No. 26-1126

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LORELLE THOMPSON,
Plaintiff-Appellant,

v.

FORD MOTOR COMPANY,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Colorado
D.C. No. 1:22-cv-00541-MDB
The Honorable Maritza Dominguez Braswell

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE LAWYERS FOR CIVIL JUSTICE IN SUPPORT OF FORD MOTOR COMPANY

Raffi Melkonian
WRIGHT CLOSE BARGER &
GUZMAN, LLP
700 Louisiana, Suite 300-
Houston, TX 77002
(713) 572-4321
(713) 572-4320 (facsimile)
melkonian@wcbglaw.com

Attorney for Amicus Curiae Lawyers for Civil Justice

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), amicus curiae Lawyers for Civil Justice states as follows:

- Lawyers for Civil Justice is a not-for-profit corporation.
- It has no parent corporation.
- No publicly held corporation owns 10% or more of its stock.

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(a)(4) because this case presents important issues about Rule 702 about which LCJ has deep experience and knowledge.

The proposed brief is attached as Exhibit A. This motion is opposed by Appellant Lorelle Thompson. Appellee Ford consents. As noted below, no party or counsel authored this motion or the brief in whole or in part. No party, counsel for a party, or person other than the prospective amici, its members, or counsel made any monetary contribution intended to fund the preparation or submission of this motion or the brief.

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).[1] LCJ's analysis has identified widespread misunderstanding of Rule 702's

[1] *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.

requirements and purposeful shifting of the expert admissibility standard away from in the Rule's text, including in Appellants brief. *See* Ant. Appellant's Brief, pp. 39-44 (citing cases like *McCoy v. Whirlpool Corp*, which pre-date the current text of Rule 702.)

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 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.

CONCLUSION

The motion for leave to file an amicus brief should be granted.

Respectfully Submitted,

/s/ Raffi Melkonian

Raffi Melkonian
WRIGHT CLOSE BARGER & GUZMAN, LLP
700 Louisiana, Suite 300-
Houston, TX 77002
(713) 572-4321
(713) 572-4320 (facsimile)
melkonian@wcbglaw.com

Attorney for Amicus Curiae
Lawyers for Civil Justice

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FED. R. APP. P. 27(d) because it been produced in a proportionally spaced typeface using Microsoft Word in Century Schoolbook 14-point font.

/s/ Raffi Melkonian
Raffi Melkonian

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2026, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Raffi Melkonian
Raffi Melkonian

Exhibit A

No. 26-1126

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LORELLE THOMPSON,
Plaintiff-Appellant,

v.

FORD MOTOR COMPANY,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Colorado
D.C. No. 1:22-cv-00541-MDB
The Honorable Maritza Dominguez Braswell

BRIEF OF AMICUS CURIAE LAWYERS FOR CIVIL JUSTICE IN SUPPORT OF FORD MOTOR COMPANY

Raffi Melkonian
WRIGHT CLOSE BARGER & GUZMAN, LLP
700 Louisiana, Suite 3000
Houston, TX 77002
(713) 572-4321
(713) 572-4320 (facsimile)
melkonian@wcbglaw.com

Attorney for Amicus Curiae Lawyers for Civil Justice

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), amicus curiae Lawyers for Civil Justice states as follows:

- Lawyers for Civil Justice is a not-for-profit corporation.
- It has no parent corporation.
- No publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT 2

TABLE OF CONTENTS 3

TABLE OF AUTHORITIES 5

STATEMENT OF INTEREST OF AMICUS CURIAE 9

SUMMARY OF ARGUMENT 12

ARGUMENT 15

I. Amended Rule 702 repudiates the "weight, not admissibility" formulation that Thompson relies on. 15

A. Rule 702, not Daubert, governs the admission of expert testimony in federal court. 16

B. The 2023 amendment was adopted to correct erroneous gatekeeping practices. 17

C. The pre-amendment authority Thompson invokes originated in this Circuit and cannot survive the amended text. 19

II. The district court did not abuse its discretion in applying Rule 702, and Thompson's criticisms misdescribe both the ruling and the Rule. 22

