

No. 25-2196

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

JACK ANTHONY WILLIAMS,
Plaintiff-Appellant,

v.

SIG SAUER, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of North Carolina
Case No. 4:22-CV-00048-D, Hon. James C. Dever III

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

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Jack Anthony Williams v. Sig Sauer, Inc.
NO. 25-2196

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/s/ Lee Mickus

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STATEMENT OF INTEREST¹

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

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),

recommended 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 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.

To address the problems it identified, LCJ advocated for specific revisions. One change LCJ urged was to add an explicit reference to the court as the decision-maker, so that Rule 702 itself would give unmistakable direction about judges' gatekeeping responsibilities.⁴ LCJ also encouraged the Advisory Committee to

https://static1.squarespace.com/static/640b6c7e5b8934552d35ab05/t/64872bd8aa883f4ddeae6382/1686580184749/lcj_public_comment_on_rule_702_amendmentsept_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://www.uscourts.gov/sites/default/files/20-ev-y_suggestion_from_lawyers_for_civil_justice_-_rule_702_0.pdf.

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

call out certain influential appellate opinions as containing statements of law that are simply wrong, such as the Eighth Circuit’s assertion that “the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility[.]”⁵ Ultimately, the phrase “to the court” was included in the enacted version of the 2023 amendment, and the Advisory Committee’s Note declared decisions identifying the sufficiency of an expert’s factual basis as a matter of weight and not admissibility to be “an incorrect application of Rules 702 and 104(a).”⁶

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

⁵ Lawyers for Civil Justice, *A Note About the Note: Specific Rejection of Errant Case law Is Necessary for the Success of an Amendment Clarifying Rule 702’s Admissibility Requirements*, Comment to the Advisory Committee on Evidence Rules (Feb. 8, 2021), https://static1.squarespace.com/static/640b6c7e5b8934552d35ab05/t/64872919088f9e3a691b5e36/1686579481598/lcj_comment_on_the_note_to_draft_rule_702_amendment_-_feb_8_2021.pdf (quoting *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988)).

⁶ Fed. R. Evid. 702 advisory committee’s note to 2023 amendment; *see also* 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 23-25, 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 (addressing LCJ’s proposal and observing that the Advisory Committee Note under consideration will “mak[e] it clear that these overbroad statements are incorrect.”).

Rule 702’s requirements by a preponderance of the evidence. Despite this directive, many courts and litigants continue to misconstrue the admissibility criteria. And this Court’s recent decisions in *Sommerville v. Union Carbide Corp.*⁷ and *Mountain Valley Pipeline, LLC v. 9.89 Acres of Land*,⁸ which include pronouncements that “questions regarding the factual underpinnings of the [expert witness’] opinion affect the weight and credibility of the witness’ assessment, not its admissibility,” have added to the existing confusion. This Court should reconcile the *Sommerville* and *Mountain Valley Pipeline* opinions with Rule 702’s language and provide guidance to district courts that their gatekeeping assessments must comport with the rule’s directives.

This brief addressing the purposes of the corrective 2023 amendment will assist the Court because the District Court here analyzed the expert opinions at issue exactly as Rule 702 directs. The court found Plaintiff did not establish by a preponderance of proof that his liability experts drew upon sufficient facts, employed reliable methodologies, or reliably applied their methods to the facts of the case and so failed to fulfill the admissibility requirements of Rule 702(b), (c) and (d). This was textbook judicial gatekeeping.

⁷149 F.4th 408, 423, 424 & n.6 (4th Cir. 2025) (quoting *Bresler v. Wilmington Tr. Co.*, 855 F.3d 178, 195 (4th Cir. 2017)).

⁸127 F.4th 437, 445-46 (4th Cir. 2025) (quoting *Bresler*, 855 F.3d at 195).

Plaintiff’s arguments for reversal misunderstand Rule 702. The gatekeeping responsibility *requires* the court to examine the experts’ factual basis, the methodologies employed and how the experts applied those methodologies to meet the factual circumstances at issue. These issues are matters of admissibility, not merely weight. 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 Sig Sauer, Inc., urging affirmance with clarifying guidance.

