

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 24-916, 24-1121, 24-2360, 24-2594

In Re Acetaminophen - ASD-ADHD Products

Caption [use short title]

Motion for: Leave to file amicus brief on behalf of amicus
curiae Lawyers for Civil Justice

Set forth below precise, complete statement of relief sought:

Amicus Curiae asks the Court to grant leave to file an amicus
brief in support of rehearing under FRAP 29.

MOVING PARTY: Amicus Curiae OPPOSING PARTY: N/A

☐ Plaintiff☐ Defendant☐ Appellant/Petitioner☐ Appellee/Respondent

MOVING ATTORNEY: Raffi Melkonian

OPPOSING ATTORNEY:

[name of attorney, with firm, address, phone number and e-mail]

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Court- Judge/ Agency appealed from:

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):



Yes



No (explain):

Opposing counsel's position on motion:



Unopposed



Opposed

☒ Don't Know

Does opposing counsel intend to file a response:



Yes



No

☐ Don't KnowFOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND
INJUNCTIONS PENDING APPEAL:

Has this request for relief been made below?



Yes



No

Has this relief been previously sought in this court?



Yes



No

Requested return date and explanation of emergency:

Is the oral argument on motion requested?



Yes



No (requests for oral argument will not necessarily be granted)

Has the appeal argument date been set?



Yes



No If yes, enter date:

Signature of Moving Attorney:

Raffi Melkonian

Digitally signed by Raffi Melkonian
Date: 2026.09.17 15:39:32 -05'00'

Date: 9/17/2026

Service :



Electronic



Other [Attach proof of service]

24-916(L)

24-2360(CON), 24-1121(CON), 24-2594

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

TIFFANY RUTLEDGE, INDIVIDUALLY AND AS MOTHER, GENERAL GUARDIAN
OF, ET AL., KRISTOPHER WHITE, BRIDGET McCONNELL, ALEXANDER
HOLLAND, CHRISTINE HOLLAND,

Plaintiffs-Appellants,

—against—

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CORPORATION, CVS PHARMACY, INC., SAFEWAY, INC., WALMART INC., A
DELAWARE CORPORATION, RITE AID CORPORATION, TARGET
CORPORATION, SAM'S WEST, INC., DOLLAR TREE, INC., 7-ELEVEN, INC.,
FAMILY DOLLAR STORES, LLC, THE KROGER CO., DOLLAR TREE STORES,
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LLC, ALBERTSON'S, HARRIS TEETER LLC, DOLGENCORP, LLC,

Defendants-Appellees.

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**MOTION FOR LEAVE TO FILE BRIEF FOR AMICUS CURIAE
LAWYERS FOR CIVIL JUSTICE IN SUPPORT OF PETITION FOR
REHEARING**

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MICHELLE PHIPPEN, individually and as General Guardian of P.P. and L. A., minors, ALISHA DAY, individually and as mother, General Guardian of A.D., a minor, SARAH STOKES, individually and as General Guardian of K.G., a minor, JUAN EMANUEL BORDOY, individually, MARY ELIN ARCE, individually and as Mother of JUAN EMANUEL BORDOY, AMANDA TRIGLOFF, individually and as General Guardian of R.S., a minor, DEANDRE BARBEE, individually, JANTAIL BARBEE, individually and as Mother of DEANDRE BARBEE, LAURIE COURINGTON, HUNTER COURINGTON, JENNIFER MORROW, ALENA MORROW, CALLISTA BASSETT, ANDREW BASSETT, SONNITA ROBY, individually and as General Guardian of D.P., a minor, SHANNON MIKUSKI, BRAYDON MCKENZIE, HEATHER GILLIAM, COLBY GILLIAM, TAYLOR BROWN, TARYNE BURKE, individually and as Mother with Court Appointed Guardian of ASHTON BURKE, SAMARI SIMS, individually, DENISA CULLOM, individually and as Mother of SAMARI SIMS, COLLIN STOVER, individually, DANA STEWART, individually and as Mother of COLLIN STOVER, RIAN CZAR JOHNSON, individually, SHILO RICH, individually and as Mother of RIAN CZAR JOHNSON, SHEENA SCHNEPP, individually and as Mother and Natural Guardian of H.S., a minor, ZAYNE COSTELLO, individually, CRYSTAL ALEXANDER, COURTNEY TILLOTSON, MICHELLE BROWN,

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WALMART INC.,

Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Second Circuit Rule 26.1, 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.