A. The district court identified concrete failures of factual basis and reliable application, not a failure of belief. 23

B. A ruling that the proponent failed to carry her burden is not a credibility determination. 25

C. Rule 702, not case law, supplies the criteria the district court applied. 28

III. Rule 702 assigns these questions to the court before trial, and this record shows why that allocation matters. 29

CONCLUSION 31

CERTIFICATE OF COMPLIANCE 32

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS 33

CERTIFICATE OF SERVICE 34

TABLE OF AUTHORITIES

Federal Cases

Beech Aircraft Corp. v. Rainey,
488 U.S. 153 (1988) 12

Bitler v. A.O. Smith Corp.,
400 F.3d 1227 (10th Cir. 2005) 29

Daubert v. Merrell Dow Pharmaceuticals, Inc.,
509 U.S. 579 (1993) 15

EcoFactor, Inc. v. Google LLC,
137 F. 4th 1333 (Fed. Cir. 2025) 19

Engilis v. Monsanto Co.,
151 F. 4th 1040 (9th Cir. 2025) 19

Gen. Elec. Co. v. Joiner,
522 U.S. 136 (1997) 29

Gomez v. Martin Marietta Corp.,
50 F.3d 1511 (10th Cir. 1995) 13, 20, 21

Harris v. FedEx Corporate Services,
92 F. 4th 286 (5th Cir. 2024) 19

In re Kirkland,
75 F.4th 1030 (9th Cir. 2023) 12

Jewell v. Life Insurance Co. of North America,
508 F.3d 1303 (10th Cir. 2007) 26, 27

Kechi Township v. Freightliner, LLC,
592 F. App'x 657 (10th Cir. 2014) 26, 27

McCoy v. Whirlpool Corp.,
258 F. App'x 189 (10th Cir. 2007) 26, 27

Mitchell v. Gencorp Inc.,
165 F.3d 778 (10th Cir. 1999) 20

Price v. Gen. Motors, LLC,
No. CIV-17-156-R, 2018 WL 8333415 (W.D. Okla. Oct. 3, 2018) 20

Roe v. FCA USA, LLC,
42 F. 4th 1175 (10th Cir. 2022) 22

Sardis v. Overhead Door Corp.,
10 F.4th 268 (4th Cir. 2021) 19

Sprafka v. Med. Device Bus. Servs.,
139 F.4th 656 (8th Cir. 2025) 19

Thompson v. Ford Motor Co.,
2026 WL 809376 ..... 23, 24, 30

Truck Ins. Exch. v. MagneTek, Inc.,
360 F.3d 1206 (10th Cir. 2004) 20

United States v. Kee,
606 F. Supp. 3d 1093 (D.N.M. 2022) 20

United States v. McCluskey,
954 F. Supp. 2d 1224 (D.N.M. 2013) 20

United States v. Nacchio,
555 F.3d 1234 (10th Cir. 2009) 17

United States v. Vonn,
535 U.S. 55 (2002) 12

Werth v. Makita Electric Works, Ltd.,
950 F.2d 643 (10th Cir. 1991) 13, 19

Federal Statutes

28 U.S.C. § 2072(a) 16

28 U.S.C. § 2072(b) 16, 21

Rules

FED. R. EVID. 702 ..... passim

Other Authorities

Communication from the Chief Justice Transmitting Amendments to the Federal Rules of Evidence (Apr. 24, 2023) at 1, 7, https://www.govinfo.gov/content/pkg/CDOC-118hdoc33/pdf/CDOC-118hdoc33.pdf 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 871 (2022) 18

Lawyers for Civil *Justice, A Note about the Note: Specific Rejection of Errant Caselaw is Necessary for the Success of an Amendment Clarifying Rule 702's Admissibility Req*uirements, Comment to the Advisory Committee on Evidence Rules (Feb. 8,2021). https://bit.ly/4qn4zoL 15

