No. 21-1100

In The Supreme Court of the United States

3M COMPANY; ARIZANT HEALTHCARE, INC.,

Petitioners,

v.

GEORGE AMADOR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF ATLANTIC LEGAL FOUNDATION, WASHINGTON LEGAL FOUNDATION, & DRI–THE VOICE OF THE DEFENSE BAR AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

LAWRENCE S. EBNER
Counsel of Record
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Ave., NW
Washington, DC 20006
(202) 729-6337
lawrence.ebner@atlanticlegal.org

CORY L. ANDREWS
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

DOUGLAS K. BURRELL
DRI–THE VOICE OF THE DEFENSE BAR
222 South Riverside Plaza
Chicago, IL 60606
(312) 795-1101

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INTEREST OF THE *AMICI CURIAE* [1]

The **Atlantic Legal Foundation** (ALF) is a national, nonprofit, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and efficient government, sound science in judicial and regulatory proceedings, and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts.

ALF is widely recognized for its efforts to keep junk science out of courtrooms. For example, on behalf of esteemed scientists such as Nicholaas Bloembergen (a Nobel laureate in physics) and Bruce Ames (one of the world's most frequently cited biochemists), ALF submitted amicus briefs in each of the "*Daubert* trilogy" of cases—*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); and *Kumho*

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[1] Petitioners' and Respondent's counsel of record were provided timely notice in accordance with Supreme Court Rule 37.2(a), and have consented to the filing of this brief. In accordance with Supreme Court Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or part, and that no party or counsel other than *amici* or their counsel made a monetary contribution intended to fund preparation or submission of this brief.

Tire Co. v. Carmichael, 526 U.S. 137 (1999)—concerning admissibility of expert testimony under Federal Rule of Evidence 702. In *Daubert*, 509 U.S. at 590, the Court quoted the Foundation's brief on the meaning of "scientific . . . knowledge" as used in Rule 702.

Washington Legal Foundation (WLF) is a nonprofit, public interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often appears as *amicus curiae* in critical cases to argue that courts should exclude any expert opinion that lacks reliability. These include each of the *Daubert* trilogy of cases.

WLF's publishing arm, the Legal Studies Division, often produces and distributes articles on legal issues related to federal courts' misapplication of Rule 702. *See, e.g.*, Lee Mickus, *Trial Court's Evidentiary Ruling in Natural Vanilla Class Action Reflects Need for Changes to Rule 702*, WLF Legal Opinion Letter (Nov. 12, 2021); Lawrence A. Kogan, *Weight of the Evidence: A Lower Expert Evidence Standard Metastasizes in Federal Courts*, WLF Working Paper (Mar. 2020); Joe G. Hollingsworth & Mark A. Miller, *Inconsistent Gatekeeping Undercuts the Continuing Promise of Daubert*, WLF Working Paper (July 2019).

DRI–The Voice of the Defense Bar (DRI) is an international membership organization composed of approximately 16,000 attorneys who defend the interests of businesses and individuals in civil litigation. The organization's mission includes enhancing the skills, effectiveness, and

professionalism of civil litigation defense lawyers; promoting appreciation for their role in the civil justice system; anticipating and addressing substantive and procedural issues germane to defense lawyers and fairness in the civil justice system; and preserving the civil jury trial. To help foster these objectives, DRI, in conjunction with its Center for Law and Public Policy, participates as *amicus curiae* at both the petition and merits stages in Supreme Court cases presenting questions that significantly affect civil defense attorneys, their corporate or individual clients, and the conduct of civil litigation.

Over the years DRI has filed many amicus briefs in this Court and lower courts concerning the need for trial courts to ensure that expert testimony is reliable as well as relevant. Through its substantive law committees, DRI often has published articles and presented continuing legal education seminars on the expert testimony admissibility criteria established by *Daubert, Joiner*, and Rule 702.

Recently, ALF, WLF, and DRI each submitted to the Judicial Conference Committee on Rules of Practice and Procedure comments on draft proposed amendments to Rule 702.

SUMMARY OF ARGUMENT

This appeal is emblematic of an important civil justice problem that persists in federal courts throughout the United States: the plaintiff bar's continued reliance on professional expert witnesses who, for a price, peddle junk science testimony to support, on a wholesale basis, hundreds of thousands of unwarranted product liability and toxic tort claims.