SUMMARY OF ARGUMENT

Federal Rule of Evidence 702 was amended in 2023 to correct certain critical errors judges were making. 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).⁹ Second, many courts improperly employed a burden of proof

⁹ 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).

considerably more permissive than the preponderance of evidence standard. *Id.* The amendment makes these erroneous conceptions incompatible with Rule 702's text. In so doing, the amendment clarifies that "expert testimony *may not be admitted* unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule." *Id.* (emphasis added).

Even though the amendment has now been in place for more than two years, some courts still incorrectly perceive that assessing the sufficiency of the expert's factual basis is not a matter of admissibility that the court must undertake, but a question of credibility for the jury to decide.¹⁰ This view of the gatekeeping responsibility overlooks Rule 702's explicit directives: each element of Rule 702

¹⁰ *See, e.g., Alford v. NFL Player Disability & Survivor Benefit Plan*, No. JRR-23-358, 2025 WL 3274428, at *5 (D. Md. Nov. 24, 2025) ("Plaintiffs' challenges to the inputs and extent of Dr. Lasater's analyses bear on the weight of his opinion, not its admissibility."); *Brady v. Walmart Inc.*, No. 8:21-1412-AAQ, 2025 WL 1569966, at *6 (D. Md. June 3, 2025) ("the proper manner to challenge the factual basis of [the experts'] conclusions is cross-examination or presentation of contrary evidence."); *DHD Jessamine, LLC v. Florence Cty., S. Carolina*, No. 4:22-cv-01235-JD, 2024 WL 6955668, at *6 (D.S.C. Dec. 9, 2024) ("though DHD's contentions about [the expert's] admittedly thin data and his methodology have some force here, 'questions regarding the factual underpinnings of the expert witness'[s] opinion affect the weight and credibility of the witness'[s] assessment, not its admissibility.'") (quoting *Bresler*, 855 F.3d at 195); *Globus Med., Inc. v. Jamison*, No. 2:22cv282, 2024 WL 4711947, at *7 (E.D. Va. Nov. 7, 2024) ("Perceived flaws in the factual basis of the expert's report and testimony go to the weight, not the admissibility, of that testimony.").

provides independent grounds for exclusion. As the Advisory Committee put it, “*any* step that renders the analysis unreliable . . . renders the expert's testimony inadmissible.”¹¹

Rule 702 sets forth the admissibility analysis judges must undertake, but too often the rule’s text is disregarded by district courts within this circuit. Instead, many judges lean into descriptions of gatekeeping contained in older caselaw, even though those statements cannot be reconciled with the language of the rule and its recent clarifying amendment. 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. 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 Mr. Whealton and Dr. Harrison

¹¹ 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)).

satisfy the requirements of Rule 702. This was a proper exercise of the District Court's gatekeeping responsibility.

THE FOURTH 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). 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 Court¹² 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

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). Thus, Rule 702 establishes the inquiries and threshold findings courts must make when determining whether proposed opinion testimony should be allowed.

2. 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 applied an improper burden of proof or failed to consider all of the admissibility

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.

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

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*

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).

admissibility requirements must be established to a court by a preponderance of the evidence.¹⁶

The 2023 revisions to Rule 702 repudiated decisions diminishing courts' gatekeeping responsibility. Now, after the 2023 amendment has taken effect, it is "quite clear" as "a simple matter of textual analysis" that courts would be "wrong" to declare that "[t]he sufficiency of facts or data supporting an expert opinion is a question for the jury, not the court."¹⁷

Other Circuit Courts that have addressed the 2023 amendment acknowledge its course-changing purpose. The Rule 702 changes "were drafted *to correct* some court decisions *incorrectly holding* 'that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility.'" *In re Onglyza (Saxagliptin) and Kombiglyze (Saxagliptin and Metformin) Prods. Liab. Litig.*, 93 F.4th 339, 348 n.7 (6th Cir. 2024) (quoting Fed. R. Evid. 702 advisory committee's note to 2023 amendment) (emphasis added). Rule 702 mandates that "all requirements set forth in the rule must be established, and the expert opinions are properly excluded if any one of

