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 IN OPPOSITION

VICTOR SHER
ESTHER KLISURA
SHER LEFF
450 Mission Street
San Francisco, CA 94105
(415) 348-8300

ROBERT CHAPMAN
EISNER JAFFEE GORRY
CHAPMAN & ROSS
9601 Wilshire Blvd.
Beverly Hills, CA 90210
(310) 855-3200

PAUL M. SMITH
Counsel of Record
JOSH M. PARKER
JENNER & BLOCK LLP
1099 New York Avenue, N.W.
Suite 900
Washington, DC 20001
(202) 639-6000
psmith@jenner.com

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The petition filed by petitioner SQM North America Corporation does not come close to justifying a grant of review by this Court. The ruling below is a routine application of the standards for admission of expert testimony established by *Daubert* and Rule 702 of the Federal Rules of Evidence. The request for further review of this interlocutory decision is premised on the claim that the circuits are "deeply divided" (Pet. 11) on how to apply those standards. But that claim depends on accepting the caricatures that petitioner offers of how the circuits approach these questions. In reality, the circuits diverge hardly at all. Petitioner also suggests that the Ninth Circuit committed a grave error in overturning the district court's exclusion of certain expert testimony in this case. But that claim also fails because it is based on a one-sided description of the issues resolved below.

COUNTERSTATEMENT

Respondent City of Pomona brought this lawsuit in response to the presence in its drinking water supply of excessive levels of the chemical perchlorate. A major source of perchlorate contamination in California is nitrate fertilizers that contained the chemical and were imported from Chile. Petitioner was the exclusive importer of nitrate fertilizers from Chile from the early 1930s until 1968.

In order to establish petitioner's liability, the City needed to show that the perchlorate contaminating its water wells came from Chilean fertilizer, as opposed to other natural or synthetic sources. It retained an expert, Dr. Neil Sturchio of the University of Illinois at

Chicago, to study that question using a methodology that has been jointly developed in recent years by government and academic scientists. That method, called stable isotope analysis, takes advantage of the fact that atoms of the same chemical element will always contain the same number of protons but may contain different numbers of neutrons, with each variation called an isotope. In the past decade, Dr. Sturchio and the other scientists who worked with him to develop this test for determining the source of perchlorate have published at least a dozen peer-reviewed papers and book chapters on the subject. They also co-authored a peer-reviewed *Guidance Manual for Forensic Analysis of Perchlorate in Groundwater using Chlorine and Oxygen Isotopic Analysis* ("*DoD Guidance Manual*"), which was commissioned and published in 2011 by the Environmental Security Technology Certification Program of the U.S. Department of Defense.

Dr. Sturchio studied the water in Pomona using this method, and determined that the perchlorate was most likely a remnant of the use of the Chilean fertilizer imported by petitioner. Once this lawsuit began, petitioner sought to exclude this expert testimony under *Daubert* and the district court held a hearing on the issue. The court then held the testimony inadmissible as unreliable, on three grounds.

First, the district court said that the methodology Dr. Sturchio used had not been generally accepted in the scientific community. In support, it cited a single

sentence from the *DoD Guidance Manual* that said: "[T]he techniques and Quality Assurance/Quality Control (QA/QC) parameters are still being refined, and there are no USEPA-certified methods for [stable isotope analysis] of organic or inorganic compounds." Pet. App. 29a (quotation marks omitted).

Second, the court said that the procedures used here were further flawed by the fact that they had not been tested by other laboratories and the results reached were not subject to retesting due to the fact that dual samples were not taken. *Id.*

Third, the court concluded that "Dr. Sturchio's reference database is too limited for him to reliably comment on the exclusiveness of the location of the potential source of perchlorate in Pomona's water with an acceptable rate of error." *Id.*

The Ninth Circuit reversed and remanded, holding that the district court abused its discretion in excluding Dr. Sturchio's testimony. With regard to the methodology, it held that the joint process of developing the stable isotope method, and the resulting peer-reviewed publications including the *DoD Guidance Manual*, were enough to establish the scientific acceptance of the method. It further said that this conclusion was not undermined by the fact that the method continued to be refined. Nor was the absence of EPA certification a relevant factor under these circumstances.

Regarding the "testability" issue, the court of appeals noted that several government laboratories had independently tested the stable isotope method. It added that there was no barrier in principle to retesting the results of any application of the method. And the fact that this had not occurred here was not significant. Retesting is not required by the methodology itself — nor is it required under *Daubert*, as long as a methodology is otherwise adequately supported in scientific literature and research.

