No. 24-5493

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE NATIONAL FOOTBALL LEAGUE'S "SUNDAY TICKET" ANTITRUST LITIGATION

NINTH INNING, INC., et al.,
Plaintiffs-Appellants,

v.

NATIONAL FOOTBALL LEAGUE, INC., et al.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
PHILIP S. GUTIERREZ, DISTRICT JUDGE • CASE NO. 2:15-ML-02668

BRIEF OF LAWYERS FOR CIVIL JUSTICE AS AMICUS CURIAE IN SUPPORT OF THE NATIONAL FOOTBALL LEAGUE, INC.

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DISCLOSURE STATEMENT[1]

The Lawyers for Civil Justice is a nonprofit trade association. Pursuant to Federal Rule of Appellate Procedure 26.1(a), there is no parent corporation or publicly held owner corporation to identify.

[1] No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no other person except amicus curiae or its counsel contributed money to fund the preparation or submission of this brief. All parties consented to the filing of this brief.

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INTEREST OF AMICUS CURIAE

Lawyers for Civil Justice (LCJ) is a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 35 years, LCJ has advocated for procedural 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. Working through the Rules Enabling Act process, LCJ urges proposals to reform aspects of the Federal Rules of Civil Procedure and Federal Rules of Evidence.

LCJ has specific expertise on the meaning, history, and application of Federal Rule of Evidence 702, drawing on both its own efforts undertaken during the rulemaking process and the collective experience of its members who participate in litigation in the federal courts. LCJ has submitted several extensive comments, including original research, to the Judicial Conference Advisory Committee on

Evidence Rules.[2] LCJ's analysis has identified widespread misunderstanding of Rule 702's requirements and purposeful shifting of the expert admissibility standard away from the Rule's text.

LCJ and its members have an interest in ensuring that the Federal Rules of Evidence are consistently interpreted across the nation, particularly on the burden of production and the reliability criteria set forth in Rule 702. That standard reflects the result of the Rules Enabling Act's rulemaking process and is the governing law.

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[2] *See, 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* (Sept. 1, 2021), https://www.regulations.gov/comment/USC-RULES-EV-2021-0005-0007; 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* (Oct. 20, 2020), https://www.uscourts.gov/sites/default/files/20-ev-y_suggestion_from_lawyers_for_civil_justice_-_rule_702_0.pdf; Lawyers for Civil Justice, *Federal Rule of Evidence 702: A One-Year Review and Study of Decisions in 2020* (Sept. 30, 2021), https://www.regulations.gov/comment/USC-RULES-EV-2021-0005-0008.

SUMMARY OF THE ARGUMENT

Federal Rule of Evidence 702 makes clear that trial courts act as gatekeepers charged with ensuring that expert testimony is both relevant and reliable. Rule 702 requires district courts to engage in a meaningful inquiry into the expert's methodology, the basis for that methodology, and how it has been applied to the facts of the case. Here, the district court did just that. It undertook the careful analysis Rule 702 demands and concluded that Plaintiffs' expert testimony was unreliable. *In re NFL "Sunday Ticket" Antitrust Litig.*, No. ML 15-02668 PSG (SKX), 2024 WL 3628118, at *3, *7–8 (C.D. Cal. Aug. 1, 2024) (citing Fed. R. Evid. 702 advisory committee note 2 to 2023 amendment).

On appeal, Plaintiffs erroneously assert that the trial court misapplied Rule 702 and should not have excluded their experts' testimony. Plaintiffs fail to recognize that the admissibility of the experts' testimony was governed by the recently amended Rule 702—a rule change that essentially upends the body of precedent relied upon by Plaintiffs.

In 2023, Rule 702 was amended to correct recurring judicial misapplications. *First*, some courts had improperly treated two core reliability elements—the sufficiency of an expert's factual basis and the reliable application of methodology—as questions of weight rather than admissibility. That approach misapplied both Rule 702 and Rule 104(a). *See* Fed. R. Evid. 702 advisory committee's note to 2023 amendment ("[M]any 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).")

Second, courts too often applied a burden of proof more lenient than the preponderance standard. The amendments clarify 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 2023 amendments to Rule 702, some courts in this circuit (and Plaintiffs here) continue to misstate the Rule's standard, incorrectly asserting that Rule 702 favors admission over exclusion or that expert testimony may be admitted under a standard less

demanding than a preponderance of the evidence.[3] These positions directly conflict with the amended text and accompanying advisory committee note.