STATEMENT OF INTEREST OF AMICUS CURIAE¹

Lawyers for Civil Justice (LCJ)² 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. Since 1987, 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 often urges proposals to reform aspects of the Federal Rules of Civil Procedure and Federal Rules of Evidence. As amicus curiae, LCJ seeks to act as a true friend of the court and to “add value” to the court’s “evaluation of the issues presented on appeal.” *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020) (Scudder, J., in chambers).

¹ Leave has been sought to file this brief. 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.

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LCJ is one of the entities with the most granular knowledge on the meaning, history, and application of Rule 702. LCJ has for years focused on Rule 702, drawing on the collective experience of its members who litigate in the federal courts. For example, LCJ submitted several extensive comments, including original research, to the Judicial Conference Advisory Committee on Evidence Rules (referred to in this brief as the Advisory Committee).³ LCJ's analysis identified many courts that failed to recognize that the sufficiency of an expert's factual basis is an *admissibility* consideration under Rule 702(b) and failed to apply Rule 104(a)'s burden of proof to expert admissibility decisions. In that process, LCJ advocated for specific changes, including adding an explicit

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reference to the court as the decision-maker to the rule's test, so that Rule 702 would give unmistakable direction about judges' gatekeeping responsibility. LCJ's contributions had direct benefits in the rulemaking process, as recognized by the Reporters to the Advisory Committee on Evidence Rules.⁴

LCJ has also recently submitted amicus briefs in both the United States Supreme Court and in federal courts of appeals urging courts to give meaning to Rule 702 and its requirements. *See, e.g., Monsanto Company v. Edwin Hardeman*, 21-241 (U.S. Supreme Court); *Colwell v. Sig Sauer*, No. 24-2724 (United States Court of Appeals for the Second Circuit); *Zurbriggen v. Twin Hill*, No. 25-1963 (United States Court of Appeals for the Seventh Circuit); *Harris v. FedEx Corp. Servs., Inc.*, No. 23-20035 (United States Court of Appeals for the Fifth Circuit); *In re: Paraquat Products Liability Litigation*, Nos. 24-1865, 24-1866, 24-1867, 24-1868 (United States Court of Appeals for the Seventh Circuit). LCJ

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has also submitted amicus briefs in state supreme courts. This included an amicus brief for *In re Zantac (Ranitidine) Litigation*, Case No. 255, 244 (Delaware Supreme Court). LCJ and its members have an interest in ensuring that the admissibility standard under Rule 702 is consistently interpreted across the nation, particularly with respect to the burden of production and the reliability criteria set forth in that rule.

ARGUMENT

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. It respectfully requests that this Court grant its motion for leave to file an amicus brief under Federal Rule of Appellate Procedure 29(b) because this case presents important issues about Rule 702 about which LCJ has deep experience and knowledge. As the proposed amicus brief explains, LCJ believes the panel opinion gave insufficient weight to the 2023 amendments to Federal Rule of Evidence 702, and by doing so split from a growing consensus of other courts of appeals.

Leave should be granted because 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 are involved in litigation in the federal courts. The proper interpretation of Rule 702 is at issue in this appeal. Thus, the amicus curiae brief is “desirable” and “relevant” to the disposition of this case. FED. R. APP. P. 29(a)(3).

The amicus curiae brief likewise provides the Court “useful information.” *Albuquerque Pub. Sch. Bd. of Educ. v. Armstrong*, No. 22-2012, 2022 WL 17576355, at *3 n.2 (10th Cir. Dec. 12, 2022). Specifically, LCJ has submitted several extensive comments, including original research, to the Judicial Conference Advisory Committee on Evidence Rules (referred to in this brief as the Advisory Committee).⁵ LCJ’s analysis has identified widespread misunderstanding of Rule 702’s requirements and purposeful shifting of the expert admissibility standard away from in the Rule’s text.