The court of appeals also rejected the district court's ruling on the sufficiency of the reference database. It did so because there was sufficient expert testimony presented by respondent to make it a question for the jury whether Dr. Sturchio's results were cast into substantial doubt by the possibility of some other source of perchlorate, beyond the Chilean source and the synthetic sources that were well documented in the reference database. Dr. Sturchio had testified that while there were some minor additional sources represented in his results, there was no real basis to doubt that most of the perchlorate studied came from Chile.

The Ninth Circuit panel also discussed what it understood to be a claim by petitioner that Dr. Sturchio had not adequately followed the protocols set forth in the *DoD Guidance Manual*. The district court, however, had made no ruling about the expert's adherence to the protocols. *See* Pet. App. 29a. Respondent had made some arguments on appeal claiming that Dr. Sturchio had not adequately

documented his compliance with the protocols, Appellee's Br. at 9, as well as about some minor problems with the execution of the study, but as the Ninth Circuit pointed out, there was unrebutted evidence that the protocols had been sufficiently followed to produce meaningful results. Pet. App. 17a.

REASONS NOT TO GRANT THE PETITION

This case does not warrant further review. The decision below is a factbound interlocutory ruling on the admissibility of a single expert's testimony. Petitioner mounts scatter-shot attacks on the expert's methodology, Pet. 18-23, but does not even attempt to argue that these attacks raise certworthy issues — and indeed the claims are not even encompassed within the single question presented. The Court should accordingly ignore all of the discussion in the Petition of the alleged weaknesses and novelty of the stable isotope methodology as mere surplusage.

In an attempt to dress up its routine disagreement with the Ninth Circuit in the guise of a certworthy case, petitioner focuses (in the question presented and part I of the Petition) on a supposed conflict among the circuits about whether an expert's failure to apply a recognized methodology correctly can be a basis for excluding that expert's testimony. But this claim of a circuit conflict is much exaggerated. While there may be some differences of emphasis, there is a general consensus that the primary focus of a *Daubert* inquiry should be whether the expert is applying a sufficiently well-established and verifiable methodology, that minor departures from the methodology by the expert should

not preclude admission, but that sufficiently serious departures should lead the court to exclude the testimony.

Moreover, even if petitioner had identified a significant circuit conflict, this would not be an appropriate case in which to address it because it is far from clear whether any departure from methodology is even at issue here – and if so what it is.

I. There Is No Meaningful Circuit Conflict Identified in the Petition.

The claimed circuit conflict simply does not stand up to scrutiny. Petitioner asserts that four circuits — the Second, Third, Sixth and Tenth — authorize a district court to exclude expert testimony for failure to correctly apply a well-recognized methodology. It then claims that three other circuits — the Seventh, Eighth, Ninth — refuse to allow such exclusions, despite the express language of Fed. R. Evid. 702 authorizing exclusion of testimony where a court determines that a methodology has not been "reliably applied." Unsurprisingly, given the clarity of the rule, these are not fair descriptions of how the circuits approach these questions.

In reality, all of these circuits have striven to apply faithfully the principle that district courts should exclude unreliable testimony without unduly supplanting the jury's role as factfinder. In so doing, they have agreed that the primary focus should be on the validity of the methodology applied by the expert and not the conclusions reached. In fact, *Daubert v.*

Merill Dow Pharmaceuticals, Inc. itself says that the focus "must be solely on principles and methodology, not on the conclusions that they generate." 509 U.S. 579, 595 (1993). The circuits also agree that minor departures from established methodologies are not a basis for exclusion. But none of the cases cited in the Petition — including the decision below — goes so far as to say that a serious departure from accepted protocols can never be a basis for exclusion. To the contrary, the circuits agree that, as provided expressly in Rule 702, errors in the application of a methodology can be a basis for exclusion when they are sufficiently severe that they make the expert's testimony unlikely to be helpful to the trier of fact.

Thus, for example, the Seventh Circuit case cited by petitioner, *Manpower, Inc. v. Insurance Co. of Pennsylvania*¸ 732 F.3d 796 (7th Cir. 2013), expressly noted the requirement in Rule 702 that an expert must have "reliably applied" his method to the facts of the case. *Id.* at 806. It went on to say that reliability "is *primarily* a question of the validity of the methodology employed by an expert, not the quality of the data used in applying the methodology or the conclusions produced." *Id.* (emphasis added). And it added that a "district court usurps the role of the jury . . . if it *unduly* scrutinizes the quality of the expert's data and conclusions rather than the reliability of the methodology the expert employed." *Id.* (emphasis added). But the court certainly did not hold that expert testimony may never be excluded based on a misapplication of a valid methodology, however serious.

