No. 24-1491

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LEE ANN SOMMERIVLLE,
individually, and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

UNION CARBIDE CORPORATION; COVESTRO LLC,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of West Virginia
Case No. 2:19-cv-00878, Hon. Joseph R. Goodwin

BRIEF FOR LAWYERS FOR CIVIL JUSTICE AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLEE UNION CARBIDE CORPORATION'S PETITION FOR REHEARING EN BANC

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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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

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. Since 1987, LCJ has advocated for rule reforms that promote balance in the civil justice system, reduce the costs and burdens of litigation, and 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 expertise on the meaning, history, and application of Federal Rule of Evidence 702. LCJ provided comments and original research to the Judicial Conference Advisory Committee on Evidence Rules,[2] which unanimously recommended amendments to Rule 702 that

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[1] Appellant does not consent to the filing of this brief. Under Federal Rule of Appellate Procedure 29(a)(4)(E), counsel certifies that no counsel for a party 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 person or entity – other than *amicus curiae* – contributed money intended to fund the preparation or submission of this brief.

[2] *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), 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

became effective on December 1, 2023. LCJ's analysis revealed widespread misunderstanding of Rule 702. Although each element enumerated in the rule is a prerequisite to admission, LCJ found that many courts – including district courts within the Fourth Circuit – failed 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 courts must decide. To address those problems, 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 on judges' gatekeeping responsibilities.[3]

The issues presented in the Petition for Rehearing En Banc implicate the core of LCJ's mission and its work on Rule 702. Despite the 2023 amendment to Rule 702, which highlighted the court's gatekeeping role and clarified that expert testimony may be admitted *only* if the opinions fulfill *all* of Rule 702's

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Rule 702 Subcommittee (Oct. 20, 2020), https://20-ev-y_suggestion_from_lawyers_for_civil_justice_-_rule_702_0.pdf (uscourts.gov).

[3] *See* Memorandum from Daniel J. Capra and Liesa L. Richter, Reporters, Advisory Committee on Evidence Rules, to Advisory Committee on Evidence Rules, *Possible Amendment to Rule 702* (Oct. 1, 2021) at 4, *in* ADVISORY COMMITTEE ON EVIDENCE RULES NOVEMBER 2021 AGENDA BOOK 135 (2021), https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_agenda_book_november_202110-19_0.pdf ("LCJ's suggestion to reinsert a reference to the court has much to commend it. . . . Given [] 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 recommendation was included in the 2023 amendment.

requirements by a preponderance of the evidence, courts – including the panel majority here – continue to misconstrue the admissibility criteria. Courts within this Circuit need guidance that their gatekeeping assessments must comport with Rule 702, not caselaw that conflicts with the Rule's language. This case allows this Court to clarify how courts should apply Rule 702.

This brief will aid the Court in addressing the issues presented because the panel majority ignored Rule 702's text and employed an admissibility standard drawn from caselaw that conflicts with the Rule's text and the drafter's intent. The gatekeeping approach used here is exactly the type that the 2023 amendment intended to stop.

SUMMARY OF ARGUMENT

The panel majority applied an incorrect legal standard when it reversed the district court's exclusion of Plaintiff's expert witness, Dr. Sahu. The 2023 amendment to Rule 702 intended to correct the exact gatekeeping errors the panel majority made.

The amendment addressed some courts' failure to consider 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).[4] The 2023 amendments changed Rule 702's text to clarify that expert testimony *cannot be admitted* "unless the proponent demonstrates…that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule." *Id*.

The panel majority's approach disregards the explicit admissibility requirements of Rule 702(b) and (d) and is incompatible with the Rule. Each element of Rule 702 provides independent grounds for exclusion. "*[A]ny* step that renders the analysis unreliable . . . renders the expert's testimony inadmissible." 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)).

The Court should grant the Petition to effectuate the corrective purpose of the 2023 amendment. Already at least one district court has relied on the panel majority's improper application of Rule 702. And the panel majority's holding

[4] When, as with Rule 702, "Congress did not amend the Advisory Committee's draft. . . 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). This Court has also considered the Advisory Committee's working papers to analyze how courts should apply Rule 702. *See Sardis v. Overhead Door Corp*., 10 F. 4th 268, 283-84 (4th Cir. 2021).

places the Fourth Circuit out of alignment with other Circuits, resulting in an inconsistent application of Rule 702's clear language.

