

Nos. 25-10810, 25-10812

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ROBERT LANG,

Plaintiff/Appellee – Cross-Appellant,

v.

SIG SAUER, INC.,

Defendant-Appellant – Cross-Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia
Case No. 1:21-CV-04196-ELR (Hon. Eleanor L. Ross)

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

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Lang v. Sig Sauer, Inc.
Nos. 25-10810, 25-10812

**CERTIFICATE OF INTERESTED PARTIES AND CORPORATE
DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Circuit Rules 26.1-1 and 26.1-2(b), the undersigned counsel represents that, in addition to the Certificates of Interested Parties already filed, the following have an interest in the outcome of this appeal:

1. Lawyers for Civil Justice, *Amicus Curiae*
2. Mickus, Lee, *Counsel for Amicus Curiae*

Pursuant to Federal Rule of Appellate Procedure 29(c)(1), counsel for Lawyers for Civil Justice also represents as follows:

1. The *amicus curiae* is a not-for-profit corporation.
2. The *amicus curiae* has no parent corporation.
3. There is no publicly held corporation that owns 10% or more of the *amicus curiae*'s stock.

Dated: May 22, 2025

/s/ Lee Mickus

Lee Mickus
Attorney for Amicus Curiae

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STATEMENT OF INTEREST¹

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

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 Eleventh 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

https://static1.squarespace.com/static/640b6c7e5b8934552d35ab05/t/64872bd8aa883f4ddeae6382/1686580184749/lcj_public_comment_on_rule_702_amendment_supt_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).

⁴See 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 issue presented here lies 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 case shows the need for this Court to provide guidance that judges must stop evaluating expert admissibility based on caselaw that conflicts with Rule 702's language, and that gatekeeping determinations must comport with the rule.

This brief will assist the Court in addressing the issues presented because here the District Court employed some of the same misunderstandings of Rule 702's admissibility criteria that motivated the 2023 amendment. This brief will show how the District Court's analysis leaned heavily on problematic caselaw statements rather than the text of Rule 702, which resulted in application of an incorrect legal standard. Because of this error, the District Court admitted the experts' causation opinions without applying the necessary gatekeeping scrutiny. Accordingly, LCJ has simultaneously filed a motion for leave to file its *amicus* brief along with this proposed *amicus* brief in support of Defendant-Appellant Sig Sauer, Inc., urging affirmance with clarifying guidance.

STATEMENT OF THE ISSUES

Amicus curiae adopts the Statement of the Issues set forth in Defendant's Brief, although LCJ's Brief will address only Issue 1.

SUMMARY OF ARGUMENT

Federal Rule of Evidence 702 was amended in 2023 to correct certain critical legal 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, many courts improperly applied 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 incorrectly that the sufficiency of the factual basis for an expert's opinion is not an

admissibility issue for the court to decide.⁵ Also, some courts still assert that Rule 702 favors admission over exclusion or otherwise allows admission upon a less stringent showing than the preponderance of evidence standard.⁶

Plaintiff argued that the District Court need not consider the factual foundation of his experts' causation opinions in deciding whether they were admissible under Rule 702.⁷ The District Court adopted that erroneous narrow

⁵ See, e.g., *Blue Chip All., LLC v. Chetu, Inc.*, No. 0:22-CV-61602, 2025 WL 50391, at *7 (S.D. Fla. Jan. 8, 2025) (“as a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility”) (quotation omitted); *CSX Transp., Inc. v. Gen. Mills, Inc.*, No. 1:14-CV-201-TWT, 2024 WL 3089652, at *9 (N.D. Ga. June 21, 2024) (“as long as a logical basis exists for an expert's opinion ... the weaknesses in the underpinnings of the opinion[] go to the weight and not the admissibility of the testimony.”) (quotation omitted); *Polk v. Gen. Motors LLC*, No. 3:20-CV-549-MMH-LLL, 2024 WL 326624, at *10 (M.D. Fla. Jan. 29, 2024) (objection challenging the adequacy of expert's factual basis due to no case-specific testing or inspection of the subject vehicle “goes to the weight of his testimony and not its admissibility.”).

