No. 24-7092

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Erick Jensen,
Plaintiff-Appellant,

v.

Camco Manufacturing LLC, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona, No. 23-cv-00266 (Hon. David G. Campbell)

OPPOSED MOTION OF LAWYERS FOR CIVIL JUSTICE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE CAMCO MANUFACTURING, LLC

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Lawyers for Civil Justice ("LCJ") respectfully moves this Court, pursuant to Federal Rule of Appellate Procedure 29(a)(2), for leave to file its *amici curiae* brief in support of Defendant-Appellee Sig Sauer, Inc.

In support of its motion, LCJ states as follows:

1. LCJ is a national coalition of corporations, defense trial lawyer organizations, and law firms. Its primary purpose is to advocate for fairness and balance in the administration of civil justice. LCJ often does so by proposing changes to the Federal Rules of Evidence and the Federal Rules of Civil Procedure, and also through the filing of *amicus curiae* briefs in cases involving the interpretation and application of rules to issues in civil litigation.

2. LCJ has expertise on the meaning, history, and application of Rule 702. LCJ was deeply involved with the rulemaking process addressing Rule 702. Specifically, LCJ submitted extensive comments and original research to the Judicial Conference Advisory Committee on Rules of Evidence, which unanimously recommended amendments to Rule 702 that became effective December 1, 2023.

3. LCJ has submitted *amicus* briefs regarding applications of Rule 702, including in the United States Supreme Court in *3M Co. v. Amador*, Case No. 21-1100, and *Monsanto Co v. Hardeman*, Case No. 21-241, as well as in this Court in *In re NFL "Sunday Ticket" Antitrust Litig.*, Case No. 24-5493. It has also submitted

amicus briefs addressing amended Rule 702 in several U.S. Courts of Appeals, including:

- *Lang v. Sig Sauer, Inc.*, Case No. 25-10810 (11th Cir.);
- *Martin v. Polaris, Inc.*, Case No. 24-5852 (6th Cir.);
- *Colwell v. Sig Sauer, Inc.*, Case No. 24-1874 (2d Cir.);
- *Ecofactor, Inc. v. Google LLC*, Case No. 2023-1101 (Fed. Cir.);
- *Rutledge v. Walgreen Co.*, Case No. 24-916(L) (2d Cir.);
- *Sprafka v. Med. Device Bus. Servs., Inc.*, Case No. 24-1874 (8th Cir);
- *Harris v. Fedex Corp. Svcs. Inc.*, Case No. 23-20035 (5th Cir.).

4. Although most of LCJ's *amicus* briefs referenced above were filed with the consent of all parties, in *Sprafka* the appellant opposed the submission of LCJ's brief. The Eighth Circuit in that case granted LCJ's motion for leave to file its *amicus* brief. *Sprafka v. Med. Device Bus. Servs., Inc.*, 139 F.4th 656, 664 (8th Cir. 2025).

5. After conferral, counsel for Defendant-Appellee indicates no opposition to this motion but counsel for Plaintiff-Appellant stated that he does oppose this motion.

6. This brief will assist the Court in addressing the issues presented because Plaintiff-Appellant's arguments seeking to overturn the district court's appropriate exclusion of the proffered expert testimony rest on fundamental

misunderstandings of Rule 702. LCJ's brief addresses the purpose of the 2023 amendment to Rule 702, how it has changed the gatekeeping analysis that has been applied by courts in the Ninth Circuit, and describes the need for this Court to provide clarifying guidance as to Rule 702's requirements.

7. Neither Defendant-Appellee nor its counsel authored this brief in whole or in part. Only LCJ's undersigned counsel prepared its content. No party or party's counsel contributed any money to LCJ or its counsel for the purpose of preparing or submitting this brief.

8. LCJ conditionally filed its proposed *amicus curiae* brief contemporaneously with this motion.

For the above reasons, LCJ respectfully request that this Court grant this motion for leave to file the proposed *amici curiae* brief in support of Defendant-Appellee that is attached hereto.

