No. 09-1123

IN THE

Supreme Court of the United States

WYETH LLC, *et al.*,

Petitioners,

v.

DONNA SCROGGIN,

Respondent.

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

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* DRI[1]

Amicus curiae DRI—the Voice of the Defense Bar is an international organization that includes more than 23,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys and the civil justice system, to promote the role of the defense attorney, to improve the civil justice system, and to preserve the civil jury. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—where national issues are involved—consistent. To promote these objectives, DRI participates as *amicus* in cases, such as this one, raising issues of importance to its members, their clients, and the judicial system.

Recently, DRI has filed *amicus* briefs in cases involving the inconsistent application of law to matters of national importance. See, *e.g.*, *Stolt-Nielsen S.A.* v. *Animalfeeds Int'l Corp.*, No. 08-1198 (U.S. argued Dec. 9, 2009). DRI long has been a participant in cases involving punitive damages, see *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003); *Gasperini* v. *Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996); *Browning-Ferris Indus. of Vt., Inc.* v.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* DRI states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have received timely notice of *amicus curiae*'s intent to file this brief and have consented to the filing of this brief in letters on file with the Clerk's office.

Kelco Disposal, Inc., 492 U.S. 257 (1989); *Ford Motor Co.* v. *Benetta Buell-Wilson*, No. 09-297 (U.S. filed Sept. 4, 2009), and the admission of expert evidence, see *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137 (1999); *Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

The decision below raises issues of special interest to DRI and its members. First, as to the punitive damages question, in the nearly 80 years since the Court's leading case in this area, *Gasoline Prods. Co.* v. *Champlin Ref. Co.*, 283 U.S. 494 (1931), there has been significant confusion in the lower courts about whether and in what circumstances the issue of punitive damages may be separately retried and examined by a new jury. DRI and its members have considerable practical experience in cases involving punitive damages, including those involving complex product liability claims, that may assist the Court in evaluating the importance of this issue.

Second, as to the expert evidence issue, despite the guidance provided by this Court's decision in *Daubert*, in the last nearly two decades, the lower courts continue to take divergent approaches to its application. DRI and its members have substantial experience evaluating the proper admission and use of expert scientific evidence in federal courts, particularly in the context of multi-district product liability cases.

The lack of judicial consistency across the nation on the questions of federal law raised in the petition, coupled with the high stakes in many such cases, make this case a matter of particular significance to DRI and its members, and make the petition worthy of certiorari. On both questions, insufficient clarity in the governing standard has led to a lack of

uniformity among the lower courts that calls out for this Court's review.

INTRODUCTION

DRI will not repeat the reasons fully and persuasively explained in the petition for why the decision below warrants this Court's immediate review. Instead, DRI submits this *amicus* brief to amplify the legal and practical imperatives for granting certiorari in order to clarify the governing federal standards.

First, in the vast majority of civil litigation, the issues of liability and punitive damages are substantially intertwined. For example, in the typical mass tort pharmaceutical case, a key issue for both the liability and punitive damages inquiry is the degree of care or recklessness that went into the defendant's decisions to test and warn about its product. This connection is further enhanced in light of this Court's Due Process Clause benchmarks, which require assessing punitive damages in light of the overall context of the defendant's conduct in the particular case. In light of the fundamental link between these issues, they cannot be separated for trial by separate juries in accordance with the Seventh Amendment under the standard set forth by this Court in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931). Neither the constitutional defects nor the practical difficulties associated with partially retrying punitive damages can be overcome by remedial measures—such as interrogatories, special verdicts, and jury instructions—that some courts have resorted to in an attempt to cure this constitutionally infirm practice.

Second, there are substantial practical repercussions to the inconsistent application of the *Daubert*

standard. District courts are called on routinely to assess the relevance and reliability of expert testimony—testimony that is accorded special weight by the jury once it passes through the *Daubert* threshold. But trial courts do not apply *Daubert* with consistent rigor and some do not even produce a clear record of the basis for their rulings. For civil litigators, these shortcomings have led to a number of problems, including unpredictable and inconsistent rulings on the admissibility of expert testimony, increased costs and inefficiencies in the litigation, and a weakening of *Daubert*'s objective that only expert testimony based on "good grounds" reach the jury. This case presents a prime opportunity for the Court to promote the policies underlying *Daubert* by requiring trial courts to articulate the base for their conclusions as a fundamental part of the *Daubert* inquiry.