⁶ See, e.g., *SFR Servs., LLC v. Am. Coastal Ins. Co.*, No. 2:22-CV-505-JLB-NPM, 2025 WL 436714, at *4 (M.D. Fla. Feb. 7, 2025) (“application of his methodology is not so unreliable that the Court should exclude it out of hand.”); *Brown v. SharkNinja Operating, LLC*, 749 F. Supp. 3d 1342, 1355 (N.D. Ga. 2024) (admitting expert's testimony because the court “cannot conclusively determine that his opinion fails to fit with the facts of the case.”) (quotation omitted).

⁷ Plaintiff's Response to Defendant's Motion to Exclude and/or Limit the Testimony [sic] William Vigilante, Jr., Ph.D, R.35 at 15-16 (“An expert's alleged failure to review certain materials is insufficient to show an expert's otherwise reliable methods are faulty. Indeed, in most cases, objections to the inadequacies of a study are more appropriately considered an objection going to the weight of the evidence rather than its admissibility.”) (quotation omitted); Plaintiff's Response to Defendant's Motion to Exclude and/or Limit the Testimony of James

conception of its gatekeeping responsibility, and dismissed Defendant’s challenges to the experts’ factual bases as “not the proper subject of a motion to exclude; rather they are a proper subject for cross-examination of Plaintiff’s experts at trial.”⁸ The District Court did not consider or decide whether the requirements of Rule 702(b) had been established by a preponderance of evidence.⁹ When revisiting its gatekeeping analysis post-trial, the District Court again brushed aside Defendant’s arguments as merely raising credibility and not admissibility issues.¹⁰

The District Court failed to recognize that Rule 702(b) requires the judge to consider and find that certain prerequisites are established before admitting opinion testimony. Moreover, district courts within the Eleventh Circuit have taken inconsistent and often problematic approaches to challenges to expert testimony since the 2023 amendment became effective. Accordingly, there is great need for this Court to provide guidance. To meet this need, the Court should clarify that the

Tertin, R.34 at 21 (same). Pursuant to 11th Cir. R. 28-5, references to the record (“R”) are to the District Court docket entries, followed by the specific page(s) of the document being cited.

⁸ September 28, 2023 Order, R.46 at 25.

⁹ *Id.* at 25 – 26, 29 -30.

¹⁰ February 6, 2025 Order, R.179 at 13 – 14; *see also* Defendant, Sig Sauer, Inc.’s Renewed Motion for Judgment as a Matter of Law, R.151 at 13 – 19 (challenging admissibility of Tertin and Vigilante opinions as “lacking any reliable foundation sufficient to warrant admission under Rule 702”).

language of Rule 702 articulates the appropriate admissibility analysis judges within this Circuit must use.

ARGUMENT AND CITATION OF AUTHORITIES

THE ELEVENTH 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 often 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. Ongoing repetition of these misconceptions even in the aftermath of the corrective 2023 amendment – including by the District Court here – 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 exclusion. 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 Court¹¹ and enacted under the Rules Enabling Act, Rule 702 supersedes 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).¹² 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.”¹³

¹¹ See Communication from the Chief Justice Transmitting Amendments to the Federal Rules of Evidence (Apr. 24, 2023) at 1, 7, <https://www.govinfo.gov/content/pkg/CDOC-118hdoc33/pdf/CDOC-118hdoc33.pdf>.

¹² 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*”).

¹³ 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.a.1.

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. Federal Rule of Evidence 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 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 Courts Improperly Repeat.

Rule 702 was amended effective December 1, 2023, to correct erroneous practices in which courts failed to consider all of the admissibility prerequisites

and applied an improper burden of proof. 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.*¹⁴

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.¹⁵

In the aftermath of the 2023 amendment, it is “certainly incorrect” for a court to declare that the sufficiency of facts or data supporting an expert opinion “is a

¹⁴ 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).