The persistence of district court errors in applying Rule 702 is likely attributable to the continued effect of Ninth Circuit caselaw that did not apply Rule 702 with full force and were part of the reason for the recent amendments. Indeed, in discussing the Rule 702 amendments, the chair of the advisory committee's subcommittee on Rule 702 specifically identified several Ninth Circuit precedents—including those cited in Plaintiffs' opening brief—as illustrative of the

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[3] *See, e.g.*, *Symeonides v. Trump Ruffin Com., LLC*, No. 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 v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1232 (9th Cir. 2017)); *Waterwatch of Or. v. Winchester Water Control Dist.*, No. 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. Litig.*, No. 18-cv-06753-PJH, 2024 WL 4583525, at *1 (N.D. Cal. Oct. 24, 2024) (noting there is a "presumption of admissibility" for proffered expert testimony); *Powers v. McDonough*, No. 22-cv-08357-DOC-KS, 2024 WL 3491008, at *3 (C.D. Cal. July 19, 2024) ("Courts begin from a presumption that expert testimony is admissible."); *McCandless Grp., LLC v. Coy Collective, Inc.*, No. 21-CV-02069-DOC-KES, 2024 WL 3221742, at *2 (C.D. Cal. May 22, 2024) (same); *Doe v. Becerra*, 711 F.Supp.3d 1112, 1133 (C.D. Cal. 2024) (same).

problem the amendments were intended to correct. *See* Hon. Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 Notre Dame L. Rev. 2039, 2050–52 (2020) (criticizing decisions such as *Primiano v. Cook*, 598 F.3d 558 (9th Cir. 2010), for treating deviations from methodological standards as issues of weight rather than admissibility, and concluding that such an approach "appears facially wrong"); *see also* AOB 46 (citing *Primiano*), 57 (citing *Pyramid Techs., Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807 (9th Cir. 2014)); *Pyramid Techs.*, 752 F.3d at 826–27 (Rawlinson, J., dissenting) ("fervently disagree[ing]" with the panel majority's application of *Primiano* to reverse the district court and admit expert testimony that "failed to explain 'what principles and methods he use[d]'").

The advisory committee echoed Judge Schroeder's view, observing that "federal cases . . . revealed a pervasive problem with courts discussing expert admissibility requirements as matters of weight." *See* Advisory Committee on Evidence Rules, Minutes of the Meeting of Nov. 13, 2020, at 4.

The 2023 amendments and committee note make clear that many Ninth Circuit decisions have diluted Rule 702 by allowing "a 'liberal thrust' favoring admission," which "has resulted in slightly more room for deference to experts in close cases than might be appropriate in some other Circuits," *In re Roundup Prods. Liab. Litig.*, 390 F.Supp.3d 1102, 1112–13 (N.D. Cal. 2018) (quoting *Messick*, 747 F.3d at 1196).

In this case, the district court applied an approach centered on Rule 702 to reach the right result. *See In re NFL "Sunday Ticket" Antitrust Litig.*, 2024 WL 3628118, at *3; *see also* NFL Br. 24–27. While the district court and NFL properly focused on the admissibility factors enumerated in Rule 702, unlike Plaintiffs who seek to keep distorting the law, the inconsistent application of the Rule by district courts within the Ninth Circuit since the 2023 amendments underscores the need for clarification and a proper statement of the law by this court. This court should therefore confirm that the governing standard for admissibility is the text of Rule 702 itself, as amended, and that trial courts must apply that standard faithfully in evaluating expert testimony, as the district court did here.

ARGUMENT

I. The 2023 amendments to Federal Rule of Evidence 702 require a significant shift in Ninth Circuit precedent on admissibility of expert testimony.

A. Rule 702 sets the expert admissibility standard.

Rule 702 is the bedrock authority governing the admissibility of expert testimony. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 588–89 (1993). Promulgated under the Rules Enabling Act, Rule 702 carries the full force of law and supersedes any inconsistent judicial decisions. *See* 28 U.S.C. § 2072(a), (b); *see also Kansas City S. Ry. Co. v. Sny Island Levee Drainage Dist.*, 831 F.3d 892, 900 (7th Cir. 2016) ("[Litigants] should have paid more attention to Federal Rule of Evidence 702, which superseded *Daubert* many years ago.").