REASONS FOR GRANTING THE PETITION

I. THIS COURT'S REVIEW IS NEEDED TO CLARIFY THAT THE RETRIAL OF PUNITIVE DAMAGES TO A NEW JURY VIOLATES THE SEVENTH AMENDMENT'S BAR ON RETRYING INTERWOVEN ISSUES OF FACT.

The Seventh Amendment ensures the right to a trial by jury in civil cases.[2] A fundamental aspect of this right is to safeguard against retrial of an issue

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[2] The Seventh Amendment states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII.

before a second jury unless "it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Gasoline Prods. Co.*, 283 U.S. at 500. Retrial is barred where "the question of damages . . . is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty." *Id.*

Application of this "interwoven" standard to the context of punitive damages has sown considerable confusion in the lower courts. See Pet. 9-18 (detailing split in the circuits). As explained more fully hereafter, the inevitable overlap of factual considerations for liability and punitive damages determinations almost inexorably means that a partial retrial of punitive damages violates the Seventh Amendment. Given the overlapping factual predicates underlying compensatory and punitive damages determinations, evidence on liability almost always must be evaluated again in a retrial of punitive damages. See, *e.g.*, *Spence* v. *Bd. of Educ.*, 806 F.2d 1198, 1202 (3d Cir. 1986). This overlay between what the first jury has decided and what the second jury is being asked to decide necessarily invites the second jury to reexamine the fact findings of the first jury in violation of the Seventh Amendment's reexamination clause. See, *e.g.*, *Blyden* v. *Mancusi*, 186 F.3d 252, 268-69 (2d Cir. 1999). No procedural measures can adequately remedy this constitutional defect.

A. Common Factual Predicates Underlying Liability And Punitive Damages Demonstrate That These Issues Are Fundamentally Linked.

Punitive damages and liability are so interwoven in the ordinary case that punitive damages may not be subject to separate retrial under the *Gasoline Products* standard. In assessing punitive damages, the jury necessarily considers "the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm*, 538 U.S. at 425. Typical considerations include the nature of the defendant's conduct, the extent of harm or potential harm caused by the conduct, the degree of care exercised by the defendant, and the intent of the defendant. See, *e.g.*, *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 463 n.29 (1993) (plurality opinion); *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 446 (2001) (Ginsburg, J., dissenting). These considerations are closely linked to the typical inquiries involved in the jury's initial liability determination under well-known standards of negligence, strict liability, and the like. See, *e.g.*, *Mason* v. *Texaco, Inc.*, 948 F.2d 1546, 1554 (10th Cir. 1991); *Smyth Sales, Inc.* v. *Petroleum Heat & Power Co.*, 141 F.2d 41, 45 (3d Cir. 1944) ("[T]he determination of the amount of punitive damages, if any, to be awarded under the Connecticut law cannot appropriately take place except in connection with the consideration . . . of the defendant's liability and of all the circumstances which it is asserted give rise to that liability").

This Court's due process benchmarks for punitive damages underscore the important link between punitive damages and liability determinations. For example, a constitutionally valid punitive damages

award is informed by the degree of reprehensibility of the defendant's conduct, including whether the harm caused was physical, evinced an indifference to safety, or involved intentional bad conduct. See *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 575-76 (1996). Punitive damages must be tied to the "specific harm suffered by the plaintiff," *State Farm*, 538 U.S. at 422, rather than the "injury . . . inflict[ed] upon nonparties," *Phillip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007). Under these guidelines, evidence admitted to establish a punitive damages award must focus on the defendant's conduct vis-à-vis the plaintiff. See *State Farm*, 538 U.S. at 422 ("conduct may be probative when it . . . ha[s] a nexus to the specific harm suffered by the plaintiff"). Part and parcel of these standards is the premise that the jury have sufficiently detailed knowledge of the specific circumstances of the defendant's conduct and the resulting injury to the plaintiff to assess fully the nature of the conduct—the same considerations that underlie the jury's assessments of liability.

The entanglement of factual considerations underlying liability and punitive damages is further highlighted by this Court's recognition that punitive damage "awards are the product of numerous, and sometimes intangible, factors; a jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it." *TXO*, 509 U.S. at 457; see also *Cooper Indus.*, 532 U.S. at 437 n.11 (recognizing the "fact-sensitive undertaking"); *Leading Cases*, 117 Harv. L. Rev. 226, 326 (2003) ("[D]etermining when, and what amount of, punitive damages are appropriate seems a subjective and fact-sensitive judgment.").