These purveyors of pseudo-science offer made-for-litigation testimony even where, as here, an expert federal regulatory agency, the Food and Drug Administration, has cleared a widely used, life-saving medical device as safe and effective, and following thorough investigation, repeatedly has repudiated a competitor's claims that the device jeopardizes human health. *See* Pet. at 1, 7, 10, 14.

The amendments to Federal Rule of Evidence 702 that were adopted 22 years ago in response to this Court's opinions in *Daubert*, *Joiner*, and *Kumho Tire* are intended to ensure that district court judges act as gatekeepers who block junk science and other unreliable expert testimony from reaching juries. But unlike the district court here, too many district court judges, including transferee judges who preside over multidistrict litigation (MDL) proceedings, leave the *Daubert/Joiner* gates ajar, if not wide open, for admission of junk science, thereby glossing over the crucial distinction that the Court has drawn between reliability and relevance. *See Daubert*, 509 U.S. at 590 ("[U]nder the Rules, the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."); Fed. R. Evid. 702. Contrary to Rule 702, "some trial and appellate courts misstate and muddle the *admissibility* standard, suggesting that questions of the sufficiency of the expert's basis and the reliability of the application of the expert's method raise questions of weight that

should be resolved by a jury, where they can be subject to cross-examination and competing evidence."[2]

District court judges' abrogation of their expert testimony gatekeeping duty is particularly problematic where courts of appeals, such as the Eighth Circuit, interpret Rule 702 in a way that affords trial judges broad discretion to admit unreliable scientific testimony, or as here, provides insufficient deference to a judge who, equipped with first-hand knowledge of significant flaws in medical causation testimony, ultimately rules that it is inadmissible. The nationwide scope of this junk science admissibility problem is underscored by the fact that "*Daubert* motions" in most federal mass-action and class-action product liability and toxic tort litigation are decided in coordinated or consolidated MDL proceedings, where a transferee judge can control the outcome of tens or hundreds of thousands of individual claims from around the United States by admitting as much unreliable causation or other scientific testimony as admissibility precedent in his or her circuit allows. Admission of such testimony not only deprives defendants of a fair trial and due process, but also compels them to pay millions (or billions) of dollars to settle myriad meritless claims, or crushes such defendants with runaway jury verdicts and astronomical damages awards.

Rule 702 "recognizes that '[t]he more tightly law is bound to good science, the more orderly and predictable the legal process will become.'" *UGI*

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[2] Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 Notre Dame L. Rev. 2039 (2020).

Sunbury LLC v. 1.7575 Acres, 949 F.3d 825, 829 (3rd Cir. 2020) (quoting Peter W. Huber, *Galileo's Revenge: Junk Science in the Courtroom* 215 (1991)). Unfortunately, due to many lower federal courts' deep-seated resistance to the expert testimony admissibility criteria that *Daubert*/*Joiner* and Rule 702 firmly establish, the inadmissibility of unreliable expert testimony—*even* junk science testimony—cannot be presumed. Instead, courts of appeals too often affirm district court rulings that admit junk science, or as here, reverse carefully considered district court rulings that exclude it.

The Court should grant review here to ensure that every circuit, and in turn, every district court, approaches admissibility of expert testimony in accordance with the purpose and letter of Rule 702.

ARGUMENT

Review Is Needed To Reinforce Rule 702's Objective of Eliminating Junk Science From Federal Courtrooms

A. Rule 702, which incorporates this Court's *Daubert* and *Joiner* expert testimony admissibility criteria, is intended to bar junk science

Junk science is "the science of things that aren't so."[3] "Referred to as science without evidence, junk science typically employs questionable methodology to

[3] Peter Huber, *Junk Science and the Jury*, 1990 U. Chi. Legal F. 251, 276 (1990) (quoting Lecture by Nobel Prize-winning chemist Irving Langmuir (1953)).

reach unsupported conclusions" based on "grossly fallacious interpretations of scientific data or opinions."[4] It is "scientific testimony based on idiosyncratic, invalid, or unreliable science, in which the methodologies used are not generally accepted by the relevant scientific community."[5]

Although "[j]udicial concern over junk science is at least [120] years old,"[6] the now common phrase "'junk science' seems to have emerged in the late 1980s and early 1990s" due to "the rising epidemic of toxic tort cases."[7] "[D]efendants and the defense bar complained about being hoodwinked by 'junk science' in mass tort cases. They accused plaintiffs' attorneys of manufacturing toxic tort cases by calling dubious scientific experts willing to testify to just about

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[4] Debra L. Worthington, et al., *Hindsight Bias, Daubert, and the Silicone Breast Implant Litigation: Making the Case for Court-Appointed Experts in Complex Medical and Scientific Litigation,* 8 Psychol., Pub. Pol'y, and the Law 154, 158 (2002) (internal quotation marks and citations omitted).