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 10

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 10

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) at23-25, 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..... 15

Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, Forensic Evidence, Daubert and Rule702 (Apr. 1, 2018), at 43, 49, in ADVISORY COMMITTEE ON EVIDENCE RULESAPRIL 2018 AGENDA BOOK 49 (2018). 17

Memorandum from Patrick J. Schiltz, Chair, Advisory Committee On Evidence Rules, to John D. Bates, Chair Standing Committee on Rules of Practice and Procedure,6 (May 15, 2022), evidence_rules_report_-_may_2022_0.pdf..... 26

Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039 (2020) 16

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 the2000 Amendment Changed the Law, Comment to the Advisory Committee on Rules of Evidence and Rule 702 Subcommittee (Oct. 20, 2020) 10

STATEMENT OF INTEREST OF AMICUS CURIAE

Lawyers for Civil Justice (LCJ)[1] 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.[2] 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 regularly urges proposals to reform aspects of the Federal Rules of Civil Procedure and the 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. LCJ's interest here is to provide the Court with its views on the development and meaning of Federal Rule of Evidence 702.

---

[1] This brief is filed with the accompanying motion for leave under Fed. R. App. P. 29(a)(3). 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 its website, at the "About Us" tab. https://www.lfcj.com/about-us.html.

LCJ is among the entities with the most granular knowledge of the meaning, history, and application of Rule 702. LCJ submitted extensive comments, including original research, to the Judicial Conference Advisory Committee on Evidence Rules.[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 that 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 reference to the court as decision-maker—so that Rule 702 would give unmistakable direction about judges' gatekeeping responsibility. The Reporters to the Advisory Committee recognized the value of those contributions.

[3] *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; 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); 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.

LCJ has submitted amicus briefs in the Supreme Court and in the federal courts of appeals urging courts to give meaning to Rule 702 and its requirements. *See, e.g., Fischer v. BMW of North America*, No. 20-01399 (10th Cir.); *Williams v. Sig Sauer, Inc.,* No. 25-2196 (4th Cir.); *Barry v. Depuy Synthes Companies*, Case No. 23-2226 (Fed. Cir.); *Jensen v. Camco Manufacturing LLC*, Case No. 24-7092 (9th Cir.). In each case—as here—LCJ has endeavored to clarify the proper standards for the admission of expert testimony under Rule 702.

LCJ takes no position on the underlying merits, the sufficiency of the summary judgment record, or any question of Colorado substantive law. LCJ writes on a single point: Thompson asks this Court to decide a Rule 702 appeal using a standard the 2023 amendment was adopted to repudiate. Because Thompson's authority originated in this Circuit, this case presents a direct opportunity for the Court to confirm that the text of amended Rule 702—not pre-amendment gloss—supplies the governing standard.

SUMMARY OF ARGUMENT

Before Rule 702 was amended in 2023, "many courts" misapplied the Rule by declaring 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." FED. R. EVID. 702 advisory committee's note to 2023 amendment.[4] The error was so pervasive that the Rule's text was rewritten to "clarify and emphasize 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).

Thompson's opening brief invokes the very formulation the amendment discarded. Thompson tells this Court that "concerns regarding Mr. Hille's testimony should go to weight, not admissibility," and that "weaknesses in underlying data" are for the jury. Thompson's

[4] 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).

Br. 37, 44. Her principal authority is *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1519 (10th Cir. 1995)—a decision predating both the 2000 and 2023 amendments, and belonging to the same family as *Werth v. Makita Electric Works, Ltd.*, 950 F.2d 643, 654 (10th Cir. 1991), which the rulemaking record identifies as a source of the error the amendment corrected. Thompson is asking this Court to apply a 1991–1995 gloss that the current text of Rule 702 was designed to supersede.