Although Rule 702 leaves trial courts with discretion in determining whether expert testimony satisfies the rule, it does not permit discretion over the standard governing that determination. "[T]he elements of Rule 702, not the caselaw, are the starting point for the requirements for admissibility." Schroeder, *supra*, at 2060; *see Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988) ("Because the Federal Rules of Evidence are a legislative enactment, we turn to the

'traditional tools of statutory construction' in order to construe their provisions. We begin with the language of the Rule itself.").

Rule 702 mandates that four requirements be satisfied before expert testimony may be admitted: (1) the testimony must help the trier of fact; (2) it must be based on sufficient facts or data; (3) it must derive from reliable principles and methods; and (4) those methods must be reliably applied to the facts of the case. Fed. R. Evid. 702. The Rule further specifies that the burden of proof lies with the proponent, who must demonstrate by a preponderance of the evidence that each requirement is met. *Id.*; *see* Fed. R. Evid. 702 advisory committee's note to 2023 amendment.

This neutral burden leaves no room for presumptions of admissibility. Fed. R. Evid. 702 advisory committee's note to 2023 amendment (emphasis added) ("[E]xpert 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]."). Rather, Rule 702 establishes both the inquiries courts must undertake and the evidentiary threshold that must be satisfied before admitting expert testimony. District

courts must rigorously apply the Rule's text when evaluating the admissibility of expert evidence.

B. The 2023 amendments reject prior caselaw that undermined the court's gatekeeping role.

Effective December 2023, Rule 702 was amended to address widespread misapplication by courts that failed to enforce the Rule's admissibility requirements or applied an improperly lenient burden of proof. The amendments reaffirm that expert testimony may not be admitted unless the proponent proves, by a preponderance of the evidence, that all four elements of Rule 702 are satisfied.

Before the amendments, courts often misstated two critical aspects of Rule 702. *First*, that sufficiency of an expert's factual basis and the reliability of the expert's application of methodology were merely questions of weight for the jury, not admissibility. And *second*, that expert evidence was presumptively admissible. These approaches were explicitly rejected: "[T]he 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." Memorandum from 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). "These statements *misstate* Rule 702, because its admissibility requirements must be established to a court by a preponderance of the evidence." *Id.* (emphasis added).

C. This court's precedent on admissibility of expert testimony cannot stand in light of the 2023 amendments to Rule 702.

The 2023 amendments to Rule 702 made "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." Memorandum from Daniel J. Capra & Liesa L. Richter, Possible Amendment to Rule 702, Apr. 1, 2022, at 24–25, in Advisory Committee on Evidence Rules May 2022 Agenda Book 125 (2022). And, after the amendments, it is "certainly incorrect" for a court to declare that the sufficiency of facts or data supporting an expert opinion "is a question for the jury, not the court." *Id.*

Particularly instructive is Judge Thomas Schroeder's careful tracing of the roots of the Ninth Circuit's more permissive expert

admissibility standard, which has tension with Rule 702's recent amendments. As he explained in his *Notre Dame Law Review* article, the Ninth Circuit had frequently misconstrued *Daubert* as liberalizing the admissibility of expert testimony. *See* Schroeder, *supra*, at 2050–51; *see also In re Roundup Prods. Liab. Litig.*, 390 F.Supp.3d at 1112–13 (quoting *Messick*, 747 F.3d at 1196) ("The Ninth Circuit has placed great emphasis on *Daubert*'s admonition that a district court should conduct this analysis 'with a liberal thrust favoring admission,'" which "has resulted in slightly more room for deference to experts in close cases than might be appropriate in some other Circuits.").

Judge Schroeder pointed to *City of Pomona v. SQM North America Corp.*, 750 F.3d 1036 (9th Cir. 2014), as emblematic of the problem. Schroeder, *supra*, at 2050–51. In *Pomona*, the city alleged that perchlorate impurities in sodium nitrate imported from Chile between 1927 and the 1950s had contaminated its groundwater. 750 F.3d at 1041. Central to its case was Dr. Neil Sturchio, a causation expert who used a four-step stable isotope analysis to conclude that the perchlorate in the city's water matched the isotopic signature of Chilean perchlorate. *Id.* at 1042. The district court, after holding a *Daubert*

hearing, excluded Dr. Sturchio's opinions as unreliable. *Id.* at 1043. But the Ninth Circuit reversed, emphasizing that "[s]haky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." *Id.* at 1044 (quoting *Primiano*, 598 F.3d at 564).