[5] Thomas G. Gutheil, M.D. & Harold J. Bursztajn, M.D., *Attorney Abuses of Daubert Hearings: Junk Science, Junk Law, or Just Plain Obstruction?,* 33 J. Am. Acad. Psychiatry L. 150 (2005).

[6] Henry P. Sorett, *Junk Science in the States: The Battle Lines*, Atl. Legal Found., Science in the Courtroom Rev. 30 (Autumn 2000).

[7] Jim Hilbert, *The Disappointing History of Science in the Courtroom: Frye, Daubert, and the Ongoing Crisis of "Junk Science" in Criminal Trials*, 71 Okla. L. Rev. 759, 774, 776 n.90 (2019).

anything."[8] In an article discussing trial lawyers' ethical responsibilities, former U.S. Attorney General Dick Thornburg observed that "'junk science' in the courtroom emanates from testimony by expert witnesses hired not for their scientific expertise, but for their willingness, for a price, to say whatever is needed to make the client's case."[9] Although General Thornburgh's article was published a quarter century ago, "[i]n America, expert witness services now represent a billion dollar industry."[10]

Junk scientists continue to supply the fuel that keeps the multi-billion dollar mass-tort industry's machinery running. "[T]he systematized ignorance of the pseudo-scientist . . . bring[s] to court the bad science that most compellingly supports [an] otherwise unsupportable claim."[11] "Experts employing junk science often lead jurors to believe that their claims are based on valid scientific theory, when in fact they are not."[12]

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[8] Edward K. Cheng, *The Consensus Rule: A New Approach To Scientific Evidence*, 75 Vand. L. Rev. ___ (2022) (forthcoming) (slip copy at 5), available at https://tinyurl.com/86h22mnh.

[9] Dick Thornburgh, *Junk Science – The Lawyer's Ethical Responsibilities*, 25 Fordham Urb. L.J. 449, 452 (1998).

[10] Judge Bradford H. Charles, *Rule 706: An Underutilized Tool To Be Used When Partisan Experts Become "Hired Guns,"* 60 Vill. L. Rev. 941, 946 (2015).

[11] Huber, *supra* at 276-77 (internal quotation marks omitted).

[12] Worthington, *supra* at 158.

The *Daubert* trilogy and resultant Rule 702 amendments were intended to close courtroom doors to junk science. In *Daubert* "this Court focused upon the admissibility of scientific expert testimony [and] pointed out that such testimony is admissible only if it is both relevant and reliable." *Kumho Tire*, 526 U.S. at 141. *Daubert* identifies "specific factors, such as testing, peer review, error rates, and 'acceptability' in the relevant scientific community, some or all of which might prove helpful in determining the reliability of a particular scientific 'theory or technique.'" *Kumho*, 526 U.S. at 141 (citing *Daubert*, 509 U.S. at 593-94). Thus, "[w]ith *Daubert*, the Supreme Court attempted to redress the distortions caused by the increasing influence of junk science in the courtroom."[13]

Emphasizing "the 'gatekeeper' role of the trial judge in screening [scientific] evidence" for reliability, *Joiner*, 522 U.S. at 142, "*Daubert* attempts to strike a balance between a liberal admissibility standard for relevant evidence on the one hand and the need to exclude misleading 'junk science' on the other." *United States v. Lavictor*, 848 F.3d 428, 441 (6th Cir. 2017); *see also Joiner*, 522 U.S. at 153 (Stevens, J., concurring in part and dissenting in part) (referring to "the sort of 'junk science' with which *Daubert* was concerned"); *Kumho Tire*, 526 U.S. at 158-59 (Scalia, J., concurring) ("trial-court discretion in choosing the manner of testing expert reliability . . . is discretion to choose among *reasonable* means of excluding expertise that is *fauesse* and science that is junky"); *McKiver v. Murphy-Brown LLC*, 980 F.3d 937, 1008 (4th Cir. 2020) (*Daubert* "attempted to ensure that courts

[13] Worthington, *supra* at 159.

screen out junk science") (internal quotation marks omitted); *United States v. Machado-Erazo*, 901 F.3d 326, 339 (D.C. Cir. 2018) (*Daubert* was "spawned by 'junk science' masquerading as science"); *Thomas v. Novartis Pharm. Corp.*, 443 F. App'x 58, 60 (6th Cir. 2011) ("Under *Daubert* and its progeny, district courts must exercise a gatekeeping role in screening the reliability of expert testimony to keep 'junk science' away from juries.").