In light of the interwoven factual predicates typically underlying liability and punitive damages determinations, lower courts have widely acknowledged that fairly retrying punitive damages requires the ability to repeat all or substantially all of the evidence on liability. See, *e.g.*, *Atlas Food Sys. & Servs., Inc.* v. *Crane Nat'l Vendors, Inc.,* 99 F.3d 587, 599-600 (4th Cir. 1996) ("[a]ll of the evidence relating to National Vendors' willful or wanton conduct was before the second jury" assessing punitive damages); *Robertson Oil Co.* v. *Phillips Petrol. Co.*, 871 F.2d 1368, 1376 (8th Cir. 1989) ("retrial of the punitive damage award will necessarily involve full development of Phillips' conduct"); *Spence*, 806 F.2d at 1202 ("to prove that the defendants' conduct warranted punitive damages, plaintiff would have to present to the jury all the facts leading up to defendants' decision to transfer her"); *Fury Imports, Inc.* v. *Shakespeare Co.*, 554 F.2d 1376, 1389 (5th Cir. 1977) ("an award of punitive damages should rest on the jury's assessment of all the evidence in the case"); *Olsen* v. *Correiro*, No. 92-10961-PBS, 1995 U.S. Dist. LEXIS 1715, at *14 (D. Mass. Feb. 3, 1995) ("defendants' state of mind and conduct are inextricably intertwined with punitive damages," and thus "the parties are free to produce all relevant evidence within the framework of a partial trial in damages"); *Middleby Corp.* v. *Hussmann Corp.*, No. 90C2744, 1993 U.S. Dist. LEXIS 4445, at *13 (N.D. Ill. Apr. 6, 1993) ("And all evidence offered in support of each alleged breach is relevant to Middleby's request for punitive damages.").[3]

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[3] The presentation of punitive damages evidence in the case below illustrates the point. The district court instructed the jury that evidence relevant to punitive damages included evidence presented in the liability phase, Trial Tr. XVI-2978,

Although recognizing this overlap, some courts nonetheless have permitted a new trial limited to punitive damages before a new jury. Compare *Atlas Food Sys. & Servs.*, 99 F.3d at 599-600 (permitting separate retrial of punitive damages), and *Robertson*, 871 F.2d at 1369 (same), and *Olsen*, 1995 U.S. Dist. LEXIS 1715, at *12-15 (same), with *Spence*, 806 F.2d at 1202 (punitive damages cannot be separately retried), and *Fury Imports, Inc.*, 554 F.2d at 1389 (same), and *Middleby Corp.*, 1993 U.S. Dist. LEXIS 4445, at *13-14 (same).

Repetition of evidence on liability in a separate retrial on punitive damages is an open invitation for the second jury to reexamine the factual conclusions decided by the first jury.[4] Under the Reexamination Clause of the Seventh Amendment, a "given [factual] issue may not be tried by different, successive juries." *Blyden*, 186 F.3d at 268-69. This follows because "[t]he right to a jury trial . . . is a right to have juriable issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial [of all of the issues]), and not reexamined by another finder of fact." *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1302-03 (7th Cir. 1995) (Posner, J.).

This Court already has made clear that the Seventh Amendment would not permit an appellate court to reexamine the findings of fact underlying a punitive

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2983, and plaintiff's counsel relied on that liability-phase evidence to seek punitive damages, *id.* XV-2647-48; *id.* XVI-3020.

[4] This concern, of course, arises only when there are *different* juries considering the same factual issue. *See In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1302-03 (7th Cir. 1995) (Posner, J.) ("The problem is not inherent in bifurcation. It does not arise when the *same* jury is to try the successive phases of the litigation.") (emphasis added).

damages award. In *Cooper Industries*, this Court held that although "the *level* of punitive damages is not really a fact tried by the jury"—and thus that an appellate court can review *de novo* the amount of a punitive damages award, 532 U.S. at 437, 443 (internal quotation marks omitted) (emphasis added)—"the jury's application of . . . [punitive damages] instructions may have depended on specific findings of fact," and "nothing in our decision today suggests that the Seventh Amendment would permit a court, in reviewing a punitive damages award, to disregard such jury findings." *Id.* at 339 n.12. The Seventh Amendment precludes a second jury from doing the same.