Dated: July 21, 2025

Respectfully Submitted

/s/ Lee Mickus

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 27, I certify that the referenced motion for leave complies with the type-volume limitation of Fed. R. App. P. 27(d) because it contains **558 words**. This motion complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced Times New Roman font using Microsoft Word.

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2025, I electronically filed the foregoing Motion for Leave with the Clerk of Court using the CM/ECF System, which will send a notification of electronic filing to all counsel of record who are registered CM/ECF users.

/s/ Lee Mickus

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BRIEF FOR LAWYERS FOR CIVIL JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(c)(1), Lawyers for Civil Justice provides the following disclosures:

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.

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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 revisions to 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 Evidence Rules,[3] which unanimously recommended

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[1] Appellant does not consent 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 on Evidence Rules (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. Although each element enumerated in the rule is a prerequisite to admission, LCJ found that many courts – including district courts within the Ninth Circuit – fail to recognize that the sufficiency of an expert's factual basis and the reliability of the expert's methodological application to the case facts are gatekeeping assessments that the court must decide. 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 on Evidence Rules and its 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_rul

The issues presented here lie at the core of LCJ's mission and its work on Rule 702. The 2023 amendment highlighted the court's gatekeeping role and clarified that expert testimony may be admitted *only* if the opinions fulfill *all* of Rule 702's requirements by a preponderance of the evidence. Despite this directive, many courts and litigants continue to misconstrue the applicable burden of production and admissibility criteria. District courts need guidance that their gatekeeping assessments must comport with the directives set forth in Rule 702, and that they must stop evaluating expert admissibility based on caselaw that conflicts with the rule's language.

This brief will assist the Court to address the issues presented because the District Court analyzed the expert opinions exactly as Rule 702 directs. The court found Plaintiff did not establish by a preponderance of proof that the expert employed a reliable methodology or reliably applied his methodology to the facts of the case, and so failed to fulfill the admissibility requirements of Rule 702(c) and (d). This was textbook judicial gatekeeping.

Plaintiff's arguments misunderstand Rule 702. The gatekeeping responsibility *requires* the court to examine how the expert applied his

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es_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.

methodology to meet the factual circumstances at issue and form conclusions that account for the available data points. Because the District Court's thorough analysis comports with Rule 702, LCJ submitted its motion for leave to file this *amicus* brief in support of Defendant Camco Manufacturing LLC, 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).[5] Second, many 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

[5] The Court "may look to the advisory committee's notes because they 'provide a reliable source of insight into the meaning of a rule.'" *In re Kirkland*, 75 F.4th 1030, 1043 (9th Cir. 2023) (quoting *United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002)). Where, as with Rule 702, "Congress did not amend the Advisory Committee's draft in any way . . . the Committee's commentary is particularly relevant in determining the meaning of the document Congress enacted." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 165-166 n.9 (1988).

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 carries "a presumption that expert testimony is admissible" or otherwise allows admission upon a less stringent showing than the preponderance of evidence standard.[6] Also, some courts still incorrectly perceive that assessing whether the expert's methodological application was reliable[7] and if the expert's

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[6] *See*, *e.g*., *Powers v. McDonough*, No. 2:22-CV-08357-DOC-KS, 2024 WL 3491008, at *3 (C.D. Cal. July 19, 2024); s*ee also Jones v. Riot Hospitality Grp. LLC*, 95 F.4th 730, 737 (9th Cir. 2024) ("Rule 702 should be applied with a liberal thrust favoring admission.") (quoting *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1232 (9th Cir. 2017)); *Symeonides v. Trump Ruffin Com., LLC*, No. 2:23-CV-00854-JAD-MDC, 2025 WL 1532635, at *3 (D. Nev. May 28, 2025) ("district courts are instructed to apply the rule 'with a liberal thrust favoring admission.'") (quoting *Wendell*, 858 F.3d at 1232); *Waterwatch of Or. v. Winchester Water Control Dist.*, No. 3:20-CV-01927-IM, 2025 WL 1067620, at *2 (D. Or. Feb. 20, 2025) ("In the Ninth Circuit, the *Daubert* inquiry is conducted with a liberal thrust favoring admission.") (citing *Messick v. Novartis Pharms. Corp*., 747 F.3d 1193, 1196 (9th Cir. 2014)); *In re Ripple Labs, Inc*., No. 18-cv-06753-PJH, 2024 WL 4583525, at *1 (N.D. Cal. Oct. 24, 2024) (there is a "presumption of admissibility" for proffered expert testimony).