"Since *Daubert* . . . parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet." *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000). Indeed, Rule 702 was amended in 2000 "in response to *Daubert* . . . and the many cases applying *Daubert*." Fed. R. Evid. advisory comm. note to 2000 amendments. "The amendment affirms the trial court's role as gatekeeper . . . ." *Id.*

In a recent decision the Fourth Circuit reiterated that Rule 702 "appoints trial judges as gatekeepers of expert testimony to protect the judicial process from the potential pitfalls of junk science." *Sardis v. Overhead Door Corp.*, 10 F.4th 268, 275 (4th Cir. 2021) (internal quotation marks omitted). Even the Eighth Circuit (whose lax interpretation of Rule 702 is at issue here) and the Ninth Circuit (whose receptivity to unreliable expert testimony is notorious) acknowledge that Rule 702 is directed to elimination of junk science from federal courtrooms. *See, e.g.*, *Robinson v. Geico Gen. Ins. Co.*, 447 F.3d 1096, 1100 (8th Cir. 2006) ("*Daubert* provides a district court with the discretion necessary to close the courtroom door to 'junk science' . . . ."); *Murray v. S. Route Mar. SA*, 870 F.3d 915, 923

(9th Cir. 2017) ("District judges play an active and important role as gatekeepers examining the full picture of the experts' methodology and preventing shoddy expert testimony and junk science from reaching the jury.")

In short, *Daubert, Joiner*, and Rule 702 unquestionably require junk science to be excluded from federal courtrooms.

B. Junk science deprives defendants of a fair trial and due process

Due process requires a fair trial. When trial judges fail to fulfill their "special gatekeeping obligation" and admit unreliable scientific testimony, *Sardis*, 10 F.4th at 281, defendants are deprived of a fair trial. "At its core," the battle against junk science "is ultimately intended to prevent fraud on society and the legal system."[14]

"Expert testimony, whether presented by plaintiffs or defendants, can strongly influence juries. . . . 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."[15] *See Daubert*, 509 U.S. at 596 ("expert evidence can be both powerful and quite misleading") (internal

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[14] Sorett, *supra* at 31.

[15] 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) (internal quotation marks omitted).

quotation marks omitted); *see also Kondash v. Kia Motors Am., Inc.*, 107 Fed. R. Serv. 3d 2186, 2020 WL 5816228, at *4 (N.D. Ohio 2020) ("jurors can be easily overwhelmed, confused, and misled by 'hired-gun' experts peddling 'junk science'"). "Junk science testimony attempts to make causation appear more plausible in cases where it is doubtful, thus enhancing jurors' inherent tendency to engage in hindsight bias."[16] It "relies on the elevated status that 'science' enjoys among jurors as a method of truth finding. Jurors are often impressed by scientific evidence because they believe it has greater accuracy, objectivity, and therefore greater credibility, than lay testimony."[17]

"[T]he Court, by stressing the judge's role as a gatekeeper, appears implicitly to have assumed that the judge should protect the jury" from influential but unreliable scientific testimony.[18] Cross-examination and presentation of contrary evidence, *i.e.*, the "traditional and appropriate means of attacking shaky but *admissible* evidence," *Daubert*, 509 U.S. at 596 (emphasis added), are no substitute for the critical gatekeeping duty that *Daubert, Joiner*, and Rule 702 require district court judges to fulfill before scientific testimony can reach a jury. *See Kumho Tire*, 526 U.S. at 158-59 (Scalia, J., concurring) (trial judges do not

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[16] Worthington, *supra* at 158.

[17] *Id.*

[18] Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 Brook. L. Rev. 1121, 1125 (2001).

have "discretion to abandon the gatekeeping function [or] to perform the function inadequately").