THE FOURTH CIRCUIT SHOULD GRANT THE PETITION TO CLARIFY THAT RULE 702 GOVERNS THE ADMISSIBILITY OF EXPERT TESTIMONY

A. Rule 702 Sets the Admissibility Standard

Federal Rule of Evidence 702 is the bedrock authority "governing expert testimony," and 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 …and courts of appeals." 28 U.S.C. § 2072(a). Because Rule 702 was adopted by the Supreme Court[5] and enacted under the Rules Enabling Act, it supersedes any other inconsistent law. 28 U.S.C. § 2072(b). Although Rule 702 gives courts discretion to decide what expert evidence is admissible, it does not grant discretion to decide the admissibility standard. Thus, "the elements of Rule 702, not the caselaw, are the starting point for the requirements of admissibility." Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039, 2060 (2020).

[5] *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.

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.1.

B. Rule 702 Was Amended to Reject the Gatekeeping Characterizations that Courts Have Erroneously Repeated

Rule 702 was amended to correct erroneous practices in which courts failed to consider all the admissibility prerequisites. Before the 2023 amendment, courts often misapplied Rule 702:

> [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*.

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). 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…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.

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).

The 2023 revisions to Rule 702 intended to repudiate decisions relaxing the standard to admit expert testimony and diminishing the court's gatekeeping role. Now, it is "certainly incorrect" for courts to declare that assessing whether sufficient facts or data support for an expert's opinions "is a question for the jury, not the court." 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.

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 Rule 702's enumerated requirements. *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").

C. The Panel Majority Applied an Admissibility Standard That Contradicts Rule 702

The panel majority failed to recognize that Rule 702 itself, and not superseded caselaw, establishes the admissibility standard.

The panel majority repeatedly stated: "questions regarding the factual underpinnings of the [expert witness'] opinion affect the weight and credibility of the witness' assessment, not its admissibility." Slip op. at 21, 23 (quoting *Bresler v. Wilmington Tr. Co.*, 855 F.3d 178, 195 (4th Cir. 2017)). The majority panel found the district court abused its discretion in excluding Dr. Sahu's opinions because they lacked a sufficient factual basis under Rule 702(b), as this "violated *Bresler's* holding." Slip. op. at 23. But Rule 702 establishes the admissibility standard, not *Bresler. Bresler's* rejection of the expert's factual basis as a judicial gatekeeping consideration matches the Advisory Committee's description of a case that reflects an "incorrect application of Rules 702 and 104(a)." Fed. R. Evid. 702 advisory committee's note to 2023 amendment.

The *Bresler* statement used by the panel majority does not interpret Rule 702 or *Daubert*. Instead, it perpetuates pre-*Daubert* conceptions. *Bresler* drew the quoted language from *Structural Polymer Grp. v. Zoltek Corp.*, 543 F.3d 987, 997

(8th Cir. 2008). *Structural Polymer* paraphrased the statement from *South Cent. Petroleum, Inc. v. Long Bros. Oil Co.*, 974 F.2d 1015, 1016 (8th Cir. 1992). And that case quotes an even earlier ruling, *Hurst v. United States*, 882 F.2d 306, 311 (8th Cir. 1989), which stated "weaknesses in the factual underpinnings of [the expert witness'] opinion go to the weight and credibility of his testimony, not to its admissibility." The *Bresler* statement the panel majority relied on is thus outdated and conflicts with Rule 702.