¹⁵ 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).

question for the jury, not the court.”¹⁶ Likewise, the 2023 amendment makes “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.”¹⁷

The course correction established by the 2023 amendment has been noted by several courts.¹⁸ 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*

¹⁶ 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* (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.

¹⁷ *Id.*; *see also id.* at 24 (“the wrong-ness of these statements is absolutely apparent from the inclusion of the preponderance standard in the text.”).

¹⁸ 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., In re Deepwater Horizon Belo Cases*, No. 3:18CV2364, 2024 WL 3176927, at *17 (N.D. Fla. June 25, 2024), *report and recommendation adopted*, No. 3:18CV2364, 2024 WL 4347872 (N.D. Fla. Sept. 30, 2024) (quoting Fed. R. Evid. 702 advisory committee’s note to 2023 amendment that change was motivated by rulings that erroneously disregard Rule 702’s enumerated admissibility requirements); *Ballew v. StandardAero Bus. Aviation Servs., LLC*, No. 2:21-cv-747-JLB-NPM, 2024 WL 245803, at *3 (M.D. Fla. June 23, 2024) (same). But recognition of the amendment’s corrective effects is far from universal. *See* cases cited at n.5 and n.6, *supra*.

Onglyza (Saxagliptin) and Kombiglyze (Saxagliptin and Metformin) Prods. Liab. Litig., 93 F.4th 339, 348 n.7 (6th Cir. 2024) (emphasis added); *see also Sardis v. Overhead Door Corp.*, 10 F.4th 268, 283-84 (4th Cir. 2021) (observing that the then-proposed 702 amendment rejects “incorrect” decisions finding expert’s factual basis and methodological application are issues of weight rather than admissibility). Similarly, the Fifth Circuit 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);. Most recently, on May 21, 2025 the Federal Circuit, ruling *en banc*, noted the purpose of the 2023 amendment and reversed a district court’s denial of a motion for new trial due to its erroneous admission of expert opinion testimony that “was not based on sufficient facts or data, as required by Rule 702(b).” *EcoFactor, Inc. v. Google LLC*, No. 2023-1011, 2025 WL 1453149, at *9 (Fed. Cir. May 21, 2025). The Federal Circuit found that the district court failed “to fulfill its responsibility as gatekeeper by allowing the expert to testify at trial.” *Id.*

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);¹⁹ *see 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 in this Circuit Often Misunderstand the Judicial Gatekeeping Responsibility Because They Rely on Caselaw That Does Not Conform to Rule 702.

Some district courts in the Eleventh Circuit do not recognize that Rule 702 sets the admissibility standard and supersedes pre-amendment rulings when they are incompatible with the rule’s amended text. This includes the District Court here. 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.” *Ballew v. StandardAero Bus. Aviation Servs.*,

¹⁹ 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).

LLC, No. 2:21-cv-747-JLB-NPM, 2024 WL 245803, at *3 (M.D. Fla. June 23, 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.²⁰

A. Rule 702’s Enumerated Reliability Factors Identify Admissibility Determinations Courts Must Decide.

Courts in this Circuit often repeat the misconception that the sufficiency of an expert’s factual basis will “go to the weight and credibility of his testimony, not to its admissibility.” *See, e.g., CSX Transp., Inc. v. Gen. Mills, Inc.*, No. 1:14-CV-201-TWT, 2024 WL 3089652, at *9 (N.D. Ga. June 21, 2024).²¹ The District

²⁰ *See* Schroeder, *supra* n.13, at 2060:

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 (2021), *infra* n.25, 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.”).

²¹ For several additional recent examples, *see* n.5, *supra*.

Court here quoted similar language in ruling that Defendant's challenges that the experts' causation opinions lacked adequate factual foundation "are not the proper subject of a motion to exclude" and would be disregarded as issues for cross-examination rather than judicial gatekeeping.²² But even though this view of an expert's factual foundation is often repeated in the caselaw, it cannot be reconciled with Rule 702.