"While meticulous *Daubert* inquiries may bring judges under criticism for donning white coats and making determinations that are outside their field of expertise, the Supreme Court," as reflected in Rule 702, "has obviously deemed this less objectionable than dumping a barrage of questionable scientific evidence on a jury, who would likely be even less equipped than the judge to make reliability and relevance determinations and more likely than the judge to be awestruck by the expert's mystique." *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1310 (11th Cir. 1999). In short, allowing litigation to be "degraded by 'junk science,'" like other "justly reprobated abuses of the legal process," *Braun v. Lorillard Inc.*, 84 F.3d 230, 232 (7th Cir. 1996), deprives defendants of due process.

C. Due to loose interpretations of, or lax compliance with, Rule 702, junk science continues to infect civil litigation throughout the United States

Daubert, *Joiner*, and Rule 702 still have not eliminated junk science from many federal courtrooms, including in MDL transferee courts that are coordinating high-stakes product liability and toxic tort litigation.

"There has been an extraordinary undercurrent of rebellion by a minority of federal judges who implicitly object to the radical changes wrought by the '*Daubert* revolution.' These judges ignore the text of Rule 702, and instead rely on lenient precedents that predate

(and conflict with) not only the text of amended Rule 702, but also with some or all of the *Daubert* trilogy."[19]

Here, the district judge ultimately concluded that the plaintiff's expert testimony was inadmissible, *see* App-15, but the Eighth Circuit reversed, and in so doing, continued to rely on its own, overly permissive, pre-*Daubert* admissibility precedent. *See* App-12 ("[T]o put it in the language we have frequently used both *before* and after *Daubert* and *Joiner*, a district court may exclude an expert's opinion if it is 'so fundamentally unsupported' by its factual basis 'that it can offer no assistance to the jury.'") (quoting *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988)) (emphasis added).

The First and Ninth Circuits, as well as a significant number of district courts in those and other circuits, also continue to be less than faithful to Rule 702's objective of ensuring that trial judges exercise broad discretion to shield juries from junk science and other types of unreliable expert testimony. *See* Pet. at 26-27. For example, in *Milward v. Acuity Specialty Products Group*, 639 F.3d 11, 22 (1st Cir. 2011), a benzene occupational exposure case, the First Circuit reversed the district court's exclusion of causation testimony on the ground that "the court over-stepped the authorized bounds of its role as gatekeeper." According to the court of appeals, the district court

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[19] David E. Bernstein, *The Misbegotten Judicial Resistance to the Daubert Revolution*, 89 Notre Dame L. Rev. 27, 28-29 (2013); *see also* Schroeder, *supra* at 2044 (providing "a sampling of illustrative cases . . . as evidence that courts are abdicating their gatekeeper role.")

erred because its "exclusion of the testimony was based on its evalaution of the weight of the evidence, which is an issue that is the province of the jury." *Id.* at 20. *Milward* "narrowed the scope of federal district courts' evidentiary gatekeeping role under FRE 702 and *Daubert*."[20] As another example of lack of fidelity to Rule 702, in *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1237 (9th Cir. 2017), the Ninth Circuit reversed a district court's exclusion of causation testimony, in part because "'[m]edicine partakes of *art as well as science*'") (quoting *Messick v. Novartis Pharm. Corp.*, 747 F.3d 1193, 1198 (9th Cir. 2014)) (emphasis added).

The persistent problem of junk science being ruled admissible either by a district court, or as here, on appeal, is particularly prevalent in product liability and toxic tort litigation, where general and specific causation are pivotal issues. *See* *Sardis*, 10 F.4th at 275 ("If a trial court abdicates [its gatekeeper] duty," the risk of "opening the gate indiscriminately to *any* proffered expert witness . . . is notably amplified in products liability cases, for expert witnesses necessarily may play a significant part in establishing or refuting liability.") The distinct possibility that a district court either will allow a jury to be exposed to junk science, or will be reversed on appeal if it excludes junk science, strongly incentivizes entrepreneurial "victims' rights" attorneys, who often with the benefit of third-party litigation financing,

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[20] Lawrence A. Kogan, *Weight of the Evidence: A Lower Expert Evidence Standard Metastasizes in Federal Courts*, WLF Working Paper, at 1 (March 2020), available at https://tinyurl.com/bd9bby7z.

search for potentially lucrative product liability or toxic tort targets and pay for custom-manufactured junk science testimony to support opportunistic, and often meritless, litigation.