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 Capra & Richter (2022), *supra* n.6, at 24-25.

them is lacking.” *Sprafka v. Med. Device Bus. Servs., Inc.*, 139 F.4th 656, 660 (8th Cir. 2025); *see also Engilis v. Monsanto Co.*, 151 F.4th 1040, 1049 (9th Cir. 2025) (Rule 702 “expressly require[s] a proponent of expert testimony to ‘demonstrate[] to the court that it is more likely than not that’ the four admissibility requirements are satisfied.”) (quoting Fed. R. Evid. 702 advisory committee’s note to 2023 amendment).

An insufficient factual basis for the expert’s opinions, in particular, is a proper basis for exclusion. *Sprafka*, 139 F.4th at 660 (expert opinions “lack reliability” and should be excluded if the court finds that they lack an adequate basis); *Nairne v. Landry*, 151 F.4th 666, 697 (5th Cir. 2025) (affirming exclusion of opinion testimony that was not “based on sufficient data”). For example, in a recent *en banc* ruling, the Federal Circuit reversed a district court’s admission of expert 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. Indeed, a district court “abdicate[s] its role as gatekeeper” if it allows 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).

3. The Court Should Clarify the Admissibility Standard and Correct Caselaw-Based Misconceptions of the Judicial Gatekeeping Responsibility That Do Not Conform to Rule 702.

This case provides the Court the opportunity to remedy festering confusion among the district courts that has arisen in the wake of *Sommerville* and *Mountain Valley Pipeline*. In those cases the Court reversed exclusions of expert opinions and, in doing so, relied on a quotation from *Bresler v. Wilmington Tr. Co.*, 855 F.3d 178, 195 (4th Cir. 2017) that “questions regarding the factual underpinnings of the expert witness’ opinion affect the weight and credibility of the witness’ assessment, not its admissibility.” *Sommerville*, 149 F.4th at 423, 424 & n.6; *Mountain Valley Pipeline*, 127 F.4th at 445-46. These opinions are problematic and need clarification, for two reasons.

First, *Sommerville* and *Mountain Valley Pipeline* project that caselaw, rather than the text of Rule 702, supplies the proper standard for admissibility. But there can be no doubt: Rule 702 itself is the authority “governing expert testimony.” *Daubert*, 509 U.S. at 588-89; *see also* 28 U.S.C. §2072(a) & (b); *Nairne*, 151 F.4th at 698 n.20 (“There is no question that Federal Rule of Evidence 702 governs the admissibility of expert testimony.”). And Rule 702 requires courts to address specific issues bearing on the reliability of proffered expert testimony, including whether the expert has a sufficient factual basis. 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).¹⁸ By adding these explicit requirements, the 2000 amendment put in place “a more rigorous and structured approach than some courts [were then] employing.”¹⁹

The 2023 amendment rejects caselaw assertions that the sufficiency of the opinions’ factual basis goes “to the weight, not the admissibility, of the testimony[.]” Fed. R. Evid. 702 advisory committee’s note to 2023 amendment (identifying as “incorrect” decisions holding that an expert’s basis presents “questions of weight and not admissibility.”). The amendment’s addition of the

¹⁸ 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).

¹⁹ 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>.

phrase “demonstrates to the court” into Rule 702’s text renders the notion that judges should defer to the jury on these issues irreconcilable with the rule.²⁰

Next, the *Bresler* “factual underpinnings” rule that shaped the *Sommerville* and *Mountain Valley Pipeline* admissibility determinations does not reflect judicial construction of Rule 702. Instead, it is a pre-*Daubert* conception of the gatekeeping role that has been reflexively repeated for decades without questioning if it retains validity. Its lineage directly traces back to Eighth and Fifth Circuit cases decided in the 1980s – some of the same infamous cases that LCJ raised with the Advisory Committee.²¹