[7] *See*, *e.g*., *Labbe' v. Dometic Corp*., No. 2:20-cv-01975-DAD-DMC, 2025 WL 1755823, at *15 (E.D. Cal. June 25, 2025) ("the court rejects defendant's arguments that Mr. Baker's testimony should be excluded for improperly applying the methodology of NFPA 921 because those arguments go to the weight of his testimony rather than its admissibility under Federal Rule of Evidence 702."); *Cadena v. American Honda Motor Co*., No. CV 18-4007-MWF, 2024 WL

factual basis is sufficient[8] are questions of credibility for the jury to weigh and not matters of admissibility that the court must decide. These conceptions of gatekeeping overlook Rule 702's explicit directives. Each element of Rule 702 provides independent grounds for exclusion. As the Advisory Committee put it, "*any* step that renders the analysis unreliable . . . renders the expert's testimony inadmissible."[9]

4005097, at *4 (C.D. Cal. July 2, 2024) ("[F]aults in the [use] of a particular methodology . . . go to weight, not the admissibility, of [an expert's] testimony.") (quoting *Tortilla Factory, LLC v. GT's Living Foods, Inc*., No. CV 17-7539-FMO (GJSx), 2022 WL 3134458, at *6 (C.D. Cal. June 9, 2022); *Feindt v. United States*, No. 22-00397, 2024 WL 1514021, at *5 -*6 (D. Haw. Apr. 8, 2024) (arguments that expert "did not reliably apply the 'grounded theory' methodology . . . go to the weight of Dr. Spira's opinions, not admissibility.").

[8] *See*, *e.g*., *Vizcarra v. Michael Stores, Inc.*, No. 23-CV-00468-NW, 2025 WL 1561530, at *4 (N.D. Cal. June 2, 2025) (argument that expert relied on non-empirical assumptions "goes to the weight, not the admissibility, of Silverman's opinions."); *Smith v. City of Oakland*, No. 19-cv-05398-JST, 2025 WL 490474, at *8 (N.D. Cal. Feb. 13, 2025) ("the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility") (citation omitted); *Grenier v. United States*, No. CV 22-00396 LEK-KJM, 2024 WL 4063909, at *3 (D. Haw. Sept. 5, 2024) ("facts that the expert relies upon for his or her opinion is not an issue of admissibility"); *Laub v. Horbaczewski*, No. LA CV17-06210 JAK (KSX), 2024 WL 3466876, at *35 (C.D. Cal. July 11, 2024) ("To the extent Plaintiffs seek to question certain aspects of the factual basis for Cumming's opinions, the appropriate vehicle for their challenge is cross-examination.").

[9] Fed. R. Evid. 702 advisory committee's note to 2000 amendment (emphasis original) (quoting *In re Paoli R.R. Yard PCB Litig*., 35 F.3d 717, 745 (3d Cir. 1994)).

Rule 702 sets forth the admissibility analysis district courts must undertake, but too often the rule's text is disregarded by district courts within this circuit. Instead, judges often lean into descriptions of gatekeeping contained in caselaw, even though they deviate from the language of the rule. Continued repetition of these misconceptions – even after the corrective 2023 amendment – shows the need for this Court's guidance. 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. The Court should repudiate the oft-repeated but erroneous assertion that Rule 702 should be applied "with a liberal thrust favoring admission."[10] Doing so will provide the necessary direction to align district courts' gatekeeping practices with Rule 702.