LCJ has also numerous amicus briefs in federal courts of appeals urging courts to give meaning to Rule 702 and its requirements. *See, e.g., Monsanto Company v. Edwin Hardeman*, 21-241 (United States

⁵ *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*, Comment to Advisory Committee on Evidence Rules (Sept. 1, 2021); <https://www.regulations.gov/comment/USC-RULES-EV-2021-0005-0007> (henceforth “Clarity and Emphasis”); *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 Rules of Evidence and Rule 702 Subcommittee (Oct. 20, 2020); <https://www.uscourts.gov/file/28752/download>; Lawyers for Civil Justice, *Federal Rule of Evidence 702: A One-Year Review and Study of Decisions in 2020*, submitted to Advisory Committee on Evidence Rules (September 30, 2021), <https://www.regulations.gov/comment/USC-RULES-EV-2021-0005-0008>.

Supreme Court); *Fischer v. BMW of North America*, No. 20-01399 (United States Court of Appeals for the Tenth Circuit); *Daniels-Feasel et al. v. Forest Pharmaceuticals, et al.*, No. 22-146 (United States Court of Appeals for the Second Circuit).

LCJ and its members thus have an interest in ensuring that the Federal Rules of Evidence be consistently interpreted across the nation, particularly with respect to the burden of production and the reliability criteria set forth in Rule 702. That standard, and not local variations that modify or remove elements or alter the explicit admissibility requirements, reflects the result of the Rules Enabling Act's rulemaking process and is the governing law. All this experience and interest is directly relevant to this case.

Defendants-Appellees consent to this motion. Plaintiffs-Appellants have indicated that they believe no consent is necessary under Federal Rule of Appellate Procedure 29(b), and thus have instructed LCJ to state that it does not know Plaintiffs-Appellants' position.

CONCLUSION

LCJ respectfully requests that the Court grant this Motion and accept the proposed *amicus* brief.

Respectfully submitted,

/s/ Raffi Melkonian

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 1325 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook 14-point font.

Date: September 17, 2026

Respectfully submitted,

/s/ Raffi Melkonian
Raffi Melkonian

CERTIFICATE OF SERVICE

I certify that on September 17, 2026, I caused service of the foregoing Motion to be made by electronic filing with the Clerk of the Court using the ACMS system, which will send a Notice of Electronic Filing to all parties with an e-mail address of record, who have appeared and consent to electronic service in this action.

/s/ Raffi Melkonian
Raffi Melkonian

24-916(L)

24-2360(CON), 24-1121(CON), 24-2594

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SUMMARY OF ARGUMENT

Rule 702 was amended in 2023 because “many courts” had wrongly treated “the critical questions of the sufficiency of an expert’s basis, and the application of the expert’s methodology,” as “questions of weight and not admissibility.” FED. R. EVID. 702 advisory committee’s note to 2023 amendment. Courts of appeals around the country have since given the amendment its intended effect. *See Harris v. FedEx Corp. Servs., Inc.*, 92 F.4th 286, 303 (5th Cir. 2024); *Sprafka v. Med. Device Bus. Servs., Inc.*, 139 F.4th 656, 660 & n.3 (8th Cir. 2025); *Engilis v. Monsanto Co.*, 151 F.4th 1040, 1049 (9th Cir. 2025); *EcoFactor, Inc. v. Google LLC*, 137 F.4th 1333, 1339 (Fed. Cir. 2025) (en banc).

The panel decision departs from those decisions. It called the district court’s analysis “thorough and well-documented.” Op. 27. Yet it held that disputes over whether Plaintiffs’ experts reliably applied their methodology belong to the jury whenever “there is disagreement in the scientific community” (even where there is in fact no such disagreement). Op. 28. That is a formulation of Rule 702 the amendment repudiated. The panel relied instead on pre-amendment authority, in particular *Milward v. Acuity Specialty Products Group, Inc.*, 639 F.3d 11 (1st Cir. 2011), to

hold that Plaintiffs' speculative theories of biological possibility be presented to the jury. Rehearing en banc is warranted to resolve the panel's conflict with other circuits and with this Court's precedent.

ARGUMENT

I. The recent amendment to Rule 702 clarifies existing law that trial courts must vigorously exercise their gatekeeping function.

