24-2724(L)

24-3047(CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MICHAEL COLWELL AND JULIA COLWELL,
Plaintiffs-Appellants,

—against—

SIG SAUER, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK (HON. BRENDA K. SANNES)

BRIEF FOR AMICUS CURIAE LAWYERS FOR CIVIL JUSTICE
IN SUPPORT OF DEFENDANT-APPELLEE SIG SAUER, INC.

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STATEMENT OF INTEREST[1]

Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, defense trial lawyer organizations, and law firms that promotes excellence and fairness in the civil justice system.[2] Since 1987, LCJ has advocated for procedural rule reforms that (1) promote balance in the civil justice system; (2) reduce the costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation. LCJ often urges reforms to aspects of the Federal Rules of Civil Procedure and Federal Rules of Evidence.

LCJ's participation in the rulemaking process has given LCJ specific expertise on the meaning, history, and application of Federal Rule of Evidence 702. LCJ provided extensive comments and original research to the Judicial Conference Advisory Committee on Rules of Evidence,[3] which unanimously recommended

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[1] All parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel certifies that (1) no counsel for a party authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and (3) no person or entity – other than *amicus curiae* – contributed money intended to fund the preparation or submission of this brief.

[2] LCJ's members are listed on the "About" tab of the LCJ website. https://www.lfcj.com/about.

[3] *E.g.*, Lawyers for Civil Justice, *Clarity and Emphasis: The Committee's Proposed Rule 702 Amendment Would Provide Much-Needed Guidance About the Proper Standards for Admissibility of Expert Evidence and the Reliable Application of an Expert's Basis and Methodology*, Comment to the Advisory Committee of Rules of Evidence and Rule 702 Subcommittee (Sept. 1, 2021),

amendments to Rule 702 that became effective on December 1, 2023. LCJ's analysis revealed widespread misunderstanding of Rule 702's requirements. In particular, LCJ found that many courts – including district courts within the Second Circuit – fail to recognize that the sufficiency of an expert's factual basis is an *admissibility* consideration. Additionally, courts often apply a presumption of admissibility rather than the burden of proof specified by Federal Rule of Evidence 104(a). To address the problems it identified, LCJ advocated for specific revisions, including adding an explicit reference to the court as the decision-maker so that Rule 702 itself would give unmistakable direction about judges' gatekeeping responsibilities.[4]

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https://static1.squarespace.com/static/640b6c7e5b8934552d35ab05/t/64872bd8aa883f4ddeae6382/1686580184749/lcj_public_comment_on_rule_702_amendment_sept_1_2021.pdf; Lawyers for Civil Justice, *Why Loudermill Speaks Louder than the Rule: A "DNA" Analysis of Rule 702 Case Law Shows that Courts Continue to Rely on Pre-Daubert Standards Without Understanding that the 2000 Amendment Changed the Law*, Comment to the Advisory Committee of Rules of Evidence and Rule 702 Subcommittee (Oct. 20, 2020), https://20-ev-y_suggestion_from_lawyers_for_civil_justice_-_rule_702_0.pdf (uscourts.gov).

[4] *See* Memorandum from Daniel J. Capra and Liesa L. Richter, Reporters, Advisory Committee on Evidence Rules, to Advisory Committee on Evidence Rules, *Possible Amendment to Rule 702* (Oct. 1, 2021) at 4, *in* ADVISORY COMMITTEE ON EVIDENCE RULES NOVEMBER 2021 AGENDA BOOK 135 (2021), https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_agenda_book_november_202110-19_0.pdf ("LCJ's suggestion to reinsert a reference to the court has much to commend it. . . . Given the fact that the reason the rule is being amended is that some courts did not construe the 2000 amendment properly, it makes eminent sense to make it as explicit as possible."). LCJ's recommended change was included in the enacted version of the 2023 amendment.

The issues presented here lie at the core of LCJ's mission and its work on Rule 702. The 2023 amendment to Rule 702 highlighted the important nature of the court's gatekeeping role and clarified that expert testimony may be admitted only if the testimony meets the admissibility requirements of Rule 702 by a preponderance of the evidence. Despite this directive, courts and litigants continue to misconstrue the applicable burden of production and admissibility criteria. This appeal shows the need for this Court to provide guidance that gatekeeping assessments must comport with Rule 702, and that courts must stop evaluating expert admissibility based on caselaw that conflicts with the rule's language.

This brief will assist the Court in addressing the issues presented because Plaintiffs are urging this Court to rely on common misunderstandings about appropriate judicial gatekeeping to overturn the District Court's appropriate exclusion of the proffered expert testimony. Accordingly, LCJ has simultaneously filed a motion for leave to file its *amicus* brief along with this proposed *amicus* brief in support of Defendant Sig Sauer, Inc., urging affirmance with clarifying guidance.

SUMMARY OF ARGUMENT

Federal Rule of Evidence 702 was amended in 2023 to correct certain critical errors. First, some courts discounted two essential reliability factors enumerated in Rule 702:

> many courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility. *These rulings are an incorrect application of Rules 702 and 104(a)*.

Fed. R. Evid. 702 advisory committee's note to 2023 amendment (emphasis added). Second, a number of courts improperly employed a burden of proof considerably more permissive than the preponderance of evidence standard. *Id*. The amendment makes these erroneous approaches incompatible with Rule 702's text. In so doing, the amendment clarifies that "expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule." *Id*.