Judge Schroeder criticized this approach, observing that the Ninth Circuit's "blanket conclusion that challenges to the expert's deviation from the protocols merely raised questions as to the weight of the evidence and presented a question for the fact finder, not the trial court, appears facially wrong." Schroeder, *supra*, at 2051. Although this court cited the 2000 version of Rule 702 and its advisory note, it relied primarily on *United States v. Chischilly*, 30 F.3d 1144 (9th Cir. 1994), *overruled on another ground by United States v. Preston*, 751 F.3d 1008, 1019 (9th Cir. 2014)—a pre-2000 amendment decision. *Pomona*, 750 F.3d at 1049. From *Chischilly*, this court drew the proposition that "adherence to protocol . . . typically is an issue for the jury." *Id.* at 1047 (citing *Chischilly*, 30 F.3d at 1154). In doing so, it expressly rejected the Third Circuit's reasoning in *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994), which *correctly* held that "any step that

renders the analysis unreliable . . . renders the expert's testimony inadmissible." *Id.* at 745 (emphasis omitted). As the advisory committee later noted, decisions like *Pomona* reflect a "pervasive problem" in which courts treat questions of admissibility as questions of weight. *See* Advisory Committee on Evidence Rules, Minutes of the Meeting of Nov. 13, 2020, at 4.

This court's oft-repeated assertion that Rule 702 should be applied as a "liberal" standard favoring the admission of expert testimony is unsupported by the text of Rule 702 or *Daubert*. *See, e.g.*, *Messick*, 747 F.3d at 1196 ("Rule 702 should be applied with a 'liberal thrust' favoring admission"); *Wendell*, 858 F.3d at 1232 (same); *Hardeman v. Monsanto Co.*, 997 F.3d 941, 960 (9th Cir. 2021) (same). Although *Daubert* observed that the Federal Rules of Evidence generally have a "liberal thrust" that relaxes the "traditional barriers to 'opinion' testimony," this remark must be read in context. *See* 509 U.S. at 588–89 (citation omitted). The Supreme Court made that observation to contrast the "rigid 'general acceptance' requirement" of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which *Daubert* expressly rejected in

favor of Rule 702. 509 U.S. at 587 (concluding that "the *Frye* test was superseded by the adoption of the Federal Rules of Evidence").

But *Daubert* did not hold—and Rule 702 does not permit—courts to presume admissibility or to defer threshold reliability determinations to the jury. To the contrary, *Daubert* emphasized that Rule 702 "displaced" alternative gatekeeping standards that were "incompatible" with the framework embodied in the Federal Rules. 509 U.S. at 589. As the Eighth Circuit explained, "[i]n *Daubert*, the Supreme Court determined that the *Frye* test . . . had been superseded by Rule 702." *Jaurequi v. Carter Mfg. Co.*, 173 F.3d 1076, 1081 (8th Cir. 1999).

Judge Schroeder cautioned that undue reliance on *Daubert*'s "liberal thrust" language is misplaced in light of Rule 702's 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*, at 2060.

D. The amendments to Rule 702 reject reliance on the *Pomona-Primiano-Messick* line of cases.

The *Pomona-Primiano-Messick* line of decisions are contrary to Rule 702. Each of these cases rests on the misguided premise that key

Rule 702 admissibility requirements—such as whether an expert's opinion is based on sufficient facts or whether the methodology has been reliably applied—are questions for the jury rather than the judge. *See Pomona*, 750 F.3d at 1044; *Primiano*, 598 F.3d at 564; *Messick*, 747 F.3d at 1196–97. That framework undermines Rule 702's text and purpose. Despite the 2023 amendments, district courts within this circuit continue to rely on these cases, perpetuating the very errors the amendments were designed to correct. *See, e.g.*, *supra*, n.3.

