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

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

Pomona's claim that the lower courts have reached a "general consensus" concerning the proper application of Federal Rule of Evidence 702 and *Daubert*, Opp. 5, blinks reality. The divergence of approaches to Rule 702 is crystallized in the decision below. Try as Pomona may to explain away differences in how the circuits apply Rule 702, the Ninth Circuit itself expressly acknowledged that its "faulty methodology" approach split from the "any step" approach taken by the Third Circuit in *Paoli II*, subsequently adopted by other courts of appeals, and codified in the 2000 amendments to Rule 702 itself. *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994) (emphasis omitted). *See also* Pet. 12-14. Pomona seeks to minimize the split as a narrow one about misapplication of "protocols," but the issues in this case are not so limited.

Numerous judges and legal scholars have recognized that, notwithstanding the apparent simplicity of Rule 702, lower

courts continue to apply widely differing legal standards—ranging from rigorous judicial "gatekeeping" at the admissibility stage to the "let-it-all-in" approach adopted by the panel below. Pet. 14-18. *See also* Amicus Br. of American Coatings Ass'n, *et al*. 4-6, 10-12 ("ACA Br."); Amicus Br. of Coalition for Litigation Justice 12-15. The result is "a roulette wheel randomness as to whether sound science will * * * prevail" in any given case. 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). As four judges from the Fifth Circuit summed up the problem: "What is a trial judge to do" when one case "says that the trial judge *may* exclude" expert testimony, 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., on behalf of four judges, dissenting from denial of rehearing en banc) (emphases in original). The current situation is untenable.

It thus should come as no surprise that twelve institutions representing a broad swath of industries and interests, such as the U.S. Chamber of Commerce, have joined in four *amicus* briefs strongly urging the Court to revisit *Daubert* and Rule 702 in this case. *Amici* confirm that the continuing disarray in the lower courts has led to unpredictable, wildly disparate results in a wide range of cases in which expert testimony plays a central role. *See, e.g.*, ACA Br. 12-19. The uncertainty also creates extreme pressure to settle unmeritorious claims, given the undue sway that expert evidence holds over jurors, and therefore seriously threatens the truth-seeking function of our judicial system. Amicus Br. of DRI 5-7. The Court's guidance is urgently needed.

ARGUMENT

I. POMONA'S EFFORT TO MINIMIZE THE LOWER COURTS' PROFOUND CONFUSION OVER RULE 702 IS UNCONVINCING.

1. Pomona appears to stand alone in believing that when it comes to applying *Daubert* and Rule 702, "the circuits diverge hardly at all." Opp. 1. It reaches that startling conclusion by recasting the issue in this case as being about nothing more than "departures from protocols." *Id.* 11. According to Pomona, the courts of appeals are in agreement that "sufficiently severe" misapplications of an established methodology warrant exclusion of expert testimony, while "minor" flaws do not, *id.* 7—although even that supposed "agreement" begs the question when a misapplication of methodology is "sufficiently severe" or "minor." Pomona further argues that SQMNA never actually claimed that Dr. Sturchio's proposed testimony misapplied an established methodology. *Id.* 11-12.

Pomona is wrong on all scores. It is true that the panel announced its "faulty methodology" rule, and its disagreement with *Paoli II*, in a portion of its opinion discussing Dr. Sturchio's failure to follow certain procedures set forth in his own "Guidance Manual." Pet. App. 16a-17a. But this case is not about the simple misapplication of established "protocols." SQMNA has consistently argued that Dr. Sturchio's approach to identifying the sources of perchlorate in Pomona's groundwater rested on a novel and fundamentally unreliable application of stable isotope analysis. His complex, multi-step forensic method lacked the most basic indicia of scientific reliability—the ability of other scientists to test his approach, and a database of comparator sources sufficient to support his conclusions within a reasonable rate of error. These are hardly "minor" details for a jury to sort out, as the District Court below properly recognized. Rather,

they are reliability determinations that trial judges must make under *Daubert* and the plain language of Rule 702.

Nor do other courts of appeals deem such flaws "minor." For example, the Tenth Circuit in *Attorney General of Oklahoma* v. *Tyson Foods, Inc.*, 565 F.3d 769 (10th Cir. 2009), affirmed a trial court's rejection of expert testimony in a case strikingly similar to this one, involving a state's claim that fertilizer had contaminated local waterways. Applying *Paoli II's* "any step" approach, the Tenth Circuit rejected forensic testimony purporting to identify the defendant's product as the source of contamination because the expert admitted that her approach was "novel and untested." *Id.* at 781. Another expert's testimony was also rejected because his approach "had not been tested or peer reviewed"; "doubts were raised regarding [his] sampling procedures and possible flaws in the data presented"; and his analysis failed to "account for alternative sources." *Id.*

SQMNA raised exactly the same challenges to Dr. Sturchio's proposed testimony, and yet the Ninth Circuit held that the testimony could be considered by the jury. *See* Pet. 14-15. Pomona's opposition ignores *Tyson Foods*, and its silence is telling. It is difficult to imagine a clearer circuit split on an evidentiary issue.

