources and methods.’” *Id.* at *6. *See also McLain v. Metabolife Int'l, Inc.*, 401 F.3d 1233 (11th Cir. 2005).

On the other hand, the First Circuit's opinion in *Milward* appears to be squarely in line with the approach reflected in the decision below. *Milward* involved the novel opinion that exposure to benzene could cause a rare form of cancer never before associated in the scientific literature with benzene exposure. This sort of “getting ahead of the science” opinion is properly subject to searching scrutiny.

Yet the *Milward* panel let the key elements of the expert's opinion go to the jury without a reliability analysis. As here, multiple paragraphs in the appellate opinion start with the phrase “Dr. Smith considered ...” or “Dr. Smith explained ...,”

followed by absolutely no analysis as to whether the underlying record in fact supported what Dr. Smith “considered” or whether his opinions were in fact reliable. 639 F.3d at 19-21. The *Milward* court approach mirrors the same reluctance to review the full body of the expert’s work evident in the Ninth Circuit’s truncated view of *Daubert*: “The alleged flaws identified by the court go to the weight of Dr. Smith’s opinion, not its admissibility.” *Id.* at 22. *Milward* actually criticized the trial judge for doing exactly what it should have done – “The court’s analysis repeatedly challenged the factual underpinnings of Dr. Smith’s opinion” *Id.*

The Seventh Circuit likewise appears to be trending toward a very generous approach to unreliable expert testimony. That Circuit, in *Manpower, Inc. v. Insurance Co. of Pa.*, 732 F.3d 796 (7th Cir. 2013), refused to allow the trial court to examine the quality of the data relied on by the expert, even though that reliance arguably resulted in an unreliable expert opinion. *Id.* at 807-10.

It is apparent that there are two very divergent approaches to the admission of expert testimony prevailing in the federal courts – the previously well-established “rigorous” review, and the more recent trend toward a highly permissive review that is inconsistent with *Daubert* and Rule 702. This Petition therefore represents an opportunity to address, and restore, the rigor and comprehensiveness that Rule 702 requires in evaluating all aspects of proposed scientific testimony.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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