Thompson's two remaining Rule 702 arguments fail for related reasons. *First*, Thompson characterizes the district court's ruling as an impermissible credibility determination because the court observed that the expert's lack of documentation would require it to "just believe him." Appellant's Br. 40–41. But Rule 702 assigns the *burden* to the proponent, and Rule 104(a) makes the court the finder of preliminary facts. A ruling that the proponent failed to carry that burden—because the record rendered the expert's methodology unreviewable—is not a credibility finding; it is the gatekeeping determination the Rule demands. *Second*, Thompson faults the district court for calling the testimony "nothing more than ipse dixit" without citing case law defining that term. Appellant's Br. 42. But Rule 702, not case law, supplies the admissibility

criteria. The district court properly applied the Rule and the Advisory Committee's directive that gatekeeping "requires more than simply taking the expert's word for it."

This case illustrates why the amended Rule matters. The district court initially deferred its reliability concerns to cross-examination. What followed was an eight-day trial, a large judgment, a new trial order, a Rule 702 hearing held years after the challenge was first raised, and finally the exclusion ruling now on review. Rule 702 exists to resolve these questions before trial, not after.

The judgment should be affirmed.

ARGUMENT

I. Amended Rule 702 repudiates the "weight, not admissibility" formulation that Thompson relies on.

As shorthand, many courts have stated that *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. Yet some courts long looked past the Rule's text and announced a far more permissive test—adopting a presumption of admissibility, speaking of a "liberal thrust" favoring expert testimony, and consigning reliability disputes wholesale to the jury.[5] The Advisory Committee has now corrected those misunderstandings. The district court here applied the Rule as amended and as the Advisory Committee intended.

---

[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://bit.ly/4qn4zoL.

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.").

A. Rule 702, not Daubert, governs the admission of expert testimony in federal court.

In federal court, the standard for admitting expert testimony is set by the Rules of Evidence. The Rules Enabling Act vests the power to make procedural rules in the Supreme Court and the Judicial Conference committees. 28 U.S.C. § 2072(a), (b). The 2023 clarification of Rule 702 was adopted by the Supreme Court and transmitted to Congress following rulemaking under that Act.[6] As amended, Rule 702 supersedes any conflicting law, including decisions of the courts of appeals: "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). The "elements of Rule 702, not the caselaw, are the starting point for the requirements for admissibility." *See* Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039, 2060 (2020).

Courts applying Rule 702 must decide whether the elements for admission have been shown by a preponderance of the evidence. FED. R. EVID. 702 (the proponent must demonstrate "to the court that it is more

[6] Communication from the Chief Justice Transmitting Amendments to the Federal Rules of Evidence (Apr. 24, 2023) at 1, 7, https://www.govinfo.gov/content/pkg/CDOC-118hdoc33/pdf/CDOC-118hdoc33.pdf.

likely than not that" the elements are established). The subsections enumerate the specific criteria. Rule 702(b) requires that opinion testimony be "based on sufficient facts or data[,]" so the court must decide the adequacy of the expert's factual foundation as a matter of admissibility.[7] Rule 702(d) further requires that the opinion "reflect[] a reliable application of the principles and methods to the facts of the case." And this Court has confirmed that the burden of satisfying these standards rests on the proponent of the evidence. *United States v. Nacchio*, 555 F.3d 1234, 1241 (10th Cir. 2009) (en banc).