Despite the amendment, courts and litigants continue to declare that Rule 702 favors admission over exclusion or otherwise allows admission upon a less stringent showing than the preponderance of evidence standard.[5] Also, some

[5] *See*, *e.g.*, *Wood v. Mike Bloomberg 2020, Inc*., No. 1:20-CV-2489-LTS-GWG, 2025 WL 1002058, at *6 (S.D.N.Y. Mar. 31, 2025) ("expert testimony should be excluded only 'if it is speculative or conjectural or based on assumptions that are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples

courts still incorrectly assert that the factual basis underlying an expert's opinion is not an admissibility issue for the court to decide.[6]

Plaintiffs raise some of these baseless arguments. Plaintiffs suggest the Court should overlook their burden of proof and instead presume admissibility of the experts' opinions.[7] Plaintiffs also contend that the Court should brush aside

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to oranges comparison.'") (quoting *Restivo v. Hessemann*, 846 F.3d 547, 577 (2d Cir. 2017)); *Baldi-Perry v. Emerson Elec. Co.*, No. 1:22-cv-400-JLS-JJM, 2025 WL 601232, at *5 (W.D.N.Y. Feb. 25, 2025) ("there is presumption in favor of admissibility."); *B & R Supermarket v. Visa Inc.*, No. 17-CV-2738 (MKB), 2024 WL 4252031, at *8 (E.D.N.Y. Sept. 20, 2024) ("The Court concludes that none of these opinions are so seriously lacking in support that they amount to the serious flaws in reasoning or methodology that warrant exclusion, especially given the liberal admissibility standards of the Federal Rules of Evidence.") (quotation omitted); *Novartis Pharma Ag v. Incyte Corp.*, No. 1:20-cv-400-GHW, 2024 WL 3608338, at * 5 (S.D.N.Y. July 29, 2024) ("In light of the liberal admissibility standards of the Federal Rules of Evidence, exclusion of expert testimony is warranted only when the district court finds serious flaws in reasoning or methodology.") (quotation omitted); *Doubleline Capital LP v. Odebrecht Finance, Ltd.*, No. 17-CV-4576 (DEH) (BCM), 2024 WL 1115944, at *6 (S.D.N.Y. Mar. 14, 2024) ("in a close case, a court should permit the [expert] testimony to be presented at trial") (quotation omitted).

[6] *See*, *e.g.*, *Wood*, 2025 WL 1002058, at *6 ("The Campaign's concerns related to the underlying data . . . go to weight rather than admissibility.") (quotation omitted); *Community Care Companions, Inc. v. Interim Healthcare, Inc.*, No 19-CV-4870 (PKC) (LGD), 2025 WL 929407, at *13 (E.D.N.Y. Mar. 27, 2025) ("arguments about the assumptions and data underlying an expert's testimony go to the weight, rather than the admissibility, of that testimony.") (quotation omitted); *U.S. v. M/Y Amadea*, No. 23-CV-9304 (DEH), 2025 WL 460030, at *1 (S.D.N.Y. Jan. 15, 2025) ("assertions that an expert witness's testimony is based on unfounded assumptions go to the weight, not the admissibility, of the testimony.") (quotation omitted).

[7] *See* Plaintiffs' Br. at 42, 55.

challenges to their experts' factual foundation as not raising admissibility concerns.[8] These assertions are contrary to Rule 702.

Although the District Court correctly focused on the admissibility factors set forth in Rule 702, the inconsistent approach taken by district courts in the Second Circuit since the 2023 amendment became effective signals a need for guidance. The Court should clarify that the text of Rule 702 articulates the appropriate admissibility analysis judges within this Circuit should use. Further, the Court should reject Plaintiffs' attempts to argue against the plain language of the rule.

THE SECOND CIRCUIT SHOULD CLARIFY THAT FEDERAL RULE OF EVIDENCE 702 GOVERNS THE ADMISSIBILITY OF EXPERT TESTIMONY.

Rule 702 sets forth the admissibility analysis district courts must undertake, but too frequently the rule is disregarded. Instead, judges often lean into descriptions of gatekeeping contained in caselaw, even though they deviate from the text of the rule. Continued repetition of these misconceptions – even after the corrective 2023 amendment – shows the need for this Court's direction. Specifically, the Court should declare that Rule 702 requires judges to evaluate an expert's factual basis and methodological application as matters of admissibility, and that the Rule 702 gatekeeping analysis does not favor admission over

[8] *Id*. at 52 – 53.

exclusion. As part of this guidance, the Court should repudiate the erroneous assertion often repeated by district courts in this Circuit that "only serious flaws in reasoning or methodology will warrant exclusion."[9] Doing so will provide the direction district courts need to align their gatekeeping practices with Rule 702.