Both the 2000 and 2023 amendments 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

²² Sept. 28, 2023 Order, R.46 at 25-26. The quotations the District Court used to support its interpretation that an expert's factual basis is not an admissibility consideration have pre-2000 caselaw statements at their root. The statement quoted from *Carrizosa v. Chiquita Brands Int'l, Inc.*, 47 F.4th 1278, 1323 (11th Cir. 2022) originated in a 1987 decision from the Fifth Circuit, *Viterbo v. Dow Chem. Co.*, 826 F.2d 420. The District Court's quotation from *Sorrels v. NCL (Bahamas) Ltd.*, 796 F.3d 1275, 1285 (11th Cir. 2015) comes from *Hurst v. United States*, 882 F.2d 306, 311 (8th Cir. 1989). The same is true for the other caselaw statements cited by the District Court – they stem from pre-2000 rulings. The age of these statements is important because *subparts (b) and (d) were not added to Rule 702 until the 2000 amendment*. 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.").

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).²³ Rule 702(b) specifies that courts must consider 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.”²⁴

The 2023 amendment corrects lingering misunderstandings about the nature of Rule 702’s listed elements.²⁵ It rejects suggestions that the sufficiency of an

²³ 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 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).

²⁴ 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>.

²⁵ As the Advisory Committee explains:

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 court” within Rule 702 rejects the notion that judges should defer to the jury on the sufficiency of an expert’s factual foundation and renders that thinking 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

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. Commenting on research revealing the breadth of the problem, the Reporter to the Advisory Committee similarly observed:

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).

‘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.’²⁶

B. The District Court Abused Its Discretion Because It Allowed the Experts’ Causation Opinions Without Determining That the Rule 702(b) and 702(d) Admissibility Requirements Had Been Met.

The District Court fell into the trap of relying on caselaw statements to set its gatekeeping parameters rather than applying Rule 702 as written. As a result, it applied the wrong legal standard and erroneously failed to determine whether the experts’ causation opinions fulfilled the mandates of Rule 702(b) and 702(d).

An abuse of discretion occurs when the court does not apply the correct legal standard to a disputed issue. *Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1134-35 (11th Cir. 2005) (vacating based on abuse of discretion due to “misapplication of the legal standard”); *see also Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1254 (11th Cir. 2005) (“application of an improper legal

²⁶ *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).

standard is never within a district court’s discretion.”) (quotation omitted). Here, the District Court failed to assess the experts’ causation opinions in accordance with Rule 702.

By dismissing Defendant’s contention that the experts’ causation opinions lacked sufficient factual basis as merely arguments that “go to the weight of that expert’s testimony, not its admissibility,”²⁷ the District Court did not consider whether the requirements of Rule 702(b) were met before allowing the experts to present their challenged causation opinions. This was a failure of the court’s gatekeeping obligation. *See Harris*, 92 F.4th at 303. And because the experts’ causation opinions could not be connected to the facts of the case, Plaintiff did 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 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”). The District Court perpetuated these legal errors when it refused to adjust its thinking to meet Rule 702 admissibility requirements even though Defendant’s post-trial motions highlighted the 2023 amendment.²⁸

²⁷ Sept. 28, 2023 Order, R.46 at 25-26, 29-30.

²⁸ Feb. 6, 2025 Order, R.179 at 12-14; Defendant, Sig Sauer, Inc.’s Renewed Motion for Judgment as a Matter of Law, R.151 at 13.