In the related context of precluding bifurcation of trial issues by separate juries from the outset of a trial, application of the *Gasoline Products* rule:

> "is dictated for the very practical reason that if separate juries are allowed to pass on issues involving overlapping legal and factual questions the verdicts rendered by each jury could be inconsistent."
>
> . . . .
>
> . . . At a bare minimum, a second jury will rehear evidence of the defendant's conduct. . . . In such a situation, the second jury would be impermissibly reconsidering the findings of a first jury.

Castano v. *Am. Tobacco Co.*, 84 F.3d 734, 750-51 (5th Cir. 1996).[5] These same risks apply to a partial

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[5] The courts of appeals likewise disagree on the application of *Gasoline Products* to the question of pre-trial bifurcation of issues for trial by separate juries. *See*, *e.g.*, *Valentino* v. *Carter-Wallace, Inc.*, 97 F.3d 1227, 1232 (9th Cir. 1996) (the

retrial of punitive damages given the overlap of factual considerations underlying liability and punitive damages. See *supra* at 6-8.

B. Trial Management Techniques Cannot Adequately Remedy The Constitutional Defect—Another Issue On Which The Lower Courts Have Divided.

The lower federal courts also have divided on whether judicial management techniques, such as instructions to the second jury, special verdict forms, or interrogatories with a general verdict, can effectively disentangle punitive damages from liability—further underscoring the need for resolution by this Court. Compare, *e.g.*, *Robertson*, 871 F.2d at 1376 (allowing partial retrial of punitive damages alone because "[t]he district court may by proper instructions inform the jury as to the relationship between actual damages and punitive damage considerations"), with *Pryer* v. *C.O. 3 Slavic*, 251 F.3d 448, 457-58 (3d Cir. 2001) ("we decline to adopt the practice . . . promulgated in other circuits whereby new trials are permitted solely on [punitive] damages with cautionary instructions to the second jury"). See also *Brooks* v. *Brattleboro Mem'l Hosp.*, 958 F.2d 525, 531 (2d Cir. 1992) ("Even when special interrogatories are used, a partial retrial is still not warranted where . . . an issue erroneously decided is inextricably interwoven with other issues in the case."); *Crane* v. *Consol. Rail Corp.*, 731 F.2d 1042, 1050 (2d Cir. 1984) (Friendly, J.) ("'detailed special verdicts [may] enabl[e] a trial or a reviewing court to be

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"constitutional concern of the *Rhone-Poulenc* court may not be fully in line with the law of this circuit"). This division further underscores the need for this Court's guidance on whether separate juries may, consistent with the Seventh Amendment, consider liability and punitive damages in a civil trial.

reasonably certain that an erroneous verdict was reached independent of another verdict'").

First, there are a number of practical difficulties with these techniques. For a special verdict form to be effective, "the court must carefully craft the verdict form for the first jury so that the second jury knows what has been decided already. If the first jury makes sufficiently detailed findings, those findings are then akin to instructions for the second jury to follow." Steven S. Gensler, *Bifurcation Unbound*, 75 Wash. L. Rev. 705, 736-37 (2000) (footnote omitted). In the context of a punitive damages assessment, even if the second jury were instructed to accept the conclusions of the first jury as to liability, the large number of overlapping factual considerations that form a punitive damages analysis makes it virtually impossible for a special verdict form to be sufficiently comprehensive to avoid the specter of reexamination. See, *e.g.*, *TXO Prod. Corp.*, 509 U.S. at 457 (recognizing "numerous . . . factors").[6]

Instructions cannot prevent reexamination when there is a lack of clarity about the boundaries of the first jury's verdict. This risk is compounded by the broad nature of the information required for the assessment of punitive damages, when there is a misunderstanding by the second jury, or when the

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[6] Special verdict forms and interrogatories have other downsides. They can increase the complexity of deliberations and the likelihood of inconsistent verdicts. *Manual for Complex Litigation* §§ 11.633, 12.451 (4th ed. 2004). They tend to be difficult for parties to agree on, and thus can ratchet up already high litigation costs, as well as exhaust already taxed judicial resources. *Id.* § 11.633. Because it is impossible to know in advance which cases might require a retrial, these measures would have to be put in place in every trial involving punitive damages, greatly magnifying costs.

second jury viewed common facts differently from the first. Research confirms that instructions cannot adequately curb the risk of reexamination: even when instructed otherwise, there is considerable risk that jurors still will decide the case according to their view of the case as a whole. *See* James A. Henderson et al., *Optimal Issue Separation in Modern Products Liability Litigation*, 73 Tex. L. Rev. 1653, 1654 n.8, 1667, 1695 (1995) (citing studies to this effect).