B. The 2023 amendment was adopted to correct erroneous gatekeeping practices.

Corrective action became necessary because many courts went astray when applying Rule 702 to admit expert evidence. As the Advisory Committee observed, "many courts have held that the critical questions of the sufficiency of an expert's basis" are questions of "weight and not admissibility," which is an "incorrect application of Rules 702 and 104(a)." FED. R. EVID. 702 advisory committee's note to 2023 amendment. The Advisory Committee was direct: any claim that a dispute about

[7] Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, Forensic Evidence, Daubert and Rule 702 (Apr. 1, 2018), at 43, 49, in ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2018 AGENDA BOOK 49 (2018).

reliable methodology goes to "weight and not admissibility" *misstates* Rule 702.[8]

The amendment clarified three things. *First*, it confirms that the *court* must rule on admissibility before the evidence reaches the trier of fact—such questions are *not* for the jury. *Second*, it places the preponderance standard in the text, requiring the proponent to demonstrate "to the court that it is *more likely than not*" that each requirement is satisfied, and confirming that this standard applies to the reliability-based requirements added in 2000. *Third*, Rule 702(d) emphasizes that each opinion must reflect a reliable application of the expert's principles and methods to the facts of the case; while this "does not require perfection," an expert may not make claims unsupported by his own basis and methodology. FED. R. EVID. 702 advisory committee's note to 2023 amendment.

[8] 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 871 (2022) ("[M]any 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 . . . .").

Since the 2023 amendment, circuit courts have begun applying the amended Rule as intended. *See Sardis v. Overhead Door Corp.*, 10 F.4th 268, 284 (4th Cir. 2021) (noting that the Advisory Committee's then-draft analysis "clearly echoes the existing law on the issue"); *Sprafka v. Med. Device Bus. Servs.*, 139 F.4th 656, 660 & n.3 (8th Cir. 2025); *Engilis v. Monsanto Co.*, 151 F. 4th 1040, 1049 (9th Cir. 2025) (noting that there is no "presumption in favor of admission" of expert testimony); *EcoFactor, Inc. v. Google LLC*, 137 F. 4th 1333 (Fed. Cir. 2025) (recognizing the importance of the "[j]udicial gatekeeping" role to ensure that the "determination of reliability under Rule 702" remains an "essential prerequisite"); *Harris v. FedEx Corporate Services*, 92 F. 4th 286, 303 (5th Cir. 2024) (the district court had "abdicated its role as gatekeeper").

C. The pre-amendment authority Thompson invokes originated in this Circuit and cannot survive the amended text.

This appeal presents the problem in its most direct form: the formulation the Advisory Committee repudiated is the formulation Thompson says is controlling. In *Werth v. Makita Electric Works, Ltd.*, 950 F.2d 643, 654 (10th Cir. 1991), this Court stated that "doubts concerning" testimony's "factual sufficiency" go to weight. Four years

later, in *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1519 (10th Cir. 1995), the Court repeated that "weaknesses in the data upon which [the] expert relied go to the weight" of the testimony. Both decisions predate the 2000 amendment that added Rule 702(b)–(d), and both predate the 2023 amendment that placed the burden and preponderance standard in the text. Soon after, in *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 781 (10th Cir. 1999), this Court stated that a plaintiff need not prove that her expert's theory is "generally accepted" to be admissible (citations omitted). Indeed, this Court required only a "minimal gatekeeping role" to discharge Rule 702 obligations. *Truck Ins. Exch. v. MagneTek, Inc.*, 360 F.3d 1206, 1210 n.4 (10th Cir. 2004). All of these cases were decided under prior versions of Rule 702 that are no longer operative.

Following those precedents, some district courts have adopted a "presumption of admissibility" standard. *See, e.g.*, *United States v. McCluskey*, 954 F. Supp. 2d 1224, 1238 (D.N.M. 2013) ("The presumption under the Rules is that expert testimony is admissible."); *United States v. Kee*, 606 F. Supp. 3d 1093, 1097 (D.N.M. 2022) ("Thus, the presumption is that expert testimony is admissible."); *Price v. Gen. Motors, LLC*, No. CIV-17-156-R, 2018 WL 8333415, at *1 (W.D. Okla. Oct. 3, 2018)

("[T]here is a presumption under the Rules that expert testimony is admissible.") (all internal quotation marks and citations omitted). Such a standard directly contravenes the text of the amended Rule 702.