1. Rule 702 Sets the Admissibility Standard.

Federal Rule of Evidence 702 is the bedrock authority "governing expert testimony," and it establishes the criteria for admission. *Daubert v. Merrell Dow Pharms., Inc*., 509 U.S. 579, 588-589 (1993). The Rules Enabling Act empowers the U.S. Supreme Court to prescribe "rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals." 28 U.S.C. § 2072(a). As a rule of evidence adopted by the Supreme Court[10] and enacted under the Rules Enabling Act, Rule 702 supersedes

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[9] *See*, *e.g.*, *PRCM Advisors LLC v. Two Harbors Invest. Corp*., No. 20-CV-5649 (LAK) (BCM), 2025 WL 1276513, at *13 (S.D.N.Y. May 2, 2025) (quotation omitted) (invoking quoted language in describing the gatekeeping standard the court employed); *Larball Publ'g Co., Inc. v. Lipa*, No. 22 CIV. 1872 (KPF), 2025 WL 936536, at *6 (S.D.N.Y. Mar. 27, 2025) (quotation omitted) (same); *Hasemann v. Gerber Products Co*., No. 15-CV-2995(EK)(JAM), 2024 WL 1282368, at *8 (E.D.N.Y. Mar. 25, 2024) (quotation omitted) (same); *see also B & R Supermarket*, 2024 WL 4252031, at *8; *Novartis Pharma*, 2024 WL 3608338, at *5 (similar statement); *Johnson v. U.S.*, No. 21-CV-2851 (MKB), 2024 WL 1246503, at *4 (E.D.N.Y. Jan. 16, 2024) (similar statement).

[10] *See* Communication from the Chief Justice Transmitting Amendments to the Federal Rules of Evidence, at 1, 7, https://www.govinfo.gov/content/pkg/CDOC-118hdoc33/pdf/CDOC-118hdoc33.pdf.

any other law that is inconsistent: "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072(b).[11] Although Rule 702 provides courts discretion to decide what expert evidence is admissible, it does not grant discretion to decide what the admissibility standard will be. Thus, "the elements of Rule 702, not the caselaw, are the starting point for the requirements of admissibility."[12]

Rule 702 enumerates several elements that "*the court*" must find established before admitting expert opinions into evidence: helpfulness to the trier of fact, sufficient factual basis, use of reliable principles and methods, and reliable application of the methodology to the facts of the case. Fed. R. Evid. 702 (emphasis added). Rule 702 also specifies the burden of proof courts must use to determine whether these admissibility criteria are fulfilled: it is necessary that "the proponent demonstrates to the court that *it is more likely than not.*" *Id*. (emphasis

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[11] *See also Kansas City S. Ry. Co. v. Sny Island Levee Drainage Dist.*, 831 F.3d 892, 900 (7th Cir. 2016) (stating that the litigants "should have paid more attention to Federal Rule of Evidence 702, which superseded *Daubert* many years ago"); *United States v. Parra*, 402 F.3d 752, 758 (7th Cir. 2005) (recognizing that, "[a]t this point, Rule 702 has superseded *Daubert*"); *Thames v. Bally's Park Place, LLC*, No. CV 21-1876, 2024 WL 3024870, at *1 (D.N.J. June 17, 2024) (Rule 702 "superseded *Daubert*").

[12] Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039, 2060 (2020). Judge Schroeder was Chair of the Advisory Committee on Evidence Rules' Subcommittee on Rule 702 during the rulemaking process that produced the 2023 amendment. *Id*. at 2039, n. a1.

added). This neutral standard leaves no room for presumptions of admissibility. Fed. R. Evid. 702 advisory committee's note to 2023 amendment ("expert testimony *may not be admitted* unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in [Rule 702].") (emphasis added). Thus, Rule 702 sets both the inquiries courts must make and the threshold courts must use when determining whether proposed opinion testimony should be admitted.

2. Rule 702 Was Amended to Scuttle the Gatekeeping Characterizations that Some District Courts Improperly Repeat.

Rule 702 was amended effective December 1, 2023, to correct erroneous practices in which courts applied an improper burden of proof and failed to consider all of the admissibility prerequisites. Before the amendment, courts often misstated and misapplied these aspects of Rule 702:

> It is clear that a judge should not allow expert testimony without determining that all requirements of Rule 702 are met by a preponderance of the evidence. . . . *It is not appropriate for these determinations to be punted to the jury, but judges often do so*.[13]

[13] Minutes - Committee on Rules of Practice & Procedure, Report of the Advisory Committee on Evidence Rules (Jan. 5, 2021) at 25, *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2021 AGENDA BOOK 36 (2021), https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_-_agenda_book_spring_2021_0.pdf (emphasis added). Commenting on research revealing the breadth of the problem, the Reporter to the Advisory Committee similarly observed:

The Advisory Committee designed the 2023 amendment to stop courts from repeating these errors:

> the Committee resolved to respond to the fact that many courts have declared that the reliability requirements set forth in Rule 702(b) and (d) – that the expert has relied on sufficient facts or data and has reliably applied a reliable methodology – are questions of weight and not admissibility, and more broadly that expert testimony is presumed to be admissible. *These statements misstate Rule 702*, because its admissibility requirements must be established to a court by a preponderance of the evidence.[14]

The 2023 amendments to Rule 702 make "quite clear" as "a simple matter of textual analysis" that it is "wrong" to state "[t]here is a presumption in favor of admitting expert testimony."[15] Likewise, after the amendment it is "certainly

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> Many opinions can be found with broad statements such as "challenges to the sufficiency of an expert's basis raise questions of weight and not admissibility" – *a misstatement made by circuit courts and district courts in a disturbing number of cases*.

Memorandum from Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules, to Advisory Committee on Evidence Rules, *Possible Amendment to Rule 702* (Apr. 1, 2021) at 11, *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2021 90 (2021), https://www.uscourts.gov/sites/default/files/ advisory_committee_on_evidence_rules_-_agenda_book_spring_2021_0.pdf (emphasis added).

[14] Hon. Patrick J. Schiltz, Report of the Advisory Committee on Evidence Rules (May 15, 2022) at 6, *in* COMMITTEE ON RULES OF PRACTICE & PROCEDURE JUNE 2022 AGENDA BOOK 866 (2022), https://www.uscourts.gov/sites/default/files/2022-6_standing_committee_agenda_book_final.pdf (emphasis added).