Even if instructions could effectively prevent re-examination, and they cannot, instructing the second jury on the liability findings of the first jury improperly divests the second jury of the chance to draw all permissible inferences from that evidence and inappropriately undermines its discretion in awarding punitive damages. See *Cooper Indus.*, 532 U.S. at 437 n.11. The competing concerns of avoiding reexamination and permitting discretion ultimately lead to a Seventh Amendment Catch 22: the more the second jury is constrained by instructions to limit reexamination, the less discretion it can exercise in the award of punitive damages, and *vice versa.*

In all events, as a practical matter, it is difficult to see how the partial retrial of punitive damages alone, rather than the entire matter, enhances judicial efficiency. If all of the evidence on liability must be presented for a proper retrial on punitive damages, the partial retrial offers little or no gain in efficiency, especially when offset against the concerns of jury confusion and reexamination. As long as the same evidence is being presented again, the jury should be able to apply it to all the issues. See generally *Sears* v. *S. Pac. Co.*, 313 F.2d 498, 503 (9th Cir. 1963).

In sum, there are both jurisprudential and practical reasons for this Court to decide how the lower courts should respond when a punitive damages verdict is

set aside and a second jury trial is required. The decisional conflicts coupled with the costs of uncertainty more than warrant certiorari on this issue.

II. REVIEW IS NEEDED TO CLARIFY THE SCOPE OF THE TRIAL COURT'S GATE-KEEPING ROLE UNDER *DAUBERT*.

This Court's review also is needed to bring clarity to the manner in which trial courts fulfill their gatekeeping role with respect to expert testimony. Under *Daubert*, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at 589. *Daubert* set out four factors that bear on this inquiry, including whether the theory or technique (1) can be and has been tested, (2) has been subjected to peer review and publication, (3) has a known or potential rate of error and the existence of standards to control its operation, and (4) is generally accepted in the relevant scientific community. *Id.* at 593-94. Although the *Daubert* inquiry is "a flexible one," the trial court must engage in "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and . . . properly can be applied to the facts in issue." *Id.* at 592-94. In *Kumho Tire Co.* v. *Carmichael*, this Court further explained that notwithstanding a trial court's "considerable leeway" in determining precisely how to conduct the reliability analysis, it "should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony." 526 U.S. at 152.

A. Expert Testimony Presents Special Concerns That Underscore The Need For Clear, On-The-Record *Daubert* Findings.

Expert witness testimony requires close judicial scrutiny for a number of reasons. First, the Federal Rules of Evidence "grant expert witnesses testimonial latitude unavailable to other witnesses." *Kumho Tire*, 526 at 148. Experts may present opinions not based on firsthand knowledge or observation, *id.*, offer testimony based on otherwise inadmissible evidence, such as hearsay, see Fed. R. Evid. 703, and even embrace an ultimate issue in the case, see *id.* 704(a). In light of this latitude, and the credence jurors may give to someone designated by the judge as an "expert," this testimony has a significant potential to influence the jury's verdict. 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" that are not available to lay witnesses).

Second, experts provide testimony on matters beyond the realm of the typical juror's knowledge. See Fed. R. Evid. 702 (defining expert testimony as relaying "scientific, technical, or other specialized knowledge"). Accordingly, a jury presented with "expert" testimony will be less likely to evaluate the expert's conclusions critically and more likely to give special weight to those opinions merely based on their "scientific" or specialized nature. See *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.").

Because jurors often attribute an "aura of special reliability and trustworthiness" to expert opinion, *United States* v. *Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1973), testimony that fails to meet *Daubert* standards is likely to confuse the issues, mislead the jury, and result in unfair prejudice. See *Daubert*, 509 U.S. at 595; see also *O'Key*, 899 P.2d at 678 n.20 ("Evidence that purports to be based on science beyond the common knowledge of the average person that does not meet the judicial standard for scientific validity can mislead, confuse, and mystify the jury.").