Although *Sommerville* and *Mountain Valley Pipeline* quoted *Bresler* for the “factual underpinnings” rule, *Bresler* took the statement verbatim from the Eighth Circuit’s opinion in *Structural Polymer Grp. v. Zoltek Corp.*, 543 F.3d 987, 997 (8th Cir. 2008). *Bressler*, 855 F.3d at 195 (quoting *Structural Polymer*). But *Structural Polymer* cites and paraphrases a pre-*Daubert* case, *South Central Petroleum, Inc. v. Long Bros. Oil Co.*, 974 F.2d 1015, 1019 (8th Cir. 1992) when it

²⁰ See Capra & Richter (2022), *supra* n.6, at 24-25 (the “wrong-ness” of statements such as “[t]he sufficiency of facts or data supporting an expert opinion is a question for the jury, not the court” is “absolutely apparent” from the text of amended Rule 702).

²¹ See Lawyers for Civil Justice (2021), *supra* n.5; Capra & Richter (2022), *supra* n.6, at 23-25.

articulates the “factual underpinnings” rule. *Structural Polymer*, 543 F.3d at 997 (citing *South Central Petroleum*).

South Central Petroleum, in turn, quotes an even older ruling, *Hurst v. United States*, 882 F.2d 306, 311 (8th Cir. 1989). *South Central Petroleum*, 974 F.2d at 1019 (quoting *Hurst*). The *Hurst* decision – issued four years before *Daubert* – uses phrasing almost identical to the *Bresler* “factual underpinnings” rule to assert that “[a]ny weaknesses in the factual underpinnings of (the expert’s) opinion go to the weight and credibility of his testimony, not to its admissibility.” 882 F.2d at 311. Yet *Hurst* carried forward this cramped view of judges’ gatekeeping responsibility from even more distant Eighth Circuit decisions, *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988) and *Polk v. Ford Motor Co.*, 529 F.2d 259, 271 (8th Cir. 1976). *Hurst*, 882 F.2d at 311. *Loudermill* presents a “general rule” that the “factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility,” which itself was derived from the constrained conception of judges’ expert screening role the Fifth Circuit articulated in *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987). *Loudermill*, 863 F.2d at 570 (citing *Viterbo*). As discussed above, *Loudermill* and *Viterbo* received particular attention during the

Rule 702 rulemaking process as being influential opinions that incorrectly articulate the current expert admissibility standard.²²

In short, the *Bresler* “factual underpinnings” statement emphasized in *Sommerville* and *Mountain Valley Pipeline* does not stem from analysis of Rule 702’s requirements. Instead, it is an archaic conception of gatekeeping formed years before the Supreme Court provided its direction in *Daubert* that “the trial judge must ensure” that all expert testimony is “reliable,” 509 U.S. at 589, and more than a decade before the 2000 amendment changed the text of Rule 702 to include the specific admissibility prerequisite that an expert’s testimony must be “based on sufficient facts or data.” The courts in *Loudermill* and *Viterbo* could not have foreseen what judicial gatekeeping would become after *Daubert*, but by deferring to the outdated *Bresler* statement *Sommerville* and *Mountain Valley Pipeline* “effectively vitiated the application of Rule 104(a) to Rule 702(b).”²³

²² See Lawyers for Civil Justice (2021), *supra* n.5; Capra & Richter (2022), *supra* n. 6, at 23-25. These problematic statements from *Loudermill* and *Viterbo* were recently highlighted again as being legally inaccurate. See Liesa L. Richter & Daniel J. Capra, The Admissibility of Expert Testimony, in *Reference Manual on Scientific Evidence* 22 n.61 (4th ed. 2025) (“Language incorrectly stating that the sufficiency of facts or data and reliable application are generally questions of weight and not admissibility can be found in *Loudermill v. Dow Chemical Co.*, 863 F.2d 566 (8th Cir. 1988); *Viterbo v. Dow Chemical Co.*, 826 F.2d 420 (5th Cir. 1987); and *Smith v. Ford Motor Co.*, 215 F.3d 713 (7th Cir. 2000).”).