As shorthand, many courts have stated that the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) governs expert admission standards in federal court. That is inaccurate. Rule 702, enacted under the Rules Enabling Act, establishes the governing standard. But some courts have long ignored the standards in Rule 702 to announce a far more permissive standard for expert admission than the rule prescribes. Among other things, courts have erroneously adopted a presumption of admissibility, spoken of Rule 702 having a "liberal thrust" in favor of expert testimony, and held that all disputes about admissibility should be given wholesale to the jury to decide.

Because of this confusion, the Advisory Committee engaged in detailed rulemaking work to remedy some courts' misunderstanding of Rule 702 and highlight judicial gatekeeping in the admission of expert

testimony without substantively changing the rules. These efforts resulted in the Supreme Court adopting important clarifications to Rule 702, precisely to repudiate the view (expressed by “many courts”) 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.” Rule 702 advisory committee’s note to 2023 amendment. As the Advisory Committee observed, these “rulings are an incorrect application of Rules 702 and 104(a).” The 2023 changes to Rule 702 make “quite clear” as “a simple matter of textual analysis” that it is “wrong” to state “[t]here is a presumption in favor of admitting expert testimony.”⁵

The 2023 amendments do not impose “any new, specific, procedures,” but instead “clarify” the gatekeeping approach that has always been intended: that Rule 702 is governed by Federal Rule of Evidence 104(a)’s requirement that the *court* must decide “any preliminary question” of a witness’s admissibility. *See* Rule 702 advisory committee’s note to 2023 amendment. *See also* Rule 702 advisory

⁵ 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 AGENDA BOOK 90 (2021).

committee's note to 2000 amendment ("The trial judge in all cases . . . must find that [expert testimony] is properly grounded, well-reasoned, and not speculative *before it can be admitted.*") (emphasis added).]

The 2023 amendment clarified misconceptions about Rule 702 in three key ways. *First*, the amendment confirms, as Rule 702 had always required, that the *court* must rule on admissibility before allowing the evidence to be shown to the trier of fact—this change emphasizes that such questions are *not* for the jury to decide.

Second, the amendment places the preponderance of the evidence standard within the text of Rule 702, requiring the proponent of expert evidence to "demonstrate[] to the court that it is *more likely than not*" that all the requirements of Rule 702 are satisfied. *See* Rule 702, 2023 Amendment (emphasis added). This change renders unmistakable the fact that the "preponderance standard applies to the three reliability-based requirements added in 2000," contrary to the incorrect holdings of some courts. Rule 702 advisory committee's note to 2023 Amendment. This amendment shows that an evenhanded preponderance of proof test, and not some presumption of admissibility of opinion testimony, is how judges must determine experts' admissibility.

Third, Rule 702(d) was amended to emphasize that each expert opinion must “reflect a reliable application” of her principles and methods to the fact of the case. Although this standard “does not require perfection,” the Advisory Committee emphasized that an expert may not make claims that are “unsupported” by the expert’s basis and methodology. Rule 702 advisory committee’s note to 2023 Amendment. Again, judicial gatekeeping is necessary to protect jurors—who lack specialized knowledge and so may be unable to “evaluate meaningfully the reliability” of an expert’s testimony—from being misled. *Id.* Each of these clarifications should be given effect.

II. The panel decision cannot be reconciled with amended Rule 702.

A. The panel gave the 2023 amendment inadequate attention.

The panel opinion quotes the amended text of Rule 702, Op. 24–25, but the framework it then applies is drawn almost entirely from decisions that predate the amendment: *Daubert*, *Kumho Tire*, *Joiner*, *Amorgianos*, and *Ruggiero*. Op. 25–27. The opinion’s only discussion of what the 2023 amendment was meant to accomplish appears in a single footnote. Op. 44 n.25. Its only other reference to the 2023 Committee Note quotes a passage observing that experts often “come to different conclusions based

on contested sets of facts” and that “[t]he evidentiary standard of reliability is lower than the merits standard of correctness.” Op. 27. That passage does not suggest that disputes over whether an expert reliably *applied* his methodology belong to the jury. The surrounding text of the Note addresses that question directly—and answers it the other way. A judge must carry out the gatekeeping function.