[15] Memorandum from Daniel J. Capra and Liesa L. Richter, Reporters, Advisory Committee on Evidence Rules, to Advisory Committee on Evidence Rules,

incorrect" for a court to declare that the sufficiency of facts or data supporting an expert opinion "is a question for the jury, not the court."[16]

The course correction established by the 2023 amendment has been noted by several courts.[17] For example, the Sixth Circuit observed that the Rule 702 changes "were drafted *to correct* some court decisions *incorrectly holding* 'that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility.'" *In re Onglyza (Saxagliptin) and Kombiglyze (Saxagliptin and Metformin) Prods. Liab. Litig*., 93 F.4th 339, 348 n.7 (6th Cir. 2024) (emphasis added). Similarly, the Fifth Circuit

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Possible Amendment to Rule 702 (Apr. 1, 2022) at 24-25, *in* ADVISORY COMMITTEE ON EVIDENCE RULES MAY 2022 AGENDA BOOK 125 (2022), https://www.uscourts.gov/sites/default/files/evidence_agenda_book_may_6_2022.pdf; *see also id*. at 24 ("the wrong-ness of these statements is absolutely apparent from the inclusion of the preponderance standard in the text.").

[16] *Id.*

[17] Some district courts have acknowledged that the 2023 amendment re-focuses the gatekeeping analysis on the burden of proof and the elements indicated in Rule 702's text. *See*, *e.g*., *Keller v. ExxonMobil Oil Corp*., No. 23-CV-1528-LTS, 2025 WL 771297, at *6 (S.D.N.Y. Mar. 11, 2025) ("Recent amendments to Rule 702 served to clarify and emphasize that the preponderance-of-the-evidence standard from Federal Rule of Evidence 104(a) applies to each of the four criteria set forth in Rule 702.") (internal quotation omitted); *In re Terrorist Attacks on September 11, 2001*, No. 03-MD-01570 (GBD)(SN), 2024 WL 5077293, at *14 (S.D.N.Y. Dec. 11, 2024) ("the Court cannot admit expert testimony that falls below Rule 702's standards.") (citing Fed. R. Evid. 702 advisory committee's note to 2023 amendment). But recognition of the amendment's corrective effects is far from universal. *See* cases cited at n.5 and n.6, *supra*.

found that a district court "abdicated its role as gatekeeper" by allowing expert "to testify without a proper foundation" in contravention of Rule 702(b). *Harris v. Fedex Corp. Svcs., Inc.*, 92 F.4th 286, 303 (5th Cir. 2024); *see also Sardis v. Overhead Door Corp*., 10 F.4th 268, 283-84 (4th Cir. 2021) (observing that the proposed 702 amendment rejects "incorrect" decisions finding expert's factual basis and methodological application are issues of weight rather than admissibility); *Maldonado v. Town of Greenburgh*, No. 18-CV-11077 (KMK), 2024 WL 4336771, at *10, n.14 (S.D.N.Y. Sept. 26, 2024) (the amendment "was aimed at courts that had erroneously held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility.") (quotation omitted).

Amended Rule 702 also leaves no room for courts to presume that opinion testimony is admissible, because "the proponent of expert testimony must show by a preponderance of the evidence that the proposed testimony satisfies each of the rule's requirements." *Farmers Ins. Co. of Ariz. v. DNS Auto Glass Shop LLC*, No. CV-21-01390-PHX-DGC, 2024 WL 1256042, at *7 (D. Ariz. Mar. 25, 2024);[18] *see*

[18] Judge David G. Campbell, who wrote the *Farmers Ins*. decision, chaired the Judicial Conference Committee on Rules of Practice and Procedure and participated in the Advisory Committee's discussions on amending Rule 702. *See* Daniel J. Capra, *Symposium on Forensic Expert Testimony, Daubert, and Rule 702*, 86 FORDHAM L. REV. 1463, 1464 (2018).

also Sardis, 10 F.4th at 283 (noting the Advisory Committee's declaration that judges must "apply the preponderance standard of admissibility to Rule 702's requirements"). As one district court explained, the amendment clarifies that "Courts must withhold endorsement from expert witnesses who fail to meet Rule 702's standards." *In re Terrorist Attacks on September 11, 2001*, No. 03-MD-01570 (GBD)(SN), 2024 WL 5077293, at *3 (S.D.N.Y. Dec. 11, 2024).

3. District Courts' and Plaintiffs' Conceptions of the Judicial Gatekeeping Responsibility Rest on Caselaw That Does Not Conform to Rule 702.