The District Court here correctly focused on the admissibility factors set forth in Rule 702, and concluded that Plaintiff failed to establish by a preponderance of evidence that the opinions of Dr. Bosch, Plaintiff's sole liability expert, satisfy the requirements of Rule 702(c) or Rule 702(d). This was a proper exercise of the District Court's gatekeeping responsibility.

[10] *See* cases cited at n.6, *supra*.

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

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).[11] 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[12] 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).[13]

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[11] *See also F.T.C. v. BurnLounge, Inc.*, 753 F.3d 878, 888 (9th Cir. 2014) ("The admission of expert testimony is governed by Federal Rule of Evidence 702.").

[12] *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.

[13] A federal rule is "as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988); *see also Kansas City S. Ry. Co. v. Sny Island Levee Drainage Dist.*, 831 F.3d 892, 900 (7th Cir. 2016) ("Federal Rule of Evidence 702 . . . superseded *Daubert* many years ago").

Although Rule 702 provides courts discretion to decide what expert evidence is admissible, it does not grant discretion to decide what admissibility standard to apply. Thus, "the elements of Rule 702, not the caselaw, are the starting point for the requirements of admissibility."[14]

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 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 the

[14] 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.

inquiries courts must make and the threshold courts must use when determining whether proposed opinion testimony should be allowed.

2. Rule 702 Was Amended to Scuttle the Inaccurate Gatekeeping Characterizations that Courts Have Repeated.

Rule 702 was amended to correct erroneous practices in which courts applied an improper burden of proof and failed to consider all of the admissibility prerequisites. Before the 2023 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*.[15]

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[15] 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:

> 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).

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.[16]

After the 2023 amendment it is "certainly incorrect" for a court to declare that assessing whether the expert has properly applied the chosen methodology "is a question for the jury, not the court."[17] Likewise, the changes 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."[18]

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[16] 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).

[17] 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.

[18] *Id.*

Reflecting this corrective purpose, the language of Rule 702 now emphasizes that expert testimony "may not be admitted" unless the proponent demonstrates by a preponderance of proof that the proffered opinion satisfies each of the requirements set forth in the rule. *Sprafka v. Med. Device Bus. Servs., Inc*., 139 F.4th 656, 660 (8th Cir. 2025) (quoting Fed. R. Evid. 702 advisory committee's note to 2023 amendment); *see also Sardis v. Overhead Door Corp*., 10 F.4th 268, 283 (4th Cir. 2021) (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).[19]

[19] Some district courts within the Ninth Circuit 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*., *Sullivan v. Loden,* Civil No. 21-00123 MWJS-RT, 2024 WL 4370839, at *3 (D. Haw. Oct. 2, 2024) ("But as Rule 702 makes clear, it is the proponent of the witness who bears the burden to 'demonstrate[ ] to the court that it is more likely than not that' the requirements of Rule 702 have been met.") (quoting Fed. R. Evid, 702); *Boyer v. City of Simi Valley*, No. 2:19-cv-00560-DSF-JPR, 2024 WL 993316, at *1 - *2 (C.D. Cal. Feb. 21, 2024) (excluding experts' testimony because "the Court finds that Plaintiff has not met his burden of establishing that Rule 702's requirements have been met" and observing that after enactment of the 2023 amendment "[t]he Court is required to analyze the expert's data and methodology at the admissibility stage more critically than in the past."); *Cleaver v. Transnation Title & Escrow, Inc*., No. 1:21-cv-00031-AKB, 2024 WL 326848, at *2 (D. Idaho Jan. 29, 2024) ("Effective December 1, 2023, Rule 702 clarified the proponent of expert testimony must meet