It is “incorrect” under Rule 702 for gatekeeping rulings to defer to the jury rather than assess as a matter of admissibility whether expert opinions are supported by a sufficient factual basis or reflect a reliable methodological application to the facts of the case. Fed. R. Evid. 702 advisory committee’s note to 2023 amendment. This was true before the clarifying 2023 amendment. *Sardis*, 10 F. 4th at 282 - 84 (observing that the advisory committee’s note to the then-proposed Rule 702 amendment “clearly echoes the existing law” and that reliability considerations are “*preconditions* to the admissibility of expert testimony” that are “entirely distinct” from credibility) (emphasis original); *EcoFactor*, 2025 WL 1453149, at *4 (determining reliability, including sufficient factual basis under Rule 702(b), “is an essential prerequisite” to admission under both 2000 and 2023 versions of Rule 702). And it is true after the 2023 amendment changed the text of Rule 702 to correct earlier misunderstandings.²⁹

C. 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. District courts in this

²⁹ See Fed. R. Evid. 702 advisory committee’s note to 2023 amendment; see also Minutes - Committee on Rules of Practice & Procedure (Jan. 5, 2021), *supra* n.14, at 25 (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.”).

Circuit have often suggested that Rule 702 should be applied in a manner that prefers admission over exclusion of a proffered expert's testimony.³⁰ This approach misapplies Rule 702.³¹

Because Rule 702 controls the admissibility analysis, courts must apply the process the rule 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 Org.*, 597 U.S. 215, 231 (2022) (addressing admissibility of expert testimony using Rule 702). Reading the rule to favor admission would not hold the proponent responsible for establishing that the expert's analysis more likely than not meets all Rule 702 requirements. This conception improperly flips the burden to the opposing party. When cases suggest that courts can tilt the gatekeeping analysis, “[t]hese statements misstate Rule 702[.]”³² 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.

³⁰ *See, e.g.*, cases cited in n.6, *supra*.

³¹ *See* Capra (2021), *supra* n.25, at 11, n.4 (declaring that it “is decidedly not the case” that expert testimony can be described as “presumptively admissible”).

³² Schiltz, *supra* n.15, at 6; *see also* Capra & Richter (2022), *supra* n.16, at 25 (such statements “are wrong as a simple matter of textual analysis.”).

4. Rule 702 Gatekeeping Is an Indispensable Judicial Function.

Gatekeeping is a critical court function that safeguards the integrity of jury trials. Contrary to Plaintiff's and some district courts' contentions that cross-examination is the solution when an expert offers suspect reasoning,³³ 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.*"³⁴ 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 requiring specialized study or training."³⁵ This information gulf impeding jurors'

³³ See, e.g., Plaintiff's Response to Defendant's Motion to Exclude and/or Limit the Testimony [sic] William Vigilante, Jr., Ph.D, R.35 at 15 ("vigorous 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.") (quotation omitted); Plaintiff's Response to Defendant's Motion to Exclude and/or Limit the Testimony of James Tertin, R.34 at 21 (same); see also *Blue Chip All., LLC v. Chetu, Inc.*, 2025 WL 50391, at *4 (same); *CSX Transp.*, 2024 WL 3089652, at *11 (same).

³⁴ 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).

³⁵ U.S. Chamber Institute for Legal Reform, *Fact or Fiction: Ensuring the Integrity of Expert Testimony*, at 3 (Feb. 2021), <https://instituteforlegalreform.com/wp->

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.³⁶

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.

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*,

[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.”).

³⁶ 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.”).

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.

CONCLUSION

District courts in this Circuit, including the District Court here, too often use misconceptions of the admissibility standard in deciding whether to admit expert opinions. The inconsistent approaches seen in rulings on challenges to opinion testimony 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.³⁷

Litigants and courts would benefit from this Court’s caution against reliance on caselaw statements that fail to consider the sufficiency of an expert’s factual basis or methodological application as admissibility issues or disregard the

³⁷ Schroeder, *supra* n.13, at 2059.

preponderance of the evidence test. Instead, district courts should apply Rule 702 as written.

Dated: May 22, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rules 29(a)(5) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains **6,116 words** (fewer than 6,500), 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 22, 2025, I electronically filed the foregoing amicus brief with the Clerk of Court for the United States Court of Appeals for the Eleventh 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 22, 2025

/s/ Lee Mickus _____