Accordingly, this court should reinforce the 2023 amendments' purpose and clarify the proper framework in applying Rule 702. *See EcoFactor, Inc. v. Google LLC*, 137 F.4th 1333, 1339 (Fed. Cir. 2025) (en banc) (citation omitted) (explaining the advisory committee noted that "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)."); *Sprafka v. Med. Device Bus. Servs., Inc.*, No. 24-1874, 2025 WL 1573583, at *3 n.3 (8th Cir. June 4, 2025) ("The Committee concluded this emphasis was 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.'"); *Taylor v. Bristol-Myers Squibb Co.* (*In re Onglyza (Saxagliptin) & Kombiglyze (Saxagliptin & Metformin) Prods. Liab. Litig.*), 93 F.4th 339, 348 n.7 (6th Cir. 2024) (citation omitted) (noting that the Rule 702 amendments "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'"); *see also Sardis v. Overhead Door Corp.*, 10 F.4th 268, 283–84 (4th Cir. 2021) (observing that the then-proposed 702 amendments reject "incorrect" decisions finding expert's factual basis and methodological application are issues of weight rather than admissibility).

E. Plaintiffs rely on cases that conflict with the updated Rule 702.

Plaintiffs heavily cite decisions that overlooked Rule 702's mandate, of the sort that prompted the 2023 amendments. (*See* AOB 48, 53–54.) *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 970 (9th Cir. 2013) is illustrative of the problem of not applying the required preponderance standard, and the defendant there did not even

"challenge [the expert's] general methodology." (*See* AOB 48–50, 52.) In *Alaska Rent-A-Car*, this court upheld the admission of expert testimony based on questionable comparators and market assumptions, reasoning that the defendant's criticisms were "colorable," yet went to weight, not admissibility. 738 F.3d at 969. The court deferred to the jury without considering whether the expert had reliably applied his methodology to the facts. The court never mentioned, much less applied, the preponderance of the evidence standard embedded in Rule 702. Nor did it acknowledge the problems of punting tough issues to the jury to sort out.

Plaintiffs' brief also cites cases in passing that suffer from the same problem. For example, in *Primiano*, 598 F.3d at 567–68 and *Pyramid Technologies*, 752 F.3d at 813–17, this court defaulted to the jury's role and leaned heavily on the adversarial process to sort out reliability. (*See* AOB 46.) But as explained above, there is no "liberal thrust" favoring expert admission in applying Rule 702.

Plaintiffs' citation to *Humetrix, Inc. v. Gemplus S.C.A.*, 268 F.3d 910, 919 (9th Cir. 2001) is also misplaced. (*See* AOB 53.) Plaintiffs omit that the excerpt they cite—that "criticisms of an expert's method of

calculation [are] a matter for the jury's consideration in weighing that evidence"—is taken from a California case that did not apply Rule 702, *Humetrix*, 268 F.3d at 920 (quoting *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.*, 47 Cal.App.4th 464, 489–90 (1996), and is contrary to Rule 702's recent amendment requiring the district court to confirm that the testimony is "the product of reliable principles and methods." Fed. R. Evid. 702(c).

Plaintiffs' out-of-circuit decisions also are distinguishable because the experts in those cases generally used and applied valid methodologies. (*See* AOB 53–54.) In other words, those experts actually met the requirements of Rule 702, unlike Plaintiffs' experts here. For instance, *S&H Farm Supply, Inc. v. Bad Boy, Inc.*, 25 F.4th 541, 551–52 (8th Cir. 2022) held that the district court did not abuse its discretion because the expert "used and thoroughly explained" the application of historical data to estimate loss profits. Similarly, in *Stollings v. Ryobi Technologies, Inc.*, 725 F.3d 753, 766 (7th Cir. 2013), the district court found that the expert correctly used a valid methodology but held the expert's opinion unreliable only because he concluded that one of the key data *inputs* was not sufficiently reliable.

In reversing the exclusion of the expert, the Seventh Circuit noted that even though the data input in question was a rough estimate, the district court should have let the jury determine how the uncertainty about the accuracy of the data input affected the weight of the expert's testimony. *Id.* at 767.

And in *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 248 (5th Cir. 2002), the medical expert had "methodically eliminated the alternative sources of the infection as viable possibilities." These decisions are different than this one because the district court here correctly found that "Dr. Rascher's and Dr. Zona's testimonies [were] based on their flawed methodologies [and] should be excluded." *In re NFL "Sunday Ticket" Antitrust Litig.*, 2024 WL 3628118, at *3.

