

No. 14-297

IN THE
Supreme Court of the United States

SQM NORTH AMERICA CORPORATION,

Petitioner,

v.

CITY OF POMONA, CALIFORNIA,

Respondent.

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

**BRIEF OF DRI – THE VOICE OF THE
DEFENSE BAR AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

Amicus curiae DRI – The Voice of the Defense Bar (“DRI”) is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness and professionalism of defense attorneys. Consistent with this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense attorney, and to improve the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient. To that end, DRI regularly files *amicus curiae* briefs in cases that raise issues of concern to its members.

The question presented in this case significantly affects the interest of DRI and its members. In cases involving complex or highly technical subject matter, expert testimony is often critical. Accordingly, the standards for assessing the admissibility of expert testimony play an increasingly pivotal role in the outcome. Since the decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *GE v. Joiner*, 522 U.S. 136 (1997); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), and the

¹ The parties have filed with the Clerk a letter reflecting blanket consent. Counsel of record received notice of DRI’s intent to file this brief at least 10 days prior to the due date. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

amendment of Federal Rule of Evidence 702 in 2000, this Court has not provided further guidance on the critical gatekeeping responsibilities with which the lower courts are charged. Such guidance is needed so that trial courts — and trial lawyers — can minimize the uncertainty and confusion that abound on this vital issue.

This Court's review is warranted to restore a measure of regularity to the critical gatekeeping function. Certiorari should be granted so that this Court can clarify the governing standards, resolve the conflicting views of appellate courts and trial courts nationwide, and promote the uniformity of standards upon which the justice system depends.

REASONS FOR GRANTING THE PETITION

The Lower Federal Courts are Divided on Important Questions Arising Under Federal Rule of Evidence 702 that are of Profound Consequence for Litigants and for the Administration of Justice.

In the past twenty years, the gatekeeping responsibility over the admissibility of scientific expert testimony that *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) conferred on district courts has dramatically expanded in its reach and its practical impact. Several readily identifiable steps have accelerated that expansion:

- In *GE v. Joiner*, 522 U.S. 136 (1997), the holding that *Daubert* decisions are subject to appellate review under the deferential abuse-of-discretion standard made it even more important that district courts have clear rules to guide the performance of their gatekeeper responsibilities;
- In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the gatekeeping function was expanded from scientific expert testimony to all expert testimony;
- In 2000, Federal Rule of Evidence 702 was amended to codify the *Daubert* gatekeeping standard;
- The *Daubert* standard expanded beyond the federal courts to become the governing standard in most state courts as well.

Today, *Daubert* often poses case-dispositive issues in a broad swath of litigation nationwide. *See, e.g.*, Kenneth R. Foster & Peter W. Huber, *Judging Science: Scientific Knowledge and the Federal Courts*, 1 (1997) (“the outcomes of criminal, paternity, first amendment, and civil liability cases ... often turn on scientific evidence”); Edward K. 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”).

Although Rule 702 recites the requirements for admissibility with simplicity and clarity, lower courts have grappled mightily with core underlying issues, *viz.*, how to articulate and apply — and review on appeal — the standards that govern the gatekeeping function assigned to the trial courts. Having struggled with those standards for years, the lower courts now find themselves in conflict and disarray, posing intractable real-world dilemmas for counsel and litigants. This Court’s guidance is urgently needed.

The petition for a writ of certiorari delineates the entrenched circuit conflict that the issues in this case present. Pet. 11-18. The existence of that conflict is neither hyperbole nor empty rhetoric. Indeed, in the opinion below (Pet. App. 16a) the Ninth Circuit expressly noted its disagreement with the Third Circuit’s decision in *In re Paoli R.R. Yard PCB Litigation*. 35 F.3d 717 (3d Cir. 1994). DRI will not repeat the reasons for immediate review that the petition persuasively explains. Instead, in this *amicus* brief DRI will focus on the practical need for

this Court's prompt, authoritative clarification of the governing federal standards for the admissibility of expert testimony.

Expert witness testimony requires close judicial scrutiny for multiple reasons. First, fidelity to this Court's holding in *Daubert* compels trial courts to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at 589. *Kumho Tire* expanded this imperative to cover all expert testimony. 526 U.S. at 147.

Second, in recognition of the unique attributes of expert witnesses, the Federal Rules of Evidence and the governing cases "grant expert witnesses testimonial latitude unavailable to other witnesses." *Kumho Tire*, 526 U.S. at 148. Accordingly, the judicial designation of "expert" status is freighted with disproportionate potential to influence jurors. *See Daubert*, 509 U.S. at 595 (the expert's opinion "can be both powerful and quite misleading because of the difficulty in evaluating it") (internal quotation marks omitted); 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, 220 (2006) (explaining that expert witnesses enjoy "extraordinary powers and privileges in court" not shared by lay witnesses).

Third, the exaggerated impact on jurors is amplified even further because experts provide testimony on matters beyond the realm of the typical juror's knowledge. *See Fed. R. Evid.* 702 (defining

expert testimony as conveying “scientific, technical, or other specialized knowledge”). *Cf. 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”); *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”); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 553 (Tex. 1995) (explaining that “[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” and, therefore expert testimony 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”); *Cunningham v. Wong*, 704 F.3d 1143, 1167 (9th Cir. 2013) (“Scientific and expert testimony contains an ‘aura of special reliability and trustworthiness’”), *cert. denied sub nom. Cunningham v. Chappell*, 134 S. Ct. 169 (2013).