Thompson relies on *Gomez* as affirmative authority. Appellant's Br. 44 (citing *Gomez* for the proposition that "weaknesses" in an expert's methodology "may be dealt with as going to the weight to be given to the evidence"). Thompson then supplements *Gomez* with a string of unpublished district court decisions repeating the same formulation. *Id.* That is precisely the pattern the Advisory Committee identified: a pre-amendment statement, propagated through citation, displacing the text of the Rule itself.

If *Werth* and *Gomez* hold that the sufficiency of an expert's factual basis and the reliability of his methodology are questions of weight rather than admissibility, they conflict with Rule 702 as amended and are "of no further force or effect." 28 U.S.C. § 2072(b). No panel need overrule them; the Rule has done that work. But the Court should say so, because litigants continue citing these decisions to district courts throughout the Circuit, and because this Court has not yet addressed the amended Rule's

effects in a published majority opinion.[9] This Court applied the amended Rule correctly in *Herman v. Sig Sauer, Inc.*, No. 23-6136 (10th Cir. June 13, 2025), affirming exclusion of causation experts whose opinions rested on ipse dixit. This Court should reiterate that ruling here.

II. The district court did not abuse its discretion in applying Rule 702, and Thompson's criticisms misdescribe both the ruling and the Rule.

The district court did what Rule 702 requires: it held the proponent to her burden, examined whether the proffered testimony satisfied subsections (b), (c), and (d), and explained why it did not. This Court's decision in *Roe v. FCA USA, LLC*, 42 F. 4th 1175, 1178-81 (10th Cir. 2022), is dispositive. As there, Thompson's expert here failed to show that "a shifter could self-engage from false park to reverse." *Id.* The district court reached the same conclusion and did not err in doing so.

But even if *Roe* did not exist, the answer is clear under Rule 702. A ruling cataloguing the absence of a protocol, the absence of notes, the absence of measurements, and the absence of any record of which vehicle

[9] This Court briefly cited the amended rules in *United States v. Smith*, No. 23-7029, n.1 (10th Cir. 2024), but noted that amended rules had "no bearing on [the] analysis or the ultimate resolution" of the case. (internal quotation marks and citations omitted). Such a statement gives the Court even more reason to directly address the new rules.

configuration produced the two dispositive results is not a ruling about whether the court found the witness "credible." Thompson's contrary account depends on isolating a single phrase from a fifteen-page order and treating it as the holding. The district court applied the standards Rule 702 requires.

A. The district court identified concrete failures of factual basis and reliable application, not a failure of belief.

The order rests on findings about what the expert's testing did and did not establish. *Thompson v. Ford Motor Co.*, 2026 WL 809376, at *3-4 (D. Col. Mar. 24, 2026). The court found that the expert conducted the exemplar testing without any contemporaneous written record of conditions or results; that he took eight photographs and no video; that he did not measure the force applied in moving the shifter; that he could not state how long the shift lever remained perched before falling into reverse beyond "seconds"; and that he had, on some occasions, *deliberately* perched the shifter into the false-park position—a fact that bears directly on what the reported ratio of outcomes across approximately 100 iterations actually measures. *Id.* at *4-5.

Most significant for Rule 702(d), the court found that the configuration of the exemplar vehicle changed during the testing. The shift cable was initially secured to the shift lever with tape because of a malfunctioning bushing, and was later reattached with a replacement bushing. *Id.* The expert estimated that "75, 80 percent" of the testing occurred after the replacement, but could not say how many iterations were run in which configuration—and, critically, could not identify which configuration was in place during the two iterations in which the shifter moved from false park into powered reverse. *Id.*

That finding is dispositive under Rule 702(d), and it has nothing to do with credibility. Two iterations were the entire empirical foundation for the opinion that a vehicle in false park will self-shift into powered reverse. *Id.* If the mechanical condition of the exemplar during those two iterations is unknown, then the opinion does not "reflect[] a reliable application of the principles and methods to the facts of the case." FED. R. EVID. 702(d). A court could credit every word of the expert's testimony and reach the same conclusion.