Other Circuit Courts that have addressed the 2023 amendment understand it rejects the deferential approach to gatekeeping that many courts had been using, and instead requires the court to determine that all of the admissibility prerequisites are established by a preponderance of proof. As the Eighth Circuit recently explained, under amended Rule 702, "[t]o be admissible, expert opinions must be based upon sufficient facts or data and must be the product of reliable principles and methods that have been reliably applied to the facts of the case." *Sprafka*, 139 F.4th at 660. Identifying the preponderance standard and the court as decision-maker in the text of Rule 702 became necessary "because many courts had incorrectly 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.'" *Id.* at 660 n.3 (quoting Fed. R. Evid. 702 advisory committee's note to 2023 amendment); *see also In re Onglyza (Saxagliptin) and Kombiglyze (Saxagliptin and Metformin) Prods. Liab. Litig.*, 93 F.4th 339, 348 n.7 (6th Cir. 2024) (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

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all of Rule 702's substantive standards for admissibility by a preponderance of evidence."). But recognition of the amendment's corrective effects is far from universal. *See* cases cited at n.6, n.7, and n.8, *supra*.

not admissibility.'") (quoting Fed. R. Evid. 702 advisory committee's note to 2023 amendment) (emphasis added).

If the proponent fails to establish any of the requirements listed in Rule 702 to the court, the expert opinions may not be admitted. This is seen in the Federal Circuit's recent *en banc* ruling, which observed the purpose of the 2023 amendment and reversed a district court's erroneous admission of opinion testimony that "was not based on sufficient facts or data, as required by Rule 702(b)." *EcoFactor, Inc. v. Google LLC*, 137 F.4th 1333, 1345 (Fed. Cir. 2025). This Rule 702 element, like the others, is "an essential prerequisite," and so the district court's decision to allow the expert's testimony failed "to fulfill its responsibility as gatekeeper." *Id*. at 1339, 1346. Similarly, the Fifth Circuit found that a district court "abdicated its role as gatekeeper" by allowing an 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). Amended Rule 702 demands "that all of the requirements set forth in the rule must be established, and the expert opinions are properly excluded if any one of them is lacking." *Sprafka*, 139 F.4th at 660.

3. The Court Should Reject Caselaw-Based Conceptions of the Judicial Gatekeeping Responsibility That Do Not Conform to Rule 702.

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

Courts in this Circuit often mistakenly draw on prior opinions to conclude that contentions that an expert improperly applied the methodology to the facts of the case "go to the weight of [the expert's] testimony rather than its admissibility under Federal Rule of Evidence 702." *E.g.*, *Labbe' v. Dometic Corp*., No. 2:20-cv-01975-DAD-DMC, 2025 WL 1755823, at *15 (E.D. Cal. June 25, 2025) (citing *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1048 (9th Cir. 2014)). Similarly, courts regularly reiterate the misconception that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility[.]" *E.g.*, *Fair v. King Cty.*, Case No. 2:21-cv-01706-JHC, 2025 WL 1031274, at *12 (W.D. Wash. Apr. 7, 2025) (quoting *Hangarter v. Provident Life & Accident Ins. Co*., 373 F.3d 998, 1017 n.14 (9th Cir. 2004)). These statements have been carried forward from prior decisions, but they cannot be squared 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).[20] Courts are directed by Rule 702(b) and (d) to consider during the gatekeeping process whether "sufficient facts or data" underlies the expert's opinion and if the expert "reliably applied"[21] the methodology to the facts of the case. By adding these explicit requirements, 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 assertions found in caselaw

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[20] *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).

[21] After the 2023 amendment, Rule 702(d) requires that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case."

[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:

that the application of the expert's methodology and the sufficiency of the opinions' factual basis go "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 and methodological application to be "questions of weight and not admissibility."). The presence of the phrase "demonstrates to the court" within Rule 702 renders the notion that judges should defer to the jury on these issues 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]

> 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.

[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),

This Court should help judges within the Ninth Circuit understand that challenges to the adequacy of the expert's methodological application or factual foundation cannot be dismissed as mere credibility concerns. It can do so by providing explicit guidance that trial judges must determine that all elements of Rule 702 have been established by a preponderance of evidence before allowing admission of opinion testimony.[25] In short, this Court should make it clear that caselaw statements that are inconsistent with Rule 702's text are not good law and should not influence how courts undertake gatekeeping.[26]

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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).