Fourth, studies and scholars report “indications that cross-examination does little to affect jury appraisals of expert testimony.” Christopher B. Mueller, *Daubert Asks the Right Questions: Now Appellate Courts Should Help Find the Right Answers*, 33 Seton Hall L. Rev. 987, 993 (2003). Indeed, a recent study confirmed the common assumption by jurors that, because the trial judge admitted the evidence, it must have passed at least a minimum level of reliability. *See* N.J. Schweitzer & Michael J. 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).

Additional practical factors heighten the importance of clearly delineating how the gatekeeping role should function. Chief among these factors is the impact of appellate review under the abuse-of-discretion standard. *See Joiner*, 522 U.S. at 141-42. Given the reality of deferential review, the gatekeeper responsibility confers upon the trial court an even more important role in the resolution of disputes involving expert testimony. And, with the reduced prospect of correction by the circuit courts in individual cases, the need for district courts to receive clear instructions of general application from this Court becomes even greater.

Experience with litigation since the 2000 amendment to Rule 702 bears out the increasing necessity for this Court’s guidance. For example, an 11-year study of cases involving financial experts showed “[t]he success rate of challenges varied widely by jurisdiction” ranging from the Tenth and Eleventh Circuits (where 63% of financial expert testimony challenged under *Daubert* was excluded in whole or in part), to the Third Circuit (where the exclusion rate was a national low of 33%). PriceWaterhouse Coopers, *Daubert Challenges to Financial Experts: An 11-year Study of Trends and Outcomes 2000-2010* at 12 (2011) available at http://www.pwc.com/en_US/us/forensic-services/publications/assets/daubert-study-2010.pdf.

Consistent with the pervasive confusion that emerges from published opinions, even the private,

anonymous responses of trial courts to scholarly studies evidences their befuddlement. A national survey of state court trial judges reported general disarray on even the simple threshold question of which *Daubert* factor, if any, should be given the most weight. Sophia I. Gatowski, *et al.*, *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 Law & Hum. Behav. 433, 448 (2001) (half of the judges willing to weigh factors gave the most weight to general scientific acceptance, with the remaining *Daubert* factors divided about equally in the percentage of judges weighing them as “most important”). Indeed, more than 20% of the 400 surveyed judges reported they were unsure how to combine the *Daubert* guidelines. *Id.*

Nor is this entrenched confusion a fleeting, recent development: “at the time *Daubert* was handed down, all parties and amici claimed victory and satisfaction with the decision.” Note, *Flexible Standards, Deferential Review: Daubert’s Legacy of Confusion*, 29 Harv. J. Law & Pub. Policy 1085, 1091 (2006) (citing Paul C. Giannelli, *The Supreme Court’s “Criminal” Daubert Cases*, 33 Seton Hall L. Rev. 1071, 1077 (2003) (all parties were pleased with the decision and noting, “This alone should have raised red flags”)). Early commentary on *Daubert* reported that “no one is exactly sure what the new standard is.” David O. Stewart, *Decision Creates Uncertain Future for Admissibility of Expert Testimony*, A.B.A. J., Nov. 1993 at 48. In the two decades that followed, uncertainty and inconsistency went unabated. *See, e.g.*, Victor G. Rosenblum, *On Law’s Responsiveness to Social Scientists’ Findings:*

An Intelligible Nexus?, 2 Psychol. Pub. Pol’y & L. 620, 631 (1996) (“[U]ncertainty and confusion — fueled unintentionally in *Daubert* — prevail in the legal system”); 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 (“five general areas of inconsistency in the application of expert testimony standards”); Margaret A. Berger, *The Admissibility of Expert Testimony*, Fed. Judicial Ctr., *Reference Manual on Scientific Evidence* 11, 19 (3d ed. 2011) (“Although almost 20 years have passed since *Daubert* was decided, a number of basic interpretive issues remain”).

In some respects the pervasive confusion was inevitable. The scientific method and the judicial craft employ different standards and serve different purposes. No matter how learned and knowledgeable they are in their own profession, judges and lawyers are not scientists. Nor is the judiciary well suited to function as a credentialing body for science and technology. There is, accordingly, an inherent tension in fashioning rules for the admissibility of expert testimony. *Daubert*, *Joiner* and *Kumho Tire* are important steps in an ongoing process. But, additional steps are required. Disparate, conflicting decisions on the admissibility of expert testimony highlight the pressing need to fine-tune and direct the trial courts in discharging their gatekeeping responsibilities.

This case is well positioned as a suitable vehicle for providing that guidance because it incorporates multiple key aspects of the underlying

issues. Since the district court ruled the expert testimony to be inadmissible, a decision by this Court can address the relative roles of trial judge, as gatekeeper, and jury, as factfinder. And, since the court of appeals reversed the district court's ruling, a decision by this Court can also address the relative roles of trial judge, as gatekeeper, and appellate court, as reviewer of the gatekeeper's exercise of discretionary power.

The frequency with which courts face *Daubert* challenges, the increasing complexity of technology issues being litigated, and the practical ramifications for the disposition of cases involving expert testimony all weigh strongly in favor of this Court's review. The issues affect counsel for plaintiffs and defendants (whether they are supporting or opposing an expert in a particular case). The issues affect the fair, orderly administration of justice. The courts of appeals are in conflict. And the inconsistent application of standards by the trial courts reveals a pressing need for this Court's direction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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