Much of today's most widely publicized, well financed, mass-tort litigation filed in or removed to federal district courts is transferred by the Judicial Panel on Multidistrict Litigation to a single district court judge for coordinated pretrial proceedings—including "*Daubert* motions." During 2021, for example, the 60 pending product liability MDLs accounted for one third of all pending MDLs.[21] And as of February 15, 2022, the top 12 MDLs, collectively encompassing approximately 400,000 actions (and a multitude of individual claimants), all were in the product liability category.[22]

The transferee judge in any MDL wields enormous, nationwide power over the outcome of litigation that frequently encompasses tens of thousands of individual claimants. "More than 95% of the cases transferred to an MDL proceeding are never remanded back to their forum of origin due primarily to global settlements that are consummated in the transferee forum typically under the active direction

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[21] MDL Panel, Distribution of Pending MDLs By Type (185 Dockets), available at https://tinyurl.com/yckzfa7a.

[22] MDL Panel, MDL Statistics Report – Distribution of Pending MDL Dockets by Actions Pending (Feb. 15. 2022), available at https://tinyurl.com/3csx5ts3.

of a transferee judge."[23] "[S]ubstantive rulings regarding . . . the admissibility of expert evidence relating to causation under [Rule] 702 and *Daubert* . . . have often been dispositive in large MDL proceedings involving product liability claims."[24] An MDL judge's ruling in product liability or toxic tort litigation, either prior to or as part of a bellwether trial, admitting the general-causation testimony of even a single purveyor of junk science, can have a major deleterious impact on the defendant, who may be forced to settle meritless litigation involving tens or hundreds of thousands of claimants from around the nation. Equally important, adherence to Rule 702 also can "have a critical impact on MDLs" because such "rulings can help defendants avoid large numbers of non-meritorious cases."[25]

An MDL transferee judge's ruling on the admissibility of medical causation or other scientific testimony often has nationwide ramifications also because "for questions of federal law, such as the admissibility of expert testimony under *Daubert*," the law of the circuit in which the transferee court is located "will govern regardless of where a case originated." *In re Roundup Prods. Liab. Litig.*, 2019

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[23] Clay D. Land, Chief U.S. District Judge, Middle District of Georgia, *Multidistrict Litigation After 50 Years: A Minority Perspective From the Trenches*, 53 Ga. L. Rev. 1237, 1238 (2019).

[24] Douglas G. Smith, *Resolution of Common Questions In MDL Proceedings*, 66 U. Kan. L. Rev. 219, 227 (2017).

[25] Robert Adams, et al., *Bellwether Trials*, 89 UMKC L. Rev. 937, 946 (2021).

U.S. Dist. LEXIS 114855, at *65 (N.D. Cal. July 10, 2019) (citing *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 391 F.3d 907, 911 (8th Cir. 2004)); *see also In re Korean Air Lines Disaster of Sept. 1983*, 829 F.2d 1171, 1175 (D.C. Cir. 1987) ("[B]ecause there is ultimately a single proper interpretation of federal law, the attempt to ascertain and apply diverse circuit interpretations simultaneously is inherently self-contradictory."). Thus, in this *Bair Hugger* litigation, the Eighth Circuit's lax approach to admissibility of scientific testimony, and the inadequate deference that it pays to carefully considered district court rulings that exclude such testimony, govern all of the actions encompassed by the MDL, regardless of where they were filed.

Admission of junk science testimony is particularly troubling in mass-tort litigation where well-funded contingency fee lawyers employ "infomercials" and other forms of advertising to troll for (and in reality, exploit) alleged victims of widely used products, such as the Bair Hugger medical device, whose safety not only has been confirmed by scientific consensus, but also cleared by one or more federal regulatory agencies. Along with the *Bair Hugger* litigation, other pending MDLs demonstrate why this Court needs to intercede, as it did with the *Daubert* trilogy, to mandate nationally uniform expert testimony admissibility standards, and to correct the misdirected course of wayward circuits such as the Eighth Circuit here.