Some district courts in the Second Circuit fail to understand that Rule 702 sets the admissibility standard and supersedes pre-amendment rulings to the extent they are incompatible with the rule's text. Rule 702 is the governing law, and it directs a specific analysis: "expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule." *Trombetta v. Novocin*, No. 18-CV-0993-LTS-SLC, 2024 WL 689144, at *2 (S.D.N.Y. Feb. 20, 2024) (quoting Fed. R. Evid. 702 advisory committee's note to 2023 amendment). This Court should make it clear that caselaw statements that are inconsistent with the Rule 702 standard are not good law and should not influence how courts undertake gatekeeping.[19]

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[19] *See* Schroeder, *supra* n.12, at 2060:

A. Rule 702's Enumerated Reliability Factors Describe Admissibility Determinations Courts Must Decide.

Courts in this Circuit often repeat the misconception that the sufficiency of an expert's factual basis goes "to the weight, not the admissibility, of the testimony." *See*, *e.g.*, *Swanson v. Schindler Elevator Corp.*, No. 21-CV-10306 (JMF), 2024 WL 967331, at *7 (S.D.N.Y. Mar. 6, 2024). Plaintiffs also rely on such language to argue here that "any challenges to the inadequacies of a study or '[t]he fact that an expert may have neglected to perform some "essential" tests or measurements . . . go[es] to the weight of his testimony, not its admissibility.'" Plaintiffs' Br. at 52-53 (quoting *Figueroa v. Bos. Sci. Corp.*, 254 F. Supp. 2d 361, 368 (S.D.N.Y. Mar. 31, 2003) (citing *Lappe v. Am. Honda Motor Co.*, 857 F. Supp.

> In the vast majority of cases under question, while Rule 702 and relevant cases are cited, there is no acknowledgement that the gatekeeper function requires application of Rule 104(a)'s preponderance test, much less for *each* of the elements of the Rule. Instead, courts tend to defer to statements from caselaw, even if it is outdated. (emphasis original).

See also Capra, *supra* n.13, at 11 (noting concern about court repetition of caselaw-derived statements that inaccurately describe the admissibility standards because these "broad misstatements of the law can have a pernicious effect beyond the specific case.").

222, 228 (N.D.N.Y. July 15, 1994)).[20] But even though this view of an expert's factual foundation is often repeated, it cannot be reconciled with Rule 702.

Both the 2000 and 2023 versions of Rule 702 require courts to address specific issues bearing on the reliability of proffered expert testimony. The 2000 amendment added subparts (a) through (d) to Rule 702, which provide "general standards that *the trial court must use* to assess the reliability and helpfulness of proffered expert testimony." Fed. R. Evid. 702 advisory committee's note to 2000 amendment (emphasis added).[21] Rule 702(b) specifies that courts must consider

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[20] Subparts (a) – (d) were not added to Rule 702 until the 2000 amendment. Assertions that the adequacy of an expert's factual foundation does not present an admissibility consideration for the court to decide typically have pre-2000 caselaw statements at their root, as with Plaintiffs' incorrect contention that stems from the 1994 *Lappe* decision. In light of the corrective nature of the 2023 amendment, the Court should give no weight to pronouncements about the limits of judicial gatekeeping that interpreted an earlier formulation of Rule 702 and are inconsistent with the rule's current text. *See In re Onglyza*, 93 F.4th at 348 n.7 (the 2023 amendment was "drafted to correct some court decisions" that had declared the sufficiency of an expert's factual basis to be only an issue of weight); *Knight v. Avco Corp*., No. 4:21-CV-00702, 2024 WL 3746269, at *7 (M.D. Pa. Aug. 9, 2024) ("This Court is not obliged to follow precedent which represents an erroneous application of Rule 702.").

[21] *See also* Fed. R. Evid. 702 advisory committee's note to 2000 amendment ("The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative *before it can be admitted*.") (emphasis added); Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Possible Amendments to Rule 702* (Apr. 1, 2019) at 23, *in* ADVISORY COMMITTEE ON EVIDENCE RULES MAY 2019 AGENDA BOOK 95 (2019), https://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-evidence-may-2019 ("The Rule provides that the requirements of sufficient basis and reliable

during the gatekeeping process whether "sufficient facts or data" underlies the expert's opinion. By adding this explicit requirement, the 2000 amendment put in place "a more rigorous and structured approach than some courts are currently employing."[22]

The 2023 amendment corrects lingering misunderstandings about the significance of Rule 702's listed elements.[23] It rejects suggestions that the sufficiency of an expert's factual basis goes "to the weight, not the admissibility, of the testimony[.]" Fed. R. Evid. 702 advisory committee's note to 2023 amendment (identifying as "incorrect" rulings that hold an expert's basis to be "questions of weight and not admissibility."). The presence of the phrase "demonstrates to the

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application *must be treated as questions of admissibility*, and so must be established by a preponderance of the evidence under Rule 104(a).") (emphasis added).

[22] *See* Hon. Fern M. Smith, Report of the Advisory Committee on Evidence Rules (May 1, 1999) at 7, *in* ADVISORY COMMITTEE ON EVIDENCE RULES OCTOBER 1999 AGENDA BOOK 52 (1999), https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-october-1999.

[23] As the Advisory Committee explains:

> The amendment clarifies that the preponderance standard applies to the three reliability-based requirements added in 2000—requirements that many courts have incorrectly determined to be governed by the more permissive Rule 104(b) standard.