Thompson contends that the district court invented a documentation requirement with no basis in Tenth Circuit law.

Appellant's Br. 41. The order says the opposite: "[W]hile an expert need not adhere to any one documentation protocol, the near-total absence of records here[] makes meaningful review of Mr. Hille's methodology impossible." *Thompson*, 2026 WL 809376 at *4. The court did not hold that photographs or video are required. *Id.* It held that *some* record adequate to permit review is required when the proponent bears the burden of demonstrating reliability. That is a straightforward application of Rule 702's allocation of the burden of proof. *Id.*

B. A ruling that the proponent failed to carry her burden is not a credibility determination.

Thompson's central submission is that the district court excluded the testimony "on the basis of credibility rather than reliability." Appellant's Br. 40–42. The argument rests almost entirely on the court's observation that the absence of documentation "essentially requires the Court to 'just believe him.'" Thompson's unstated premise is that a court may not decline to credit an expert's unverifiable account of his own methodology.

That is not the law. "[W]hen it comes to making preliminary determinations about admissibility, the judge *is* and *always has been* a

factfinder."[10] Rule 104(a) directs the court to decide preliminary questions of admissibility and provides that the court is not bound by the rules of evidence (other than privilege) in doing so. The 2023 amendment confirms that the proponent must establish each element of Rule 702 by a preponderance. These provisions cannot operate if the court must accept an expert's uncorroborated account of his methodology whenever he offers one. Doing so would deprive the court of its gatekeeping function entirely.

The decisions Thompson marshals address a different problem. *Jewell v. Life Insurance Co. of North America*, 508 F.3d 1303, 1312 (10th Cir. 2007), *Kechi Township v. Freightliner, LLC*, 592 F. App'x 657, 668 (10th Cir. 2014), and *McCoy v. Whirlpool Corp.*, 258 F. App'x 189, 195 (10th Cir. 2007), stand at most for the proposition that a district court may not discount an expert on improper bases, such as its view about an expert's "mental capacity, bias and interest, and bad moral character." *Jewell*, 508 F.3d at 1312. All are inapposite.

[10] Memorandum from Patrick J. Schiltz, Chair, Advisory Committee On Evidence Rules, to John D. Bates, Chair Standing Committee on Rules of Practice and Procedure, 6 (May 15, 2022), evidence_rules_report_-_may_2022_0.pdf

Jewell does not even *mention* Rule 702—it concerns extra-record evidence. 508 F.3d at 1312. And to the extent it is relevant, *Jewell* contradicts Thompson: "Whether, as is important here, these doctors were correct, or whether their conclusions were based on sufficient evidence and sound medical science, bears on their credibility ***in no genuine sense***." *Id.* (emphasis added).

In *McCoy*, this Court held that a district court overstepped when it excluded the plaintiff's expert because it found a *conflicting* defense expert "credible and persuasive" and elevated that opinion "to the level of established scientific fact." 258 F. App'x at 195-96. In *Kechi*, the problem was that the expert said he had taken appropriate steps, and the defendants merely disagreed. 592 F. App'x at 668-69. In that context, it would be inappropriate for the court to discount the testimony on that basis alone. Nothing in these cases relieves a proponent of the burden Rule 702 imposes, and none involved a record in which the expert's methodology could not be reviewed at all.

The distinction is between *weighing* evidence and *finding it insufficient*. A court that says "I find the defense expert more persuasive because I think the plaintiff's expert is biased" has usurped the jury's

function. A court that says "the proponent has not shown me enough to determine whether this methodology was reliably applied" has performed the gatekeeping function the Rule assigns. The district court did the latter.

C. Rule 702, not case law, supplies the criteria the district court applied.

Thompson argues that the district court's conclusion that the testimony "would offer nothing more than ipse dixit" lacks a legal basis because the court "did not cite any case law regarding testimony being ipse dixit." Appellant's Br. 42. The argument inverts the analysis. Rule 702, not caselaw, establishes the admissibility criteria. A district court applying subsections (b), (c), and (d) to a specific record is not required to locate an earlier decision using a particular Latin phrase.