Similarly, the Eighth Circuit case cited by petitioner as falling on the "no misapplication counts" side of the claimed conflict — *Johnson v. Mead Johnson & Co., LLC*, 754 F.3d 557 (8th Cir. 2014), *petition for cert filed*, 83 U.S.L.W. 3220 (U.S. Sept. 26, 2014) (No. 14-365), also did not hold that misapplication errors can never justify exclusion of expert testimony. It did note that "district courts are admonished not to weigh or assess the correctness of competing expert opinions." *Id.* at 562 (citation omitted). But that principle is not controversial. *See Daubert*, 509 U.S. at 595. And the court added that "[a]s long as the expert's scientific testimony *rests upon 'good grounds, based upon what is known'* it should be tested by the adversary process . . . rather than excluded by the court at the outset." 754 F.3d at 562 (quoting *Daubert*, 509 U.S. at 590, 596) (emphasis added). The court did not reverse based on any general rule that only flawed methodologies speak to reliability. Rather, its reversal of the district court's exclusion of testimony was based upon specific precedent holding that an expert need not rule out all possible alternative causes when employing a "differential etiology" analysis. *Id.* at 563-64. "Instead, such considerations go to the weight to be given the testimony by the factfinder, not its admissibility." *Id.* at 564 (citing *In re Prempro Prods. Liab. Litig.*, 586 F.3d 547, 566 (8th Cir. 2009)).

The Ninth Circuit is similar in its approach. The ruling below said that the question of adherence to a protocol "*typically* is an issue for the jury," Pet. App. 16a (emphasis added), but it did not hold that

misapplication of a methodology can never be a basis for exclusion. It explained that testimony based on an accepted and useful method should not be kept from the jury just because the execution is "'imperfect,'" *id.* (quoting *United States v. Chischilly*, 30 F.3d 1144, 1154 (9th Cir. 1994), *overruled on other grounds by United States v. Preston*, 751 F.3d 1008 (9th Cir. 2014)), or there is a "'minor flaw'" in the expert's reasoning, *id.* (quoting *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002)). Instead, the "failure to adhere to . . . protocols" must be "significant enough to render [the] entire analysis unreliable." *Id.* at 17a. The panel in this case derived these standards from *Chischilly*, where the Ninth Circuit embraced the principle stated earlier by the Eighth Circuit that "'an alleged error in the application of a reliable methodology should provide the basis for exclusion of the opinion only if that error negates the basis for the reliability of the principle itself.'" *Chischilly*, 30 F.3d at 1154 (quoting *United States v. Martinez*, 3 F.3d 1191, 1198 (8th Cir. 1993)).

The circuits cited by petitioner as falling on the other side of the supposed conflict really are in agreement with the Seventh, Eighth and Ninth Circuits. They themselves note that misapplication problems often should be treated as just going to the weight of the evidence and thus should be considered by the finder of fact. The petition focuses on *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994), asserting it adopted a "contrary rule" as compared to the approach of the Ninth Circuit. But

there, while holding that errors in application of a methodology can be a basis for exclusion, the Third Circuit agreed that the error has to be sufficiently serious to warrant exclusion:

> [W]e think that the primary limitation on the judge's admissibility determinations is that the judge should not exclude evidence simply because he or she thinks that there is a flaw in the expert's investigative process which renders the expert's conclusions incorrect. The judge should only exclude the evidence if the flaw is *large enough that the expert lacks "good grounds"* for his or her conclusion.

Id. at 746 (emphasis added). The court went on to hold that an expert using a differential diagnosis methodology may properly testify even if he or she has "less than full information." *Id.* at 759. Even without such information, the expert may still be able to help the jury determine whether a particular injury was more likely than not the result of a particular causal agent. *Id.* (cited for this proposition by the Eighth Circuit in *Johnson v. Mead Johnson & Co.*, 754 F.3d at 564).

The Second Circuit in *Amorgianos v. National Railroad Passenger Corp.*, 303 F.3d 256 (2d Cir. 2002), agreed that errors in application of a methodology can *sometimes* justify exclusion of expert testimony, but emphasized that a "*minor* flaw in an expert's reasoning or a *slight* modification of an otherwise reliable method will not render an expert's opinion per se inadmissible. 'The judge should only exclude the evidence if the flaw

is large enough that the expert lacks "good grounds" for his or her conclusions.'" *Id.* at 267 (quoting *Paoli*, 35 F.3d at 746) (emphasis added).