Fed. R. Evid. 702 advisory committee's note to 2023 amendment.

court" within Rule 702 renders the notion that judges should defer to the jury on the sufficiency of an expert's factual foundation irreconcilable with the rule's text. Repetition or reliance on this view consequently amounts to error. *See Johnson v. Packaging Corp. of Amer.*, No. 18-613-SDD-EWD, 2023 WL 8649814, at *2 (M.D. La. Dec. 14, 2023) ("The Court rejects the plaintiff's argument that 'questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility.' Recent revisions to FRE 702 and the official comments clarify that this is an inaccurate statement of the Court's inquiry under *Daubert* and FRE 702.").[24]

This Court has acknowledged that Rule 702(b) presents an admissibility requirement. In *Moncayo v. United Parcel Serv., Inc.*, No. 23-161-CV, 2024 WL 461694 (2d Cir. Feb. 7, 2024), the Court affirmed a district court's exclusion of an expert's testimony under Rule 702(b) because the proponent did not establish that the opinions were "based on sufficient facts or data[.]" *Id*. at *1. But the *Moncayo* ruling seemingly has not communicated the message to some district

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[24] *See also* Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Forensic Evidence, Daubert and Rule 702* (Apr. 1, 2018) at 43 *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2018 AGENDA BOOK 49 (2018), https://www.uscourts.gov/sites/default/files/agenda_book_advisory_committee_on_rules_of_evidence_-_final.pdf, ("It is not the case that the judge can say 'I see the problems, but they go to the weight of the evidence.' After a *preponderance* is found, then any slight defect in either of these factors becomes a question of weight. But not before.") (emphasis original).

courts and litigants. To project that challenges to the adequacy of an expert's factual foundation cannot be dismissed as mere credibility concerns, this Court should provide explicit guidance that, contrary to Plaintiffs' argument, the proponent must show more likely than not that the expert's opinions arise from a sufficient factual basis to be admitted.

B. Rule 702 Does Not Prefer Admission Over Exclusion.

Rule 702 does not allow courts to put a judicial thumb on the scale when deciding whether proffered opinion testimony is admissible. Many courts in this Circuit have suggested that Rule 702 should be applied as a "liberal" standard that prefers admission over exclusion of a proffered expert's testimony.[25] Some courts in this Circuit even draw on a pre-2000 decision, *Borawick v. Shay*, 68 F.3d 597,

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[25] *See*, *e.g.*, *Baldi-Perry*, 2025 WL 601232, at *5 ("there is presumption in favor of admissibility"); *Molly C. v. Oxford Health Ins.*, Inc., No. 21-CV-10144 (PGG) (BCM), 2024 WL 4850813, at *6, *13 (S.D.N.Y. Nov. 21, 2024) (stating "Rule 702 embodies a liberal standard of admissibility for expert opinions such that the rejection of expert testimony is the exception rather than the rule" and inverting the burden of production so that opinions were admitted because "defendant has failed to show" a "violation of Rule 702") (quotations omitted); *B & R Supermarket*, 2024 WL 4252031, at *8 (determining that expert testimony should be allowed "given the liberal admissibility standards of the Federal Rules of Evidence.") (quotation omitted); *Novartis Pharma*, 2024 WL 3608338, at *5 ("In light of the liberal admissibility standards of the Federal Rules of Evidence, exclusion of expert testimony is warranted only when the district court finds serious flaws in reasoning or methodology.") (quotation omitted).

610 (2d Cir. 1995), to indicate that "there should be a presumption of admissibility of [expert] evidence."[26]

Although *Daubert* describes the Federal Rules of Evidence as generally having a "liberal thrust" that relaxes "the traditional barriers to opinion testimony,"[27] this characterization of Rule 702 as "liberal" does not imply that courts should presume an expert's opinion testimony is admissible. Considered in context, the statement in *Daubert* contrasts Rule 702 as it existed in 1993 against the "rigid 'general acceptance' requirement" of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) that was under consideration. *Daubert*, 509 U.S. at 588-89. The Court in *Daubert* concluded that Rule 702, not caselaw, sets the standard courts must use to determine admissibility of expert opinions. *Id*. at 589.[28] In fact, the Court observed that Rule 702 "displaced" alternative conceptions of gatekeeping that are "incompatible" with the rule. *Id*.; *see also Jaurequi v. Carter Mfg. Co.*, 173

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[26] *See*, *e.g.*, *Molly C.*, 2024 WL 4850813, at *6; *Raymond v. Mitchell*, No. 9:18-CV-1467 (GTS/MJK), 2024 WL 2941847, at *7 (N.D.N.Y. June 11, 2024).

[27] *Daubert*, 509 U.S. at 588 (quotation omitted).

[28] *See also Amorgianos v. Natl. R.R. Passenger Corp.*, 303 F.3d 256, 266 (2d Cir. 2002) ("the bright-line 'general acceptance' test established in *Frye* was at odds with the 'liberal thrust' of the Federal Rules of Evidence . . . [but] the Supreme Court has made clear that the district court has a 'gatekeeping' function under Rule 702 – it is charged with the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." (internal quotations omitted)).

F.3d 1076, 1081 (8th Cir. 1999) ("In *Daubert*, the Supreme Court determined that the *Frye* test . . . had been superseded by Rule 702 of the Federal Rules of Evidence.").[29]

Because Rule 702 controls the admissibility analysis, courts must apply the steps the rule now describes. *See* 28 U.S.C. § 2072(b); *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 621 (2016), *abrogated on other grounds by Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 231 (2022) (addressing admissibility of expert testimony using Rule 702). Reading the rule to favor admission would fail to hold the proponent responsible for establishing that the expert's analysis more likely than not meets all Rule 702 requirements.[30] This conception improperly flips the burden to the opposing party. When cases suggest that courts can presume experts' admissibility and tilt the gatekeeping analysis,

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[29] Judge Schroeder warns against reliance on *Daubert's* "liberal thrust" statement given Rule 702's status as the governing authority: "statements as to the 'liberal thrust' of Rule 702 and 'flexible' standard trial judges should apply must be contextualized. Expansion of the gatekeeper inquiry is necessarily cabined by the elements of Rule 702." Schroeder, *supra* n.12, at 2060. *See also* Capra (2021), *supra* n.13, at 11, n.4 (declaring that it "is decidedly not the case" that expert testimony can be described as "presumptively admissible").