²³ Schroeder, *supra* n.14, at 2049-50 (addressing *Bresler* “factual underpinnings” rule). See also Capra (2021), *supra* n.15, at 11 (noting concern about court repetition of caselaw-derived statements that inaccurately describe the

Presenting the *Bresler* “factual underpinnings” rule as a limitation on gatekeeping has influenced some district courts to disregard the sufficiency of experts’ factual basis as an admissibility consideration for the court to decide. For example, in *Mincey v. Southeast Farm Equip. Co.*, No. 4:23-cv-01050-JD, 2025 WL 2450913 (D.S.C. Aug. 26, 2025), the district court quoted the statement that the “factual underpinnings” of an expert’s opinion affect only its weight, “*not its admissibility.*” *Id.* at *10 (emphasis original). On the basis of that misunderstanding, the court rejected the challenge to admission of the expert’s opinions. *Id.* Other district courts have followed that same problematic path. *See, e.g., Michael’s Fabrics, LLC v. Donegal Mut. Ins. Co.*, No. 1:24-cv-01585-JRR, 2025 WL 2624280, at *4 (D. Md. Sept. 11, 2025) (citing *Sommerville* and rejecting challenge to expert’s factual basis as affecting only “the weight and credibility of the witness’ assessment, not its admissibility.”); *Feakes v. Washington Metro. Area Transity Auth.*, No. CV 8:23-2145-AAQ, 2025 WL 2653155, at *9 (D. Md. Sept. 16, 2025) (quoting *Mountain Valley Pipeline* “factual underpinnings” statement as the legal basis for denying a motion to exclude).

This Court should help district courts within the Fourth Circuit understand that challenges to the adequacy of the expert’s factual foundation cannot be

admissibility standards because these “broad misstatements of the law can have a pernicious effect beyond the specific case.”).

dismissed as mere credibility concerns. Although this Court may have concluded that the experts in *Sommerville* and *Mountain Valley Pipeline* had a demonstrably sufficient factual foundation for the opinions expressed and so the trial court's exclusions were not warranted, the focus on the *Bresler* statement projects that caselaw statements and not Rule 702 establishes the admissibility standard. To dispel the gatekeeping confusion that presently exists, the Court should provide explicit guidance that trial judges must determine admissibility based on Rule 702, and allow opinion evidence only when all elements of the rule have been established by a preponderance of evidence.

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

The District Court's Order excluding Mr. Whealton and Dr. Harrison employed the correct admissibility standard – Rule 702, in all its parts – and properly applied it to the proffered experts' opinions. Consistent with the Advisory Committee's explanation that “expert testimony may not be admitted unless the proponent demonstrates to the court” that all requirements enumerated in Rule 702 are established,²⁴ the District Court considered whether Mr. Whealton

²⁴ Fed. R. Evid. 702 advisory committee's note to 2023 amendment; *see also Engilis v. Monsanto Co.*, 151 F.4th 1040, 1050 (9th Cir. 2025) (“Rule 702 requires a proponent of expert testimony to demonstrate each of the requirements of Rule 702 by a preponderance of the evidence.”).

and Dr. Harrison fulfilled each of Rule 702's admissibility criteria. *See* JA31-34 (Whealton); JA35-38 (Harrison).

The District Court recognized that the individual reliability factors set forth in Rule 702(b) – (d), as well as the expert's qualifications, all present independent admissibility prerequisites that the proponent must establish by a preponderance of the evidence. *See* JA34 (Plaintiff “has failed to prove that Whealton’s report and testimony meet the necessary “threshold inquiry” of demonstrating “the sufficiency of an expert’s basis, and the application of the expert’s methodology” to the facts of the case) (quoting Fed. R. Evid. 702 advisory committee’s note to 2023 amendment); JA38 (Plaintiff “has failed to demonstrate by a preponderance of the evidence that Harrison reliably applied his knowledge and experience to the facts of the case.”). This approach is what Rule 702 demands.²⁵

In particular, the District Court correctly observed that the “sufficient factual basis” requirement of Rule 702(b) must be established *before* giving any