Furthermore, Plaintiffs insist that antitrust cases have a special standard apart from Rule 702's requirements, a "relaxed legal standard for proving antitrust damages." (AOB 40–49.) But any relaxed standard only comes into play *after* Plaintiffs demonstrate causation. As the Fifth Circuit explained, "The fact of damage requirement is one of causation; the plaintiff must show that the defendant's unlawful conduct was a material cause of injury to its business. If the requisite

causal link is proven, 'a more relaxed burden of proof obtains for the amount of damages than would justify an award in other civil cases.'" *El Aguila Food Prods., Inc. v. Gruma Corp.*, 131 F. App'x 450, 452–53 (5th Cir. 2005). And "[t]hough relaxed, the standard for proving the quantum of damages is not without bounds, for antitrust damages may not be determined by guesswork or speculation; we must at least insist upon a just and reasonable estimate of the damage based on relevant data." *Id.* (internal citations and quotations omitted).

Here, the district court found Plaintiffs' expert evidence insufficient to show causation—that they were "injured and damaged by the challenged conduct." *In re NFL "Sunday Ticket" Antitrust Litig.*, 2024 WL 3628118, at *3. Expert opinions addressing the fact of injury (or threat of injury), which is what Plaintiffs' experts presented, must follow Rule 702. *Id.* at *8 ("without Dr. Rascher's and Dr. Zona's testimonies, it is impossible for a jury to determine on a class-wide basis that Sunday Ticket subscribers would have indeed paid less in the absence of Defendants' anticompetitive conduct. Thus, Plaintiffs failed to provide evidence from which a reasonable jury could make a *finding of injury*") (emphasis added).

Courts cannot rewrite rules based on Plaintiffs' policy preferences for antitrust matters. The 2023 amendments to Rule 702 were necessary precisely because decisions like those Plaintiffs generally rely on had "failed to apply correctly the reliability requirements of that rule," Fed. R. Evid. 702 advisory committee's note to 2023 amendment. It is the court's role and not the jury's to determine whether the proponent has shown, by a preponderance of the evidence, that the expert's opinion both rests on a reliable methodology and reflects a reliable application of that methodology to the facts of the case. Below, the district court correctly applied the newly amended Rule 702 to exclude Plaintiffs' unreliable expert evidence. *In re NFL "Sunday Ticket" Antitrust Litig.*, 2024 WL 3628118, at *3, *7–8 (citing Fed. R. Evid. 702 advisory committee note 2 to 2023 amendment).

F. Plaintiffs take great umbrage to the district court's post-trial exclusion of the experts, but the court's gatekeeping duty also extends to removing unreliable expert testimony during post-trial motions.

Plaintiffs suggest that the trial court's post-trial decision to exclude their experts was itself error. (*See* AOB 39–40.) But Rule 702 requires district courts to exclude unreliable expert testimony even after it was admitted. This obligation applies equally in resolving a

JNOV motion. The Supreme Court has made clear that courts must disregard inadmissible expert testimony when determining whether a verdict can stand notwithstanding the jury's determination.

In *Weisgram v. Marley Co.*, the Court affirmed the lower court's power to identify erroneously admitted expert testimony, strike it from the record, and hold that the remaining evidence is legally insufficient to sustain the verdict. 528 U.S. 440, 457 (2000) (holding defense judgment is appropriate in "cases . . . which, on excision of testimony erroneously admitted, there remains insufficient evidence to support the jury's verdict"). The Court reasoned that "[i]nadmissible evidence contributes nothing to a 'legally sufficient evidentiary basis.'" *Id.* at 454.

The district court here followed *Weisgram* and engaged in a careful post-trial Rule 702 analysis. *In re NFL "Sunday Ticket" Antitrust Litig.*, 2024 WL 3628118, at *3–8; *see El Aguila Food Prods.*, 131 F. App'x at 453 (affirming summary judgment and JNOV where the plaintiffs' experts failed to offer reliable proof on antitrust damages and causation); *Risk v. Burgettstown Borough, Pa.*, No. 05-1068, 2008 WL 4925641, at *2 (W.D. Pa. Nov. 14, 2008) ("[I]n determining whether

there is a legally sufficient evidentiary basis for the verdict, erroneously admitted evidence will play no role."). And, to be sure, "[t]hat exclusion of the expert testimony was 'outcome determinative' does not make that decision subject to a more stringent standard of review." *Schudel v. Gen. Elec. Co.*, 35 F.App'x 484, 488 (9th Cir. 2002) (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997)); *see, e.g.*, *Raynor v. Merrell Pharms. Inc.*, 104 F.3d 1371, 1377 (D.C. Cir. 1997) (affirming JNOV where "the district court was within its discretion in finding the plaintiffs' expert evidence inadmissible under Rule 702").