[30] Indeed, as one district court observed, "[t]he Advisory Committee on Evidence Rules proposed the changes in response to court decisions that admitted expert testimony too liberally." *In re Terrorist Attacks on September 11, 2001*, 2024 WL 5077293, at *3.

"[t]hese statements misstate Rule 702[.]"[31] To correct these misconceptions and prevent similar misunderstandings, this Court should explain that ignoring or altering the preponderance of evidence standard constitutes a misapplication of Rule 702.

C. Admitting Opinion Testimony Under Rule 702 Requires an Affirmative Showing that the Rule's Criteria Are More Likely Than Not Met.

The text of Rule 702 sets out the requirements for admission: the proponent must demonstrate by a preponderance of the evidence that the elements described in subparts (a) – (d) are fulfilled. To say, as some district courts do, "in accordance with the liberal admissibility standards of the Federal Rules of Evidence, only serious flaws in reasoning or methodology will warrant exclusion" is wrong. *See Johnson v. U.S.*, No. 21-CV-2851 (MKB), 2024 WL 1246503, at *4 (E.D.N.Y. Jan. 16, 2024) (quotation omitted). Amended Rule 702 rejects this misconception.[32]

Problematically, courts have continued to repeat statements that exclusion requires "serious flaws in reasoning or methodology" even following adoption of

[31] Schiltz, *supra* n.14, at 6; *see also* Capra & Richter (2022), *supra* n.15, at 25 (such statements "are wrong as a simple matter of textual analysis.").

[32] The amendment "clarify[ies] that expert testimony should not be permitted unless the judge finds by a preponderance of the evidence that each of the prerequisites are met." Minutes - Committee on Rules of Practice & Procedure (Jan. 5, 2021), *supra* n.13, at 25.

the 2023 amendment.[33] But this approach is inconsistent with Rule 702 because it allows admission even when the court has not found all the rule's requirements satisfied. The 2023 amendment, which brought the phrase "if the proponent demonstrates to the court more likely than not" into the text of Rule 702, made the "only serious flaws in reasoning or methodology will warrant exclusion" gatekeeping conception irreconcilable with the controlling standard. *See In re Terrorist Attacks on September 11, 2001*, 2024 WL 5077293, at *3 ("Courts must withhold endorsement from expert witnesses who fail to meet Rule 702's standards"); *see also In re Johnson & Johnson Talcum Powder Products Marketing, Sales Practices & Products Liability Litigation*, No. 16-2738 (MAS) (RLS), 2024 WL 1914881, at *3 (D.N.J. Apr. 30, 2024) ("These clarifications [in the 2023 amendments] not only guide courts in the future, but outline a consistent and concerning misapplication of Rule 702 by federal courts in the *past.*") (emphasis original). To prevent further repetition of district courts' mistake, the Court should declare this conception invalid.

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[33] *See, e.g.*, *Access Bus. Grp. Int'l, LLC v. Refresco Bev. US Inc.*, No. 21-cv-10779 (AS) 2023 WL 8280139, at *1-*2 (S.D.N.Y. Nov. 30, 2023); *B & R Supermarket*, 2024 WL 4252031, at *3; *Hasemann*, 2024 WL 1282368, at *8 (E.D.N.Y. Mar. 25, 2024).

4. Rule 702 Gatekeeping Is an Indispensable Judicial Function.

Gatekeeping is a critical court function that safeguards the integrity of jury trials. Contrary to Plaintiffs' and some district courts' contentions that cross-examination is the solution when an expert offers suspect reasoning,[34] the recognized "key to *Daubert* is that *cross-examination alone is ineffective* in revealing nuanced defects in expert opinion testimony and that the trial judge must act as a gatekeeper *to ensure that unreliable opinions don't get to the jury in the first place*."[35] By definition, expert testimony "is outside the realm of an ordinary juror's knowledge," and so the juror's lay "knowledge and life experience offers little value in determining whether an expert is telling the truth about a matter

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[34] Plaintiffs' Br. at 55 ("vigorous cross-examination, presentation of evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."); *see also B & R Supermarket*, 2024 WL 4252031, at *8 (quoting *Daubert*, 509 U.S. at 596) ("[v]igorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."); *Moreland v. Sportsman's Guide, Inc.*, No. 1:17-CV-1034-LJV-JJM, 2024 WL 3374360, at *2 (W.D.N.Y. Mar. 29, 2024) (same); *Swanson*, 2024 WL 967331, at *7 (same).

[35] Minutes of the Meeting of May 3, 2019, Advisory Comm. on Evidence Rules at 23, in ADVISORY COMMITTEE ON EVIDENCE RULES OCTOBER 2019 AGENDA BOOK 73 (2019), https://www.uscourts.gov/sites/default/files/advisory_committee_on_rules_of_evidence_-_final_draft_agenda_book.pdf (emphasis added).

requiring specialized study or training."[36] This information gulf impeding jurors' ability to identify expert missteps or exaggerations exists not just with respect to assessing the expert's chosen methodology, but also in analyzing the sufficiency of an expert's factual basis and application of the methodology.[37]

The Advisory Committee recognized jurors' limitations and structured Rule 702 to protect the truth-finding purpose of jury trials:

> Judicial gatekeeping is essential because just as jurors may be unable, due to lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert's basis and methodology may reliably support.