Pomona is thus left to argue that there is no "meaningful" circuit conflict over the proper application of Rule 702 because the cases are "factbound." Opp. 5, 6. But that claim is no answer, because evidentiary rulings are by definition factbound. That did not stop the Court from deciding *Joiner* or *Kumho*, and it presents no obstacle to the Court's plenary review here. If anything, it highlights why this case—where the Ninth Circuit took the rare step of acknowledging a circuit conflict instead of sweeping it under the proverbial "factbound" rug—is such a good vehicle to restore clarity to this area of the law.

2. Pomona is also strikingly silent about the conflict with *Joiner* and *Kumho*, the Court's two most recent decisions

construing Rule 702. The opposition does not mention either case even once.

Joiner specifically authorized trial courts to exclude expert testimony when the expert's conclusions prove unreliable because "there is simply too great an analytical gap" between the expert's opinion and the data supporting it. *Gen. Elec. Co.* v. *Joiner*, 522 U.S. 136, 146 (1997). *Kumho* confirmed that trial courts must scrutinize not only the expert's chosen methodology, but also whether those "principles and methods * * * have been properly applied." *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 157 (1999). As amended in 2000, Rule 702 incorporates these rulings by expressly requiring trial courts to exclude proposed expert testimony that is not "based on sufficient facts or data" or that fails to "reliably appl[y]" the expert's chosen "principles and methods to the facts of the case." Fed. R. Evid. 702(b), (d).

Unlike other court of appeals decisions that properly exclude expert testimony on these bases, *see, e.g.*, Pet. 14-16, the Ninth Circuit in this case mandated that the Rule 702(b) and (d) questions be decided by the jury. And it did so by re-evaluating the evidence before the District Court, instead of applying abuse-of-discretion review, as *Joiner* requires. In so doing, the Ninth Circuit created a conflict with *Joiner* and *Kumho* that would warrant certiorari even absent the clear circuit conflict that the panel also acknowledged. *See* S. Ct. R. 10(c) (certiorari is warranted when a court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court").

In short, Pomona's arguments notwithstanding, the decision below in fact bears several "hallmarks of one that this Court would undertake to review." Opp. 13. The panel decision creates an openly acknowledged circuit split, and also conflicts with controlling precedents of this Court, on an important legal question. Pomona offers no persuasive argument to the contrary. The petition accordingly should be granted.

II. THE NINTH CIRCUIT'S EGREGIOUS ERRORS MAKE THIS CASE AN EXCELLENT VEHICLE FOR PLENARY REVIEW.

1. Pomona urges the Court to disregard Part II of SQMNA's petition on the ground that SQMNA's challenges to the reliability of Dr. Sturchio's testimony are "mere surplusage" and "not even encompassed within the single question presented." Opp. 5. Pomona is wrong again.

In both *Joiner* and *Kumho*, the Court granted certiorari to review a single question—respectively, the appropriate standard of review in *Daubert* cases, and whether *Daubert* applies to nonscientific expert testimony—and in both cases, the Court went on to decide the merits of the parties' underlying dispute. *Kumho*, 526 U.S. at 153-158; *Joiner*, 522 U.S. at 143-147. The argument that the merits were beyond the scope of the question presented was advanced only by Justice Stevens, in lone dissent. *Kumho*, 526 U.S. at 159 (Stevens, J., concurring in part and dissenting in part); *Joiner*, 522 U.S. at 150-151 (same). [1]

2. At the same time that it gives the merits of this case the back of the hand, Pomona strains to misrepresent the facts as part of its effort to avoid review. For starters, it asserts, with no citation to the record, that "[a] major source of perchlorate contamination in California is nitrate fertilizers that contained the chemical and were imported from Chile." Opp. 1.

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[1] Pomona's characterization of the decision below as "interlocutory," Opp. 1, 5, is also surprising, given that Pomona *itself* converted the District Court's *Daubert* ruling into a final, appealable order by voluntarily dismissing its claims against SQMNA with prejudice pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), precisely in order to facilitate an immediate appeal. *See* Pet. App. 7a-8a. This Court has granted certiorari in similar circumstances. *See, e.g., Nat'l Broiler Mkt'ing Ass'n* v. *U.S.*, 436 U.S. 816, 819 n.5 (1978) (noting that court of appeals acquired jurisdiction through plaintiff's voluntary dismissal of claims). The procedural posture of the case thus presents no barrier to certiorari review.

That is of course one of Pomona's arguments, but it is certainly not an established fact. Indeed, Dr. Sturchio's own "Guidance Manual" attributes many perchlorate releases in California to rocket and explosives manufacturing and research. 2-ER-220-221.