[26] *See* Schroeder, *supra* n.14, 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), *supra* n.15, 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.").

B. Rule 702 Does Not Prefer Admission Over Exclusion.

Rule 702 does not allow courts to put a judicial thumb on the admissibility scale. Many courts in this Circuit have suggested that Rule 702 should be applied as a "liberal" standard that prefers admission over exclusion of expert testimony.[27] This understanding of the Rule 702 standard is wrong.

Although *Daubert* describes the Federal Rules of Evidence as generally having a "liberal thrust" that relaxes "the traditional barriers to opinion testimony,"[28] 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.[29] In fact, the

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[27] *See* cases cited at n.6, *supra*.

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

[29] *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).

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 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.").[30]

This Court has made the mistake of approving a less demanding admissibility standard than Rule 702 specifies. Most recently, this Court declared that "slight deference to experts with borderline opinions [is] proper under *Daubert*." *Hardeman v. Monsanto Co*., 997 F.3d 941, 962 (9th Cir. 2021) (quotation omitted). This inaccurate conception arose not from interpreting Rule 702, but from the Court's attempt to distill a policy preference out of language in the *Daubert* opinion. *Id*. Alongside this attempted extrapolation, however, this Court acknowledged that clarification of the expert admissibility standard may come: "The Supreme Court has not directed courts to follow a different rule since it first decided *Daubert* almost 28 years ago." *Id*. By incorporating the phrase "if

[30] 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.14, at 2060. *See also* Capra (2021), *supra* n.15, at 11, n.4 (declaring that it "is decidedly not the case" that expert testimony can be described as "presumptively admissible").

the proponent demonstrates to the court that it is more likely than not" into the text of Rule 702 through an amendment adopted under the Rules Enabling Act, the Supreme Court has now given the direction this Court has been awaiting.[31]

Amended Rule 702 leaves no room for giving "slight deference to experts," much less presuming that opinion testimony is admissible.[32] Because Rule 702 controls the admissibility analysis, courts must apply all 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.[33] This misconception improperly flips the burden to the opposing party.

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[31] *See* Capra & Richter (2022), *supra* n.17, at 24 ("the wrong-ness of these statements is absolutely apparent from the inclusion of the preponderance standard in the text.").

[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.15, at 25.

[33] Indeed, as one district court observed, "[t]he Advisory Committee on Evidence Rules proposed the changes in response to court decisions that admitted expert

When cases suggest that courts can presume experts' admissibility and tilt the gatekeeping analysis to favor acceptance of proffered opinion testimony, "[t]hese statements misstate Rule 702[.]"[34] To correct the widely held misunderstanding that the gatekeeping analysis should favor admitting proffered expert testimony, this Court should clarify that judges cannot ignore or alter Rule 702's preponderance of evidence standard.

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

Plaintiff's criticisms of the District Court's ruling rest on a mistaken understanding of judges' gatekeeping responsibility. Rule 702 "only allows an expert to testify" when the opinion meets *all three* enumerated reliability criteria – sufficient factual basis, reliable methodology, and reliable application to the facts of the case – in addition to being helpful and offered by a qualified expert. *Baker v. Blackhawk Mining, LLC*, ___ F. 4th ___, No. 24-5490, 2025 WL 1733399, at *3 (6th Cir. June 23, 2025). Plaintiff, as the proponent of the proffered opinion testimony, under Rule 702 bears the burden of proving these elements were

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testimony too liberally." *In re Terrorist Attacks on September 11, 2001*, 2024 WL 5077293, at *3.

[34] Schiltz, *supra* n.16, at 6; *see also* Capra & Richter (2022), *supra* n.17, at 25 (such statements "are wrong as a simple matter of textual analysis.").

established. But Plaintiff failed to carry his burden with respect to the specific admissibility requirements of Rule 702(c) and (d). ER-005, ER-010, ER-012.