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[36] U.S. Chamber Institute for Legal Reform, *Fact or Fiction: Ensuring the Integrity of Expert Testimony*, at 3 (Feb. 2021), https://instituteforlegalreform.com/wp-content/uploads/2021/02/Expert-Testimony-Paper-FINAL.pdf. *See also In re Terrorist Attacks on September 11, 2001*, 2024 WL 5077293, at *3 ("Because 'jurors may lack the specialized knowledge' to evaluate the quality of a witness's opinion and its limitations, it is not enough to 'presume[]' 'expert testimony . . . admissible' and relegate issues of reliability to cross examination.").

[37] Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Forensic Evidence, Daubert and Rule 702* (Apr. 1, 2018) at 50 *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2018 AGENDA BOOK 49 (2018), https://www.uscourts.gov/sites/default/files/agenda_book_advisory_committee_on_rules_of_evidence_-_final.pdf (uscourts.gov) ("The same 'white lab coat' problem – that the jury will not be able to figure out the expert's missteps – would seem to apply equally to basis, methodology and application.").

Fed. R. Evid. 702 advisory committee's note to 2023 amendment. The responsibility to safeguard the integrity of trial proceedings falls on courts to enforce Rule 702 and ensure that an expert fulfills the admissibility criteria. *See, e.g.*, *Knight v. Avco Corp.*, No. 4:21-CV-00702, 2024 WL 3746269, at *6 (M.D. Pa. Aug. 9, 2024) ("because 'expert evidence can be both powerful and quite misleading,' courts have recognized that 'the importance of the gatekeeping function cannot be overstated.'") (quoting *Sardis*, 10 F. 4th at 283). The Court should remind district courts in this Circuit of the critical nature of their gatekeeping role.

5. The District Court's Admissibility Analysis Comports with Rule 702.

The District Court properly found that the proffered experts' opinions "[did] not pass muster under Fed. R. Evid. 702 because [they were not] 'based on sufficient facts or data,' [were] not 'the product of reliable principles and methods' and [did] not 'reflect[] a reliable application of the principles and methods to the facts of the case.'" *See* A393, A398. The District Court reached this conclusion on William Vigilante, Jr. after finding his causation opinions to be "wholly disconnected from the facts of this particular case due to his own lack of knowledge about how the gun discharged" and "not based on [the] specifics of Plaintiff's incident." A395 – 96. With respect to Plaintiffs' other expert, James Tertin, the District Court's analysis of the factual foundation for his opinions

showed a failure to investigate the factual circumstances of the incident – no inspection of the holster, no understanding of the position of Mr. Colwell's hands at the time of discharge, and no information about what caused the pistol to discharge. A396 – 97. Because his opinions did not draw upon or relate to the circumstances at issue in Mr. Colwell's incident, the District Court could only conclude that Mr. Tertin's causation opinion lacked a sufficient factual basis. A398.

Plaintiffs, as the proponents of this opinion testimony, under Rule 702 bear the burden of proving that their experts employed reliable methodologies, had a sufficient factual basis, and reliably applied their methodologies to the facts of this case. Plaintiffs simply failed to carry that burden. The opinions have no grounding in the factual circumstances of Plaintiffs' incident,[38] and without a showing that the opinions rested on an adequate factual foundation they did not meet Rule 702's admissibility requirements. *See Harris*, 92 F.4th at 303. And because the experts' causation opinions could not be connected to the facts of the case, Plaintiffs could not establish that the experts reliably applied their methodologies as Rule 702(d) demands. *See Doucette v. Jacobs*, 106 F.4th 156, 170 (1st Cir. 2024) (finding expert's "failure to ground her conclusions in the

[38] *See* A396 ("Mr. Vigilante's opinion in this case is not based on specifics of Plaintiff's incident"); ("Mr. Tertin does not know what caused Plaintiff's pistol to Discharge").

specifics of the record – or even to consider key aspects of the record – meant that the report fell short of Rule 702[d]'s requirements").

CONCLUSION

Although district courts in this Circuit bring considerable inconsistency to the gatekeeping function, here the District Court correctly employed Rule 702's admissibility criteria to evaluate and ultimately exclude the proffered opinion testimony. But Plaintiffs' arguments, which repeat misconceptions commonly seen in expert admissibility rulings, show the need for this Court to provide corrective direction that courts must fulfill their gatekeeping responsibility in accordance with Rule 702's explicit directives. As Judge Schroeder has explained:

> No doubt, in some cases the courts are misstating and misapplying Rule 702. Correction by the courts of appeals will go a long way to remedying the most obvious outliers.[39]

Litigants and courts would benefit from this Court's caution against reliance on caselaw statements that disregard the preponderance of the evidence test or fail to consider the sufficiency of an expert's factual basis or methodological application as admissibility issues. Instead, district courts should apply Rule 702 as written.

[39] Schroeder, *supra* n.12, at 2059.

Dated: May 16, 2025

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Second Circuit Local Rule 32.1(a)(4)(A) because it contains **6873 words** (fewer than 7000), excluding the parts of the brief exempted by Rule 32(f).

This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced 14-point Times New Roman font using Microsoft Word.

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2025, I electronically filed the foregoing amicus brief with the Clerk of Court for the United States Court of Appeals for the Second Circuit using the CM/ECF System, which will send a notification of electronic filing to all counsel of record who are registered CM/ECF users.

Dated: May 16, 2025

/s/ Lee Mickus