²⁵ Fed. R. Evid. 702 advisory committee’s note to 2023 amendment (“the reliability requirements set forth in Rule 702(b) and (d) . . . must be established to a court by a preponderance of the evidence.”); *see also Sardis v. Overhead Door Corp.*, 10 F.4th 268, 283-84 (4th Cir. 2021) (Rule 702 amendments address and reject “incorrect” decisions finding expert’s factual basis and methodological application to be matters of weight and not admissibility); *Baker v. Blackhawk Mining, LLC*, 141 F. 4th 760, 766 (6th Cir. 2025) (“As for reliability, Rule 702 only allows an expert to testify when the opinion is (1) ‘based on sufficient facts or data,’ (2) ‘the product of reliable principles and methods,’ and (3) ‘a reliable application’ of those ‘principles and methods to the facts of the case.’ Fed. R. Evid. 702(b)–(d).”).

consideration to the *Bresler* “factual underpinnings” statement reiterated in *Sommerville*. This is a correct statement of the law.²⁶ And here, neither expert surpassed that initial hurdle. The District Court recognized that both Mr. Whealton and Dr. Harrison concluded the P320 firearm to be defective because spontaneous discharge could result from accumulated debris on internal components, but neither expert actually found debris on the subject pistol. JA33; JA37. With no evidentiary support that this essential condition was present, the experts’ factual basis is necessarily deficient and requires exclusion pursuant to Rule 702(b). *See, e.g., Engilis*, 151 F.4th at 1052; *EcoFactor*, 137 F.4th at 1346.

Additionally, the District Court correctly concluded that Mr. Whealton and Dr. Harrison could not meet the requirements of Rule 702(d) because of a fundamental disconnect between the experts’ evaluation of the subject firearm and the facts of the case. Having found no debris in the subject pistol, Plaintiff’s experts needed to show that this firearm could produce an unintended discharge in

²⁶ *See* Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Forensic Evidence, Daubert and Rule 702* (Apr. 1, 2018) at 43 in ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2018 AGENDA BOOK 49 (2018), https://www.uscourts.gov/sites/default/files/agenda_book_advisory_committee_on_rules_of_evidence_-_final.pdf, (“It is not the case that the judge can say ‘I see the problems, but they go to the weight of the evidence.’ After a *preponderance* is found, then any slight defect in either of these factors becomes a question of weight. But not before.”) (emphasis original); *Engilis*, 151 F.4th at 1052 (finding expert properly excluded because fulfillment of Rule 702(b) was not shown).

its observed condition. But neither expert conducted testing that produced that outcome, and so their methodologies were not shown to have been “reliably applied” to these facts. JA33-34 (Whealton); JA36-38 (Harrison).

The experts’ other defect theories, such as compression of the holster allowing trigger contact, also failed to pass muster under Rule 702(d). Neither expert could demonstrate that the subject pistol could be caused to discharge unintentionally under the factual circumstances present. JA32 (Whealton); JA37 (Harrison).

Contrary to Plaintiff’s contentions,²⁷ experts’ factual basis and methodological applications are matters of admissibility for the judge to determine, not matters of weight for the jury to assess. Fed. R. Evid. 702 (proponent must “demonstrate[e] to the court that it is more likely than not that” the requirements of Rule 702(b), (c) and (d) are met); Fed. R. Evid. 702 advisory committee’s note to 2023 amendment (rulings that “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 . . . are an incorrect application of Rules 702 and 104(a).”). The 2023 amendment to Rule 702 was enacted to correct the very misunderstanding Plaintiff asserts. This Court should not be misled.

²⁷ Appellant’s Brief at 10, 20.

CONCLUSION

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.²⁸

Here, the District Court properly employed Rule 702's admissibility criteria to evaluate and ultimately exclude the proffered opinion testimony. The Court should affirm this ruling.

Dated: February 26, 2026

Respectfully submitted,

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²⁸ Schroeder, *supra* n.14, at 2059.

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 **5,611 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 February 26, 2026, I electronically filed the foregoing amicus brief with the Clerk of Court for the United States Court of Appeals for the Fourth 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: February 26, 2026

/s/ Lee Mickus