Pomona also asserts, again with no citation to the record, that Dr. Sturchio's study of its groundwater was based on "at last a dozen peer-reviewed papers and book chapters" and the "peer-reviewed" Guidance Manual. Opp. 2. There is no record citation for a reason. The Manual was not published until months *after* Dr. Sturchio prepared his Pomona report, and indeed only a week before trial was scheduled to begin in this case. Thus, the "protocols" that Pomona claims guided Dr. Sturchio's work had not been peer-reviewed by anyone. Furthermore, the Manual itself acknowledges that the previous papers (which Pomona never placed in evidence) did not contain enough information about the new approach to enable other scientists either to validate or refute it. In fact, the Manual confirms that even after Dr. Sturchio completed his Pomona study, his approach remained highly provisional, in part because not enough sources of natural perchlorate had yet been analyzed. Pet. 6-9, 22-23.

On top of this, Pomona still insists on claiming that "several government laboratories had independently tested" Dr. Sturchio's approach. Opp. 4. As the petition explains, two government labs are listed on the cover of the Manual. But there is not an iota of record evidence that any scientist from those labs, or indeed any scientist at all besides Dr. Sturchio, has ever conducted a forensic isotope analysis of groundwater perchlorate using the procedures he developed. Pet. 6-7, 20.

Indeed, Dr. Sturchio has admitted that no other scientist has used his approach or is equipped to do so, *id.*; hence, his approach has never been independently validated. And his results in this case cannot be retested in any event, because he failed to take duplicate samples. *Id.* 20. Lacking either

independent validation or replication of his results, it is understandable that Dr. Sturchio could not provide a "known or potential rate of error" for his approach, as *Daubert* requires. *Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579, 594 (1993). Testing by other scientists and reproducibility of results are fundamental indicators of scientific reliability, as the District Court below recognized, and the Ninth Circuit clearly erred in ruling Dr. Sturchio's testimony admissible without them. Pet. 19-20; Amicus Br. of Atlantic Legal Found., *et al*. 13-17.

3. Finally, Pomona argues that the Court should ignore the Ninth Circuit's ruling on the sufficiency of Dr. Sturchio's database because the panel discussed its disagreement with *Paoli II* in a different "section of the opinion." Opp. 13. But the database ruling rests on the same faulty reasoning as the rest of the panel's decision: the panel failed to recognize that using an insufficient database is a "step" in an expert's analysis that renders his testimony unreliable, and therefore, inadmissible.

Dr. Sturchio's reference database of previously analyzed perchlorate sources did not merely lack "full information," as Pomona contends. *Id*. (internal quotation marks omitted). Rather, among all possible sources in the world, it included samples from only three geographic areas (the Atacama Desert, Texas, and Death Valley), and it lacked *any* information about the most relevant source of natural perchlorate in Pomona's water: indigenous perchlorate from around Pomona itself. Pet. 7.

In reality, Dr. Sturchio's database was vanishingly thin. And Pomona offers nothing but Dr. Sturchio's *ipse dixit* that it was adequate to support his conclusions about the source of current perchlorate levels in Pomona's groundwater. *See* Opp. 4 (citing Dr. Sturchio's testimony that "there was no real basis to doubt that most of the perchlorate studied came from Chile"). The District Court did not abuse its discretion

by excluding Dr. Sturchio's testimony on this basis, and the Ninth Circuit clearly erred by holding that it did.

* * *

The panel's grave errors in this case, together with the acknowledged circuit split and the significant *amicus* support, create an ideal opportunity for the Court to provide much-needed guidance in a vitally important area of law.[2] It has been fifteen years since the Court last looked at *Daubert*, and in that time confusion over the proper roles of judge, jury, and appellate courts in cases involving expert testimony has only proliferated. The resulting disarray impacts disputes across the legal spectrum and presents a serious challenge to the predictability and efficacy of our judicial system, as the wide-ranging *amici* attest. It is now time for this Court to restore clarity.

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[2] The Court recently denied review of the Eighth Circuit's decision in *Johnson* v. *Mead Johnson & Co.*, 754 F.3d 557 (8th Cir. 2014). The questions presented in Mead Johnson's certiorari petition, however, differed in scope and substance from the present petition. One question concerned whether appellate courts "must rigorously scrutinize district court orders excluding [expert] testimony" and "resolv[e] all doubts in favor of reversal," and the other concerned whether district courts must admit expert testimony when an expert has not "rule[d] out *any* alternative causes for plaintiff's injuries." *Mead Johnson & Co.* v. *Johnson*, No. 14-365, *cert. denied*, 83 U.S.L.W. 3220 (U.S. Nov. 10, 2014) (emphasis in original). The present petition, in contrast, asks the Court to address the direct circuit split acknowledged by the Ninth Circuit as to whether expert testimony can only be excluded as unreliable based solely on methodology flaws or also based on other flaws that render the analysis unreliable. Pet. i. This issue is cleanly presented here and makes this petition a better vehicle to address confusion over Rule 702.

CONCLUSION

For all of the foregoing reasons and the reasons stated in SQMNA's petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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