Footnote 25 of the panel’s opinion illustrates the problem. That note treats the amendment as one “principle” to be weighed against “another principle”—that a court “cannot decide a *Daubert* motion based on its own judgment of an expert’s persuasiveness”—and directs district courts to “strike a middle ground between those two principles.” Op. 44 n.25. Rule 702 does not call for that balancing. The amended text is not a policy preference to be weighed against judicial gloss; it is the governing law, and it displaces decisions to the contrary. 28 U.S.C. § 2072(b).

Thus, the Rule itself draws the line the panel was searching for. The court first determines whether the proponent has shown, by a preponderance of the evidence, that the opinion rests on sufficient facts and reflects a reliable application of a reliable method. Only “once the court has found it more likely than not that the admissibility requirement

has been met” do remaining attacks “go only to the weight of the evidence.” FED. R. EVID. 702 advisory committee’s note to 2023 Amendment. By definition, that “does not mean, as certain courts have held, that arguments about the sufficiency of an expert’s basis always go to weight and not admissibility.” *Id.* The panel reversed that sequence. It deemed an expert’s choices reliable whenever he “offers a coherent, scientifically plausible reason for the preference,” Op. 40, and consigned everything else to cross-examination.

B. Because the panel did not properly apply the 2023 Amendments, it misanalyzed the expert opinions.

The consequences of that omission are clearest in the panel’s treatment of biological plausibility, one of the Bradford Hill factors on which Plaintiffs’ lead expert relied. The district court found that Dr. Baccarelli’s conclusion that this factor was satisfied “fail[ed] to reflect a reliable application of scientific principles.” Op. 35. The panel set it aside, reasoning that the Bradford Hill methodology “asks no more than whether there is some such ‘biologically plausible mechanism,’” Op. 36, and, in *Milward*’s words, “whether the hypothesized causal link is credible in light of what is known from science and medicine,” *id.* (quoting *Milward*, 639 F.3d at 25). The absence of any identified mechanism, the

panel concluded, was something to which the jury could “assign the weight . . . it deems appropriate.” *Id.*

Milward is the wrong guide to amended Rule 702. Decided twelve years before the amendment, it rests on the premise the amendment rejected. *Milward* held that the flaws the district court identified “go to the weight of [the expert’s] opinion, not its admissibility,” and that “[w]hen the factual underpinning of an expert’s opinion is weak, it is a matter affecting the weight and credibility of the testimony—a question to be resolved by the jury.” 639 F.3d at 22 (citation omitted). It reasoned that expert testimony should “be tested by the adversarial process, rather than excluded for fear that jurors will not be able to handle the scientific complexities.” *Id.* at 15. As explained above, the Advisory Committee reached the opposite judgment. FED. R. EVID. 702 advisory committee’s note to 2023 amendment. Little wonder that *Milward* was singled out during the rulemaking process as a “prime example” of the error the amendment corrected, Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 Notre Dame L. Rev. 2039, 2044 (2020), and that commentators urged that it “was incorrectly decided and should be overruled,” David E. Bernstein &

Eric G. Lasker, *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702*, 57 WM. & MARY L. REV. 1, 42 (2015).

The panel's reliance on *Milward* was not confined to a single quotation; its reasoning tracks *Milward*'s throughout. *Milward* held that the district court "took sides on questions that are currently the focus of extensive scientific research and debate—and on which reasonable scientists can clearly disagree." 639 F.3d at 22. The panel faulted the district court for "reaching particular conclusions where there is disagreement in the scientific community." Op. 28. *Milward* acknowledged that the district court's questions "were sensible ones, but ones for the jury to resolve." 639 F.3d at 23. The panel likewise disclaimed any suggestion "that the district court's questioning of Baccarelli's logic is itself unreasonable," but held that such "arguments and counter-arguments" are for the jury. Op. 43–44. Under amended Rule 702, however, whether an expert's conclusions "stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology" is a question for the court. FED. R. EVID. 702 advisory committee's note to 2023 amendment. Whether a Bradford Hill factor resting on hypotheses can reliably support a conclusion of that reliability

is precisely the Rule 702(d) inquiry the district court conducted—and the inquiry the panel, following *Milward*, reassigned to the jury.

CONCLUSION

Because the panel misapplied Rule 702, rehearing en banc should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 29(b)(4) of the Federal Rules of Appellate Procedure because it contains 2,600 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook 14-point font.

Date: September 17, 2026

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