The third case cited by petitioner as being on this side of the supposed circuit conflict is *Tamraz v. Lincoln Electric Co.*, 620 F.3d 665 (6th Cir. 2010). There, the Sixth Circuit ruled that an expert had not ruled out enough alternative causes to make his testimony about causation of a disease useful to the jury. But nothing about that holding is in tension with the ruling below or the position of any other circuit. Here, the Ninth Circuit panel came to a different conclusion on different facts. But the standards it applied in making that determination were not meaningfully different from those applied by the Sixth Circuit in *Tamraz*.

In sum, the circuit conflict that is the focus of the Petition is a fiction.[1]

II. The Question of How Departures from Protocols Should Be Addressed Under *Daubert* Is Not Squarely Presented in this Case.

Even if there were a real conflict among the circuits, with some circuits (as petitioner claims) ignoring the clear terms of Rule 702 and refusing ever

[1] The amicus briefs filed in support of the Petition all make similar false claims about the Ninth Circuit supposedly ruling out exclusion of expert testimony based on misapplication of what would have been a valid methodology.

to exclude expert testimony based upon a misapplication of a valid methodology, this would not be an appropriate case in which to address that question. Although the Ninth Circuit did include some discussion about the distinction between challenges to methodology and challenges to the execution of a methodology, it is far from clear that petitioner raised any challenge based on a misapplication of a methodology here — let alone with sufficient clarity to make this case a useful vehicle.

The district court excluded Dr. Sturchio's testimony on three grounds: (1) the methodology was not sufficiently recognized and validated, (2) the methodology had not been tested by others and the results here could not be tested by others, and (3) the reference database of stable isotopes of perchlorate was too limited. None of these involves deviation from an established and valid methodology.

In reversing all three rulings, the Ninth Circuit included a discussion of the methodology/application distinction, noting petitioner's argument that Dr. Sturchio's processes were insufficiently documented to allow verification of his compliance with protocols. Pet. App. 17a. But it resolved that issue by relying on unrebutted evidence that there was full compliance. *Id.*

The discussion that is the focus of the petition appeared in the section of the Ninth Circuit decision dealing with whether the methodology used was sufficiently tested and whether the results reached here were sufficiently testable by third parties. But

those arguments, which the court of appeals properly addressed, were not based on any claims concerning a departure from a methodology or protocol.

At one point, petitioner seems to suggest that the application/methodology distinction instead was relevant to petitioner's challenge to the sufficiency of Dr. Sturchio's reference database. Pet. 21. But that ignores the fact that the language in the Ninth Circuit's decision to which it objects does not appear in that section of the opinion. *See* Pet. App. 16a-20a.

In any event, there is nothing about the Ninth Circuit's rejection of the reference database argument that was a result of a "myopic focus on 'methodology,'" as petitioner claims. Pet. 21. Rather, it rested on the judgment that Dr. Sturchio had enough information about the characteristics of perchlorate isotopes from various sources (including the dominant ones present in California) that his testimony would be useful to the jury. That ruling is in line with petitioner's favorite case, *Paoli*, which as noted above ruled that an expert need not have "full information" about all possible alternative causes in order for a differential diagnosis analysis to be useful and admissible. The ruling certainly bears none of the hallmarks of one that this Court would undertake to review.

In sum, this case would make a poor vehicle to decide whether or when a misapplication of a methodology is a basis to exclude expert testimony – even if there were a circuit conflict on those issues, which there is not. There were no district court findings about a misapplication of a methodology and no

Ninth Circuit ruling was clearly premised on the distinction between a methodology and the accurate application of a methodology.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

VICTOR SHER
ESTHER KLISURA
SHER LEFF
450 Mission Street
San Francisco, CA 94105
(415) 348-8300

ROBERT CHAPMAN
EISNER JAFFEE GORRY
CHAPMAN & ROSS
9601 Wilshire Blvd.
Beverly Hills, CA 90210
(310) 855-3200

PAUL M. SMITH
Counsel of Record
JOSH M. PARKER
JENNER & BLOCK LLP
1099 New York Avenue, N.W.
Suite 900
Washington, DC 20001
(202) 639-6000
psmith@jenner.com

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