For example, the plaintiffs in the *Roundup Products Liability Litigation* multidistrict litigation, MDL No. 2741 (N.D. Cal.), allege that the

manufacturer of this widely used, federally regulated herbicide failed to warn that the product's active ingredient, glyphosate, causes non-Hodgkin's lymphoma (NHL), a type of cancer. Extensive toxicology, human exposure, and other scientific studies relating to the safety of glyphosate have been reviewed by the U.S. Environmental Protection Agency (EPA) in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y. FIFRA preemption of the plaintiffs' failure-to-warn claims is the threshold issue in the *Roundup* litigation, *see* 7 U.S.C. § 136v(b), because EPA not only has determined definitively that glyphosate poses no risk of causing cancer in humans, but also has advised glyphosate producers that placing a cancer warning on the labeling of Roundup and other products containing that active ingredient would be false and misleading, and thus a violation of FIFRA. *See Hardeman v. Monsanto Co.*, 997 F.3d 941, 952 (9th Cir. 2021), *pet. for cert. filed* Aug. 16, 2021 (No. 21-241) (This Court issued an Order on Dec. 13, 2021 inviting the views of the Solicitor General.)

Despite EPA's unequivocal no-human-risk determination, the MDL transferee judge, in a July 2018 opinion, ruled that the testimony of the Roundup plaintiffs' three experts on general causation, *i.e.*, testimony that glyphosate "can cause [NHL] at exposure levels people realistically may have experienced," is admissible. *See In re Roundup Prods. Liab. Litig.*, 390 F. Supp. 3d 1102, 1108 (N.D. Cal. 2018). One year later, the district court also ruled that the plaintiffs' expert testimony on specific causation, *i.e.*, testimony about whether glyphosate caused the three bellwether plaintiffs' NHL, is admissible. *See In*

re Roundup Prods. Liab. Litig., 358 F. Supp. 3d 956, 957 (N.D. Cal. 2019).

Largely as a result of these rulings, the jury in the first bellwether trial arising out of the MDL awarded the plaintiff more than $5 million in compensatory damages and $75 million in punitive damages (the district court later reduced the punitive damages award to $20 million). In addition to rejecting FIFRA preemption of the plaintiff's failure-to-warn claims, the Ninth Circuit affirmed the district court's expert testimony admissibility rulings and also the unwarranted damages awards. *See Hardeman*, 997 F.3d at 950.

The district court found that the general causation experts' proffered testimony presented "a very close question," in part because "the evidence of a causal link between glyphosate exposure and NHL in the human population seems rather weak . . . too equivocal to support any firm conclusion that glyphosate causes NHL. This calls into question the credibility of some of the plaintiffs' experts, who have confidently identified a causal link." 390 F. Supp. 3d at 1109. The district court held, however, that the testimony was admissible, explaining that "the case law—particularly Ninth Circuit case law—emphasizes that a trial judge should not exclude an expert opinion merely because he thinks it's shaky, or because he thinks the jury will have cause to question the expert's credibility." *Id.* The district court further observed that

> [t]he Ninth Circuit has placed great emphasis on *Daubert*'s admonition that a district court should conduct this analysis

> with a liberal thrust favoring admission. . . . Accordingly, the Ninth Circuit has emphasized that the gatekeeping function is meant to screen the jury from *unreliable nonsense opinions*, but not to exclude opinions merely because they are impeachable. . . . This emphasis has resulted in slightly more room for deference to experts in close cases than might be appropriate in some other Circuits. . . . This is a difference that could matter in close cases.

Id. at 1112-13 (internal quotation marks and citations omitted) (emphasis added). Despite its finding that the general causation experts' proffered testimony was "shaky," "weak," and "equivocal," the district court, in light of the Ninth Circuit's narrow view of a trial judge's Rule 702 gatekeeping duty, found that it "could not go so far as to say these experts have served up the kind of junk science that requires exclusion from trial." *Id.* at 1109.

The district court's error, which tracked the Ninth Circuit's misreading of *Daubert*, was to equate "shaky" expert testimony with admissible expert testimony whose credibility a jury can evaluate. The Court made it clear in *Daubert*, however, that "shaky" testimony is not necessarily admissible, and that such evidence can be considered by a jury *only if* it is reliable enough to be admissible. *See* 509 U.S. at 596.

After ruling that the opinions of the plaintiffs' general causation experts were admissible, the district court ruled that the plaintiffs' expert testimony on specific causation also was admissible.

See 358 F. Supp. 3d 956, 957 (N.D. Cal. 2019). As to specific causation, the court found that "[i]t is again a close question, but the plaintiffs have barely inched over the line." *Id.* This ruling, like the district court's ruling on admissibility of the plaintiffs' testimony on general causation, was compelled by the Ninth Circuit's ultra-liberal view of the Rule 702 expert testimony admissibility criteria.