II. The district court properly applied Rule 702.

As detailed in the NFL's brief, the district court followed Rule 702 in excluding the flawed testimonies of Drs. Rascher and Zona. (*See* NFL Br. 27–51.) Neither expert provided a sufficiently reliable foundation for their economic modeling to support "a finding of injury and an award of actual damages." *In re NFL "Sunday Ticket" Antitrust Litig.*, 2024 WL 3628118, at *8. Their opinions rested more on assumption than on sound methodology.

Dr. Rascher built his but-for world on the premise that absent the NFL's distribution arrangements, out-of-market games would have

been freely accessible—like college football—on basic cable and broadcast networks. *Id.* at * 3–5. Rascher offered multiple variations of his but-for world, oscillating between NFL teams negotiating individually or in groups, retaining or abandoning CBS and FOX deals, and relying on shared feeds or new production arrangements. *Id.* Whatever the configuration, his ultimate conclusion remained unchanged: the games would appear on over-the-air and basic cable channels at no added cost to consumers. *Id.* He did not demonstrate how this result would follow from the conduct of rational economic actors. He simply assumed it: "[T]hey figured it out in college sports, [so] they would certainly figure it out at the NFL." *Id.* at *4 (criticizing Rascher's testimony).

The problem, as the district court correctly recognized, was that Rascher failed to show how rational market actors would produce that result. *Id.* at *5–6. His central assumption did not derive from data, modeling, or economic theory. *Id.* That assumption ignored fundamental differences between college and professional football, including the use of premium channels in the college market and the lack of guaranteed local broadcasts. *Id.*

Plaintiffs respond that Rule 702 does not demand a but-for world that mirrors reality in every detail. That is true. But Rule 702 still demands that experts employ something more than conjecture. Rascher never explained how rights would be allocated, how rival networks would collaborate, or how the economics of free distribution would work in his alternative reality. *Id.* at *5–6. Instead, he relied on a loose analogy to college football, unmoored from empirical or economic analysis. *Id.* Plaintiffs failed to establish by a preponderance of proof that this assumption-dependent methodology was reliable. *Id.* at *6 (citing *Joiner*, 522 U.S. at 146); *see In re Live Concert Antitrust Litig.*, 863 F.Supp.2d 966, 974–76 (C.D. Cal. 2012) (excluding expert testimony where the opinion rested on simple assumption without further examination).

The district court also found Dr. Zona's methodology unreliable. Zona proposed alternative pricing models that aimed to show how Sunday Ticket prices would have differed in a competitive market. *In re NFL "Sunday Ticket" Antitrust Litig.*, 2024 WL 3628118, at *7. But his models were undermined by contradictory assumptions. *Id.* To explain why consumers would have purchased Sunday Tickets from a

second distributor at a higher price, Zona posited that these consumers avoided the cost of a DirecTV subscription, implying that the alternative distributor was a standalone streaming provider. *Id.*

But he then backpedaled, claiming that "direct-to-consumer" could also include other cable or satellite providers. *Id.* If that were true, then the justification for consumers paying more—avoiding an underlying subscription—falls apart. *Id.* The district court properly found Zona's methodology unreliable because it failed to resolve this tension. *Id.* Although an expert may adopt simplifying assumptions, those assumptions must be internally coherent and consistent with the record. Here, Zona's inconsistent definitions of key concepts and shifting rationales rendered his model analytically unreliable.

Thus, the district court properly granted Defendants' JNOV motion because "without Dr. Rascher's and Dr. Zona's testimonies, it is impossible for a jury to determine on a class-wide basis that Sunday Ticket subscribers would have indeed paid less in the absence of Defendants' anticompetitive conduct." *Id.* at *8.

CONCLUSION

This court should confirm the proper use of Rule 702 by the district court, and the judgment below should be affirmed.

June 17, 2025

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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