These concerns underscore the need for trial courts to be vigilant in the performance of their gatekeeping function. See *Kumho Tire*, 526 U.S. at 158-59 (Scalia, J., concurring) (remarking that trial court's discretion in determining reliability "is not discretion to abandon the gatekeeping function" and "is not discretion to perform the function inadequately"). Yet, trial courts continue to struggle with how to apply *Daubert*, leading to inconsistent rulings on the type of expert testimony that may be put before the jury. See Pet. 22-26 (discussing division in the lower courts); *985 Assocs., Ltd.* v. *Daewoo Elecs. Am., Inc.*, 945 A.2d 381, 384 (Vt. 2008) (noting the "lack of a determinative standard" has led to inconsistent decisions under analogous state Rule 702) (citing Cassandra H. Welch, *Flexible Standards, Deferential Review: Daubert's Legacy of Confusion*, 29 Harv. J.L. & Pub. Pol'y 1085, 1094 (2006)). This division has led to confusion and, ultimately, the weakening of the gatekeeping function. See Pet. 22-26; Schwartz &

Silverman, *supra*, at 231 (explaining five areas of inconsistency in federal appellate caselaw applying *Daubert*).

This case provides an ideal vehicle for the Court to provide badly needed guidance about the contours of *Daubert*'s gatekeeping requirements. The Court should take review and clarify that *Daubert* requires a trial court to produce a clear record of the precise bases for its ruling, including its consideration of the applicability of the *Daubert* factors, and its reasons for admitting or excluding expert testimony. See *Goebel* v. *Denver & Rio Grande W. R.R.*, 215 F.3d 1083, 1087-88 (10th Cir. 2000) ("For purposes of appellate review, a natural requirement of [the court's gatekeeping] function is the creation of a sufficiently developed record in order to allow a determination of whether the district court properly applied the relevant law.") (internal quotation marks omitted); see also Pet. 26-30. Not only would this approach increase the likelihood of a correct result in a given *Daubert* challenge, but also it will lead to more efficient judicial management of this important and recurring issue.

Requiring express, on-the-record *Daubert* findings would not overly burden the trial courts. To the contrary, trial courts routinely conduct multi-factor assessments and explain the basis of their decisions on the record. See, *e.g.*, *United States* v. *Booker*, 543 U.S. 220, 259-60 (2005) (requiring judges to consider the factors set forth in 18 U.S.C. § 3553(a) in criminal sentencing). More to the point, *Daubert already* requires that this analysis be undertaken before expert testimony is put before the jury; this case provides an opportunity to clarify that this analysis should be spelled out in some basic form on the record. Many federal district courts already produce

a clear, detailed record addressing whether experts' proposed opinions are relevant and reliable. See, *e.g.*, *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531 (S.D.N.Y. 2004) (applying *Daubert* and detailing the rationale for granting in part and denying in part defendants' motion to exclude proposed experts' testimony).

A comparison of the approach taken by the Fifth Circuit with that employed by the Eighth Circuit below illustrates the need for this Court's review. In *Black* v. *Food Lion, Inc.*, 171 F.3d 308 (5th Cir. 1999), the Fifth Circuit reversed the trial court's admission of expert testimony, based on a differential diagnosis, that a plaintiff developed fibromyalgia as a result of a slip and fall at the defendant's store. The magistrate judge admitted the testimony because a differential diagnosis is, as a general matter, an accepted methodology in rendering a medical causation opinion. *Id.* at 310. On review, the Fifth Circuit concluded that the expert's testimony failed to meet any of the four *Daubert* factors. *Id.* at 313. Because the cause of fibromyalgia was not medically known, the opinion amounted to nothing more than "an educated guess." *Id.* Given the trial court's silence, the reviewing court could not discern whether the judge "substituted his own standards of reliability for those in *Daubert*" or "confused the *Daubert* analysis by adopting an excessive level of generality in his gatekeeping inquiry." *Id.* at 312-13.

In contrast, in the case below, the Eighth Circuit *affirmed* the admission of medical causation testimony based on a differential diagnosis where the court failed to conduct any discernable *Daubert* analysis. As in *Black*, the magistrate judge admitted the expert testimony without conducting any analysis of the *Daubert* factors and without scrutinizing the

reliability of the differential diagnosis model to the facts of the case. See Pet. App. 119a-120a. The Eighth Circuit similarly failed to apply *Daubert* explicitly, see *id.* at 27a-30a, resulting in the admission of expert opinion in circumstances at odds with the approach of the Fifth Circuit.