D. Correction Is Needed to Clarify the Admissibility Standard and Correct Misapplications of Rule 702

The panel majority's use of the wrong gatekeeping standard requires corrective action; it has already misled at least one district court. In *Mincey v. Southeast Farm Equip. Co.*, No. 4:23-cv-01050-JD, 2025 WL 2450913 (D.S.C. Aug. 26, 2025), the court quoted the statement that the "factual underpinnings" of an expert's opinion affect its weight, "not its admissibility." *Id.* at *10. It used that misunderstanding, to reject the challenge to admission of the expert's opinions. *Id.*

Even before *Sommerville*, some courts in this Circuit struggled to align their gatekeeping practices with amended Rule 702. *See, e.g.*, *Hobbs v. Kelly*, No. 1:23CV00003, 2025 WL 877129, at *17 (W.D. Va. Mar. 20, 2025) (quoting and following *Bresler* statement about "factual underpinnings" to deny motion to exclude); *United States v. Ferncreek Cardiology, P.A.*, No. 5:17-CV-616-FL, 2025 WL 871616, at *6, *8, *9 (E.D.N.C. Mar. 20, 2025) (same); *Jordan v. Town of*

Fairmount Heights, No. 8:22-cv-2680-AAQ, 2024 WL 732011, at *5 (D. Md. Feb 21, 2024) (same). The Court should remedy this ongoing confusion and clarify that Rule 702 requires courts to assess as an admissibility consideration whether experts' opinions have a sufficient factual basis.

E. The Panel Majority's Gatekeeping Conception is Inconsistent with Other Circuits

Other Circuits recognize that amended Rule 702 expressly requires courts to determine that *all* the admissibility prerequisites – including that the opinions have a sufficient factual basis – are established by a preponderance of proof. *See, e.g.*, *Sprafka*, 139 F.4th at 660; *In re Onglyza (Saxagliptin) and Kombiglyze (Saxagliptin and Metformin) Prods. Liab. Litig.*, 93 F.4th 339, 348 n.7 (6th Cir. 2024). They understand that the 2023 amendment intended "to correct some court decisions[,]" such as this one, "incorrectly holding" that the sufficiency of an expert's basis goes to "weight and not admissibility.'" *In re Onglyza*,93 F.4th at 348 n.7 (quotation omitted); *see also Sprafka*, 139 F.4th at 660 n.3 (similar statement).

Several Circuits have also recognized that, contrary to the panel majority's ruling, amended Rule 702 *requires* courts to evaluate whether there is a sufficient factual basis for the expert's opinions, and to exclude opinions where that showing is not made. *See, e.g., EcoFactor, Inc. v. Google LLC*, 137 F.4th 1333, 1345 (Fed. Cir. 2025) (en banc) (reversing admission of opinion testimony that "was not based on sufficient facts or data, as required by Rule 702(b)."); *Williams v. BP*

Exploration & Prod., Inc., 143 F.4th 593, 601 (5th Cir. 2025) (affirming exclusion where the expert lacked sufficient factual basis); *Engilis v. Monsanto Co.*, ___ F.4th ___, 2025 WL 2315898, at *10 (9th Cir. Aug. 12, 2025) (same); *Herman v. Sig Sauer Inc.*, No. 23-6136, 2025 WL 1672350, at *6 (10th Cir. June 13, 2025) (same); *Sprafka*, 139 F.4th at 661 (same); *In re Onglyza*, 93 F.4th at 347 (same). Far from being a matter of "weight and credibility of the witness' assessment," a sufficient factual basis is "an essential prerequisite" to admissibility of expert testimony; a district court fails "to fulfill its responsibility as gatekeeper" if the foundation of the opinion is not assessed. *EcoFactor*, 137 F.4th at 1339, 1346; *see also Harris v. Fedex Corp. Svcs., Inc.*, 92 F.4th 286, 303 (5th Cir. 2024) (district court "abdicated its role as gatekeeper" by allowing an expert "to testify without a proper foundation").

The panel majority's conception of gatekeeping contradicts the uniformity and clarity sought by the amendment to Rule 702 and perpetuates one of the critical errors that rule change was designed to end.

CONCLUSION

Litigants and courts need this Court's corrective guidance that judges must fulfill their gatekeeping responsibility in accordance with Rule 702's directives. When courts misapply Rule 702 "[c]orrection by the courts of appeals will go a long way to remedying the most obvious outliers." Schroeder, *supra* p. 6, at 2059. The Court should grant the Petition.

Respectfully submitted,

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Dated: September 9, 2025

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 **2,600 words**, excluding the parts of the brief exempted by Rule 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 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.

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