In any event, the standard the district court applied is stated in the Rule's own commentary: "The trial court's gatekeeping function requires more than simply taking the expert's word for it." FED. R. EVID. 702 advisory committee's note to 2000 amendment. The Supreme Court has long held that "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert," and that

a court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). This Court applies that principle. *Bitler v. A.O. Smith Corp.*, 400 F.3d 1227, 1233 (10th Cir. 2005).

Thompson's own definition of the term defeats the argument. Thompson says ipse dixit "generally refers to a situation in which an expert provides no explanation of his analysis or conclusions." Appellant's Br. 43. But an explanation that cannot be examined is not meaningfully distinct from no explanation at all. Rule 702(c) and (d) presuppose that a court can evaluate the principles and methods employed and their application to the facts. Where the proponent supplies no record from which that evaluation can be made, the Rule's requirements are not satisfied—whatever label is attached.

III. Rule 702 assigns these questions to the court before trial, and this record shows why that allocation matters.

Thompson insists that weaknesses in the expert's testing "should be addressed through cross-examination at trial, not exclusion." Appellant's Br. 44. That submission has been tested in this very case. Cross-examination cannot remedy testimony that manifestly fails Rule 702's requirements, and this record proves why.

When the reliability of this testing was first challenged, the district court denied the motion, expressing the view that the gaps "could be addressed through cross-examination." What followed: an eight-day jury trial, a verdict exceeding $56 million, a motion for new trial, an order granting a new trial, a Rule 702 hearing conducted years after the challenge was first raised, and finally the exclusion ruling now on appeal. When the court heard the expert directly, it concluded that the earlier approach had failed: "[T]hough the Court was initially of the view that the gaps it saw on paper could be addressed through cross-examination, the Hearing revealed that is not the case." *Thompson*, 2026 WL 809376, at *4 (internal citations omitted).

That sequence is not an indictment of the district court, which ultimately applied the Rule correctly and with care. It illustrates the cost the amended Rule is designed to prevent. Deferring the sufficiency of an expert's basis and the reliability of his methodology to cross-examination does not resolve those questions—it relocates them to a forum that cannot resolve them, and postpones the reckoning to post-trial motions and appeal. The Advisory Committee was explicit: judicial gatekeeping is essential precisely because jurors "may be unable to evaluate

meaningfully the reliability of scientific and other methods." FED. R. EVID. 702 advisory committee's note to 2023 amendment.

Affirming the judgment would give district courts in this Circuit crucial guidance: a precedential statement that the sufficiency of an expert's factual basis and the reliability of his methodology are admissibility questions for the court under Rule 702(b) and (d), and that pre-amendment authority to the contrary no longer states the law.

CONCLUSION

The district court applied Rule 702 as written and as the Advisory Committee intended. The judgment should be affirmed.

Respectfully submitted,

/s/ Raffi Melkonian

Raffi Melkonian
WRIGHT CLOSE BARGER & GUZMAN, LLP
700 Louisiana, Suite 3000
Houston, TX 77002
(713) 572-4321
(713) 572-4320 (facsimile)
melkonian@wcbglaw.com

Attorney for Amicus Curiae Lawyers for Civil Justice

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains **4,610** words, excluding the parts exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook 14-point font.

/s/ Raffi Melkonian
Raffi Melkonian

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that: (1) all required privacy redactions have been made pursuant to Fed. R. App. P. 25(a)(5) and 10th Cir. R. 25.5; (2) the ECF submission is an exact copy of any hard copies that may be required to be submitted; and (3) the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, and according to the program is free of viruses.

/s/ Raffi Melkonian
Raffi Melkonian

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2026, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Raffi Melkonian
Raffi Melkonian