The district court's "biggest concern" about the proffered specific-causation testimony was "how the experts account for idiopathy — that is, the possibility that a plaintiff's NHL is attributable to an unknown cause." *Id.* at 959. The plaintiffs' experts, however, could not "point to a biomarker or genetic signature associated with a particular risk factor," or to "any evidence suggesting that NHL presents differently when caused by exposure to glyphosate." *Id.* The court explained that

> [u]nder a strict interpretation of *Daubert*, perhaps that would be the end of the line for the plaintiffs and their experts (at least without much stronger epidemiological evidence). But in the Ninth Circuit, that is clearly not the case. . . . Recognizing that "[m]edicine partakes of art as well as science," the Ninth Circuit's recent decisions reflect a view that district courts *should typically admit specific causation opinions that lean strongly toward the "art" side of the spectrum*. . . . [The Ninth Circuit's *Wendell* and *Messick*] opinions are impossible to read without concluding that district courts in the Ninth Circuit

> must be more tolerant of borderline expert opinions than in other circuits. . . . Of course, district judges still must exercise their discretion, but in doing so they must account for the fact that a wider range of expert opinions (arguably much wider) will be admissible in this circuit.

Id. at 959-60 (citing *Wendell*, 858 F.3d at 1233-37; quoting *Messick*, 747 F.3d at 1198; other citations omitted) (emphasis added). Thus, "Ninth Circuit precedent compelled the trial court . . . to admit a differential diagnosis that failed to rule out idiopathic causes of the alleged NHL."[26]

Not surprisingly, the Ninth Circuit affirmed the district court's reluctant, almost apologetic, *Daubert* rulings. *Hardeman*, 997 F.3d at 960-68. The court of appeals observed that "in reaching its conclusions, the district court followed this court's precedent and thus cannot be faulted for following binding case law." *Id.* at 961. Although the Ninth Circuit disagreed that it is "an outlier following a more flexible *Daubert* approach than other circuits," *id.* at 960, it asserted that the "district court's slight deference to experts with borderline. . . opinions was proper under *Daubert*" because "[t]he interests of justice favor leaving difficult issues in the hands of the jury [and] [t]he Supreme Court has not directed courts to follow a different rule since it first decided *Daubert*." *Id.* at 962 (internal quotation marks omitted). As to "the

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[26] Joe G. Hollingsworth & Mark A. Miller, *Inconsistent Gatekeeping Undercuts the Continuing Promise of Daubert*, WLF Working Paper, at 11 (July 2019), available at https://tinyurl.com/2p842ffb.

district court's suggestion that courts in this circuit can admit opinions that lean strongly toward the art side of the spectrum," the Ninth Circuit asserted that "the district court was only reiterating our precedent following *Daubert*." *Id.* (internal quotation marks omitted).

The Ninth Circuit's freewheeling approach to *Daubert* and Rule 702, like that of the First Circuit and here, the Eighth Circuit, represents a "departure from *Daubert*'s requirements, constraining the courts within the Circuit on what evidence can be excluded."[27] Neither Rule 702 nor the Supreme Court precedent that it incorporates authorize district court judges to defer to juries on "difficult issues" of admissibility. Instead, both Rule 702 and *Daubert/Joiner* make it clear that a district judge's gatekeeping role, *i.e.*, protecting the jury, and by extension, the credibility of the proceeding itself, from junk science and other *inadmissible* expert testimony, is fundamentally different from the jury's role in weighing expert testimony that meets this Court's and Rule 702's admissibility standards.

The Court should grant review here to reaffirm that the *Daubert/Joiner* and Rule 702 admissibility standards not only govern, but also should be respected and applied by, every federal court of appeals and district court. Such a ruling also would benefit the many States that have embraced *Daubert* and *Joiner* by incoporating Rule 702 into their own rules of evidence.

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[27] Hollingsworth & Miller, *supra* at 11.

CONCLUSION

The Court should grant the Petition For Writ of Certiorari.

Respectfully submitted,

LAWRENCE S. EBNER
Counsel of Record
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Ave., NW
Washington, DC 20006
(202) 729-6337
lawrence.ebner@atlanticlegal.org

CORY L. ANDREWS
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

DOUGLAS K. BURRELL
DRI–THE VOICE OF THE DEFENSE BAR
222 South Riverside Plaza
Chicago, IL 60606
(312) 795-1101

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