B. The Lack Of Clear Standards For Applying *Daubert* Factors Has Negative Practical Consequences For Litigants And Courts.

The practical ramifications that flow from the confusion in the lower courts are significant. Expert testimony is necessary to establish a claim in an increasing number of civil cases adjudicated in the federal system today, including tort cases involving personal injury. See Schwartz & Silverman, *supra*, at 224 & n.32 (noting rise in expert testimony); Carol Krafka et al., Fed. Judicial Ctr., *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials* 10 (2002), *available at* http://www.fjc.gov (tort cases are most frequent types of trials involving experts). Moreover, in the context of multi-district product liability litigation, the same experts often are employed in hundreds or even thousands of cases to support elements of a claim or defense. This compounds the need for a clear record of what testimony is allowed to ensure consistent treatment across jurisdictions.

Unfortunately, the divergent—and silent—application of *Daubert* has turned this critical gatekeeping function into something of a "standardless standard." Maxine D. Goodman, *A Hedgehog on the Witness Stand—What's the Big Idea?: The Challenges of Using Daubert to Assess Social Science and Nonscientific Testimony*, 59 Am. U. L. Rev. 635, 651 (2010). This contributes to unpredictability as to

whether a given trial court will deem expert testimony to be supported by "'good grounds.'" *Daubert*, 509 U.S. at 590.

Significant negative consequences flow from this uncertainty. First, where district courts do not have to explain the reason for their decision, judicial decision-making becomes less predictable, thereby making it harder for litigants to make informed, strategic decisions about their cases. Especially where expert testimony is required to prove an element of plaintiff's claim or to support a key defense, as with the medical causation testimony in the case below, the need for predictability is critical. Moreover, given the time and expense of securing and putting on expert witness testimony, consistency in courts' application of the *Daubert* standard will help avoid "unjustifiable expense and delay." Fed. R. Evid. 102.

Second, the current system creates barriers to effective appellate review when the trial court fails to record its factual findings and legal analysis. See *Dodge* v. *Cotter Corp.*, 328 F.3d 1212, 1226 (10th Cir. 2003) ("[I]n the absence of specific, detailed findings, it is impossible for us on appeal to determine whether the district court carefully and meticulously reviewed the proffered scientific evidence or simply made an off-the-cuff decision to admit the expert testimony.") (internal quotation marks omitted). Not only will it promote meaningful appellate review, but on-the-record findings will provide a basis for courts that consider similar expert opinion in future cases to agree or disagree knowingly with another court's analysis, particularly where the same experts are proffered to testify about similar issues in different cases.

Finally, perhaps the most detrimental consequence of the current system is the risk that junk science will be put before the jury. The objective of *Daubert*'s reliability requirement is to ensure that an expert "employs . . . the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152. When properly performed, a *Daubert* inquiry should exclude "expertise that is *fausse* and science that is junky." *Id.* at 159 (Scalia, J., concurring). Requiring trial courts to explain the reasons for their decision to admit or exclude expert testimony, rather than relying on unreasoned *ipse dixit*, necessarily will enhance judicial analysis by requiring the court to articulate the base for its ruling. See *Black*, 171 F.3d at 314 ("The magistrate judge should have first applied the *Daubert* criteria to this case. Had that been done, the utter lack of any medical reliability of [the expert's] opinion would have been quickly exposed."); *Fuesting* v. *Zimmer, Inc.*, 421 F.3d 528, 536 (7th Cir. 2005) ("Indeed, when subjected to a more thorough *Daubert* analysis, [the expert's] testimony proves unreliable, as its juxtaposition against the *Daubert* guideposts plainly reveal."), *rev'd on other grounds*, 448 F.3d 936 (7th Cir. 2006).

Courts that simply mouth the *Daubert* factors and jump to an ultimate conclusion, without spelling out the most basic contours of their application of the standard to the circumstances of the case, are more apt to engage in faulty logic and fail at their gatekeeping mission. The discipline of articulating the basic reasoning for the decision, even in broad brush, inevitably would enhance the quality of the ultimate decision, thereby improving the gatekeeping so central to *Daubert*.

CONCLUSION

For these reasons, and those stated by petitioners, this Court should grant the petition for certiorari.

Respectfully submitted,

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