The District Court properly found that the expert's "differential etiology" assessment did not fulfill Rule 702(c) or 702(d) when employed to identify the subject fire's cause. ER-007 – ER-010. This type of analysis begins by "ruling in" all possible causes, and then winnowing down these possibilities to the extent case-specific circumstances allow in an attempt to find one causal agent that cannot be ruled out. *See Williams v. BP Expl. & Prod., Inc.*, ___ F. 4th ___, No. 24-60095, 2025 WL 1904153, at *4 (5th Cir. July 10, 2025). But this approach demands that any factor identified for inclusion be shown capable of causing the outcome at issue. When the expert "rules in" an agent but cannot provide an adequate basis for concluding that it truly does have causal capability, this methodology breaks down. *See In re Deepwater Horizon BELO Cases*, 119 F.4th 937, 946-47 (11th Cir. 2024) (finding methodology unreliable where the expert failed to establish that exposure could have caused the plaintiffs' dermal injuries).

Here, the expert performed several tests on the product but was never able to isolate a condition capable of causing the fire that injured Plaintiff – yet he concluded that the product caused the fire anyway. ER-007 – ER-010. With no basis for "ruling in" a product defect as a possible cause of the fire, the District Court properly concluded that the expert's methodology was not reliable for

purposes of Rule 702(c). *See Baker*, 2025 WL 1733399, at *3 (affirming exclusion "based on faulty methodology" where the expert had no basis for ruling in postulated causal agent) (citing *Pluck v. BP Oil Pipeline Co*., 640 F.3d 671, 679 (6th Cir. 2011)). And because the expert's causation opinion could not be connected to the facts of the case, Plaintiff could not establish that the expert reliably applied his methodology as Rule 702(d) demands. ER-010. Again, exclusion is proper where the expert did not apply the differential etiology method reliably to rule in and rule out plausible clauses. *Williams*, 2025 WL 1904153, at *4.

Although the District Court determined that the expert's analysis did not pass muster under Rule 702(c) or Rule 702(d), Plaintiff relies heavily on *Elosu v. Middlefork Ranch Inc*., 26 F.4th 1017 (9th Cir. 2022) to argue that the District Court's gatekeeping was flawed. *See* Appellant's Brief at 17 (quoting *Elosu*, 26 F.4th at 1027: "A court cannot exclude expert testimony for lacking 'sufficient facts or data' while openly disregarding the foundation of the expert's opinion."). Plaintiff's arguments fail to recognize that Rule 702 establishes three independent reliability requirements, all of which must be shown for the opinions to be admitted. *Elosu* addressed *only* Rule 702(b), which the District Court here did *not* invoke in excluding the expert. *Elosu*, 26 F.4th at 1023 ("this appeal exclusively turns on whether [the expert's] testimony was 'based on sufficient facts or data' as

required by Rule 702."). Because *Elosu* addressed gatekeeping considerations applicable to Rule 702(b), it has little significance to the Rule 702(c) and (d) assessments that resulted in the District Court's exclusion of the expert here.

Plaintiff also argues that the District Court erred because it analyzed the facts underlying the proffered expert opinions.[35] But "when it comes to making preliminary determinations about admissibility, the judge *is* and *always has been* a factfinder."[36] Doing so is necessary to make the determinations required by Rule 702, and that is what the District Court did here.

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. Litigants and courts would benefit from this Court's corrective guidance that judges 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]

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[35] Appellant's Brief at 14, 24.

[36] Schiltz, *supra* n.16, at 7 (emphasis original).

[37] Schroeder, *supra* n.14, at 2059.

In particular, the Court should caution against reliance on caselaw statements that disregard the preponderance of the evidence test or fail to consider an expert's methodological application or factual basis as admissibility issues. District courts should apply Rule 702 as written.

Dated: July 21, 2025

Respectfully submitted,

/s/ Lee Mickus

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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 **6,390 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 July 21, 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: July 21, 2025

/s/ Lee Mickus